EDITORS’ NOTEPAD

The Transportation Practice Group of ALFA International has published the Transportation Update for about eighteen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the ALFA website at ALFA Transportation Update Archives.

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

Our primary method of distribution of the Transportation Update is by email. Electronic publication allows us to include hyperlinks for the use of our readers. We encourage you to use the hyperlinks feature and our section headings to quickly get to the information that is most interesting to you. The substantive/informative section headings are as follows: The Editors’ Notepad (this section) where the Editors often provide sources of information and points of interest; ALFA Member Publications and Speaking Engagements; Cases, Regulations, and Statutes; Verdicts, Appeals, and Settlements; Practice Tips; and Articles.

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

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

The Verdicts, Appeals, and Settlements section addresses the results of litigation affecting the trucking industry and also provides information about significant results achieved by ALFA firm lawyers. We encourage you to report to the Editors any verdict, appeal, or settlement that you think is of interest to the trucking community. In this edition, we are for the first time including a compendium verdicts we have published previously as this gives a unique opportunity to look at a great deal of this information, by state and region. The

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

continued on next page
Editors are pulling together a Compendium of published verdicts and indexing it by injury, state and experts. We are considering asking the reporting lawyers to supply additional information. ALFA will make this information available to member firms for their research in the Members Only portion of the ALFA website. In this issue we present verdict reports published by us in the years 2007-2011.

The **Practice Tips** section of the *Update* features articles which address matters of practical interest to those who manage litigation for motor carriers and those who represent them. The essays in this section generally have widespread application throughout the country. In this issue, we feature the following:

- **Focus on Damages** – J. Philip Davidson and Jay Skolaut, Hinkle Elkouri Law Firm L.L.C.

**Articles** provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. In this issue, we feature the following:

- **Trends in the Law of Spoliation of Evidence ©** -- Will Fulton, Dinsmore & Shohl

The Editors suggest the following for sources of information and points of interest that we think you will find to be helpful:

- **“Free” Training Material from the Federal Government**
  The Federal Railroad Administration (FRA) released in January 2009 an educational video for truck drivers designed to promote safety at highway-rail grade crossings. The video reviews the legal responsibilities of drivers as they approach and travel over highway-rail grade crossings and is available in both English and Spanish. The video is downloadable from the website listed below and should be of interest to your safety and training personnel. We expect the Plaintiffs’ bar and “transportation safety” experts hired exclusively by Plaintiffs will now assert in crossing cases that your company had a poor safety program if your driver had not seen this material prior to the accident.  [http://www.fra.dot.gov/us/content/2109](http://www.fra.dot.gov/us/content/2109)

- **A Primer for the FMCSA’s CSA 2010 Initiative**
  The FMCSA is in the process of rolling out a new methodology to replace SAFER and SafeStat which have been seriously discredited. DOT's Audit Department was so concerned by a 2004 audit of SafeStat that it barred public access to FMCSA motor carrier ratings and published a Warning. This emerging issue is a very critical one, and we will have articles on this topic frequently. Also, a good informational website can be found at: [http://www.fmcsa.dot.gov/safety-security/sca2010/home.htm](http://www.fmcsa.dot.gov/safety-security/sca2010/home.htm). Contact the Editors or another ALFA attorney if you require additional information.

We welcome comments, suggestions for improvement, and topics which you would like for us to address in future issues. Our goal is to provide timely relevant information to members of the trucking community. The Editors can be contacted as follows:

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The Regional Directors help the Transportation Update Editors gather materials for each issue from their areas. If you have any suggestions for content, feel free to contact them or the Editors.
FUTURE EVENTS

Each year, the Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry. The 2011 Transportation Seminar will be held in Dana Point, California from May 4, 2011 to May 6, 2011. The official web site of this venue is http://www.ritzcarlton.com/en/Properties/LagunaNiguel/Information/Default.htm. On the site, the web cam tool is particularly useful. The golf course and the beach are extremely beautiful.

Both beach lovers and golf lovers will be delighted with this wonderful facility. Our Program Chair for the 2011 seminar is Joe R. Swift of Brown & James, P.C. of St. Louis, MO who can be reached at (314) 421-3400 and jswift@bjpc.com. An excellent program is in the works and we will publish information about it in our Winter 2011 issue.

The Chairman of the Transportation Practice Group for 2010-2011 is Peter Doody of Higgs, Fletcher & Mack, LLP, San Diego, California, who can be reached at (619) 236-1551 and doody@higgslaw.com. Our Vice-Chair is P. Clark Aspy of Naman, Howell, Smith & Lee, LLP, who can be reached at (512) 479-0300 and aspy@namanhowell.com. The Chair Emeritus is Danny M. Needham of Mullin, Hoard & Brown, LLP, Amarillo, Texas, who can be reached at (806) 372-5050 and dmneedham@mhba.com. Please contact any of these individuals or the Editors with any suggestions for the program.

For more information, please also consider contacting Katie Garcia at kgarcia@alfa international.com.

ALFA’S GO TEAM HOTLINE

PLEASE NOTE: THE ALFA GO TEAM HOTLINE NUMBER HAS CHANGED. The new number is 888-520-ALFA (2532). Please update your records to reflect this change. Thank you!

The ALFA Transportation Practice Group operates a service for its transportation clients: The ALFA Go Team Hotline. ALFA knows that its member firm transportation clients must often confront time-sensitive emergencies. The ALFA Go Team Hotline is designed to offer ALFA clients immediate legal and other support services, 24 hours a day and 7 days a week.

The service works as follows: An ALFA client needing immediate legal support calls the ALFA Go Team Hotline at 1-888-520-ALFA (2532). An ALFA operator will provide location-specific contact information about experienced transportation lawyers, accident reconstructionists, and other transportation industry experts. When you contact the ALFA Go Team Hotline, you are connected to a full-service emergency response team, when you need it. Contact your ALFA lawyer today for more details about the ALFA Go Team Hotline. Remember, 1-888-520-ALFA (2532).

FUTURE ISSUES OF TRANSPORTATION UPDATE

The Winter 2010 issue of Transportation Update will be published in February 2010.

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.

ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

NONE FOR THIS ISSUE
CASES, REGULATIONS, & STATUTES

SOUTH CAROLINA

In a recent case, the South Carolina Supreme Court clarified for motor carriers and others in the industry the application of S.C. Code Section 56-5-4140, which establishes the maximum permissible weight for commercial motor vehicles travelling on South Carolina’s highways. In State v. Bryant, Opinion No. 26763 (Filed January 25th, 2010), the Court had before it appeals of two magistrate court traffic citations, of all things, issued by the State Transport Police to the operators of a refuse hauler, which the Transport Police believed was over the permissible maximum weight. The trial judge ruled that the operators had in fact violated the maximum allowable weight for their three-axle vehicle.

According to the citations, the vehicle had weighed 57,100 pounds on the first violation, and 56,900 pounds on the second violation, both of which the issuing officers determined to exceed the allowable gross weight of 50,600 pounds. The 50,600 pound amount was calculated based on an initial three-axle amount of 46,000 pounds plus a ten percent “scale tolerance” of 4,600 pounds. The Transport Police had drawn these figures from Section 56-5-4140(1)(a), which establishes the general weight limit for vehicles of varying number of axles. For vehicles with three axles, that weight limit was 46,000 pounds.

The applicable provision is as follows, with italicization for clarity:

(1)(a) The gross weight of a vehicle or combination of vehicles, operated or moved upon any interstate, highway or section of highway shall not exceed:

1. Single-unit vehicle with two axles .................. 35,000 lbs.
2. Single-unit vehicle with three axles ................. 46,000 lbs.
3. Single-unit vehicle with four axles .................. 63,500 lbs.

The drivers argued that, to the contrary, the governing statutory provision was Section 56-5-4140(2)(a), which reads as follows, again with italicization of the specifically applicable portions:

Dump trucks, dump trailers, trucks carrying agricultural products, concrete mixing trucks, fuel oil trucks, line trucks, and trucks designated and constructed for special type work or use are not required to conform to the axle spacing requirements of this section. However, the vehicle is limited to a weight of twenty thousand pounds for each axle plus scale tolerances and the maximum gross weight of these vehicles may not exceed the maximum weight allowed by this section for the appropriate number of axles, irrespective of the distance between axles, plus allowable scale tolerances.

With the Transport Police conceding that the refuse hauler was a truck “designated and constructed for special type work”, the drivers argued that their three-axle vehicle was rated for 66,000 pounds: twenty thousand for each axle plus ten percent scale tolerance.

At trial, the magistrate agreed with the position advanced by the Transport Police: that the apparent 66,000 pound permissible limit appearing in 56-5-4140(2)(a) was modified by the provision that even “special type work” trucks are “limited to a weight...not exceeded[ing] the maximum weight allowed by this section for the appropriate number of axles.” The trial court interpreted “the maximum weight allowable by this section for the appropriate number of axles” to mean that even a “special type work” truck falling under the more specific provisions of Section 4140(2)(a) could not exceed the general 46,000 pound maximum limit for three-axle trucks set forth in the general weight limit provision: Section 56-5-4140(1)(a).

On the initial appeal, the Court of Appeals properly ruled that the “not exceeding the maximum weight allowed by this section for the appropriate number of axles” language in Section 56-5-4140(2)(a) simply could not refer to the 46,000 pound general limit for three axle vehicles appearing in Section 4140(1)(a). After all, the Court reasoned, Section 56-5-4140(2)(a) was designed explicitly to function as an exception to the general per-axle weight limits, and therefore could not be limited by them. This is all fairly dry and straightforward analytically. The only lesson to be drawn, very frankly, is that a well-run motor carrier who believes it has been wrongly cited by the local police should look into the matter carefully, because it is distinctly possible that the police are mistaken.
More interesting, though, is the fact that the Court of Appeals, while reaching the correct conclusion—i.e., that there was no violation—found a different interpretation of the meaning of the modifying phrase “not exceeding the maximum weight allowed by this section for the appropriate number of axles.” While the State had asked that the courts read it as alluding to the 46,000 pound general weight maximum for three-axle vehicles, the Court of Appeals read the phrase as referring to the highest maximum allowable weight for any vehicle, regardless of the number of axles. On the basis of this interpretation, the Court of Appeals picked out the highest raw number appearing anywhere in Section 56-5-4140, which was 80,000 pounds, appearing in this table: (inset)

Somehow the Court of Appeals disregarded the facts that a) the 80,000 pounds is permissible under the table only for four to seven axle vehicles, and that b) the modifying language from Section 56-5-4140(2)(a) is that the vehicle may not exceed “the maximum weight allowed by this section for the appropriate number of axles.” As such, the proper maximum allowable weight was 66,000 pounds—the maximum allowable weight for any three-axle vehicle—just as the motor carrier had asserted all along.

So, certainly, the most concrete conclusion to be drawn is that motor carriers operating refuse haulers, dump trucks, and other “special type work” vehicles in South Carolina should be aware that weight limits calculated under Section 56-5-4140(2)
(a) must be cross-referenced to the corresponding provisions using care to ensure that the proper number of axles remains consistent from one table and statutory provision to another. A secondary conclusion, perhaps, is that motor carriers should follow their regulatory compliance instincts in the face not only of adverse police action, but of adverse appellate court action, as well.

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TENNESSEE

Employee Need Not Report The Alleged Illegality To Prevail On A Retaliatory Discharge Claim
And
The McDonnell Douglas Framework Is Inapplicable At The Summary Judgment Stage

In the case of Gossett v. Tractor Supply Co., No. M2007-02530-SC-R011-CV (February 11, 2010), the Tennessee Supreme Court considered the claims of an employee named Gary Gossett, who was an “Inventory Control Manager” in the General Accounting Department for the Tractor Supply Co., Incorporated. As an Inventory Control Manager, Mr. Gossett prepared the inventory reserve analysis which calculated the amount of money Tractor Supply had to reserve each fiscal quarter to account for excess or slow-moving inventory. Each dollar reserved proportionately decreased Tractor Supply’s earnings.

After submitting his inventory reserve analysis, the Chief Financial Officer for Tractor Supply allegedly wanted Mr. Gossett to look at all the various categories that made up the company’s inventory mix and find creative ways to remove products that seemed to be creating the greatest need for additional reserves. Mr. Gossett claimed that he refused to participate in the alleged illegal activity and that he was allegedly discharged because of such refusal. He never reported the matter to anyone.

Tractor Supply moved for summary judgment on Mr. Gossett’s Complaint concerning retaliatory discharge due to Mr. Gossett’s refusal to violate public policy. On Motion to Reconsider, the trial court observed that pursuant to the case of Collins v. AmSouth Bank, 241 S.W. 3d 879 (Tenn. Ct. App. 2007), “[r]eporting the alleged illegal activity is an essential element of a cause of action for retaliatory discharge.” Consequently, the trial court granted summary judgment because it was undisputed that Mr. Gossett did not report to anyone the alleged demand that he engage in illegal activity.

The Court of Appeals reversed the grant of summary judgment. The Tennessee Supreme Court granted Tractor Supply’s application for permission to appeal, and the Tennessee Supreme Court considered the following arguments of Tractor Supply and held as follows: Tractor Supply contended that summary judgment was warranted under the framework announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Tennessee Supreme Court noted that for common law retaliatory discharge cases an analysis similar to but quite distinct from the McDonnell Douglas framework has been adopted in Tennessee. In specific, at trial the employee has the burden of proving the following four elements of the claim:

   (1) That an employment-at-will relationship existed;
   (2) That the employee was discharged;
   (3) That the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision;
   (4) That a substantial factor in the employer’s decision to discharge the employee was the employee’s exercise of protected rights or compliance with clear public policy. (Gossett at p. 4).

The Court held that “proof of a causal link between the employee’s exercise of a protected right or compliance with clear public policy and the employer’s decision to discharge the employee then imposes upon the employer the burden of showing a legitimate, non-pretextual reason for the employee’s discharge.” (Anderson v. Standard Register Company, 857 S.W.2d 555, 559 (Tenn. 1993)).

Until the Gossett case, the Tennessee Supreme Court had not addressed “how an employee must respond to the employer’s proffered reason. Nor have we been called on, until now, to demonstrate how the employer’s burden of showing a legitimate reason for discharge applies at the summary judgment stage.” (Gossett at p. 4).
“To show that a case presents no genuine issue of material fact, a party moving for summary judgment must produce evidence or refer to evidence in the record ‘that affirmatively negates an essential element of the non-moving party’s claim or shows that the non-moving party cannot prove an essential element of the claim at trial.’” (Mills v. CSX Transport, Inc., 300 S.W.3d 627, 631 (Tenn. 2009) citing Hannan v. AltTel Publishing Co., 270 S.W.3d 1, 8-9 (Tenn. 2008)). (See also Martin v. Norfolk Southern Railway Company, 271 S.W.3d 76, 84 (Tenn. 2008), wherein the Court held as follows: “[t]o affirmatively negate an essential element of the non-moving party’s claim, [the moving party] must point to evidence that tends to disprove a material factual allegation made by the non-moving party.”)

Under the McDonnell Douglas framework, the employer need only “offer evidence establishing a legitimate alternative to the reason for discharge alleged by the employee.” (Gossett at p. 5). However, “a legitimate reason for discharge ... is not always mutually exclusive of a discriminatory retaliatory motive and thus does not preclude the possibility that a discriminatory or retaliatory motive played a role in the discharge decision. ... Indeed, Title VII of the Civil Rights Act recognizes that an adverse employment action may be the result of both a legitimate reason and a discriminatory motive. (Id.) (See also Desert Palace, Inc. v. Costa, 539 U.S. 90, 94-95 (2003).

In the case in question, Tractor Supply’s proffered reason for discharging Mr. Gossett was to reduce Tractor Supply’s work force, but the proffered reason was only one reason for discharging Mr. Gossett. The proffered reason did not necessarily mean that a desire to reduce the work force was the exclusive reason for discharging Mr. Gossett. The proffered reason did not show an absence of retaliatory motive. The proffered reason did not disprove any of Mr. Gossett’s factual allegations. The court found that though the burden shifting framework of McDonnell Douglas “is particularly appropriate at trial, it is ill-suited for the purpose of determining whether ‘there is no genuine issue as to any material fact.’” (Id.) (quoting Tenn. R. Civ.P. 56.04). In finding that the McDonnell Douglas burden shifting framework is not appropriate for use at the summary judgment stage of litigation, the Tennessee Supreme Court quoted Judge Tymkovich of the United States Court of Appeals for the Tenth Circuit, who stated as follows: “‘the compartmentalization of the evidence causes courts to put on blinders, looking at categories of evidence narrowly while the totality of evidence may point to discrimination.’” (Timothy M. Tymkovich, The Problem with Pretext, 85 DNV. U.L. Rev. 503, 519 (2008)); see Wells v. Colo. Dept. of Transp., 325 F.3d 1205, 1225 (10th Cir. 2003).

In support of its decision to dramatically alter the landscape of the law in Tennessee with respect to the applicability of the McDonnell Douglas framework and the law of Tennessee with respect to summary judgment analysis, the Tennessee Supreme Court stated that “our application of the McDonnell Douglas framework in Allen [Allen v. McPhee, 240 S.W.3d 803 (Tenn. 2007)] skewed our summary judgment analysis in favor of the employer.” (Gossett at p. 8).

In summary, the Tennessee Supreme Court held that “the McDonnell Douglas framework is inapplicable at the summary judgment stage because it is incompatible with Tennessee summary judgment jurisprudence.” (Id.)

With respect to the fact that Mr. Gossett did not report to any authority within or outside Tractor Supply the alleged pressure to engage in illegal activity and his refusal to do so, the Tennessee Supreme Court stated that it had never held that “an employee alleging retaliatory discharge for refusing to participate in an illegal activity must report the illegality to show that the employer violated a clear public policy.” (Id. at p. 12).

In a whistleblowing case, “the employee has no cause of action unless the employee shows that the reporting [of the illegal activity] furthered some clear public interest.” (Id. at p. 13). However, “a case alleging a refusal to participate [in illegal activity] does not require that silence be broken for a claim to exist, and reporting therefore
is not integral to the claim. Claimants alleging common law retaliatory discharge must identify ‘an unambiguous constitutional, statutory, or regulatory provision’ as evidence of the public policy that the employee’s discharge violates.” (Id.) quoting in part Guy v. Mutual of Omaha Insurance Company, 79 S.W.3d 528, 535 (Tenn. 2002).

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VERDICTS, APPEALS AND SETTLEMENTS

Newly Reported Verdicts

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ILLINOIS

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Editors Note – Previously published in part of Cook County Jury Verdict Reporter, 10/8/2010.

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Work Injury – Father of Four Killed During Torch Cutting of Railcar

Estate of Fernando Corral, Sr., deceased v. Mervis Industries Inc. 10L-4430 (formerly 02L-590, 06L-59); Tried August 20-30, 2010.

Verdict:
$734,400 after 49% off
$1,440,000 ($100,000 survival pain & suffering; $360,000 past lost income; $180,000 future loss of income; $800,000 loss of society).

Judge:
Elizabeth M. Budzinski (IL Cook-Law)

Pltf Atty(s):
David C. Wise and Francis P. Morrissey of Burke, Wise & Morrissey

DEMAND: $4,500,000;
ASKED: $9,500,000

Deft Atty(s):
Gregory D. Conforti and Genevieve M. LeFevour of Johnson & Bell Ltd

PRETRIAL OFFER: $1,250,000

Pltf Expert(s):
Eugene Holland (Safety) and Dr. Jesse Hall (Critical Care)

April 12, 2001, Fernando Corral was working as an independent contractor performing torch-cutting work on the Defendant’s premises, at 2313 Cannon St., Danville, IL. Corral was torch-cutting a portion of a rail car when a piece of steel fell on him, causing his death by asphyxiation (survived by his wife and four children). The Plaintiff’s safety expert contended:
(a) the Defendant failed to provide a safe place for Corral to work;
(b) that Defendant should have taken reasonable steps to guard against the hazard; and
(c) the Defendant was in control of the work Corral was doing at the time of his death.

The Plaintiff’s expert Dr. Jesse Hall opined that Corral was conscious for at least two minutes after the steel fell on him and before he died.

Defense counsel Greg Conforti reports that this case was transferred to his firm shortly before it was scheduled for trial in 2008. Summary judgment was subsequently granted in favor of the Defendant in 2008 based on the defense argument that the decedent was a true independent contractor so no duty was owed to him by the Defendant under the law and the exceptions to this rule under Section 414 of the Restatement (Second) of Torts did not apply.

The Plaintiff appealed and the Appellate Court reversed the summary judgment, finding there was a question of fact that should go before a jury regarding whether the Defendant owed a duty to the decedent under Section 414 of the Restatement of Torts, and the case was remanded for trial.

At trial, the defense argued:
(a) the decedent was an independent contractor;
(b) the Defendant did not control the means, manner or methods by which he did his work;
(c) decedent was responsible for the safety of his work; and
(d) he should have recognized any hazard that existed based on his thirty years of experience doing torch-cutting work.

Defense counsel reports it was determined at trial that some information gathered by the Defendant in the initial discovery phase of the case with respect to the incident was incorrect, therefore making most of the evidence presented at trial moot, and this misinformation caused defense counsel to have to withdraw its expert witness (retained by prior law firm).

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Editors Note – Congratulations to Joe on yet another major win. We hope that we can talk Joe and Jeremy into giving us more information about this win when things calm down for them.

ALFA firm members Joseph R. Farris and Jeremy K. Ward with Feldman, Franden, Woodard & Farris in Tulsa, Oklahoma obtained a defense verdict at trial on behalf of a transportation company and its driver. The Plaintiff claimed the trucking company was guilty of negligent entrustment, training, and supervision and both the trucking company and driver were guilty of gross negligence therefore entitling him to punitive damages. The Plaintiff sought damages for loss of earnings, property damages, personal injuries, permanent disfigurement, pain and suffering both past and future, and punitive damages.
OREGON
SUPPLEMENT TO AN OLD VERDICT REPORT

Editors Note – This verdict was originally published in our Fall 2009 issue. We asked Wally Sweek and his partner Peter Wilcox-Jones to provide us with additional information about the pre- and post-trial publicity and the extensive motion practice in the case.

Excerpt from The Oregonian, August 22, 2009: Lawsuit puts big trucking in spotlight.

“Jesus Nieves Olivares was candid with a Utah trucking outfit four years ago, when he applied to become a driver: He had gone to prison for killing three men, and he had once been a cocaine user. But this didn’t stop the company from giving him a few weeks’ training and pointing him at the open road.”

“Lister’s suit alleges that C.R. England, which bills itself as the nation’s largest refrigerated trucking company, looked past Nieves Olivares’ past and rushed him onto highways whose signs, in English, were hard for him to comprehend.”

“The most sinister part is not even really the driver,” said plaintiffs attorney Thomas D’Amore of Portland. “It’s the company that brings in these kinds of drivers and puts these folks on the road. You are putting them in a highly dangerous instrument on our freeways, exposing us all to them.”

“Nieves Olivares found Dunn behind the wheel. There was blood on her deployed airbags. The woman, holding her bloody nose, looked at the driver with wide eyes and slumped to one side.

“Oh, lady,’ the truck driver recalled saying in a deposition, ‘please don’t die on me.’

“Emergency workers pushed him away and whisked Dunn to an emergency room in Salem.”


“Accounts presented by plaintiffs indicated that Olivares ran a red light and that Dunn, making a turn into an intersection, collided with the truck and flipped into a wall. Police cited Olivares for running the light.

But defense witnesses said Olivares entered the intersection on a yellow light, missed a gear, then did the right thing by continuing through the intersection. The defense also said Dunn inexplicably lurched into the intersection and struck the rear wheels of the truck.”

ARTICLE

Between Monday, August 24, 2009 and Wednesday, August 29, 2009, ALFA lawyers Wally Sweek and Peter Wilcox-Jones represented C.R. England and its driver, Jesus Olivares of Puerto Rico, in a personal injury lawsuit filed by Marjorie Dunn’s daughter, Andrea Lister, tried in the Federal District Court of Oregon. Marjorie Dunn died from complications associated with lung cancer 18 months after the accident which was the subject of the lawsuit.

On the Saturday before the Monday trial, the Oregonian featured a front-page article about the case. The information included in the article was supplied entirely by plaintiff’s counsel. The article included information about C.R. England’s driver, Olivares, including the following information which the court had months earlier ruled was inadmissible: Olivares spent ten years in prison for killing three people; Olivares had used a weapon without a serial number; and Olivares had a history of cocaine use. Sweek and Wilcox-Jones asked the court to delay the trial and/or change venue. The court denied
both motions. Ultimately, three jurors were excused due to the fact they had read the article.

During the trial, plaintiff argued that the following contributed and/or caused the accident: Olivares was an inexperienced and poorly trained driver who earned his CDL less than 30 days before the accident; Qualcomm messages indicated pressure on the part of C.R. England for Olivares to get his load of bananas timely delivered; Olivares was out of hours at the time the accident occurred; Olivares had multiple instances of daily and weekly hours violations; Olivares had a prior accident which further illustrated his inability to drive safely; and C.R. England failed to obtain a drug or alcohol test following the accident. After four hours of deliberation the jury returned a verdict for the defendants.

Pre-Trial Issues Before the Court
1. Motion to Bifurcate Issue of Punitive Damages. We moved to bifurcate the issue of punitive damages for two reasons. First, it could shorten the trial. Second, the court had ruled that certain evidence would be allowed only in support of punitive damages—issues such as driver fatigue, driving hours, log violations, etc. By bifurcating the punitive damages claim, the court would remove the risk that the jury would improperly rely on that evidence in determining liability.

2. Defendant’s Motions in Limine.
   a. Objections to Photographs. We objected to photographs on basis plaintiff failed to timely produce the photographs. Motion denied.
   b. Prior Accident. We objected to the admission of evidence relating to an accident involving the same driver two weeks prior to the accident in question. The accidents were dissimilar and played no role in the accident which was the subject matter of the lawsuit. Motion denied.
   c. Prior conviction. We moved to exclude 20 year old conviction for filing serial number of a firearm. The court had previously excluded evidence of 20 year old homicide convictions. Motion granted.
   d. Drivers logs and Q-Tracs messages from October 12 to October 29, 2005. We moved to exclude this evidence based on relevance. The accident at issue occurred on November 8, 2005. We moved to exclude this evidence as it had no possible relation to the accident at issue. Motion denied. Plaintiff asserted it was relevant to issue of driver log violations and prior violations of driving too many hours without the necessary rest in between.
   e. Post accident drivers logs and Q-Tracs messages. We moved to exclude admission of post accident driver’s logs as they were not relevant to the accident at issue. Motion granted in part and denied in part. Plaintiff was allowed to introduce post-accident Q-tracs messages relating to the accident.
   f. No post-accident drug test. Defendants moved to prevent plaintiff from offering evidence that CR England failed to timely test its, driver for drugs on the basis that it was misleading, prejudicial and not relevant. Motion denied. (Police interviewed...
driver at scene and noted “no impairment.”)

   a. Plaintiff moved to exclude medical records relating to eyesight. Medical records indicated a history of left eye problems, CR England's vehicle came from her left side. Plaintiff moved to exclude based on prejudice and because we were not calling an eye expert. Motion denied.

   b. Misc. Medical Records. Plaintiff objected to an ambulance report and medical records which essentially contradicted their version of the story. They claimed the records were prejudicial and hearsay. Motion denied.

4. Motion to Postpone Trial.
   Jury selection was to begin August 24, 2009. On Friday, August 21, 2009, The Oregonian posted on its website an article entitled "Oregon lawsuit Puts Big Trucking Into Spotlight." That same article appeared on the front page of the Oregonian on Saturday, August 22, 2009. The article contained a number of references to information which the court deemed inadmissible months ago and in the pretrial conference on August 18, 2009. Further, it was apparent from the article that some of the information contained therein was supplied by plaintiff's counsel in an apparent attempt to circumvent the court's rulings and poison the jury pool.

   From that Friday to Monday, the article was picked up by the Associated Press and the Salem Statesman Journal as well as posted to the Statesman Journal's website. The article was also posted on the website for KGW, one of the largest television stations in Oregon. In addition, the article has been posted on numerous other websites including newsday.com, nydailynews.com, and movingtoportland.net. Finally, the article was recently cited and discussed on OPB radio. The substantial likelihood of prejudicing the hearings is that the article included information the court deemed inadmissible—Olivares' homicide conviction and prior drug use. The Court ruled months prior that evidence regarding Olivares' prior homicide conviction and past drug use was inadmissible because it was irrelevant and highly prejudicial. Nevertheless, the opening paragraph of the article stated: "Jesus Nieves Olivares was candid with a Utah trucking outfit four years ago, when he applied to become a driver: He had gone to prison for killing three men, and he had once been a cocaine user." Motion denied.

5. Motion to Dismiss Punitive Damages. Moved to dismiss punitive damages on basis that plaintiff did not have requisite evidence to satisfy standard. Motion denied.
TEXAS

Wrongful Death Defense Verdict in Texas

On August 19, 2010 a Federal Court jury of three women and three men returned a defense verdict for Schwerman Trucking in a wrongful death case tried in San Antonio, Texas. The trial was based on a 6:25 PM November 13, 2008 accident in which 18 year old plaintiff Javier Zubia was traveling eastbound on rural Murphy Road at the outskirts of Odessa, Texas. At the same time a Schwerman 18 wheel driver was exiting from a shipper and turning west bound onto Murphy Road. Zubia left 170 feet of skid and slammed into the left rear tandems of the Schwerman tanker. Zubia was rendered unconscious at the scene and died four days later after incurring $100,000 in medical expenses at Odessa Medical Center. The accident took place right at dusk and Texas DPS confirmed that Zubia's headlights were on at the time of impact.

Zubia's parents filed a wrongful death claim against Schwerman Trucking alleging negligence and gross negligence. Plaintiffs claimed that Schwerman’s driver had a half mile of visibility to have seen Zubia traveling towards him, yet never saw Zubia and therefore the Schwerman driver was negligent in failing to yield the right of way. Schwerman countered that Zubia was speeding at 75 MPH in a 55 MPH zone and did not keep a proper lookout. Plaintiffs reconstruction expert testified that Zubia was traveling between 57 and 62 MPH. Schwerman’s expert testified that Zubia was traveling at 75 MPH plus. Additional allegations included negligent retention due to numerous speeding tickets and one aggressive driving counseling in our driver's previous history. The evidence of the Schwerman driver’s past conduct was admitted into evidence, however after both parties rested the court granted judgment as a matter of law in favor of Schwerman on the negligent retention claim as well as the gross negligence claim.

The plaintiffs' case on negligence of Schwerman and defendant's claim of negligence on Zubia were submitted to the jury and after six hours of deliberation the jury returned a split verdict. The jury found both parties negligent, but found Zubia 60% at fault and Schwerman’s driver 40% at fault. The Zubia’s damages were also submitted to the jury unconditionally. As a result, the jury found damages of $263,000 for Zubia's mother and father for the loss of their son. Texas is a modified comparative responsibility statute therefore plaintiffs were barred from any recovery because they were found to be more than 51 percent at fault.

Of interest is plaintiffs safety expert George Beaulieu was struck by the court and not allowed to testify. Also, plaintiffs sued Bulk Logistics, the lessor of the truck (a Schwerman related company). The court granted a summary judgment for Bulk Logistics under the Graves Amendment.

This case was tried by Larry Warren and Mark Cooper of the San Antonio, Texas ALFA law firm Ball & Weed, PC.

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Editors Note – Because members of the ALFA Transportation Practice Group try many types of cases in addition to trucking cases, the Editors have asked them to submit for publication a wider variety of verdicts than those limited to trucking cases, if those additional verdicts would be of interest to a trucking industry audience. We have one verdict for this issue which have not been previously published. In addition, we begin in this issue a compendium of verdicts reported in the last five years. Beginning in April 2012, we will begin reporting once each year all verdicts we published in the previous four issues.

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ARIZONA

JOHN CHRISTNER TRUCKING
ADV. MARY CAMERON, ET AL.

Venue: Maricopa County Superior Court, Phoenix, Arizona

Result: 10 person jury trial. Defense verdict.

Counsel for John Christner Trucking:
Tamara Cook, Bill Sowders of Renaud Cook Drury Mesaros, Phoenix, Arizona.

Facts. A multiple vehicle collision involving 13 commercial trucks and 6 passenger vehicles took place in a blinding dust storm on August 8, 2004 on westbound Interstate 10 west of Phoenix, Arizona. In the end, there were dozens injured and 2 deaths. One of the deceased was Martin Cameron who, while driving with his passenger and wife, Mary Cameron, struck the rear of the trailer pulled by John Christner trucking. Martin and Mary survived the initial impact without injury. But as their vehicle was being struck by another commercial truck, Mary jumped to safety, suffering fractures and a severe degloving injury to her right leg. Martin was crushed and killed when his vehicle and the John Christner trailer were impacted by 1, 2 or even 3 more commercial trucks.

The collision began when a mystery white vehicle caused a commercial tractor trailer unit (TT 1) to stop suddenly in lane 1 and caused a second unit (TT 2) to swerve right and stop suddenly straddling lane 2 and the emergency lane. A touring bus filled with passengers struck the rear of TT 1 in lane 1. A purple passenger van with three adults and five children, one in a wheelchair, stopped behind TT 2 in lane 2 without striking it. Our client, John Christner Trucking (JCT) at the hands of seasoned driver and extra-cautious grandmother, Kay, pulling a tractor and almost full trailer, stopped behind the purple van without striking it. MARTIN CAMERON hit the rear of the JCT trailer, lodging his car under the ICC bumper.

Evidence suggested that another TT, (TT 3) struck the rear of the Cameron car then swerved right into the desert. There was conflicting evidence whether TT 4 struck the Cameron car. Either TT3 or TT 4 caused injury to Mary Cameron and the death of Martin Cameron. A massive fire erupted. The JCT truck and trailer, TT3, TT4 and the Cameron car with Martin Cameron in it were all completely destroyed by fire.

Plaintiffs’ Allegations: Kay was illegally stopped in the roadway without her lights on. In the time and distance it took Kay to safely drop her speed and stop behind the purple van without hitting it, she should have exited the freeway entirely.

Defenses: There was conflicting evidence whether Kay had her lights on or off. The zero visibility as confirmed by every driver on scene and highway patrol made this a non-issue. Kay was slowing to adapt to the ever changing conditions. Her actions were reasonable while she had visibility particularly in a dust storm that is unpredictable in
duration and severity. When confronted with a sudden emergency, losing sight of the purple van, she stopped immediately. The vehicles behind her did not.

Plaintiffs’ claims: Degloving injury to Mary Cameron's right leg, multiple fractures to leg and ankle. Good recovery. Stipulated medicals of $162,000. Wrongful death of Martin Cameron with wife, three children, two parents as statutory beneficiaries. Demand at Trial: $500,000 for Mary Cameron’s personal injury. $1M - $1.5M for each child. Parents never mentioned. $10M-$30M for Mary Cameron for a total of $13.5M - $35M. Defendants Proposed Verdict Value at Trial: $0. The jury was asked to find that Kay was not negligent since she brought her truck to a controlled stop. The jury was also asked to consider that no one was at fault - that this was truly an accident and everyone did the best they could despite the tragic outcome. Verdict Form included JCT, TT4, and two other TT companies as non-parties at fault, and Martin Cameron for comparative fault. Jury out 5 hours (over two days). Defense verdict. Jury applied Arizona’s Sudden and Unexpected Emergency instruction, and focused a great deal of attention on the hindsight clause.

In determining whether a person acted with reasonable care under the circumstances, you may consider whether such conduct was affected by an emergency. An Aemergency@ is defined as a sudden and unexpected encounter with a danger, which is either real or reasonably seems to be real. If a person, without negligence on his or her part, encountered such an emergency and acted reasonably to avoid harm to self or others, you may find that the person was not negligent. This is so even though, in hindsight, you feel that under normal conditions some other or better course of conduct could and should have been followed. The existence of a sudden emergency and a person’s reaction to it are only some of the factors you should consider in determining what is reasonable conduct under the circumstances. (Revised Arizona Jury Instruction; emphasis added).

The jury found that no one was at fault. Finally, we found a jury willing to accept that accidents DO just happen now and then.

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ARIZONA (SUMMER 2008)

On the night of November 8, 1999, a truck driver was driving a tractor-trailer for a Transportation company up N. Val Vista Drive in Gilbert, Arizona when he crossed a median into oncoming traffic. The truck collided with a van resulting in the van driver’s death.

The van driver’s widow and his two grown children filed suit against the truck driver and transportation company. Defendants admitted negligence before trial, which was held in January, 2003. At that trial, the jury awarded a total of $7 million in compensatory damages to the plaintiff, and $4 million punitive damages against the truck driver and transportation company. The verdict was appealed.

In March, 2005, the Arizona Court of Appeals upheld the compensatory damage award but reversed the punitive damage award as having been the product of an improper jury instruction. On April 29, 2008, the parties retried the case on punitive damages only. Following a seven day trial and four hours of deliberation, the jury returned a unanimous verdict in favor of the truck driver and transportation company awarding no punitive damages.

Plaintiffs’ counsel had contended that they were entitled to recover punitive damages because they believed there was clear and convincing evidence that the truck driver had “consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.” Under Arizona law, this is the state of mind a plaintiff must establish in order to be entitled to punitive damages. Plaintiffs further argued that the transportation company had engaged in a pattern of deception through both its own employees and its attorneys.

Defendants’ case featured testimony from the two investigating officers from the Gilbert, Arizona Police Department, both of whom corroborated the account the truck driver gave the night of the accident, that he was driving within the posted speed limit and that he lost control of his truck while trying to avoid a car that was drifting into his lane from his right. Defendants also rebutted plaintiffs’ contentions regarding deceptive practices by the transportation company by showing the company’s responsive conduct, as well as plaintiffs’ own failure to obtain available information.

The lawyers for defendants were William W. Drury, Jr., Michael D. Wolver, and Steven A. Adelman, of Renaud Cook Drury Mesaros, PA in Phoenix. Plaintiffs were represented by P. Richard Meyer of Meyer and Williams in Jackson, Wyoming, and M. Paul Fischer of the Law Office of M. Paul Fischer in Mesa, Arizona.
ARKANSAS (FALL 2007)

ARKANSAS VERDICT IN TRUCKER’S ATTEMPTED MURDER CASE

Verdict: Not guilty of attempted murder second degree (3 counts), aggravated assault (3 counts), criminal mischief, battery in the second degree (3 counts), and endangering the welfare of a minor, second degree.

Judge: Honorable Harold Irwin
(Lawrence County Circuit Court)

Prosecuting Attorneys: Carl A. Powell and Joe Grider

Exposure: 126 years and/or fines up to $120,000

Defense Attorneys: Jerry J. Sallings, Wright, Lindsey & Jennings LLP

Facts. On Sunday morning October 3, 2004, Barbara Garcia was driving an 18-wheeler for Comstar pulling a load on a rural two-lane highway in north Arkansas. A 2000 Lincoln LLS driven by Glen Talley and occupied by his wife and 4-month old child passed Garcia’s truck. The accounts between Talley and Garcia vary as to the events leading up to the crash, but ultimately the Lincoln was struck in the driver’s side, spun from the highway and flipped to the hood before coming to rest. Talley claims that Garcia was angry because he passed her and, therefore, she began to ram him in the rear. Garcia says that Talley was angry because she initially kept him from passing and that once he did pass her he began to slam on his brakes trying to get her to pull over for a confrontation. There were two independent witnesses following the truck who gave accounts similar to Talleys. Pretrial investigation uncovered the fact that Talley had a long history of violent behavior including two separate bar-room brawls that resulted in misdemeanor assault charges; an aggravated assault charge that was reduced to a misdemeanor when he drove through a police roadblock; a misdemeanor domestic battery charge filed by his ex-girlfriend; and assault charges resulting from Talley’s behavior in other incidents. The trial judge refused to allow any of the prior activity of Talley into evidence. Talley and his wife, an attractive lady, gave tearful testimony at trial of the ordeal that they claimed traumatized their daughter, Jade. There were no serious injuries suffered by any of the Talleys. Prior to the criminal charges being filed, the Talleys’ retained Bobbie McDaniel, a prominent plaintiff attorney from north Arkansas (his son is now the elected Arkansas Attorney General). McDaniel filed a multi-million dollar lawsuit claiming punitive damages for the “road rage” evidenced by Garcia. Garcia grew up in New York City and was operating out of California. However, the local jurors found compelling the fact that photographs taken of the Lincoln taken shortly after the accident failed to evidence any damage to the rear of the Lincoln that would have been consistent with Talley’s account of the accident. Garcia also did a good job testifying. The jury returned with not guilty verdicts on all counts in less than 45 minutes. Since the criminal verdict came in, there has been no activity in the civil case.
ARKANSAS (FALL 2007)

FAVORABLE ARKANSAS TRIAL VERDICT WHERE TRUCKER’S DRUG TEST WAS POSITIVE

Verdict: Defense verdict on wrongful death claim.

Judge: Honorable Bynum Gibson (Desha County Circuit Court)

Prosecuting Attorneys: Charles Sidney Gibson, Dermott, Arkansas

Demand: $850,000

Black boarded Damages: $3,000,000

Defense Attorneys: Jerry J. Sallings, Wright, Lindsey & Jennings LLP

Offer: $300,000

Plaintiff Expert: Larry Williams, accident reconstructionist

Defendant Expert: John Bentley, accident reconstructionist, Bentley Technical Services, Inc. 110 Shady Lane, Perryville, AR 72126, Ph: 501-333-2480

Facts. On April 4, 2006, at around 8:00am, Jeffery Currens was operating an 18-wheeler for a small company out of Forrest City, Arkansas. He was hauling a load of grain on a two lane highway outside of Dumas, Arkansas. As he approached a curve to his left, he realized that a blue pickup truck traveling toward him was in his lane. Currens was traveling 60mph and could not stop. At the last second, Currens pulled to the left to avoid the truck, the blue truck at that time pulled into his path and a collision occurred that resulted in the death of the driver of the blue pickup. The area of impact was not in Currens lane, but there was an independent witness following Currens’ truck who gave a statement to the police that the blue truck was in the wrong lane. A drug screening test was taken from Currens that revealed positive results for marijuana, cocaine and methamphetamine. However, a drug screening test of the deceased driver revealed positive results for cocaine. Currens was ultimately charged with negligent homicide but the civil jury trial proceeded before the criminal case. Shortly after the accident, plaintiff’s counsel, Mr. Gibson, had obtained a statement from the independent witness stating that he claimed he was really not sure whether the blue truck was in the wrong lane prior to the accident or not. Although there were motions to exclude the drug test results from both drivers, the trial judge allowed all of the drug evidence in at trial. The jury returned a defense verdict. Currens’ civil counsel, Jerry Sallings, also represented him in the criminal charge of negligent homicide. Currens’ motion to suppress the drug test in the criminal trial was granted. Shortly after the civil trial verdict and the motion to suppress were granted, the criminal charges were dismissed. An interesting issue in the civil trial was whether evidence of positive drug screening results would be admissible to establish intoxication. Both parties relied upon the case of Simco v. Ellis, 303 F.3d 929 (8th Circuit 2002) for the proposition that since drug screening tests are incomplete and therefore not reliable, and because any evidence of intoxicants is extremely prejudicial, absent a confirmation test of the presence of intoxicants, the screening test would not be allowed. The trial judge held that there was sufficient evidence of intoxication of Currens in addition to the drug screening test (dilated eyes, accident occurring outside of his driving lane) that evidence of drug screening results would be admissible as to Currens. The court held that the drug screening results would be admissible as to Jones because he was making a claim for wrongful death damages and the jury was instructed to consider his “sober” status, his “life expectancy”, and his expected “moral contributions to his children”.

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COLORADO (FALL 2007)

Bruce Menk of the Denver ALFA firm of Hall & Evans, LLC recently tried a case of admitted liability on behalf of Motor Cargo which is a subsidiary of UPS Freight. The case arose out of a low speed accident where the Motor Cargo tractor-trailer rear-ended an automobile being driven by the plaintiff. The plaintiff claimed to have injured his shoulders, neck and back as a result of the accident. Over the course of the next five years, the plaintiff had three major surgeries: an open repair of his right rotator cuff; bilateral decompressive laminectomies and medial facetectomies of both his L-4 and L-5 vertebrae as well as a L4-5 discectomy; and an anterior cervical discectomy and fusion of C3-6. Medical bills totaling $141,000 were admitted into evidence at trial.

At the time of the accident, the plaintiff was 52 years old and was employed as a Brew house Supervisor at Coors. He claimed that his injuries caused him to retire early at age 59, resulting in an economic loss of $569,000.

Prior to trial, the plaintiff’s lowest demand was $1,950,000. The Defendant had made an opening offer of $100,000. Two weeks before trial, the plaintiff was approached with the proposition that the defendant would probably pay $500,000 if that would settle the matter. The plaintiff simply rejected that suggestion. During the trial, the plaintiff was offered $300,000, which was withdrawn when the jury retired for deliberations.

After a day of deliberations, the jury returned a verdict in favor of the plaintiff in the amount of $120,000.

The style of this case is Martinez v. Carder and Motor Cargo, Inc., and it was tried in the District Court of Jefferson County Colorado (Case No., 2005-CV-1129).

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GEORGIA (SPRING 2008)

RAINY NIGHT IN GEORGIA

Larry D. Warren, a shareholder in ALFA International's San Antonio, Texas firm, Ball & Weed, PC., received a defense verdict in a trucking case which was tried in Brownsville, Texas. After a five day trial, a Cameron County jury found no fault on Evenson Trucking Company and its driver, Malissa Box. Instead, the jury voted 11-1 to place 100 percent of the accident fault on the plaintiff.

On March 9, 2005, Malissa Box was west bound on I-10 in a heavy rain when she saw plaintiff Deniss Felix spinning out of control on the left shoulder. Box began breaking and steering to the right when the plaintiff's Toyota pickup bounced off the guardrail and rolled into the path of the Evenson tractor. The plaintiff's pickup was broadsided. The plaintiff ultimately had eighty-one thousand dollars ($81,000.00) in medical treatment, including coblation treatment to the C5-6 spine.

The plaintiff claimed that the Evenson Truck had changed lanes to the left and caused her to lose control. She was supported in this position by two friends who were travelling behind her. The defense was able to discredit these two witnesses by using the trucks ECM and a reconstructionist, Dr. Eric Moody. In addition, the defense established that the plaintiff's two eyewitnesses were one quarter of a mile behind the plaintiff with two tractor-trailers between them and the plaintiff.

This one quarter mile distance along with heavy truck spray on this "Rainy Night in Georgia" made these two friends comments highly incredible.

It seems by the time the jury returned its verdict the plaintiff thought "it was raining all over the world".

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ILLINOIS (SUMMER 2009)

Editors Note – This is a case that Greg Conforti was asked to come in and try three weeks before trial.

LARRY G. SHREVE AND DEBBIE SHREVE V. DOUGLAS D. SWALEC, INDIVIDUALLY AND AS AGENT FOR VERIZON NORTH INC., A FOREIGN CORPORATION, AND VERIZON NORTH INC., A FOREIGN CORPORATION (CLIENT AIG), COOK COUNTY 06 L 4783

Tried: April 28 through May 4, 2009

Judge: Clare McWilliams

Verdict: $3,209,188.69

Itemization:
Medical Treatment: $366,688.69
Lost Wages: $242,000
Disfigurement: $500
Pain and Suffering past and future: $1,000,000
Emotional distress past and future: $600,000
Loss of normal life: $300,000
Loss of Society for Debbie Shreve: $700,000

Trial Attorneys:
Thomas J. Popovich
Kim Popovich
JOHNSON & BELL, LTD.
33 West Monroe Street
Suite 2700
Chicago, IL 60603

Trial Attorneys:
Gregory D. Conforti
Lynn M. Reid

Facts of Case:
On April 5, 2006, a Verizon North, Inc. service van being operated by Douglas Swalec turned directly in front of Larry Shreve (51) as he rode his motorcycle in the opposite direction at approximately 45 mph. Mr. Shreve struck the passenger side of the van and was catapulted off his bike head first into the side of the van. He was air lifted to St. Anthony Hospital in Rockford, Illinois where he was primarily treated for severe facial fractures, loss of a majority of his teeth, and a displaced fracture of his elbow into the elbow joint. He subsequently underwent surgery to insert plates in his face with multiple screws to reconstruct it, surgery to his elbow, including a 7” rod and pins, dental reconstructive surgery and later had a cerebral spinal fluid leak repair surgery that involved removal of a large section of his skull in the forehead area in order to complete the repair.

Defense Contended:
The defense admitted liability in the case but disputed the nature, extent and permanency of the injuries involved.

Injuries:
Severe facial fractures, loss of his teeth, a displaced fracture of his elbow into the elbow joint, residual permanent pain in his face, headaches, foot and back pain and a permanent mild traumatic brain injury with moderate residual effect in the areas of short term memory, attention and concentration.

Medical Witnesses:
Plaintiff:
Dr. Dorman, Family Practice, Dr. Ghaly, Neurosurgery, Dr. Rabin, Orthopedics, Dr. Kean, Physiatry, Dr. Taha, Podiatry, Dr. Silverman, Neuropsychology, Dr. Fenger, Psychologist, Dr. Kirsch, ENT, Dr. Meyer, ENT, Dr. Daw, Plastic Surgery, Dr. Tsang, Pain Management, Dr. Lerohl, Reconstructive Dentistry, Michelle Fay, Speech and Cognitive Therapy, Dr. Binger, Emergency Medicine.

Defendant: None

Expert Witnesses:
Plaintiff: Dr. Steven Rothke, Dr. Robert Kohn, Neuropsychology
Defendant: Dr. David Price, Neuropsychology

Medical Bills: $366,688.69

Lost Income: $242,000 as a part time laborer and equipment operator

Last Demand: $3.9 million

Asked of Jury: $7.8 million

Last Offer: $3.25 million

Plaintiff Age (at time of accident): 51-year old male

Plaintiff’s Occupation: Retired from Caterpillar prior to accident but working seasonally for his brother’s soil sales company. Volunteer firefighter.

Other noteworthy features: Defense theme at trial was that the plaintiff’s were overreaching in their damages claims and pointed out to the jurors in closing that although Mr. Shreve did in fact suffer serious and permanent injuries, plaintiffs’
calling of both emergency room doctors, two different neuropsychologists and 11 video evidence depositions was geared toward an attempt to have the jury render an award that was not fair and reasonable based on the evidence. The defense also pointed out to the jurors that one of plaintiffs’ neuropsychologist was somewhat critical of the other of plaintiffs’ neuropsychologist and that the plaintiffs’ neuropsychologist had not seen some significant information that established that the plaintiff had made a better recovery than had been shown in the last records reviewed by the plaintiffs’ expert, including the plaintiff’s ability to drive an automobile, hold a limited part-time job, work as a handyman for neighbors and friends and to work on a very limited basis with the volunteer fire department that he had previously worked very closely with before his accident.

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ILLINOIS (SUMMER 2007)

Verdict: $465,400 compensatory damages (not guilty on battery/punitive damages claim).

Judge: James B. Moran (USDC IL NE)

Pltf Attys: Kenneth C. Chessick and Magdalena Dworak-Mathews of Kenneth C. Chessick M.D. (Schaumburg) for both plaintiffs

Demand: $55,000,000

Asked: $165,000,000

Deft Attys: Gregory D. Conforti and Marilyn M. Reidy of Johnson & Bell (AIG)

Offer: $800,000

Pltf Medl: Dr. David Houlihan (Psychiatrist) and Dr. Peter Bringewald (Neuro-ophthalmologist) for Heidi, Dr. Trent Davis (Neurologist), Dr. Brian G. Weinschenker (Neurologist), Dr. Ty L. Schwertfeger (Neurologist) and Dr. Zuhair K. Ballas, (Allergist) PLTF EXPERTS: Dr. Alan Hirsch (Neuropsychiatrist) and Toby Clark, R.Ph. of Medical University of South Carolina, Pharmacy Services, 171 Ashley Ave., Charleston, SC (843-792-2300) (Pharmacist) for Heidi

Facts: Aug. 4, 1993, Kent Happel picked up his wife Heidi's prescription for Toradol at the Wal-Mart pharmacy in McHenry, IL. Toradol, a non-steroidal anti-inflammatory pain reliever (NSAID), had been prescribed by Dr. Z. Ted Lorenc for Heidi's severe menstrual cramping. Heidi had been a past customer at the McHenry Wal-Mart pharmacy, and she had several medication allergies which would have been documented in Wal-Mart's computer system. She suffered from pre-existing multiple sclerosis, allergies and asthma, and her allergies to various medications included aspirin, ibuprofen and Tylenol. Toradol is an NSAID like ibuprofen, so a contraindication warning should have flashed on the pharmacy computer screen once the Toradol prescription was entered into the computer. Toradol should not have been dispensed to the plaintiff without a call being made to the prescribing physician, but there was no record of such a phone call being made either at the pharmacy or at the physician's office. Upon receiving the Toradol at home, Heidi looked for the medication instructions and warnings, but she only found a blank piece of paper with several bullet points on it. She had experienced previous allergic reactions that required emergency room treatment, including one allergic reaction to a pain medication in the aspirin/ibuprofen family, prior to the date of the occurrence. Without calling her doctor or the pharmacy, she took the pain medication and immediately began to suffer an allergic reaction which worsened over the next half hour and developed into an anaphylactic reaction that required her to be taken to the emergency room. Heidi F-26 suffered severe respiratory distress, requiring intubation/ventilation for 15 hours and hospitalization for 4 days. She claimed she sustained anoxia and brain damage, resulting in seizures, memory loss, aphasia, permanent cognitive disabilities, post-traumatic stress disorder, and exacerbation of her multiple sclerosis ($15,400 medl. in evidence out of $130,000+ total, $60,000 LT per year for 20 years totaling $1,200,000 lifetime LT as a minister). Heidi and Kent were both studying theology at the time of the occurrence and are now both Lutheran ministers. Plaintiffs sought $15 million in compensatory damages and $150 million punitive damages. Defense admitted negligence but denied Heidi sustained any permanent injury or damage and contended all of her symptoms and complications stemming from the allergic reaction had resolved within a few months of the occurrence. Defense further asserted there was no scientific or other reliable proof from which plaintiffs' expert could conclude that the multiple sclerosis was exacerbated as a result of the occurrence, and defense successfully barred plaintiffs' expert from testifying on that subject pursuant to a Daubert motion. As to the battery claim for punitive damages, defense argued Heidi either impliedly or explicitly demonstrated some consent to the contact because she took the medication knowing she had allergies without first calling her doctor or the pharmacist after she admittedly looked for and couldn't locate the instructions. Defense further maintained plaintiffs did not prove requisite intent to cause a harmful contact on the part of Wal-Mart, since there was some evidence that Wal-Mart had attempted to provide her with instructions and warnings and there was no evidence
that a contraindication actually appeared on the computer screen since the pharmacist had no recollection of filling the prescription. The pharmacist was unable to testify at trial due to pre-Alzheimer's dementia; the pharmacy technician is deceased.

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ILLINOIS (FALL 2008)

Greg Conforti recently won this case on appeal following the granting of summary judgment.

Re: Lisa Coole v. Allied Waste
No. 04-07-0793; Appellate Court of Illinois, 4th Dist.
Appeal from Circuit Court of Champaign County,
Case No. 04 L 55

This case involved the death of a 24 year old All-American student athlete from Champaign, Illinois who was driving in the early morning hours to her volunteer job at an animal shelter. The decedent was also the recipient of numerous awards from various women's groups and publications naming her “Woman of the Year” and the like. The accident occurred when the plaintiff’s decedent pulled out directly in the path of an Allied Waste refuse truck as it proceeded through the intersection of Duncan and Clayton Roads in Urbana, Illinois. The plaintiff apparently disregarded a stop sign and the refuse truck driver was operating on the uncontrolled, preferential roadway. Following the occurrence, the refuse truck driver admitted to speeding at the time of the accident by approximately 5 mph over the limit. The plaintiff claimed that the driver’s excessive speed, failure to keep a proper lookout and heavy use of Prozac all contributed to his inability to avoid colliding with the plaintiff’s vehicle. Plaintiff further argued that the lack of skid marks from the truck and the fact that the vehicle was pushed some 127 feet following the impact were evidence of the lack of the proper lookout by the driver and excessive speed.

As the plaintiff proceeded up to and through the stop sign, her vision would have been obscured by a fence line and some foliage at the corner. In addition, she was apparently looking into the bright sunlight and according to the eyewitness situated behind her in another vehicle, she was talking to a passenger in the front seat as she pulled up to the intersection. The eyewitness behind the plaintiff could only say that she never saw the decedent apply her brakes and never saw her stop. The refuse truck driver stated that he was only about one to two car lengths before the intersection when he saw the plaintiff traveling past the stop sign into the intersection. He stated that he looked down at her saw that she was talking to the passenger and realized she was not going to stop only a split second before impact. He attempted an evasive maneuver by attempting to swerve to his left, however, that maneuver was obviously unsuccessful. The decedent died at the scene and her passenger sustained a severe head injury and thus had no recollection of the event. There were also issues pertaining to company records in the form of daily and periodic maintenance reports and driver logs that were missing following the accident.

The defendants filed a motion for summary judgment on all counts claiming the following:

1. Hall’s use of medication was not relevant to Hall’s failure to maintain a proper lookout and it was not a legal cause of the accident.
2. The allegations that Hall operated his vehicle at a speed greater than reasonable and proper for the prevailing conditions was not relevant nor the legal cause of the accident.
3. That their failure to inspect or maintain the garbage truck was not relevant or the legal cause of the accident.
4. As a matter of law the plaintiff in this case could be found more than 50% the cause of the injury or damage and thus any recovery was barred.

The court held that although Hall’s admission that he was traveling up to 5 mph over the speed limit before the accident could be deemed prima facia evidence of negligence, that fact itself did not create liability as a statutory violation must have been the direct and proximate cause of the injury before liability would exist. The court further stated that even if facts showed that the driver breached his duty to keep a proper lookout and/or brake to avoid the accident, the plaintiff still had to show that the breach was the proximate cause of the injury.

The court reasoned that cause in fact existed when there is reasonable certainty that a defendant’s acts caused the injury or damage. When multiple factors may have combined to cause an injury the court considers whether a defendant’s conduct was a material element and a substantial factor in bringing about the injury.

As to legal cause, the court stated that it would have to assess the foreseeability of the incident and consider whether
the injury is of a type that a reasonable person would likely see as a result of their conduct.

The court further stated that it has recognized the concept of “unavoidable collision”. In such cases, the court held that the driver on the preferential roadway is without proximate cause and the driver’s acts or omissions in breach of a duty are not material factors in bringing about the injury in unavoidable collisions, the driver on the preferential roadway lacks sufficient time to react and take evasive action.

The court noted in its reasoning that despite the plaintiff’s arguments, the plaintiff failed to support those arguments with evidence to show that speed, reaction time or stopping distance were material factors in the accident. The court was also not persuaded by the plaintiff’s argument that a jury could conclude that but for the refuse driver’s failure to travel at the speed limit, to travel at a speed reasonable for conditions, to keep a proper lookout and/or brake, the collision would not have occurred. The court held that this assertion was conclusory as the plaintiff failed to point to any evidence or reasonable inference to support these assertions. The court specifically noted that the driver and the eyewitness both indicated that the refuse driver attempted to change lanes in an attempt to avoid the collision, thereby distinguishing this case from cases cited by the plaintiff.

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ILLINOIS

THORNTON V. GARCINI, 2009 WL 3471065
Illinois Supreme Court, October 29, 2009

Introduction:
Although this recent case is a medical malpractice case it has two important points for defending transportation cases:
(1) A plaintiff does not have to prove emotional injury by way of expert testimony in order to establish the requisites for a valid claim of negligent infliction of emotional distress.
(2) A defendant waives his right to a setoff if he files a motion raising the claim for a setoff, for the first time, after trial.

Facts and Procedural History:
Plaintiff was in labor and began to deliver her baby. During delivery, the child presented in breech position (positioned to exit the womb feet first) with its head becoming stuck inside Plaintiff’s womb. While the child was entrapped, there were no doctors present. Nurses were unable to complete the delivery, and the child died inside of Plaintiff’s womb.
Plaintiff’s obstetrician Dr. Garcini, was contacted by the hospital and informed of the circumstances of the child’s death. The obstetrician arrived at the hospital over an hour later. During this hour long period, plaintiff’s deceased child remained partially inside of her womb. Upon arrival, Dr. Garcini completed the delivery.

Plaintiff sued Dr. Garcini, the hospital, and the nurses, for wrongful death, survival, and intentional infliction of emotional distress. A jury found all the defendants not liable on the wrongful death and survival counts. Similarly, the jury returned a verdict of not liable on the intentional infliction of emotional distress count, with respect to Dr. Garcini and the nurses. However, the jury found the hospital liable for intentional infliction of emotional distress, and awarded plaintiff $175,000.

Plaintiff filed post-trial motions against all defendants. Before the post-trial motions were heard, the hospital and the nurses entered into a settlement agreement with plaintiff. In exchange for payment of $175,000, plaintiff agreed to release the hospital and the nurses. Plaintiff’s post-trial motion against Dr. Garcini was denied. Plaintiff appealed the trial court’s judgment. The appellate court reversed and ordered a new trial.

At the second trial, plaintiff brought the same wrongful death and survival actions as in the first trial. However, plaintiff substituted a claim for negligent infliction of emotional distress in place of the prior intention infliction of emotional distress. In addition, plaintiff did not provide any expert testimony to support her claim for negligent infliction of emotional distress. All claims were submitted to the jury and Dr. Garcini was not found liable in the wrongful death or survival action. However, Dr. Garcini was found liable for negligent infliction of emotional distress. The jury awarded plaintiff $700,000.

Dr. Garcini then argued that the judgment against him could only be in the amount of $530,000, the full verdict amount less the settlement amount paid by the hospital and nurses. The Court stated that while Dr. Garcini may have been entitled to a setoff in an amount equal to that paid by the settling parties, he had waived his right to such a setoff in this case. Dr. Garcini waived his right for a set-off by not filing a counter-claim against Plaintiff seeking a set-off after the settlement. The Court,

Analysis:
Dr. Garcini appealed to the Illinois Supreme Court. Dr. Garcini’s first argument was that plaintiff had failed to establish a cause for negligent infliction of emotional distress. Dr. Garcini argued that plaintiff failed to establish, by expert testimony, that she had suffered emotional distress between the time of child’s death and the time delivery was completed. As such, he argued that he could not be liable for her injuries.

The Illinois Supreme Court disagreed finding that expert testimony is not a requisite for a valid claim of negligent infliction of emotional distress. The Court found that the “existence or nonexistence of medical testimony [concerning emotional distress damages] goes to the weight of the evidence but does not prevent this issue from being submitted to the jury.” In other words, the Court held that “expert testimony, while it may assist the jury, is not required to support a claim for negligent infliction of emotional distress.”
citing its decision in MidAmerica Bank, *FSB v. Charter One Bank*, FSB, 232 Ill.2d 560, 574-75 (2009), explained that, with no counterclaim for setoff appearing in Dr. Garcini’s pleadings, Plaintiff had no “notice or opportunity to defend against the setoff claim until after the completion of the second trial.

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KENTUCKY

VERDICT REPORT: DORCH V. FOWLER

On October 13, 2004, Angela Dortch, a forty-one year old mother of two, was driving her Ford Blazer in light rain on a two lane asphalt road in northeastern Jefferson County, Kentucky. She was on her way home from her children’s school early in the afternoon and knew the road extremely well. She was going home and then to interview for a part-time job at a private school.

There were two curvy areas in the road between the school and her home, and she was approaching a poorly banked right hand curve that also dropped down a small hill. Instead of making the curve, she crossed into the opposite lane of travel and hit a Con-Way local delivery truck consisting of a tractor and a pup trailer driven by Loren Fowler, an experienced driver. The overlap between the two vehicles pushed the left hand steer wheel and tire of the truck into a 90° left turn and pushed the road wheel so far to the rear that it crushed the left saddle tank six inches and pushed it to the rear an additional 4-5 inches.

The Louisville Metro Police called their accident reconstruction unit to the scene and excellent photos were taken. Counsel was engaged for Plaintiff almost immediately and they brought an accident reconstructionist to the scene within a few days. Mr. Bereza, formerly a Michigan State Police officer, also took very good photos. In addition, a fire chief at the scene took a limited number of high quality photos.

Ms. Dortch had significant orthopedic injuries and was in a coma for three weeks, even though she was belted at the time of the accident. She had a mild brain injury, which improved in a few areas over time. Ms. Dortch had a Master in Fine Arts and a high IQ. Her focus was musical theatre, and she was an accomplished singer and dancer with regional professional appearances on her resume. The accident resulted in Ms. Dortch registering lower IQ scores, and it particularly affected her abilities in spatial orientation. She could no longer sing or dance after the accident.

Con-Way had a very strong defense based upon deep gouge marks from Ms. Dortch’s vehicle, which started in Mr. Fowler’s lane and arched over into the other lane, ending after about 60 feet back in the truck’s lane again. The gouge marks stopped under the left front suspension of the Blazer. Mr. Bereza found a single gouge mark in Ms. Dortch’s lane he designated as the point of impact between the vehicles. Con-Way countered with Bill Cloyd, an accident reconstructionist, and Frank Entwisle, a truck engineer, who rebutted testimony from Bereza about the behavior of the truck in the accident. Entwisle was a particularly strong witness.

Mr. Fowler had one very minor accident on his record but also had numerous prior problems in backing up to loading docks. His record for the year preceding the accident included the minor accident and four separate “incidents” involving bumping into docks and backing into low hanging telephone wires. His last evaluation prior to the accident included the lowest safety rating a driver can receive – “unacceptable.”

Con-Way filed twelve Motions in Limine and two Motions for Partial Summary Judgment. The Judge granted the Motion for Partial Summary Judgment on negligent hiring and retention prior to trial, stating that the incidents and minor property damage accident were so different from the accident in question that they could not be considered as predictive for Con-Way’s supervisors of the type of accident that occurred.

The second Motion for Partial Summary Judgment on punitive damages was deferred to the end of the Plaintiff’s proof and was renewed as a Motion for Partial Directed Verdict. It was granted at that time in favor of Defendants.

The Plaintiff left a female machinist on the jury panel, who served as foreperson. The verdict was unanimous for the Defendants. An appeal was taken to the Sixth Circuit, which dismissed the appeal with a published opinion. See Dortch v. Fowler, 588 F. 3d 396 (6th Cir. 2009), rehearing and rehearing en banc denied (January 28, 2010). A petition for rehearing en banc was then filed which has recently been dismissed after a unanimous vote to reject the petition. The time for filing a petition for writ of certiorari will run at the end of April 2010. Will H. Fulton and D. Craig York with Dinsmore and Shohl’s Louisville office tried the case.
for Con-Way and Fowler with an associate in September 2007, over a two week period. The jury deliberated about an hour and a half.

Will H. Fulton

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Rasey v. Federal Express involves a personal injury, multiple vehicle accident. The defendant Nastor was the driver for Fed Ex. While attempting to execute a lane change, the right front of the Fed Ex truck struck the left rear of the vehicle that the defendant Carlson was operating. This impact caused Carlson’s vehicle to spin counter clockwise and travel sideways into on-coming traffic where it collided with the plaintiff’s vehicle.

The plaintiff’s mother was operating the vehicle, and the plaintiff’s 15 year old son was a passenger. The plaintiff’s mother alleged that she sustained various soft tissue and epidermal injuries with residual pain in the right leg below the knee. She also complained of chronic pain and impaired capacity to perform employment duties. The plaintiff’s son complained of soft tissue injuries plus emotional trauma. The plaintiff brought suit against Federal Express Corporation, Bush Transportation Systems, Inc., Nastor, Carlson, and Galabiz. The defendant Carlson was operating a vehicle owned by the defendant Balabiz, and the defendant Nastor was operating the Fed Ex vehicle in the scope and course of his employment.

The defendant Nastor alleged that he was properly operating his vehicle while in the process of attempting to yield the right of way to an oncoming emergency vehicle. Mr. Nastor further stated that Mr. Carlson hit the Fed Ex truck which ultimately caused Mr. Carlson’s vehicle to spin out of control. According to Mr. Carlson, Mr. Nastor negligently merged into Carlson’s lane of travel absent any warning.

During the third day of trial, the plaintiff’s son settled for $1,500. At the close of evidence, the defendants Fed Ex, Galabiz, and Bush Transportation were dismissed as a matter of law. The jury deliberated for two hours and found in favor of the defendant Carlson. The plaintiff was awarded $147,288 against the defendant Nastor. Rasey v. Federal Express Corporation, Consolidated Case Nos. CV A451567B and A454521B, Decided on March 28, 2007 in Nevada’s Eighth Judicial District Court, Dept. 7 by Judge Stewart Bell.

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MACDONALD V. ATC/ VANCOM OF NEVADA AND BROOKER

MacDonald v. ATC/ Vancom of Nevada and Brooker is a personal injury case involving a collision between a bicyclist and an ATC bus. The plaintiff brought suit against ATC claiming that the defendant Booker negligently operated the bus while in the course of her employment. The plaintiff alleged that she was struck down by the bus which then ran over the plaintiff’s legs. The plaintiff claimed to have suffered a fractured right angle, a fractured left foot, and a spinal injury. She was wheelchair bound for six weeks.

The defendant argued that the plaintiff was negligent for failing to wear a helmet. During closing arguments, the plaintiff’s attorney asked the jury to award $15,216 in past medical expenses, $625,000 for past pain and suffering, $249,895 in future medical expenses, and $750,000 for future pain and suffering. After a one day trial, the jury deliberated for forty-five minutes and found the plaintiff to be 20% at fault and the defendants to be 80% at fault. The jury ultimately awarded the plaintiff $47,170.25. MacDonald v. ATC/Vancom of Nevada LTD and Brooker, Case No. CV A485373, Decided on March 3, 2007 in Nevada’s Eighth Judicial District Court, Dept. 12 by Judge Michelle Leavitt.
NEVADA (FALL 2007)

HERSHEY V. HENRI SPECIALTIES COMPANY, INC. AND SCHMIDT

Hershey v. Henri Specialties Company, Inc. and Schmidt is a personal injury case involving a multiple vehicle rear-end collision. According to the plaintiff, she was rear-ended by the defendant Schmidt while stopped for traffic on Interstate Highway 15. The plaintiff alleged that this collision propelled her forward causing her to impact the vehicle in front of her. The defendant Schmidt was operating his vehicle while in the course and scope of his occupational duties as a sheet metal worker for Henri Specialties. Mr. Schmidt admitted rear-ending the plaintiff’s vehicle; however, he stated that she struck the vehicle in front of her first. The motorist and passenger in the vehicle ahead of the plaintiff stated that they both felt two separate impacts.

As a result of the accident, the plaintiff alleged that she sustained a herniated cervical disk, residual chronic pain, and will require future surgery. The plaintiff’s physician testified that her chronic pain caused limited range of motion. The physician testified that the plaintiff will require ongoing medical management. However, a video surveillance showed the plaintiff with full range of motion, and it was the opinion of a physician on behalf of the defendant that the plaintiff had made a full recovery. After a five day trial, the jury deliberated for two-plus hours and found in favor of the defendants. Hershey v. Henri Specialties Company, Inc. and Schmidt, Case No. CV A476598, decided on March 9, 2007 in Nevada’s Eighth Judicial District Court, Dept. 23 by Judge Charles Thompson.

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NEW MEXICO

In December 2009, Paul Yarbrough and Alfred Green, Jr. of Butt Thornton & Baehr PC obtained a defense verdict on behalf of their client, Ozzie’s Pipeline Padder, Inc. (“Ozzie’s”), in the United States District Court for the District of New Mexico. Following a four day trial, the ten-person jury reached a unanimous verdict in favor of Ozzie’s. The only question answered by the jury on the verdict form was whether or not the Plaintiff, John Ensey, was a dual employee of both Ozzie’s and Rockford Corporation (“Rockford”).

The Plaintiff was hired to work for Ozzie’s in August 2005 as the operator of a pipeline padding machine. A pipeline padding machine is used primarily in the petroleum industry. It scoops large amounts of earth and, using a conveyor, pulls the earth up through the center of the machine. The earth is then deposited into a shaking sifter, where rocks and other impurities are removed. The debris-free dirt then falls through the sifter and onto another conveyor (running cross-wise from the first conveyor), where it is deposited to either side of the machine depending on the direction the conveyor is moving. The purpose of using the pipeline padding machine is to remove rocks and other debris from dirt that is used to bury an oil pipeline so that they do not pose a threat to the integrity of the pipeline.

Ozzie’s trains the operators it hires to run a pipeline padding machine. It also designs and manufactures the machine. The Plaintiff was trained in two different locations and on two different models of the machine before the accident that formed the basis of the lawsuit.

While operating the machine on October 19, 2005, the Plaintiff stepped on the conveyor that deposits the debris-free dirt into the pipeline trench and was pulled underneath the shaker (a 17 inch gap). He suffered significant injuries as a result of the accident. The accident occurred in the morning while the Plaintiff was checking the pipeline padding machine before beginning actual operations. He claimed that he was stepping on the rails framing the conveyor to remove debris from the shaker when the conveyor started by itself. The Plaintiff sued Ozzie’s under the theories of strict liability, negligence, and breach of warranty. Once expert testimony proved the conveyor could not start by itself, the Plaintiff amended his strategy and proceeded to trial on the theories of negligent design and negligent training and warnings.

The Plaintiff was working for and on the payroll of Ozzie’s during the time that he was training to operate the machine. At the time of the accident, however, the Plaintiff was on the payroll of Rockford, a general contractor that leased the pipeline padding machine from Ozzie’s. As part of the lease agreement, Ozzie’s agreed to provide Rockford with the name of operators qualified to operate the machine. Rockford was contractually bound to put any operators on its payroll and to pay for workers’ compensation insurance. However, Rockford never instructed the Plaintiff regarding how to operate the machine and the Plaintiff was to contact Ozzie’s with any questions regarding the machine.

Rockford was not named as a party to the lawsuit because, in New Mexico, the exclusive remedy against an employer for injuries sustained by an employee in an accident is generally under the New Mexico Workers’ Compensation Act. The Act provides an exclusive remedy against an employer for injuries sustained by an employee in an accident arising out of and in the course of employment. See, NMSA 1978, §52 1 9. The employer and the employee surrender their rights to any other method, form or amount of compensation or determination on account of personal injuries or death of the worker except as provided in the Act. See, NMSA 1978, §52 1 6(D). No cause of action can be maintained outside the Act against an employer for any matter relating to the occurrence of any injury covered by the Act. See, NMSA 1978, §52 1 6(E).

Ozzie’s argued during trial that the Plaintiff had dual employers (Ozzie’s and Rockford) at the time of the accident and, therefore, it was also immune from suit under the Act. In New Mexico, an employee may have two employers for purposes of the Act. In certain situations, an employee of a company becomes a special employee. A special employer borrows a worker from another employer and directs the borrowed worker in specific work details. Vigil v. Digital Equipment Corp., 1996 NMC 100, ¶17, 122 N.M. 417, 925 P.2d 883. The
Supreme Court in New Mexico adopted a three part test to determine whether an employer qualifies as a special employer, as follows: “(1) the employee made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work.” 

Hamberg v. Sandia Corporation, 2008 NMSC 015, ¶11, 143 N.M. 601, 179 P.3d 1209. It is the totality of the circumstances that determines whether the employer has the right to exercise control over the details of the work. 


Despite considerable opposition from the Plaintiff’s attorneys, the Judge ruled that the first question on the verdict form would be whether or not Ozzie’s was a dual employer of the Plaintiff at the time of the accident. If the jury answered in the affirmative, then the jury was to return a verdict in favor of Ozzie’s based on the protections in the Act. On the other hand, if the jury found that Ozzie’s was not a dual or special employer, then it was to proceed to evaluating negligence.

During trial, Ozzie’s presented the jury with evidence that the work being done at the time of the accident was essentially its work and that it had the right to control the Plaintiff in the details of his work. Ozzie’s trained the Plaintiff on how to operate the machine and provided the machine for the Plaintiff to operate. The Plaintiff was to contact Ozzie’s with any questions regarding the machine.

Ozzie’s referred the Plaintiff to the job with Rockford and he likely would have been referred to another job with another contractor had he not been injured in the accident. Ozzie’s also had the right to remove the Plaintiff from the job or to provide a Rockford with a replacement operator in the event that the Plaintiff was absent. Though the Plaintiff was on Rockford’s payroll and covered by Rockford’s worker’s compensation insurance, it was done at the contractual direction of Ozzie’s. Finally, the Plaintiff was required to comply with Ozzie’s policies while operating the pipeline padding machine.

The jury, based on the instruction provided by the Court, found that Ozzie’s was a dual employer of the Plaintiff at the time of the accident. The jury answered no other questions on the verdict form and, as such, did not reach the issue of negligence. As a result of the jury’s finding, the court entered judgment in favor of Ozzie’s, because Ozzie’s was immune from suit under the Workers’ Compensation Act as a dual employer of the Plaintiff.
SOUTH CAROLINA
(FALL 2008)

On Friday, September 26th, 2008, associate Ben Traywick of the Young, Clement & Rivers law firm won a defense verdict following the two day trial of a motor vehicle accident case. The defense was a two string bow: first, that the Defendant's act of colliding into the Plaintiff was excused by the affirmative defense of unavoidable accident; second, that the Plaintiffs' $20,000 in medical specials were not supported by the evidence. While a jury's deliberations, and therefore the basis of its decision, are private, the key evidence appeared to be photographs of the Plaintiff's vehicle, which revealed damage so minimal as to be wholly disproportionate to the claimed injury.

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The plaintiffs’ claims against Electrolux were based primarily on the absence of arcing activity found in the home, except for the arc on the refrigerator and the major damage to the house structure directly behind the refrigerator. Electrolux contended that there was no manufacturing defect in the refrigerator, that the refrigerator was too old at the time of the fire to reasonably infer that a manufacturing defect was the cause and that the arc was the result of the refrigerator being attacked by a fire, not the cause of the fire. Electrolux offered evidence of an alternate origin in close proximity to the refrigerator (not within or on the refrigerator itself), but the cause of the fire was undetermined.

During closing arguments, the plaintiffs asked the jury to award approximately $41 million against Electrolux. On March 12, 2009, after a week-long trial and approximately 70 minutes of deliberations, the jury returned a unanimous verdict absolving Electrolux of any responsibility.
TEXAS (WINTER 2007)

Deborah Dale was traveling westbound on IH-10 near Sonora, Texas at 9:00 PM. She was driving a 1992 Ford F-150 pulling a 19 foot camper trailer. She had just completed a series of uphill climbs which had slowed her speed to around 45 MPH. Explorer Trucking driver Tomasz Ruman was driving a tractor trailer at around 65 MPH in the same lane. After cresting the last hill, Ruman saw Ms. Dale, swerved left, and applied his brakes. Ruman’s front right caught the left rear of Ms. Dale’s camper. Both vehicles went off the road. Mr. Ruman reported no injuries. Ms. Dale reported cervical and lumbar pain and right shoulder pain and was transported to San Angelo Regional Hospital.

Ms. Dale was diagnosed with cervical and lumbar herniation and a right shoulder labrum tear. Surgery was recommended at all three levels, but none had been performed before trial. Past medical expenses totaled $34,000, and future medical medical expenses were presented totaling $105,000.

Ms. Dale contended that Ruman was negligent in the accident and also alleged negligent retention, training, supervision, and hiring as to Explorer Trucking. She claimed both defendants were grossly negligent. She sued for $3.5 million. Defendants contended the Ms. Dale was negligent for having failed to utilize her emergency flashers when she slowed down on the interstate. The topography of the hill was not an inhibiting factor to the visibility of the Dale vehicle, yet defendants contended they were still surprised by the slower moving vehicle with no emergency flashers. Defendants further argued that, with simply one more second of advanced warning from the flashers, the accident could have been avoided.

At the close of plaintiff’s case, the court granted judgment as a matter of law in favor of defendants on plaintiff’s claims of gross negligence, negligent retention, training, supervision, and hiring. After three days of trial, the jury returned a verdict finding both Ms. Dale and Mr. Ruman negligent and assessed each with 50% responsibility.

The jury awarded $74,000 in damages. Thus a judgment of $37,000 plus interest and taxable court costs was entered against Ruman. The damage aspect of the case was helped by video surveillance showing the plaintiff pruning shrubs and doing general yard work. The jury awarded no lost income or earning capacity after defendants introduced Ms. Dale’s social security disability application showing that one month before the accident she had filed a claim for benefits alleging she was totally disabled from a respiratory illness.

Explorer Trucking and Tomasz Ruman were represented by Larry D. Warren and Norma Herrera of the San Antonio ALFA firm, Ball & Weed, PC.
TEXAS (FALL 2008)

PERALEZ V CODYSUR TRUCKING.
341ST JUDICIAL DISTRICT
HIDALGO COUNTY TEXAS.

Trial date: 
April 7, 2008 in Edinburgh, 
Texas.

Tractor-Trailer accident in an 
apartment construction site. Cocaine/Marijuana in plaintiff’s 
system - jury says that doesn’t 
matter.

On August 23, 2006, a 
Codysur Trucking driver, Rene 
Chavez backed his trailer 
load of apartment doors into the 
apartment parking lot for 
delivery. Due to the constraints of the 
parking lot, Mr. Chavez had to jack-knife his tractor to a 
90 degree angle with the nose of the tractor hard left. The 
construction crew spent several 
hours unloading the truck from 
around 11:00 am until 3:00 pm.

Plaintiff, Mr. Homer Peralez, 
arrived after Codysur and began 
pumping concrete from a trailer 
pump pulled by his pick up. 
Peralez first pumped on the left 
side of Codysur’s trailer and then 
pumped on the right side of the 
trailer. Near 3:00 pm Peralez 
finished pumping concrete and 
was in the process of washing 
his portable concrete pump 
trailer. His equipment was 
running, and it was very loud.

Defendant's driver, Chavez, 
walked to the back of his trailer 
to close the trailer doors. 
However, Peralez’ equipment 
was too close to the trailer to 
allow the door to close. Chavez 
testified that he hand signaled 
Peralez that Chavez was going 
to pull the tractor-trailer forward 
to leave. According to Chavez, 
Peralez acknowledged him by 
nodding his head. Peralez denied 
receiving any signal from Chavez 
and proceeded to climb down 
from the pump trailer and stand 
between it and the Codysur 
trailer. In the meantime, Chavez 
began to pull the tractor forward 
which, of course, swung the 
rear of the trailer to the right 
and pinned Peralez between the 
trailer and the pump equipment. 
The tractor-trailer pulled forward 
further, and Peralez popped out 
from the squeeze point. The 
concrete pump trailer was not 
physically struck or damaged in 
the maneuver. Peralez, on the 
other hand, was not so lucky. He 
sustained two collapsed lungs, 
7 broken ribs, renal failure, and 
other crush injuries. Peralez was 
taken to intensive care where 
he spent the next two weeks 
and developed pneumonia. He 
incurred $193,000 in medical bills 
and had not returned to work at 
the time of trial. There were no 
other witnesses to the accident.

While at the hospital, Peralez 
blood work revealed that he was 
positive for marijuana and cocaine. 
Peralez testified that he smoked 
the marijuana and snorted the 
cocaine on Sunday night, four 
days before the accident. There 
was no quantitative drug analysis 
done; therefore, there was no 
evidence of the amount of drugs 
in his system at the time of the 
accident. Each side presented 
a toxicology expert and stated 
their opinions which boiled down 
to the positive drug test was 
consistent with use on the day of 
the accident and was equally 
consistent with use four days 
earlier.

In addition to the injuries clearly 
sustained in the accident, the 
plaintiff began to complain of 
neck pain and problems six 
months later. Peralez presented 
medical testimony that the neck 
was related to the accident 
and that he would need a neck 
fusion. Defendants countered 
this testimony with an expert to 
state the neck was not related 
and that no surgery was needed.

After a four day trial, the jury 
returned a 10-2 verdict finding both 
Chavez and Peralez to be 
negligent. The jury assessed 
80% fault to Chavez and 
20% fault to Peralez. When 
queried about their logic, the 
jury responded that they didn’t 
believe Peralez could have 
functioned in his job all day 
had he ingested the drugs that 
day or the evening before. The 
jury thought that he had taken 
the drugs four days earlier, and 
despite the scientific literature 
and expert opinion regarding 
residual effects thought that 
Peralez was not impaired at the 
time of the accident. The two 
dissenting jurors thought to the 
contrary.

The jury awarded the following 
damages:

a. Pain and mental anguish, past - $100,000
b. Pain and mental anguish, future - $50,000
c. Loss of earnings past - $31,500
d. Loss of earnings future - $250,000
e. Disfigurement - 0
f. Past Impairment - $50,000
g. Future impairment - 0
h. Medical care in the past
   - $193,000

i. Medical care in the future: - 0

**Total damages awarded:**

$674,500 (less 20% for contributory negligence resulted in a judgment of $539,600)

**Lessons learned:**

1. Evidence of drug use may not affect the outcome of the case. Quantitative analysis is very important as are behavioral evidence.

2. Jurors were able to disregard and not award the speculative damages claimed for the neck injury that arose 6 months afterwards.

3. Jurors did not go overboard in awarding pain and mental anguish damages on what was a very serious near death injury.

4. Do not stand between two pieces of mobile equipment.

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instituted new policies regarding the treatment received by players who sustain concussions and their return to the sport, and most recently, it has instituted new rules regarding helmet-to-helmet contact in an attempt to decrease the number of concussions and other head injuries being sustained by its players.

The NFL is not the only organization addressing these issues. On September 30, 2010, the House of Representatives passed House Bill 1347, the Concussion Treatment and Care Tools Act of 2010 (the “ConTACT Act”). The ConTACT Act directs the Secretary of Health and Human Services to establish concussion management guidelines that address the prevention, identification, treatment, and management of concussions for school-aged children and student athletes, and authorizes grants for states adopting such guidelines.

Due to the increased involvement by both governmental and private organizations, the prevention, diagnosis, treatment of brain injuries is likely to continue to make advancements in the near future. As more attention is given to concussions and their diagnoses, the impact to ongoing litigation and damages awards in cases involving motor vehicle accidents will be both positive and negative, in that the test will provide objective evidence of brain trauma (where to date there has been none).

PRACTICE TIPS

Focus On Damages

USA Today highlights a new advancement in the discovery of concussions and other “minor” brain injuries.

From the battlefield, to the football field, to the playground, the issue of brain injuries has become a hot topic in the last several weeks. And regardless of whether you are in a car accident or hit by a linebacker with the force of a car crash, doctors may soon have a new tool to detect what, if any, brain damage you sustained as a result of the traumatic event. In an article published on October 15, 2010, Gregg Zoroya of USA Today reported that the United States Army, working in conjunction with Banyan Biomarkers of Florida, has discovered a blood test that can diagnose “mild” traumatic brain damage, including concussions.

Similar to tests used to determine whether the heart has suffered damage caused by a heart attack or other event by measuring the amount of creatine kinase (“CK”), creatine kinase enzyme (“CK-MB”), or troponins in the blood, the test developed by the Army identifies unique proteins that enter the bloodstream after the brain has been damaged.

This test could be used to better treat the approximately 980,000 million Americans who suffer “mild” brain injuries each year. These “mild” injuries can have wide-ranging physical and psychological effects, including loss of consciousness, confusion, headache, dizziness, mood changes, depression, and fatigue. One problem in diagnosing these injuries is that the symptoms may appear immediately after the trauma, or weeks later. With respect to concussions alone, about a third of the approximately 1.3 million concussion-related emergency room visits per year are related to auto accidents. The blood test being developed could substantially decrease the number of people that suffer “mild” brain injuries which go undiagnosed or untreated.

This test will not be available right away, as it still must undergo a final set of clinical trials that will likely run through 2013. The success of this round of clinical trials will determine whether the FDA approves the test for the general public.

The clinical trials may move faster due to the interest expressed by the National Football League in the test. This fall, concussions and brain trauma has become almost as big of an issue for the NFL as the play on the field. The New York Times has published a series of articles over the past year focusing on brain injuries suffered by current and former football players. In the last year alone, the NFL has participated in Congressional hearings during which it was criticized for its practices and research methods related to head injuries, it has
or the lack thereof. As a result, the field of “mild” brain injuries will be better defined for those litigating the nature and extent of such injuries.

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Whether the Carmack Amendment applied to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a “through” bill of lading issued by an ocean carrier that extended the Carriage of Goods by Sea Act, 46 U.S.C. 30701, the court turned to Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004), which held that bills of lading between a cargo owner and an intermediary were in the nature of “maritime contracts” and were governed by federal law and that as a result, the Himalaya Clause would extend to the shipper, an intended beneficiary, even though the shipper was not a party to the bill of lading.

On appeal, the Ninth Circuit reversed. In Regal-Beloit Corp. v. Kawasaki Kisen Kaisha, Ltd., 557 F.3d 985 (9th Cir.2009), the court held that bills of lading between a cargo owner and an intermediary were in the nature of “maritime contracts” and were governed by federal law and that as a result, the Himalaya Clause would extend to the shipper, an intended beneficiary, even though the shipper was not a party to the bill of lading.
Tokyo was an acceptable forum only if the parties properly opted out under either 49 U.S.C. 10709 or 49 U.S.C. 10502. In theory, the Ninth Circuit decision would have allowed a shipper to avoid its contractual obligations and permit different legal regimes to apply to a single transaction, creating much uncertainty in contracts for international commerce — especially for U.S. carriers.

The Supreme Court issued its opinion with regard to these matters on June 21, 2010. The Supreme Court upheld the district court’s decision, concluding that Carmack does not apply to a shipment originating overseas under a single through bill of lading. Rather, the bill of lading controls the shipment. The Court found that for Carmack to apply, the journey must begin with a receiving carrier, which would be required to issue a Carmack-compliant bill of lading. Simply put, under the Supreme Court’s decision, cargo owners are bound by the contracts they make.

The impact of the Supreme Court’s decision may have a short shelf life, as COGSA will likely be replaced by the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, otherwise known as the Rotterdam Rules. Although the Rotterdam Rules were adopted by the United Nations General Assembly on September 23, 2009, at which assembly they were signed by 23 countries, including the United States, France, Greece, Spain, and Nigeria, to date, none of the countries that signed the Rotterdam Rules have ratified the agreement which ratification is necessary before the Rotterdam Rules become effective. This is not to suggest that the Rotterdam Rules will not be ratified, as they have generally been supported by shippers and carriers, and received the endorsement of the American Bar Association, and other international organizations. Once ratified, there is little doubt that the Supreme Court’s decision in *Regal-Beloit* will have to be revisited, as the Rotterdam Rules contain several key differences to COGSA.
Editors Note – The following two articles were previously published in the Pennsylvania Motor Truck Association’s magazine, PennTrux, and are used here with permission.

Warehouse Liability: Who’s Responsible for Improper Loading and Securement

Warehouses May Have Greater Liability Than They Think

The Federal Motor Carrier Safety Regulations ("FMCSR") have long placed the primary responsibility for proper placement and securement of cargo on the shoulders of truck drivers and trucking companies. In our transportation defense practice, we have seen a recent trend of plaintiff’s lawyers suing warehouses for improper loading and securement in order to find another pocket to recover on behalf of their clients.

A typical set of facts is as follows. The truck driver backs his truck up to the warehouse loading dock. He submits and receives his paperwork from a warehouse office outside of the loading dock. Warehouse personnel place the cargo in the trailer. The driver never sets foot onto the loading dock or communicates with the warehouse personnel on how to load the cargo. The driver then pulls the truck away from the loading dock. He briefly checks the cargo as he closes the doors on the back of his trailer. The driver then is involved in an accident some time during transportation of the load. Plaintiffs allege that the accident was caused, at least in part, by a load shift, and the load shift occurred because the cargo was not properly placed or secured within the trailer. In some instances, plaintiffs don’t assert these allegations until nearly two years after the accident, just within the time before the statute of limitations runs on any claim.

The FMCSR state that "a driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless . . . the commercial motor vehicle's cargo is properly distributed and adequately secured . . ." The regulation clearly imposes this duty on the driver. It says that the driver of a truck must "assure himself/herself that the [cargo is properly distributed and adequately secured] before he/she drives that commercial motor vehicle." The driver also has an obligation to "inspect the cargo and the devices used to secure the cargo within the first 50 miles after beginning a trip and cause any adjustments to be made to the cargo or load securement devices as necessary. . ." See FMCSR, Section 392.9.

The potential problem for warehouses is that the rules also provide an "out" for truck drivers and trucking companies. The FMCSR states "the rules . . . do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver of a commercial motor vehicle that has been loaded in a manner that makes inspection of its cargo impracticable."

Due in part to the way modern warehouses are operated (i.e., closed loading docks, drivers not permitted in the loading dock area, little communication between drivers and warehouse employees about the method of loading), plaintiff’s lawyers have begun to latch on to this exception to the general rule of driver/carrier responsibility for proper loading and securement, and are arguing that in many cases loads are either sealed or are loaded in a way that makes it "impracticable" for the driver to adequately inspect the load.

In real world litigation settings, this exception to the general rule makes it much more attractive for plaintiff’s lawyers to sue warehouses, and much more difficult for transportation defense lawyers to eliminate such claims at an early stage of a case. A court can simply hold that whether inspection was "impracticable" or not is a question for the jury to decide. Additionally, trucking companies are often not successful in using the exception to avoid liability. The exception usually just adds warehouses as a target, without removing trucking companies from potential liability.

So, what can a warehouse do to protect itself against these claims? Here are several practical tips:
1. There is no reason for most loads to be sealed. However, when a claim is brought sometimes two years after a routine load was handled, warehouse employees may no longer remember whether a load was sealed or not. Make sure that your shipping documentation clearly indicates whether a load was sealed. If no seal is required, the documentation should state that the load was not sealed and the driver should sign off on this fact.

2. If a load is to be sealed, and there is no objection from the shipper, make sure that a driver has an adequate opportunity to inspect the load before the doors are closed and sealed.

3. Have every driver who picks up a load sign a form acknowledging that he/she has been given an adequate opportunity to inspect the placement and securement of the load, and that either the load is properly placed and secured, or the driver will make sure that the load is properly placed and secured before leaving the warehouse grounds.

4. Make sure that the driver’s opportunity to inspect the load isn’t just on a piece of paper. Make sure that the drivers are given an actual opportunity to inspect the load before they leave your warehouse property.

5. Plaintiff’s lawyers love to focus on a lack of training for warehouse employees in the placement and securement of cargo. Make sure that you conduct either in-house training programs on a regular basis, or send your employees to regular training programs for the proper loading and securement of cargo on at least an annual basis. Companies should develop their own (or follow a recognized guidebook) policies and procedures for loading cargo. Employees should record for each load the pattern of placement of the load and the method of securement. The employee responsible for loading should sign a form indicating that he/she adhered to the loading procedures for each load.

Undertaking these simple and cost-effective measures may help you avoid burdensome and expensive litigation, as well as limit your insurance claims.

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**Freight Liability Issues – An Overview**

Issues and claims relating to freight continue to be an area of interest and frustration in the trucking industry. What follows is a summary of several areas of concern in this arena and some insight into best practices to try and avoid circumstances that go to your bottom line.

**Warehouse Liability**

As Hurricane Season 2010 is thankfully coming to a close, we are reminded that we never know what Mother Nature may bring. From dangerous flooding, to high winds, to crashing waves and pounding rain, hurricanes can wreak havoc on life, limb, and property. Given the uncertainty of Mother Nature, it is important, whether you are a shipper or a warehouseman, to ensure that you are in the best position to protect yourself if loss ensues to property stored in a warehouse.

When storing goods on behalf of another party pursuant to a bailment contract, a warehouseman is expected to exercise the duty of care that a reasonably careful person would exercise for warehoused goods under like circumstances. What happens, however, when Mother Nature reveals her dark side and a hurricane sweeps through, causing flooding and subsequent damage to a warehouse? Who will ultimately bear the loss of the goods that were stored in the warehouse when flood waters and high winds damage those items stored within the warehouse walls? If the dispute over the property damage cannot be resolved amicably, and a breach of contract lawsuit ensues, the bailor (the party who requested the goods to be stored) needs to prove that the warehouseman failed to return the bailment property in good condition. The burden then shifts to the warehouseman to demonstrate that it exercised ordinary care in storing the property. The judge or jury will ultimately decide whether the warehouseman indeed exercised the same type of care to the property as any reasonably careful person would have exercised under similar circumstances. In making this determination, the decision maker will likely evaluate the actions the warehouseman took in protecting the property against both foreseeable and unforeseeable circumstances, such as a hurricane. If it is determined that the warehouseman could have done more to protect against loss to the stored property, the bailor will be able to recover the fair market value of the damaged goods, not simply the cost to replace those goods. The bailor may also recover loss of profits caused by damage to the goods if those lost profits can be proven with reasonable certainty.

To protect against the uncertainties that can ensue as a result of litigation over damage to goods stored in a warehouse pursuant to a bailment relationship, both the bailor and the warehouseman should negotiate the terms of a warehouse receipt to determine, with more certainty than litigation, what damages will be allowed in the event of damage to the stored goods. By law, damages may be limited by the warehouse receipt, and the receipt may set forth specific liability for goods beyond which the warehouseman should not be liable.

**Brokered Loads**

Brokers continue to play in integral role of connecting shippers and carriers. Brokers provide pricing and service availability information and arrange for transportation of loads, which can include assisting with scheduling, collections, billing, evaluating damage, etc. Brokers engaged in arranging transport of interstate loads must be licensed by the Federal Motor Carrier Safety Administration. Not every state otherwise requires brokers to be licensed; Pennsylvania does not. As such, if the broker’s business is limited to arranging only intrastate transportation of loads, they have no licensing requirements.

The most consistent concern that arises with brokers is who is responsible to pay a carrier for transporting a load when the broker fails to, even though the broker has already been paid in full by the shipper. Yes, the unfortunate truth is that this does happen and when it does, the money paid by the shipper to the broker is typically gone and the shipper and carrier are
left to resolve the issue between themselves. In this instance, carriers are likely to argue that the shipper is liable to them regardless of the fact that they already paid the broker. The shipper, in turn, will argue that it has no obligation to the carrier because its contract was with the broker and that contract has been fulfilled. Plus, the shipper is not going to willingly agree to pay twice. Factors to consider in such a dispute will include how much control the shipper exercised over the broker, i.e. did the broker or shipper select the carrier, did the carrier bill the shipper or the broker, who is named on the bill of lading as the carrier (the broker or carrier), who priced the load, etc. Sometimes the party with the greater control will also be the party deemed responsible to pay the carrier when the broker fails to.

The initial reaction of both the shipper and carrier may be to file a claim against the broker’s bond. Reality often sets in rather quickly, however, because by law the broker must only have a $10,000 bond. As such, it is quite likely that the bond has already been exhausted. In fact, you may recall a recent case reported in Transport Topics in which 68 trucking companies had filed a claim against a broker’s $10,000 bond. The Court was quick to clarify that it was only one $10,000 bond and that each company that filed a claim with the court (only seven of the 68 did), would receive a recovery proportionate to the amount owed to them by the broker.

There has been some movement for the rules and regulations relating to brokers to be tightened. Specifically, there is currently federal legislation pending that would increase the minimum bond for brokers to $100,000. Interestingly, even that would not have been enough in the Mississippi case noted above where the total owed to the initial 68 trucking companies exceeded $160,000.

In addition to carriers and shippers evaluating the brokers they are using, which should include asking the broker to provide references, parties in this three-tiered relationship should protect themselves with written documentation. There should be a written agreement between the broker and the shipper and a separate written agreement between the broker and the carrier. The terms of these agreements should clearly delineate who is responsible to pay the carrier. The terms of payment should not be a surprise to anyone. Therefore, if the shipper pays the broker and expects the carrier to look solely to the broker for payment, the documents should specify these facts. These agreements should also specify who is going to be responsible for damaged, refused or lost cargo. Federal law requires carriers to carry cargo liability insurance in a minimal amount ($5,000 for loss of or damage to property carried on any one motor vehicle, and/or $10,000 for loss of or damage to property occurring at any one time and place.) Nothing prohibits a shipper or broker requiring the carrier to have increased amounts of cargo liability insurance.

Now is a good time to review your relationships with brokers and make sure that the intended relationship is sufficiently set forth in a written document.

**Cargo Loss and Damage for Interstate Transport**

For cargo being transported in interstate commerce, liability for cargo losses and damages will be limited to the actual loss or injury to the cargo being transported. This is true because of the Carmack Amendment, a Federal law existing since the early 1900’s. Notably, this law does not apply to brokers; as such, it does not limit their liability. The actual loss or injury to the property will be the difference between the market value of the property as it should have arrived and the market value of the property as it did arrive. Special or consequential damages will only be recoverable if the carrier had notice of special issues or conditions relating to the load being transported.

Remember that claims made for cargo damages and losses covered under the Carmack Amendment must be made by the shipper to the carrier within nine months of the delivery date (or nine months of non-delivery or notice of non-delivery in the event the cargo is not delivered). Additionally, a shipper must
Beware of Cargo Loss and Damage for Goods Shipped Overseas

Despite the Carmack Amendment’s application to cargo being transported in interstate commerce, which allows shippers to recover the actual loss or injury to the cargo being transported, along with special or consequential damages if it is shown that the carrier had the requisite notice, such recovery is not permitted when the goods damaged in transit originated overseas. The United States Supreme Court recently ruled that the Carmack Amendment does not apply when cargo is shipped from a foreign port to a U.S. destination. To the contrary, such international transports are governed by the Carriage of Goods by Sea Act, which limits recovery to $500 "per package," no matter if the damaged package was originally worth $10,000 or $250. It is of no significance if the cargo was damaged, not during the international leg of its journey to its ultimate U.S. destination, but while being transported within the United States itself, e.g. while the goods were being transported via truck or railroad from the United States port to the shipper's location within the United States. Even in this instance, shippers are limited to recovering only $500 per damaged package, as opposed to the full value of the cargo as permitted by the Carmack Amendment.

Given this limitation on recovery for damaged cargo shipped overseas, now is the time for shippers to re-evaluate their insurance coverage to ensure that they are properly insured in the event of a loss to internationally-shipped cargo so that they can mitigate against out-of-pocket losses to the greatest extent possible.

Loading Liability

As the law on freight liability issues continue to develop, liability for freight issues tied to loading deficiencies continues to be an area with mixed results. Federal regulations, contractual agreements (like the bill of lading) and court cases have addressed loading liability. Freight and damage claims tied to loading tend to be fact intensive and will look to what the driver, shipper and carrier’s roles were in the loading process. Look for our article specific to this issue in a future issue of PennTrux.

Barbara Darkes is the Chair and Kimberly Selemba is a member of McNees Wallace & Nurick’s Transportation, Distribution & Logistics Group. McNees Wallace & Nurick regularly represents distribution facilities, third party logistics providers, national common carriers, LTL carriers, manufacturers with their own transportation fleet, small and single power unit trucking companies, and bus transportation providers. For more information on McNees Wallace & Nurick, visit www.mwn.com.
Trends In The Law Of Spoliation Of Evidence

INTRODUCTION

The law of spoliation continues to develop rapidly in both the federal and state courts but this article focuses on federal law. Section I deals with the development of a federal body of common law on spoliation in diversity jurisdiction cases. Section II contains a discussion of several spoliation issues, while Section III discusses when spoliation remedies may be available. Section IV covers what remedies are available when evidence is spoiled, and Section V provides a practical checklist to help all litigators and motor carriers avoid spoliation problems.

I. DEVELOPMENT OF THE FEDERAL COMMON LAW OF SPOLIGATION

In the following paper, you will find citations to far more federal decisions than state court decisions. This is not simply due to the fact that motor carrier litigation is regularly removed to the federal court. The federal courts are in the process of adopting a “federal common law” on the subject of spoliation, even in diversity jurisdiction cases. This developing area of federal common law is yet another reason to remove when possible as spoliation is generally approached in a sensible way by the federal courts. A recent example of this trend is the decision of the United States Court of Appeals for the Sixth Circuit in Adkins v. Wolever, 554 F.3d 650 (on rehearing en banc, February 4, 2009). Judge Boyce F. Martin, circuit judge, writing for the Court specifically found that the federal law of spoliation applies to a case litigated in a federal court because the authority to impose sanctions for spoliated evidence derives from that court’s power to control cases before it. The Adkins Court approached this issue as a choice of law question:

We reheard this case en banc to resolve a choice-of-law question: Does state law control a federal court’s imposition of sanctions as relief for spoliated evidence? The original panel, constrained by our earlier opinions that applied state law to determine whether spoliation sanctions were available, (see, e.g., Beck v. Haik, 377 F.3d 624, 641 (6th Cir.2004); Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 804 (6th Cir.1999); Welsh v. United States, 844 F.2d 1239, 1245 (6th Cir.1988)), affirmed the district court’s denial of sanctions because applicable state law did not provide for sanctions based on third-party spoliation. Adkins v. Wolever, 520 F.3d 585, 587 (6th Cir.2008) (citing Salmi v. Sec’y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir.1985)). We granted rehearing en banc to bring our case law in line with other courts of appeals. We now recognize—as does every other federal court of appeals to have addressed the question—that a federal court’s inherent powers include broad discretion to craft proper sanctions for spoliated evidence. (Adkins, 554 F.3d 650, 651.)

The Sixth Circuit went on to point out in the Adkins case that all sister circuits who had addressed this issue concluded that it was a matter of federal common law to craft spoliation sanctions. And the Sixth Circuit was convinced to follow the lead of the Ninth Circuit, the Fifth Circuit and the Fourth Circuit. Silvestri v. General Motors Corporation, 271 F.3d 583 (4th Cir.2001). Reilly v. Nat West Markets Group, 181 F.3d 253 (2nd Cir.1999). Glover v. BIC Corporation, 6 F.3d 1318 (9th Cir.1993). King v. Illinois Central Railroad, 337 F.3d 550 (5th Cir.2003). Vodusek v. Bayliner 71 F.3d 148 (4th Cir.1995).

The Adkins Court then went on to remand the case to the trial court:

But the fact-intensive inquiry into a party’s degree of fault is for a district court. See Reilly, 181 F.3d at 267 (explaining that the “remedial purpose” of sanctions is “best adjusted according to the facts and evidentiary posture of each case”). Thus, we leave to the district court the exercise of its broad discretion to decide if Wolever should be subject to any form of spoliation sanctions despite the fact that he was not the prison records custodian. (Adkins, 554 F.3d 650 at 653.)
The Sixth Circuit gave only broad guidelines to the trial courts:

As our sister circuits have recognized, a proper spoliation sanction should serve both fairness and punitive functions. See Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (observing that a proper sanction will serve the “purpose[s] of leveling the evidentiary playing field and ... sanctioning the improper conduct”). Because failures to produce relevant evidence fall “along a continuum of fault-ranging from innocence through the degrees of negligence to intentionality,” Welsh, 844 F.2d at 1246, the severity of a sanction may, depending on the circumstances of the case, correspond to the party’s fault. Thus, a district court could impose many different kinds of sanctions for spoliated evidence, including dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence. Vodusek, 71 F.3d at 156. (Adkins, 554 F.3d 650 at 652-653.)

As will be seen in the balance of this article, the federal courts are already developing a body of common law on the law of spoliation. This development does require that all preservation decisions be made thoughtfully and consistently. The trial courts in the federal system are used to dealing with defendants large and small and if the federal trial bench in your jurisdiction is a reasonable one, motor carriers can expect to be treated fairly on this issue as they are on all issues by the trial court.

II. THE CRITERIA REQUIRED TO ESTABLISH SPOLIATION OF EVIDENCE

This section discusses the three requirements for evidence to be deemed spoiled in some detail. Notification is the first requirement for evidence to be deemed spoiled. The Courts in most jurisdictions have developed the concept of notification as an important threshold in determining whether spoliation has occurred, and when the determination is made that spoliation did occur, in fashioning a remedy.

For example, the court in Brown v. U.S. Dept. of Justice was faced with a defendant who destroyed a file with the intent of harming the plaintiff’s case. 2007 WL 1032301 (E.D. Ky. 2007). Because the defendant knew that the evidence would likely be relevant to litigation but destroyed it anyway, the court found that there had been spoliation. Id. Further, because the spoliating party intended to harm the plaintiff’s case, the court imposed a more severe penalty than it would have had the destruction been unintentional. Id. Notification can include the filing of a lawsuit, the written assertion of a claim, or even mere notice of the potential for a claim depending upon all the circumstances. When these events occur, individuals and corporations have a considerably heightened responsibility to preserve physical and electronic evidence which may relate to the suit or claim.

Second, some evidence must actually be missing for spoliation to occur. Both formal and informal discovery can be used to determine if evidence is missing or altered. I routinely ask several questions regarding relevant evidence in the first conversation with opposing counsel. In product liability cases, attorneys often go to considerable lengths prior to litigation to locate, purchase, and preserve the product at issue. If the case is worth filing, it is worth the expense of securing the product. The same approach is often necessary in trucking cases and preserving the plaintiff’s car often is important to the defense of a trucking case. Further, it is common for the costs of preserving the product or the vehicles in a truck accident to be shared among the parties. When this is done, the parties should work out the conditions of preservation immediately and memorialize them in writing. A letter will usually suffice, but if you have an adverse party or attorney that you have any concern about, you should memorialize these agreements in an agreed order. Clearly motor carriers have strong business interest in getting their moderately damaged tractor trailers back on the road. Allowing plaintiff thirty days to inspect the equipment is almost always sufficient.
Formal discovery is also important in determining whether evidence is missing or altered. For example, in a recent case, one party produced numerous documents in response to written discovery. When these documents were compared with the documents that party produced in response to an electronic discovery request, it was determined by implication that certain documents were missing. The documents were never located, but it was established that they had existed and were destroyed.

Third, the evidence spoiled must be relevant in order for a spoliation remedy to be proper. Consulting experts are often used in spoliation cases, particularly to prove that the spoiled evidence was relevant. When discussing relevance, the expert must establish that the evidence is likely to lead to the discovery of admissible evidence and that it is unique. If you feel that your client is aggrieved by spoliation, request a spoliation hearing and bring an expert to testify that the evidence was relevant. If you cannot pursue or defend your case effectively because of spoliation, the spoliation hearing can effectively be your client’s day in court. Furthermore, to file a motion seeking the types of civil discovery sanctions identified below, it is essential to file an affidavit of an expert in support of that motion in almost all cases involving product liability or truck accidents. The motion required is very similar in nature to the type required for striking an expert’s testimony in hearings conducted under the decision of the Supreme Court in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 US 579 (1993).

Even with the help of consulting experts, it is often difficult to determine whether the missing evidence would have been helpful in proving the case. Nonetheless, it would have often been helpful to one party. For example, the destruction of documents in the ordinary course of business usually benefits the destroying party as opposed to adverse parties. However, exceptions do exist. For example, a corporation may retain a document that indicates that there was a problem with an early prototype of a product but not retain the document created when the problem was resolved prior to the first release of the product. In such a situation, the adverse party can occasionally comment on the missing evidence, and the corporation may be unfairly disadvantaged. For this reason, it is best to counsel clients to retain as much documentation as feasible.

Many jurisdictions such as Kentucky do not have a jurisprudence that is well developed on spoliation of evidence issues, but this area of the law is growing. Consequently, when faced with a spoliation situation of any kind, you must often look to other jurisdictions for legal support. Unfortunately, those decisions are not necessarily considered controlling, but the development of a federal common law will be helpful in providing guidance to all litigants. In order to satisfy the burden of proof on spoliation motions, it is critical to provide the court with expert affidavits or testimony on the subjects of notification, missing evidence, and relevance of the spoiled evidence.

When dealing with electronic evidence, reason must be balanced with business and personal practicality. For instance, the cost associated with electronic storage of information is but one concern. Coupled with the very real problem of the efficient retrieval of electronic documents, it is essentially impossible for a well-run business to keep all electronic documents or paper documents indefinitely. Motor carriers can often, but not always, find shelter behind the retention requirements of the Department of Transportation. However, most large and middle sized companies have formal document retention policies that can assist attorneys in locating discoverable evidence. For some reason, companies frequently do not discard outdated storage media. Consultants often have older machines, data drives and software which can be used to review any outdated media produced in discovery. When changing to new computer networks, software, or hardware, companies often simply copy all information currently available. They fail to sort through or
conventional electronic devices, including Personal Digital Assistants (“PDA”) such as Blackberries™, are also fertile areas for discovery. These devices typically synchronize with an individual’s calendar, email, notes, memos and task lists. Cell phones which are PDAs should be considered a source for electronic evidence as well. In our jurisdiction, plaintiffs primarily seek the billing and transmission tower information directly from the cell phone providers.

Further, courts, in my experience, are more likely to compel discovery of specific requests of electronic evidence than of very broad requests. Thus, by making requests targeted both to specific locations and individuals, the chances of plaintiffs getting exactly what they want are greatly increased; in effect, they may use your technical support personnel as their own consultant. No one knows more about how a company preserves, or does not preserve, electronic information more than the individuals who have the responsibility for running the company’s network. Plaintiffs can also take this approach with your third party vendors such as Qualcomm. Indeed, it is the approach that counsel for the business entity should take themselves in dealing with their own client.

--Ethical Issues in Preservation

While backups can be good sources of evidence, other, less difficult to destroy completely. For instance, when you hit “delete,” an item is not truly deleted from your hard drive. Similarly, in many email programs such as Microsoft Outlook™, when you delete an item it goes to a folder that usually is not emptied unless you take additional, specific actions. However, the software defaults addressed above can be altered by IT personnel to permanently delete items when the user signs off the network or within a set time period. Nonetheless, many corporations do not permanently delete such items unless they have significant storage problems, which typically only happen every few years. Consequently, even if a user deletes an email item and thinks that it is gone, it is probably still available somewhere. This also applies to email in copies of Outlook on the computers of individual plaintiffs (and their counsel).

Furthermore, most companies and many individual plaintiffs backup their files to off-site tapes or disks, usually at least once a week. Thus, an email that a user thinks was deleted may still exist on a backup tape, disc or drive, even if the deleted folder was later emptied. These tapes are almost always rotated, so older data is typically lost on a periodic basis. Regardless of the attitude of litigators, the reality is that such rotation of back-up tapes is done for business reasons and not typically to “destroy” documents or spoil evidence.

Despite the complexities of electronic evidence, it does have one extremely valuable trait: such evidence is exceptionally easy to destroy completely. For instance, when you hit “delete,” an item is not truly deleted from your hard drive. Similarly, in many email programs such as Microsoft Outlook™, when you delete an item it goes to a folder that usually is not emptied unless you take additional, specific actions. However, the software defaults addressed above can be altered by IT personnel to permanently delete items when the user signs off the network or within a set time period. Nonetheless, many corporations do not permanently delete such items unless they have significant storage problems, which typically only happen every few years. Consequently, even if a user deletes an email item and thinks that it is gone, it is probably still available somewhere. This also applies to email in copies of Outlook on the computers of individual plaintiffs (and their counsel).

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While backups can be good sources of evidence, other, less conventional electronic devices, including Personal Digital Assistants (“PDA”) such as Blackberries™, are also fertile areas for discovery. These devices typically synchronize with an individual’s calendar, email, notes, memos and task lists. Cell phones which are PDAs should be considered a source for electronic evidence as well. In our jurisdiction, plaintiffs primarily seek the billing and transmission tower information directly from the cell phone providers.

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--Ethical Issues in Preservation

Ethical considerations are applicable to both traditional
and electronic discovery. These give guidance to both motor carriers and their counsel. Richard C. Stanley, an ethics professor at Tulane University, authored an excellent summary of these considerations, and DRI published it in 2001 as part of the seminar materials. See “Key Ethical Issues Relating to the Discovery of Electronic Information” Stanley, DRI, 150 North Michigan Avenue, Suite 300, Chicago, Illinois 60601 (2001). An even older article that also deals with these issues is “Electronic Discovery: Making Your Opponent’s Computer a Vital Part of Your Legal Team” Grenig, 21 Am. J. Trial. Advoc. 293 (1997).

One of the most frequent ethical issues that arises during electronic discovery is the receipt of unsolicited privileged or confidential materials. The American Bar Association issued two formal ethics opinions on this topic, both of which hold that the recipient must notify opposing counsel and not use the materials. See ABA Formal Op. 94-382 and ABA Formal Op. 92-368. Several early court decisions address important ethical issues involved with electronic discovery. See American Cash Card Corporation v. AT&T Corporation, 95 Civ. 10607 (DC), United States District Court for the Southern District of New York (1989); Metal Marketplace Inc. v. United Parcel Service, Inc., 733 F.Supp. 976 (ED. PA 1990); Lloyd’s Bank PLC v. Republic of Ecuador, 1997 WL 96591 (S.D.N.Y).

Ken Withers has also authored several articles on this topic. See The Federal Rules in Electronic Discovery, available at http://www.kenwithers.com in the “articles and presentations” section of the website.

There are many additional considerations for attorneys and their motor carrier clients regarding electronic documents. Attorneys have to consider not only what the client is providing to them for discovery, but they also have to take into account how the client electronically searched for that information. If the search was unreasonable, the attorney could be held responsible for not disclosing information that was not found by the client but could have been found if a proper search had been conducted. Essentially, the attorney is responsible for satisfying the discovery rules regarding both the search and the produced documents. Attorneys are now responsible for understanding a company’s computer system so we can assess whether an adequate search has been performed by the client. This will cause additional inconvenience and expense for clients. Attorneys will need to perhaps give motor carriers more guidance than they ordinarily would for paper document searches as the client’s IT personnel will need reasonable and comprehensive key search terms to perform searches.

Attorneys and clients must work together to “ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.” Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932, No. 05cv1958-B, slip op. at *9 (S.D. Cal. Jan. 7, 2008) (vacated in part by Qualcomm Inc. v. Broadcom Corp., 2008 WL 638108, No. 05cv1958-RMB (S.D.Cal. Mar. 5, 2008)). Both attorneys and clients also should be aware of issues regarding the cost of recovering and searching the electronic information and potential spoliation.

III. WHEN SPOLIATION REMEDIES ARE AVAILABLE

Whether there is a duty to preserve evidence, and the potential for a remedy if that evidence is destroyed, is measured by the reasonable person standard in Kentucky. However, spoliation will only be sanctioned if the missing evidence was actually prejudicial, although many state court judges will simply jump over this requirement straight to the remedy of a missing evidence instruction. Further, the exact effect of the spoliating party’s degree intent is somewhat unclear in Kentucky.

The Courts routinely have held in many jurisdictions that, if litigation is reasonably expected by the parties (i.e. if the parties are on notice of potential litigation), they are on notice that they spoil evidence at their peril. A recent decision that follows this rule is Brown v. U.S. Dept. of Justice, 2007 WL 1032301 (E.D. Ky. 2007). The court in
Brown, as discussed above, severely sanctioned a party who destroyed evidence that the party knew would be relevant to litigation. Although Kentucky’s Supreme Court has not ruled definitively on the issue, it will likely determine whether sanctions are available for spoliation by evaluating whether litigation was foreseeable under the circumstances. Many jurisdictions do not yet have clear guidelines on the question of notice.

In addition to requiring that litigation be reasonably expected, Kentucky courts usually also require the evidence to be prejudicial before sanctioning spoliation. However, the Kentucky Supreme Court has refused to make spoliation an independent tort, as it now is in many states. See Monsanto Co. v. Reed, 950 S.W.2d 811 (Ky. 1997) involving the destruction of physical evidence.

Unfortunately, the decisions of Kentucky state courts do not lead to the clear conclusion that the degree of intent to spoil evidence is a factor used to determine whether a remedy is available to an innocent party. In Sanborn v. Com., however, the prosecutor’s intentional destruction of evidence was described by the Court as “misconduct of constitutional proportions.” 754 S.W.2d 534 (Ky. 1988) (Certiorari denied by Sanborn v. Ky., 516 U.S. 854 (1995); habeas corpus granted in part, denied in part by Sanborn v. Parker, 2007 WL 495202 (W.D. Ky. Feb. 14, 2007)). There was no clear indication that the spoiled evidence would have assisted Sanborn’s defense, but the Court was clearly furious with the prosecutor. Id. However, the Court limited the punishment to a jury instruction that allowed but did not compel the jury to make an inference adverse to the Commonwealth. Id. Inference law in each jurisdiction is significant on the rebuttal of inferences. This is a legal question in Kentucky.

Nonetheless, some Kentucky decisions do consider the spoliator’s intent. For example, in Barrister Farm, LLC v. Upson Downs Farm, Inc., the defendant cleared the scene of a barn fire after the defendant’s investigators photographed the site. 2006 WL 319344 (Ky. Ct. App. 2006). The plaintiff’s property was destroyed in the fire, but the trial court granted the defendant’s motion for summary judgment because the plaintiff could not produce any evidence of negligence. Id. On appeal, the plaintiff argued that it could not prove negligence because of the defendant’s destruction of the fire site. Id. However, the trial court refused to find spoliation because there was “no evidence to suggest that [the defendant] was negligent in clearing the fire site [or] that it did so with the intent of hiding evidence.” Accord, Kentucky Department of Corrections v. McCullough, 123 S.W.3d 130, 141 (Ky. Ct. App. 2001) (refusing to sanction the employer in an employment discrimination suit because there was no evidence that the employer destroyed a personnel file). It is difficult to predict the attitude the Kentucky Supreme Court will have to these cases. I would predict that they will make it very difficult to completely knock an injured plaintiff out of court. Kentucky’s Supreme Court can be expected to come down harder on defendants.

However, the federal courts have consistently held that the level of intent is important, if not critical, in fashioning a remedy for spoliation. “Destruction of potentially relevant evidence . . . occurs along a continuum of fault . . . The resulting penalties vary correspondingly.” Welsh v. U.S., 844 F.2d 1239 (6th Cir. 1988) (emphasis added). However, mere negligence resulting in the loss of evidence does not bring up spoliation issues in federal court; rather, missing evidence instructions are given. For example, in Louisville Gas & Electric Company v. Continental Field Systems, Inc., the plaintiff suffered damages when a fan shaft, maintained by the defendant, broke. 420 F. Supp. 2d 764 (W.D. Ky. 2005). Two pieces of the shaft remained after the incident. Id. One was lost by the plaintiff’s expert, while the other was left outside to rust. Id. Because the plaintiff was merely negligent and did not intend to destroy the fan shafts, remedies such as dismissal and negative inferences were improper. Id. However, the defendant was entitled to a missing evidence instruction, which permitted but did not require the jury to make
a negative inference because of the plaintiff’s negligent destruction of evidence. See also One Beacon Ins. Co. v. Broadcast Development Group, 147 Fed. Appx. 535 (6th Cir. 2005) (holding that the issuance of a similar jury instruction in a case involving the negligent destruction of evidence was within the trial court’s discretion).

IV. REMEDIES AVAILABLE WHEN EVIDENCE IS SPOILED

In a recent unpublished opinion, a Kentucky federal court articulated the following five issues to consider when fashioning a remedy for an alleged spoliation of evidence:

(1) Was the spoliation prejudicial? (2) Can the spoliation be cured? (3) How important is the missing evidence? (4) Was the spoliating party acting in good or bad faith? (5) What is the deterrent effectiveness of the remedy compared with a lesser sanction?


While the courts do not explicitly answer these five questions, they do consider the basic issues behind the questions. For example, courts will grant summary judgment in favor of the non-spoliating party in some cases involving destruction of evidence in bad faith. See Beil, 15 F.3d at 556. Alternatively, a court may require a jury to make an inference adverse to the spoliating party. For example, in Brown v. U.S. Dept. of Justice, discussed above, the court required the jury to assume that one element of the plaintiff’s claim was met because the defendant destroyed evidence with the intent of harming the plaintiff’s claim. 2007 WL 1032301 (E.D. Ky. 2006). However, regardless of the degree of bad faith, spoliation is not a tort separate from the cause of action it is related to in Kentucky. See Monsanto v. Reed, 950 S.W.2d 811 (Ky. 1997). A few jurisdictions do recognize the independent tort of spoliation. At least eleven jurisdictions recognize an independent cause of action for spoliation of evidence. A party adversely affected by spoliation may bring a tort action for monetary damages against a party who has destroyed evidence. Some states also allow recovery of punitive damages.

The following jurisdictions have established the tort. Alaska, District of Columbia, Florida, Idaho, Illinois, Montana, New Jersey, New Mexico, New York, Ohio, and West Virginia recognize the tort of spoliation. See, e.g., Mayes v. Black & Decker (U.S.), Inc., 931 F. Supp. 80 (D.N.H. 1996) (reversing trial court’s dismissal of suit against appliance manufacturer for damages sustained after an alleged electrical wiring problem caused a house fire because there was no indication that the relevant evidence was destroyed out of malicious intent, given that the evidence remained available to the defendants for at least one full month following the fire); Heginbotham v. Bowser & Tarr, Inc., 38 Pa. D. & C.4th 343 (1997) (holding that defendant manufacturer was entitled to summary judgment on the basis of spoliation of evidence because defendant employer had discarded the hydraulic hose that had ruptured and caused plaintiff’s injuries); Garfoot v. Fireman’s Fund Ins. Co., 599 N.W.2d 411 (Wis. 1999) (dismissing action was warranted in a personal injury action caused by an explosion alleged to have been caused by a gas leak in the joints and during the initial testing to whether the joints located near the furnace and near the hot water heater were leaking at the time of the explosion, plaintiff’s expert spoliated the evidence by connecting and reconnecting the hose, thus making it impossible for defendant to prove that there was no leak at the time of the explosion); Callahan v. Stanley Works, 703 A.2d 1014 (N.J. 1997) (holding that employer’s failure to preserve pallet that fell from forklift, injuring the employee, disrupted employee’s ability to pursue third party negligence action was sufficient to state a spoliation claim against employer).

For cases not involving the intentional destruction of evidence, courts will typically give jury instructions that allow, but do not require, the jury to make inferences favorable to the non-spoliating party. See Louisville Gas & Elec. Co. v.
Continental Field Systems, Inc., 420 F. Supp. 2d 764 (W.D. Ky. 2005). However, these instructions can overcorrect the disadvantage that the non-spoliating party suffers from the absence of evidence alone. Kentucky courts sometimes will not issue these instructions because of the possibility of such an imbalance. See Jarrett v. Duro-Med Industries, 2008 WL 89932 (E.D. Ky. 2008). Nonetheless, many other jurisdictions will issue such instructions and even dismiss cases if the spoliation was merely negligent. See, e.g., Thiele v. Oddy’s Auto and Marine, Inc., 906 F.Supp. 158 (W.D.N.Y. 1995) and Graves v. Daley, 526 N.E.2d 679 (Ill. App. 3 Dist. 1988). When a third party spoliates evidence, the result can fall on the litigant with the burden of proof on an issue. I would, for this reason, urge all trial lawyers to ask our court to reconsider allowing spoliation to be considered a separate tort. If the court feels that it is necessary to avoid potential misuse, it can use a burden of proof similar to that in fraud cases.

For cases that involve the spoliation of evidence that is not needed to prove or rebut a claim, courts will usually refuse to give spoliation instructions. For example, the plaintiff in Hays v. Alia discarded the trampoline that the defendant was injured on. 2007 WL 3036871 (Ky. Ct. App. 2007). However, because a similar trampoline was introduced as evidence at trial, the defendant was not prejudiced by the missing trampoline, and the court refused to give a spoliation instruction. Id. The courts should be careful in examining the facts in such cases. For example, an assertion that a case is “merely” a design case could be used to hide a lack of proper maintenance.

Finally, it is important to note that all litigators have an ethical duty to preserve evidence and advise their clients of this duty. The failure of a lawyer to properly advise a client can result in the disciplinary action being taken against the lawyer in addition to any of the sanctions above being taken against the client.

V. KEY STEPS TO TAKE TO AVOID SPOILIATION

• Prior to litigation, counsel for motor carriers should plan for electronic discovery in advance. This will assist in avoiding unnecessary spoliation and will make electronic discovery directed to that client cheaper, more efficient, and less disruptive.

• Prior to litigation, when you notify an adverse party or their counsel of your representation, request in writing that they preserve relevant electronic information, using language that clearly defines the matter at issue and the specific types of materials you wish preserved.

• Prior to litigation, begin informal discovery of electronic documents. It is imperative in trucking litigation to be certain to deal with the question of downloading the data from the truck’s engine control module if you feel it could be relevant. The seriousness of the injuries are a good guide to how the court will look at the failure to preserve the evidence.

• When handling physical evidence, never disassemble or modify the physical evidence, unless there is a written agreement with all possible parties or all possible parties are present. Treat data downloads the same if your expert advises the data will be compromised by a download.

• Insist that all technical experts and other consultants, including photographers, preserve all physical evidence. Provide them a copy of the ASTM standards if they do not already have them. Strongly consider not engaging the services of any expert or technical personnel who are not already familiar with the ASTM standards.

• If a product cannot be purchased, inspect it and photograph it extensively.

• Purchase the plaintiff’s salvage on their car in serious accidents if at all possible and store them. Share these costs when appropriate. Download the involved car’s EDR information if it is potentially relevant. You must get permission to do this as the data belongs to the car owner. Check NHTSA’s current rules on this issue.

• Consult a metallurgist or other specialized technical expert about how to preserve metal
parts, particularly ferrous parts. Take similar steps with other physical evidence of significance.

- Talk to the other side about ways in which all parties can be assured that spoliation does not occur. These problems can almost always be worked out in advance.

- Ensure that your experts and witnesses are familiar with all applicable evidence preservation techniques and that they take reasonable steps to preserve evidence.

- Obtain a protective order for physical and/or documentary evidence.

**VI. CONCLUSION**

The most reliable remedy for motor carriers for spoliation is avoidance. This is best accomplished in trucking cases by early notification from counsel for plaintiff. If you are not contacted by plaintiff’s counsel in serious injury cases, we recommend ECM downloads, isolation of three months of logs and similar information, and extensive photos of the scene and vehicles.
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