EDITORS’ NOTEPAD

The Transportation Practice Group of ALFA International has published the Transportation Update for about seventeen 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 Katherine Garcia (kgarcia@alfainternational.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 section headings are as follows: ALFA Member Publications and Speaking Engagements; Cases, Regulations, and Statutes; Verdicts and Settlements; Practice Tips; and Articles. We also offer non-recurring headings and in the future will offer issues focused on a particular area of trucking law.

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 and Settlements section addresses the results of litigation affecting the trucking industry. We encourage you to report to the editors any verdict or settlement that you think is of interest to the trucking community. See results achieved in Massachusetts and in New Mexico. For a result in Tennessee, see the Cases, Regulations, and Statutes section.

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

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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
application throughout the country. In this issue, we feature the following:


- Mark Scudder on “Critical Self-Analysis Privilege.”

- Eric Benton on “A New Uncertainty: Center for Medicare and Medicaid Services Reporting Requirements Necessitate Diligence, Prognostication.”

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

- John Tarpley on e-Discovery: The Rules and Their Practical Applications for the Trucking Industry

- Bruce Churchill-Smith on e-Discovery: The Canadian Perspective

- Will Fulton, Andrew Dill, and Loren T. Prizant on Defending the Dangerous Trucking Case Trial Strategies to Short Circuit the Plaintiff©

The Directory of Member Firms at the end of the newsletter offers a current list of all the individuals who are active in the ALFA Transportation Practice Group by firm at the end of the Transportation Update for a number of years.

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

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9. VERDICTS AND SETTLEMENTS
   Gareth Notis, partner with the law firm of Morrison Mahoney LLP, in Boston, Massachusetts, won a five (5) day jury trial in Suffolk Superior Court in Boston, Massachusetts. See the summary for the effective use of Motions in Limine.

   Paul T. Yarbrough, Martin Diamond, and Shawn S. Cummings of Butt Thornton & Baehr won a Motion for Summary Judgment in the United States District
Court for the District of New Mexico granted the Defendants’ Motion for Summary Judgment on the issue of punitive damages. See the summary for insight into their excellent result.

Please also see the Tennessee Case Notes for an excellent result achieved by Dana Holloway of the Leitner, Williams, Dooley & Napolitan law firm.

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12. TRANSPORTATION PRACTICE GROUP DIRECTORY OF MEMBER FIRMS

FUTURE EVENTS

Every year, the Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry. The 2009 Transportation Seminar was held in Coronado (San Diego), California at the Hotel del Coronado from May 6, 2009 to May 8, 2009. Their official web site of the hotel is http://www.hoteldel.com/.

Both beach lovers and golf lovers were delighted with this wonderful facility. Our Program Chair for the 2009 seminar was Peter Doody of Higgs, Fletcher & Mack, LLP, San Diego, California, who can be reached at (619) 236-1551 and doody@higgslaw.com.

Our 2009 program was titled “Practical Solutions for Issues Effecting the Trucking Industry.” The topics that were covered are as follows: 1) How to Deal Effectively with the Case of a Disappearing Driver; 2) State of the Art Technology and How to Preserve and Protect ESI; 3) Keeping a Close Eye on How the Plaintiff’s Bar is Targeting the Trucking Industry; 4) Strategies to Protect Work Product and Post-Accident Review Following a Trucking Accident; 5) Insurance Issues Surrounding the Catastrophic Accident; and 6) Case Valuation and Resolution Strategies.

Our Chairman of the Transportation Practice Group for 2008-09 was Paul T. Yarbrough of Butt Thornton & Baehr PC, Albuquerque, New Mexico, who can be reached at (505) 884-0777 and ptyarbrough@btblaw.com. Our Vice Chair was 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, the practice group and event coordinator at kgarcia@alfainternational.com and (312) 642-2215.

FUTURE ISSUES OF TRANSPORTATION UPDATE

The Summer issue of Transportation Update will be published in July 2009.
DISCLAIMER

The ALFA International 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 International 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.

OF SPECIAL NOTE IN THIS ISSUE: ALFA’S GO TEAM HOTLINE

The ALFA Transportation Practice Group now presents a new service for its transportation clients, THE ALFA GO TEAM HOTLINE. ALFA knows that its 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.

Here’s how the service works. An ALFA client needing immediate legal support calls the ALFA GO TEAM HOTLINE at 1-866-540-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. But remember that number, 1-866-540-ALFA (2532).

“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

ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

Our ALFA attorneys are putting together an excellent program that we encourage you to attend from May 6 – 8, 2009 at the Hotel del Coronado in San Diego. Peter Doody is the Program Chair. The brochure is now available and Katherine A. Garcia at ALFA International would be happy to send it to you. She can be reached at klgarcia@alfainternational.com.

On March 26-27, Peter Doody spoke on a panel regarding ECM download data at the Association of Southern California Defense Counsel annual meeting in Los Angeles. In April, he spoke at the Transportation Lawyers Association annual meeting on FMCSA regulation and its impact on casualty litigation and damages.

In April, Will Fulton presented a biomechanist on direct examination in “Presenting the Biomechanical Witness” at the Kentucky Defense Counsel/Kentucky Justice Association Trial Practical Skills Seminar on the Seat Belt Defense in Lexington and in Louisville, KY.

The following ALFA members are presenting at the conference on the following topics:

Greg Conforti of Johnson & Bell, LTD is on a panel addressing the topic titled “Truth or Consequences: The Handling of Ethical Dilemmas.”

Will Fulton of Woodward, Hobson & Fulton, LLP is on a panel addressing the topic titled “Big Brother: Anticipating FMCSA Agenda.”

Curtis Stambaugh of McNees, Wallace & Nurick, LLC is on a panel addressing the topic titled Extreme Makeover: Predicting Environmental Regulatory Focus”.

Walter Zink of Baylor, Evnen, Curtiss, Grimit & Witt, LLP is on a panel addressing the topic titled “I've Got a Secret: Managing Electronic Data Issues.”

Paul Yarbrough of Butt, Thornton & Baehr, PC is the moderator and Tamara Cook of Renaud, Cook, Drury, & Mesaros, PA is on the panel addressing the topic titled “Pictionary: Developments in Accident Reconstruction Techniques.”

Bruce Menk of Hall & Evans, LLC is the moderator for a panel addressing the topic titled “Who Wants to be a Millionaire: Trends in Damages Awards.”

Danny Needham of Mullin, Hoard & Brown, LLP is on a panel addressing the topic titled “Survivor: Collecting in Bankruptcy Proceedings.”

Mark Scudder of Strasburger & Price, LLP is the moderator for a panel addressing the topic titled “Password: Preparing for Cross Border Operations and Issues.”

Please hold the date.
CASES, REGULATIONS, & STATUTES

ALL JURISDICTIONS - FEDERAL

Disaster on I-80, but Federal Appeals Court Holds Only $1 Million in Insurance Coverage

This case is a declaratory judgment action that sought to limit Carolina Casualty’s liability to $1 million per accident as set forth in its policy issued to the trucking company. The estate argued that since there were several victims, the endorsement that the insurance company issued verifying compliance with MCA established coverage at $750,000 per person. Following the hearing on Motion for summary judgment, the district judge rejected this argument and limited Carolina to $1 million per the policy limits.

The facts of the case are as follows: the truck driver rear-ended a stopped automobile in a construction zone on the Indiana Toll Road, which set off a chain reaction of crashes leading to the death of four individuals and numerous injuries to others as well as property damage to automobiles and to the Indiana Toll Road. Carolina insured the trucking company for $1 million and included the “MCS-90” endorsement. Carolina filed an interpleader and deposited the money and then the interpleaded parties filed cross-motions for summary judgment. The court granted Carolina its summary judgment stating that the policy contained clear and unambiguous language and limited the payment to the per-accident limit of $1 million. The appellants argued that the MCA and MCS-90 endorsement establishes a $750,000 per person liability minimum. Citing 49 U.S.C. §31139(b)(1)-(2). The court of appeals discussed the policy language versus the Code language and relied on an unpublished decision of the Fourth Circuit, which determined that an insurance carrier’s potential financial obligation was limited by the terms of the policy. Citing Hamm v. Canal Ins. Co., 178 F.3d 1283 (4th Cir. 1999).

The Seventh Circuit held that the clear and ambiguous language of the policy expressly limited Carolina Casualty’s liability to the maximum of $1 million per accident and neither the MCA nor MCS-90 established a per-person limit.

Carolina Casualty Ins. Co. v. Estate of Karpov, 559 F.3d 621 (7th Cir. 2009)

Broker Hauled into Court on Carrier’s and Driver’s Negligence.

In Jones v. C. H. Robinson Worldwide, 558 F. Supp. 2d 630 (WD Va. 2008), the United States District Court for the Western District of Virginia exposes brokers to liability for a motor carrier’s or driver’s negligence and creates a new cause of action against brokers for negligent entrustment of an activity. Even though a motor carrier under federal law is responsible for its equipment and driver, the court allows the jury to determine if a broker is responsible for negligently entrusting the motor carrier and its driver with an activity that results in a personal injury.

FACTS

This case involves the head-on collision of two tractor trailers. The Plaintiff suffered serious injuries in the accident. Kristina Mae Arciszewski was employed by AKJ Enterprises, Inc. (“AKJ”) which owned the tractor and trailer that Arciszewski was driving when she crossed the center line and struck the Plaintiff, Winford Dallas Jones. AKJ was under contract as a motor carrier with a broker, C. H. Robinson Worldwide, Inc. (“C.H. Robinson”). The Plaintiff claimed Arciszewski was an employee of both AKJ and C. H. Robinson and was acting in the course and scope of her employment at the time of the accident.

The Plaintiff sued for negligence, negligent hiring and supervision

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of AKJ, negligent entrustment, violations of the Federal Motor Carrier Act and violation of the Federal Motor Carrier Regulations. The Plaintiff never served and voluntarily dismissed all the defendants except for C. H. Robinson.

At the onset of the suit, C. H. Robinson filed a motion to dismiss all of the claims against it. Jones v. D’Souza, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. Sept. 11, 2007). The court ruled in the motion to dismiss that the defendant driver caused the collision with the Plaintiff. The court also found that the motor carrier was the employer of the at-fault driver and the motor carrier, AKJ, was an independent contractor to the broker, C.H. Robinson. Jones v. D’Souza, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. Sept. 11, 2007).

The Plaintiff asserted that C. H. Robinson was vicariously liable for the negligence of Arciszewski and AKJ. C. H. Robinson denied it was vicariously liable for their negligence because AKJ was an independent contractor and Arciszewski was AKJ's employee. The contract between AKJ and C. H. Robinson contained a standard independent contractor clause. Because C.H. Robinson had filed a Federal Rules of Civil Procedure 12 (b) (6) motion to dismiss, the court found it premature to dismiss the claim based upon an unsubstantiated broker and carrier agreement. The Contract Carrier Agreement had been entered into between AKJ and C. H. Robinson to specify the terms and conditions of their relationship.

Plaintiff’s negligent supervision claim was dismissed by the court because this particular cause of action has not been recognized in Virginia. Negligent hiring, however, has been recognized by Virginia. In Virginia, this cause of action requires that the employer knew the hired individual had propensities that posed a threat to others. Plaintiff claimed C. H. Robinson knew or should have known that AKJ (i) had limited experience as a motor carrier; (ii) had been assigned a conditional or unsatisfactory rating by the Federal Motor Carrier Safety Administration; (iii) was impaired financially; and (iv) was otherwise incompetent and unfit to operate safely as an interstate commercial carrier. Jones v. D’Souza at 12. The court found the plaintiff had alleged sufficient facts to support the negligent hiring claim.

With respect to Plaintiff's negligent entrustment claim, C.H. Robinson argued that it could not negligently entrust equipment that was owned by AKJ. The Plaintiff argued that it was not the negligent entrustment of equipment by the negligent entrustment of assignment to haul the cargo. Therefore, it was a negligent entrustment of an activity instead of an instrumentality. The Plaintiff argued that this claim is recognizable under Section 308 of the RESTATEMENT (SECOND) OF TORTS. Even though Virginia had not addressed the negligent entrustment of an activity, the court acting with diversity jurisdiction undertook to determine what the Supreme Court of Virginia would do if faced with this issue and determined that if presented to the Virginia Supreme Court, it would recognize a cause of action for negligent entrustment of an activity.

Finally, the court addressed Plaintiff's claims under the Motor Carrier Act and the Federal Motor Carrier Safety Regulations. The Plaintiff claimed it was entitled to bring an action under 49 U.S.C. Sec. 14704 (a) (2) which provides:

A carrier or broker providing transportation or service subject to jurisdiction under Chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

49 U.S.C. Sec. 14704 (a) (2).

The court found that the legislative history did not indicate that Congress was intending to create a private cause of action to address personal injury actions under the Motor Carrier Act. Therefore, the court granted C. H. Robinson's motion to dismiss these claims.

After what the court termed "extensive discovery," the parties filed cross-motions for summary judgment. Previously when considering the motion to dismiss, the court found that Arciszewski was negligent and that her negligence was the proximate cause of the accident. The court revisited the claim that C. H. Robinson was vicariously liable for the negligence of AKJ and Arciszewski; however, the court was now able to review the Contract Carrier Agreement between AKJ and C. H. Robinson. Under this Agreement, AKJ was deemed an independent contractor, and thus C. H. Robinson had no control over AKJ or its driver Arciszewski. The
Plaintiff attempted to make an argument that C.H. Robinson was a third party logistics company and thus exercised more control over AKJ. The court relied on the Contract Carrier Agreement, however, to find that AKJ was an independent contractor. Thus, C. H. Robinson could not be held liable under a respondeat superior theory of liability for the negligence of AKJ or Arciszewski.

The court also revisited the claim that C. H. Robinson negligently hired AKJ as an independent motor carrier. Once again the court turned to the RESTATEMENT (SECOND) OF TORTS wherein Section 411 provides a defendant may be liable for physical harm caused to third persons by failing to exercise reasonable care in employing a competent or careful contractor to do work involving a risk unless it is done skillfully and carefully. The court once again found that if faced with the issue, the Supreme Court of Virginia would extend the cause of action for negligently hiring an independent contractor if the situation involved the selection of a carrier by a freight broker or third party logistics provider when there is a threat of physical harm.

The court discussed the burden upon a plaintiff to succeed on a claim for negligent hiring of an independent contractor. The court found that the Plaintiff would have to prove that the independent contractor was indeed incompetent or unskilled to perform the job for which he was hired; that the harm resulted from that incompetence and that the principal knew or should have known of the incompetence. It is important to note, that the court stated that the parties did not dispute the incompetence of AKJ or Arciszewski or that C. H. Robinson conducted any investigation into AKJ’s safety and fitness as a carrier other than determining it had a conditional safety rating and a valid operating authority from the Federal Motor Carrier Safety Administration (“FMCSA”). Instead the court follows the parties focus as to the duty of inquiry that is required of Robinson under the facts of this case. C. H. Robinson claimed there was no evidence that would cause them to believe that AKJ was likely to be involved in a collision such as that involved in this case. Plaintiff, on the other hand, argued that if C. H. Robinson would have investigated AKJ’s safety program and safety ratings, it would have know that AKJ was a carrier likely to be involved in an accident.

Important to the facts of this case was a requirement contained in the Contract Carrier Agreement that AKJ maintain a “satisfactory” safety rating with the FMCSA. There are three levels of safety rating under the FMCSA SafeStat program: satisfactory, conditional and unsatisfactory. The FMCSA gave AKJ a conditional safety rating because the FMCSA did not believe AKJ had adequate safety management controls. The court also noted internal documentation wherein C. H. Robinson had noted other problems with AKJ’s performance during the time period that it had done business with the carrier.

The court turned to a decision by a federal district court in Maryland, Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004), which permitted a negligent hiring claim against C. H. Robinson to go to the jury. The court in Schramm found a common law duty of third party logistic providers to use reasonable care in the selection of carriers. The Schramm court even went so far as to delineate the duties of a third party logistics company when it stated:

This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMCSA, and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings.


To determine whether C. H. Robinson owed a duty to the Plaintiff, the court examined the conflicting testimony of the Plaintiff and the Defendant. C. H. Robinson argued that the Schramm court’s finding that there was a duty was mistaken. C. H. Robinson offered, as expert testimony, the head of the FMCSA at the time of the accident to explain the purpose of SafeStat. This testimony was not available in the Schramm case claimed C. H. Robinson.
While the court determined that C. H. Robinson was a third party logistics provider and Robinson interjected itself into exercising more control over the shipment, the court also found that C. H. Robinson had a duty to investigate the fitness of AKJ prior to hiring the carrier. The court found however that the question of whether C. H. Robinson reached the appropriate duty of inquiry in selecting a competent carrier was not an appropriate subject for a motion for summary judgment and, thus, would be submitted to the jury.

**COMMENTARY**

After recognizing the general rule that “one who employs an independent contractor is not liable for injuries to third parties resulting from the contractor's negligence,” the court gets caught up in non-legal titles to send the case to the jury. Further the court imposes on the broker responsibilities neither intended by Congress nor imposed by common law upon principals that arrange for the transportation of freight.

There is no legal entity known as a “third party logistics provider.” A third party logistics provider is an industry term that brokers use to describe their value added services to the shipper or consignee. Not only is there is no legal definition of “third party logistics provider” but also the contractual services vary by each company and can range from arranging transportation to synchronous manufacturing and beyond. Following the lead of Schramm, this court imposes a higher burden on property brokers for undertaking services that are a creature of contract and assume that all third party logistic providers are the same or provide similar services. The court presumes that a third party logistics provider exercises more control over a shipment than a broker and this control lessens the independence of the contractor.

A broker has been defined and its duties outlined in 49 C.F.R. Sec. 371 (a). This regulation provides:

(a) **Broker** means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. 49 C.F.R. Sec. 371 (a)

The federal regulation recognizes that a broker may provide additional value added services. 49 C.F.R. § 371 (b) and (c) provide:

(c) **Brokerage or brokerage service** is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.

(d) **Non-brokerage service** is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee. 49 C.F.R. § 371 (b) and (c)

The court presumes that C. H. Robinson, as a third party logistics provider, retained control of the manner and means of doing the work that is subject to the contract of carriage. Further, the court is quick to presume that AKJ was incompetent and that Arciszewski was an incompetent driver just because C. H. Robinson did not elect to dispute their competency in its briefs. Based upon these presumptions, the court finds the general proposition that one who employees an independent contractor is not liable for that contractor’s negligence is not applicable to C. H. Robinson’s selection of AKJ.

As in Schramm, the court relies on the information contained in the SafeStat website even though the FMCSA has specifically issued a disclaimer from using the information for other than its intended purposes. Thus, the agency charged with the responsibility for determining the qualifications for operating a motor carrier states not to use this information for the purpose in which the court wants it used. To its credit, the court does state that the causal connection between the conditional rating and the accident are not strong but sufficient to withstand a motion for summary judgment.

The FMCSA has been given the authority to determine whether a motor carrier is fit to operate on the nation’s highways. If the carrier is not fit to operate on the nation’s highways, it shall be given an “unsatisfactory” status by the FMCSA and its operating authority is revoked. To determine if a carrier is fit, the government has given the FMCSA a broad range of powers to inspect and audit a carrier. In addition, the carrier under 49 U.S.C. § 385.15 is permitted to have an administrative review of an unsatisfactory rating. To place this burden on the broker, not only must the broker make these
decisions regarding a carrier’s fitness without the benefit of similar investigatory powers, but also it must evaluate the differences of the state laws in which the transportation may take place. Finally, forcing such a determination to be made by the broker effectively takes away the carrier’s right to an administrative review of an unsatisfactory rating.

CONCLUSION

A string of cases, including Schramm, through this most recent decision in Jones v. C.H. Robinson has started the trip down the slippery slope of allowing a state law claim of negligent hiring and now negligent entrustment to be alleged against the broker for the acts or omissions of the motor carrier or its driver. See, Schramm v. Foster, 341 F. Supp. 2d 536 (D. Maryland 2004) (negligent hiring); Clarendon National Ins. Co. v. Johnson, 666 SE 2d 567 (Ga. App. 2008) (negligent hiring). Brokers, however, are regulated by the federal government as is the activity entrusted. The morass of differing state laws will paralyze a vital piece of the nation’s transportation puzzle if left to the courts to impose requirements on brokers that may conflict with the federal regulatory scheme. Finally, a motor carrier with any negative information in their SafeStat report may be effectively put out of business when brokers are reluctant to assign the carrier moves. Certainly, such a result was neither intended nor condoned by the FMCSA.

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KANSAS

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

In the recently published Memorandum and Order of Senior District Court Judge Wesley E. Brown, for the United States District Court for the District of Kansas in Stallings v. Werner Enterprises, Inc., 2009 WL 412995 (D.Kan.), the court denied defendant Werner Enterprises’ motions for partial summary judgment on the issues of negligent entrustment, retention, and hiring, and granted defendant’s motion for summary judgment on the issue of punitive damages. The suit, which is still pending, was brought by plaintiff against Werner Enterprises and the co-defendant driver after the tractor-trailer being driven by the co-defendant rear-ended plaintiff’s minivan.

Of note, the Memorandum and Order denied Werner Enterprises’ motion for partial summary judgment of plaintiff’s negligent entrustment claim even though Werner Enterprises did not own the tractor—it only owned the trailer. The tractor was actually owned by the co-defendant driver. In Kansas, a claim for negligent entrustment is “based upon knowingly entrusting, lending, permitting, furnishing, or supplying an automobile to an incompetent or habitually careless driver.” Snodgrass v. Baumgart, 25 Kan.App.2d 812, 815-16, 974 P.2d 604, 606 (1999) (quoting McCart v.
complete responsibility for the operation of the equipment for the duration of the lease.”

The court noted that while evidence Werner Enterprises did not own the tractor “would normally be sufficient to preclude a claim for negligent entrustment”, the operating agreement and applicable federal regulations created a question of fact regarding whether Werner Enterprises had a “superior right to control or possession of the tractor at the pertinent time.” Based on this decision, it is hard to imagine when a commercial carrier operating under a lease would be able to meet the summary judgment burden to dismiss a claim of negligent entrustment.

Werner Enterprises also filed a motion for partial summary judgment on the claims of negligent entrustment, hiring, and retention, asserting that it could not be held independently liable under these theories because it admitted it was vicariously liable for the negligence of the co-defendant driver. Werner Enterprises asserted that plaintiff was proceeding with these theories of negligence solely for the purpose of bringing in “highly prejudicial character evidence relating” to the driving history of the co-defendant driver, and that allowing plaintiff to proceed with such theories would allow him “to recover double damages for one collision.”

Kansas has “long recognized” a cause of action for negligent hiring and retention, which provides that an employer “has a duty to use reasonable care in the selection and retention of employees” by requiring “that an employer hire and retain only safe and competent employees.” Plains Resources, Inc. v. Gable, 235 Kan. 580, 590-91, 682 P.2d 653 (1984). However, Kansas is among a small minority of states—including Arizona, Delaware, Iowa, Michigan, Minnesota, Ohio—that have held that an admission of vicarious liability does not preclude an action for both respondeat superior and negligent entrustment or negligent hiring, retention, or supervision. See Marquis v. State Farm Fire and Casualty Co., 265 Kan. 317, 334-335, 961 P.2d 1213 (1998). This is based on the proposition that negligent entrustment and negligent hiring, retention, or supervision “are torts distinct from respondeat superior and that liability is not imputed but instead runs directly from the employer to the person.” Marquis, 265 Kan. at 334.

The majority of states have concluded that once a defendant employer admits it is vicariously liable for the negligence of the co-defendant, then plaintiff’s claims for negligent hiring, retention, and supervision should be dismissed because their prosecution wastes the time and energy of courts and litigants and serves no purpose, except for allowing potentially inflammatory, irrelevant evidence into the record. See Elrod v. G & R Const. Co., 275 Ark. 151, 628 S.W.2d 17 (1982); Armenta v. Churchill, 42 Cal.2d 448, 267 P.2d 303 (1954); Hackett v. Washington Metropolitan Area Transit Authority, 736 F.Supp.8, 11 (D.D.C.1990); Clooney v. Geeting, 352 So.2d 815-16. See also RESTATEMENT (SECOND) OF TORTS § 308.

Although plaintiff introduced evidence that the tractor had a sign on it which stated it was “leased” to Werner Enterprises, that all permits needed to transport loads were in Werner Enterprises’ name, that Werner Enterprises encouraged its drivers to keep the trailer with them so that it would be available when it was time to pick up a load, and that Werner Enterprises had the right to terminate its contract with the co-defendant driver, the court was most interested in the operating agreement entered into between Werner Enterprises and the co-defendant driver, pursuant to which the co-defendant driver agreed to “make available motor vehicle equipment” to Werner Enterprises and to furnish it “the exclusive possession, use and control of the EQUIPMENT that [Werner] may require to fulfill requirements placed on it by all applicable regulations.” The court also briefly discussed 49 C.F.R. 376.12(c)(1), which allows an authorized carrier to use equipment it does not own only if there is a written lease granting use of the equipment, which lease provides that “the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease” and that the “authorized carrier lessee shall assume

Practically speaking, allowing such theses theories of negligence to be introduced at trial means that once the jury determines how much plaintiff is entitled to recover, it then must apportion fault between the company and the driver. Although the plaintiff is prevented from receiving a double recovery, allowing plaintiff to present evidence during trial concerning the commercial carrier’s potential negligence in hiring, retaining, and supervising its driver is a significant weapon for plaintiff’s counsel who, in a majority of other states, would otherwise be unable to introduce such evidence.

SOUTH CAROLINA

Court Sets Dangerous Precedent in Refusing to Strike Potentially Biased Jurors

In a recent case involving allegations of negligent hiring and supervision against Wal-Mart, South Carolina’s Court of Appeals validated a frightening level of discretion on the trial judge’s part with respect to jury qualification and exclusion. In Hollins v. Wal-Mart Stores, Inc. Opinion No. 4473 (filed December 22nd, 2008), the plaintiff alleged that while she and her minor daughter shopped at the local Wal-Mart, a store employee had exposed himself to the daughter and had then committed a lewd act upon her. The details are beyond sordid but, mercifully, are not pertinent for present purposes.

The interesting aspect of the case is the trial judge’s refusal to strike jurors, despite significant ties to parties and attorneys in the case. During jury qualification the court learned that Juror B, an attorney, had been adverse to plaintiff’s counsel in a recent case; later, Juror B informed the court that one of his partners had represented Wal-Mart. Upon learning of each entanglement, counsel for plaintiff requested that the trial judge strike Juror B- in both instances, the court refused.

More surprisingly, the court refused a request to strike Juror D, despite Juror D’s acknowledgement that his
brother was employed at the very Wal-Mart store where the alleged indecent exposure had transpired. Indeed, one of the Wal-Mart representatives at trial was the direct supervisor of Juror D’s brother. Once again, plaintiff’s counsel requested that the juror be excused; once again, the court refused.

Wal-Mart secured a defense verdict, the jury evidently accepting the retailer’s explanation that it had no knowledge and was not on notice of the employee’s tendencies. On appeal, the primary issue was the trial judge’s decision to seat Jurors B and D. The court of appeals dismissed the plaintiff’s protestations more or less out of hand, stating merely that “[t]he decision to disqualify a juror is within the sound discretion of the trial court,” and relying very heavily upon each juror’s bare representation that he could be impartial.

With the juror rulings in the Hollins case going against the plaintiff the rulings’ significance is easily dismissed. Yet such rulings as easily could go against a motor carrier in the future. Especially in light of the many small, close-knit communities in which significant tort actions are tried in South Carolina, the court of appeals’ ruling is alarming. Minimally extrapolated, the court’s opinion approves a scenario in which a personal injury plaintiff’s co-worker’s father sits on a jury panel, or his neighbor’s brother. In the small, already plaintiff-friendly towns of South Carolina, these connections are quite likely to surface. The presence of such jurors on the panel would have seemed, pre-Hollins, to support a robust appellate argument, but now the onus is that much greater on defense counsel to prevail at trial.

TENNESSEE

No First-Party Cause Of Action For One Who Furnishes Alcoholic Beverages

In a case of first impression in Tennessee, the Tennessee Court of Appeals held in Montgomery v. Kali Ortxi, LLC, (Tenn. Ct. App. No. E2008-01207-COA-R3-CV, March 27, 2009) that the defendant restaurant that served alcoholic beverages to an extremely intoxicated restaurant was not liable to the decedent as a matter of law.

In this case, the deceased plaintiff was intoxicated. A staff member of the restaurant summoned a cab to take the decedent from the restaurant to the decedent’s home. The staff member of the restaurant paid the cab fare for the decedent who became belligerent on the ride home; grabbed the steering wheel of the cab; and caused the cab to veer into the lane of oncoming traffic. After warning the decedent to stop such behavior, the decedent grabbed the steering wheel of the cab a second time. Consequently, the cab driver pulled to the side of the road and put the decedent out of the cab. The cab driver called 911 to inform the operator of the man’s condition. The man’s body was discovered beneath a bridge from which he had fallen to his death.

The decedent’s estate filed a claim for wrongful death against the restaurant on a general negligence theory and under the
provisions of the Dram Shop Act (Tenn. Code Ann. § 57-10-101 & 102), which provides as follows under Section 57-10-101:

The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person. (Emphasis added).

Section 57-10-102 states:

Notwithstanding the provision of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:

(1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or

(2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

The court of appeals determined that the statute's plain meaning when read as a whole created only a cause of action for a third-party injured by an intoxicated person if the sale of the alcoholic beverage was knowingly made to a minor who injures another or the sale was made to a “obviously intoxicated person” who injures another.

(Dana Holloway of the Leitner, Williams, Dooley & Napolitan law firm defended the restaurant).

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VERDICTS, APPEALS AND SETTLEMENTS

Verdict for the Defense in Massachusetts

On January 16, 2009, Gareth Notis, partner with the law firm of Morrison Mahoney LLP in Boston, Massachusetts, won a five (5) day jury trial in Suffolk Superior Court in Boston, Massachusetts in a wrongful death case involving the death of thirteen (13) year old girl. The decedent was struck by a vehicle during school hours while exiting a middle school she attended. She did not have permission from the school’s faculty to leave the school’s grounds.

The decedent’s grandmother witnessed the accident. She was picking up another grandchild, a cousin of the decedent, at the time of the accident and was parked across the street from the school. The decedent’s grandmother, once a defendant, settled with the plaintiff’s estate before the trial along with another defendant. The decedent’s grandmother provided emotionally charged testimony about the decedent’s movements prior to impact, speed of the involved vehicles, the point of impact, and the distance the victim’s body travelled after impact. The court denied the defendant’s attempt to introduce evidence that the grandmother was once a named defendant in the suit.

In Massachusetts, the plaintiff may recover from a defendant found liable under the Wrongful Death Statute, M.G.L. c. 229, § 2, the following damages:

(1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered . . . , including but not limited to compensation for the loss of the reasonably expected net income, services protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent’s death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant.

The statute permits recovery for heirs of the decedent those losses akin to loss of consortium. Shultz v. Grogean, 406 Mass. 364 (1990). The plaintiff is entitled to recover the reasonable medical and funeral expenses of the decedent. The plaintiff may also recover damages “for conscious suffering resulting from the same injury. . . .” M.G.L. c. 229, § 6. Those eligible for recovery in an action for wrongful death include the executor or administrator (acting on behalf of the decedent’s estate), surviving spouse, heirs and other beneficiaries. The case illustrated the mechanics of trying a wrongful death case in Massachusetts. Motions in Limine were critically important to preventing introduction of prejudicial arguments and evidence.

Per a Motion in Limine, the City of Boston’s Police Department accident reconstructionist was deemed a qualified expert witness by the court during a voir dire hearing. During the defendant’s case in chief, the reconstructionist provided favorable testimony for the defense regarding point of impact, line of site distances, and estimates of the vehicle speeds and braking distances. The court allowed the defendant to illicit testimony from the reconstructionist that the co-defendant driver that struck the girl was speeding in a school zone and had a clear line of vision of the decedent for at least 100 yards.

The court allowed the defendant’s Motion in Limine to exclude the decedent’s step-sister as a beneficiary in jury instructions and the jury verdict slip. The decedent’s step-sister spent only weekends with the decedent’s family. The court ruled that the step-sister’s relationship was too tenuous with the decedent for her to be considered an heir under the Wrongful Death statute.

The court also ruled pursuant to a Motion in Limine that the defendant could argue that the decedent was comparatively negligent for the estate’s damages. In Massachusetts, the possible negligence of a child is “judged by the standard of behavior expected from a child of like age, intelligence, and experience.” Mann v. Cook, 346 Mass. 174, 178 (1963). The defendant argued during closing argument that the thirteen (13) year old decedent knew the dangers of the street on which
she was killed and understood the school’s policy that she was not permitted to leave the school during school hours without explicit permission.

In Massachusetts, if the jury determines the plaintiff is comparatively negligent, the verdict is reduced proportionally to the amount of the plaintiff’s negligence. Mass. Gen. Laws c. 231, §85. Under M.G.L. c. 229, § 2, the Wrongful Death Statute, the comparative negligence of the decedent can be taken into consideration by the jury. Lane v. Meserve, 20 Mass. App. Ct. 659 (1985). If the decedent was more than 50% negligent, the Estate will be precluded from recovery.

The case involved a potentially significant conscious pain and suffering damage award because the decedent was in a coma for ten (10) days following the accident while admitted in the pediatric intensive care unit at Boston University Medical Center. Pursuant to a Motion in Limine, the defendant was successful in precluding evidence a conscious pain and suffering because the plaintiff failed to “show conscious suffering by cognizable proof beyond mere surmise.” Heng Or v. Edwards, 62 Mass. App. Ct. 475 (2004).

The fourteen (14) person jury returned a verdict in favor of the defendant after deliberations lasting less than an hour. The jury ruled that the defendant was not negligent without reaching questions on the verdict slip concerning proximate cause, comparative negligence, and damages.

Motion for Summary Judgment Granted on Punitive Damages

On August 30, 2007, a truck driver named Samuel James Gavito (“Gavito”) had just made a delivery to a local Albuquerque, NM business, in his semi tractor-trailer, and was attempting to make a left turn on an eight lane city street in a sometimes congested business area. Gavito was exiting the parking lot of a business that was somewhat diagonal to the intersection and facing slightly north. As Gavito entered the north bound lanes and was attempting to make his turn south, he slowed to almost a stop when noticing an approaching car in the south bound lanes. Mr. Gavito did not notice a motorcycle heading north in the opposite direction that was driven by Sean Holbrook. Mr. Holbrook laid down his motorcycle on the road, slid toward the truck, and sustained injuries as a result of the accident. Mr. Holbrook sued Gavito and his trucking company, and he asked for punitive damages, claiming that Gavito’s conduct was reckless or wanton.

The Defendants filed a Motion for Summary Judgment to dismiss the punitive damage claim, asserting that Gavito’s conduct did not support an award of punitive damages. Under New Mexico law, punitive damages can only be awarded when conduct is malicious, willful, reckless, wanton, fraudulent, or in bad faith, and when there exists an evil motive or a culpable mental state. Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co., 170
Because the undisputed facts showed that Gavito proceeded to make his turn south after looking for traffic, proceeding only when he believed it was clear, and that Gavito did not notice the motorcycle until he heard the sound of the motorcycle’s screeching tires, the Defendants argued that his conduct could not be considered reckless or wanton and that he lacked any evil motive or culpable mental state.

In Response, the Plaintiff prepared and submitted an affidavit of their accident expert, Jeff Vick, who identified several factors to consider in determining whether Gavito acted in a reckless or wanton manner. The expert’s affidavit stated that there was a heightened sense of responsibility for truck drivers, that it was rush hour, there were several lanes of traffic, and that Gavito’s maneuver to turn left was dangerous because of the number of lanes in the commercial area. In Reply, the Defendants stated that the Plaintiff, through Mr. Vick’s affidavit, was trying to paint a picture of a street filled with cars when Gavito attempted to make his turn, despite the undisputed fact that Mr. Gavito checked for traffic and only proceeded to make his turn when the street was clear.

The court’s ruling seems to indicate that a Plaintiff who is seeking to proceed on a punitive damage claim based on generalized statements of common traffic conditions in a particular location needs more evidence to survive summary judgment. It appears that there needs to be specific, particularized evidence showing that the individual conduct of the Defendant was reckless or wanton, in addition to any general statements of the traffic conditions of the area, to continue with a punitive damage claim.
PRACTICE TIPS

Use of NHTSA Research Program Data on Light Vehicle Anti-Lock Brake Systems to Address Emergency Perception and Reaction Time Analysis

For anyone who engages in the analysis of driver behavior in motor vehicle accidents, time and distance factors are constantly being estimated; perception and reaction time are necessary elements of this analysis when the effect of steering, braking or unassisted slowing are amongst the maneuvers being considered. Hazard perception or hazard recognition as well as reaction time are typically maximized or minimized depending upon the outcome desired or to set parameters of possible factual scenarios to present or from which to argue.

In doing so, the basis for perception and reaction times, although necessarily used by the persons performing the analysis, are frequently accepted or relied on with little or no challenge either as to their applicability, reliability or foundational methodology. In the past, courts have often admitted evidence of an average driver’s reaction time of three-fourth’s (3/4’s) of a second either by taking judicial notice or without requiring an expert to provide any foundation other than that he or she says so because it is “commonly accepted”. Likewise, perception times that have been reported in the past from the Northwestern Traffic Institute or other programs are accepted merely because they have been commonly used for such a long period of time without anyone truly investigating – let alone challenging – the factual basis for the time attributed to particular hazard recognition scenarios or the methodology upon which those times are ostensibly based. Individual “experts” or scientific/academic investigators have reported various times for hazard recognition, but again – from an “epidemiological” viewpoint – these would generally be considered to have little power or sensitivity because of the lack of control within the study, the low numbers of participants, confounding factors, and a variety of other challenges that could be asserted if one had some basis to believe that the time and effort to do so would be worthwhile. Unfortunately, the common response from most judges in most cases has been, “That’s a matter for cross-examination that goes to weight and credit – not admissibility.”

Having said that, one of the approaches to challenging an opposing expert’s time and distance analysis and for determining or evaluating one’s own time and distance analysis is to look to the driver performance metrics that were established by The Light Vehicle Anti-Lock Brake Systems’ Research Program sponsored by NHTSA and published in August of 2000 (DOT HS 809 132). (This document is available from the National Technical Information Service at Springfield, VA 22161.) One of the key aspects of this study was to address emergency perception and reaction time of drivers together with any differences in driver initiated avoidance actions. As part of this study using the Iowa Driving Simulator, a driver (with no prior knowledge of the emergency circumstance to be presented) traveling at a speed of 45 to 50 mph towards an intersection was confronted with another vehicle entering the subject vehicle’s path from the driver’s right at 2.5 or 3.0 seconds prior to impact. A variety of response times were determined and summarized. Accelerator release time, brake application time, and time for steering were all measured from the same point; thus accelerator release time was incorporated in the other measures. In some cases, some drivers initiated actions simultaneously. In general, the following key information was developed which appears to be current, reliable data with respect to perception and reaction times with 120 participants in this part of the study:

- Average accelerator release time in response to the incursion [emergency] event in this scenario was .97 seconds after the encroaching vehicle began to move.

- Average brake application time in response to the incursion [emergency] event was 1.14 seconds after the encroaching vehicle began to move. (The time required to apply the brake was deemed to have ended when the driver’s foot was over the brake pedal.)
* - Average time to maximum brake pedal force, that is the average time from accelerator release to the point of maximum brake application was 2.20 seconds.

* - Average time to first steering was 1.65 seconds after the encroaching vehicle began to move.

- Average magnitude of avoidance steering input was 148 degrees.

- Highest observed avoidance steering input was 540 degrees.

- Average maximum steering rate was 514 degrees.

- Highest observed maximum steering rate was 1416 degrees.

For purposes of time and distance analysis, the most important data derived from this NHTSA program study is the average time to maximum brake pedal force of 2.2 seconds and the average time to first steering input of 1.65 seconds. In other words, in this controlled emergency test pattern, the average perception and reaction time to maximum brake application in an emergency circumstance was 2.2 seconds and the average perception and reaction time to first steering input in an emergency circumstance was 1.65 seconds.

The other data derived from this emergency circumstance confronting the study participants is that of their avoidance strategy. Significantly, an instructional video on the proper use of ABS Systems shown prior to the test was found to have no benefit in reducing the likelihood of crash, but overall, drivers of ABS equipped vehicles demonstrated increased stability and control in the scenario utilized in this study. 35% of the drivers crashed overall – 10% in the 3.0 second TTI (i.e. time to incursion) scenario and 60% of the drivers crashed in the 2.5 second TTI scenario. Because their avoidance strategy, all drivers braked and steered, but a few interesting points were observed:

- 79% of drivers braked first.
- 4% braked and steered simultaneously.
- 17% steered first.
- 86% steered to their left to avoid the encroaching vehicle.
- 14% steered to the right to avoid the encroaching vehicle.

The rationale for these various avoidance strategies is outlined in some reasonable detail in the NHTSA report.

Two other emergency circumstances were examined, driver’s response to tire failure and driver’s response to pedestrians. For purposes of this analysis, results of the simulator study in which a pedestrian and a vehicle’s paths intersected with an oncoming vehicle are probably more useful. That study involved 32 drivers in which pedestrians darted into the road at a distance of approximately 130 feet from an approaching vehicle traveling at approximately 25 mph (37 feet per second). At this speed and distance, “preview time” (i.e. the time of the impact) was approximately 3.5 seconds.

Summarized, the results of this study were as follows:

* - 72% of the drivers struck the pedestrian.
* - 90% of the drivers took some avoidance action.
- 12% only steered to avoid the collision.
- 43% only braked to avoid the collision.
- 44% both braked and steered to avoid the collision.

While this NHTSA study was designed to examine the collision avoidance behavior of drivers using both conventional and anti-lock brake systems, the controlled methodology with the Iowa Driving Simulator provides potentially reliable data for use in applying methodologically the probable perception and reaction times for unexpected emergency events. Utilizing the perception and reaction time for full brake application at 2.2 seconds and a perception and reaction time of 1.65 seconds for initial steering avoidance defensible time and distance analysis can be performed based on physical evidence of pre- and post-accident vehicle positions (assuming that those are known and/or determinable). In addition to the study methodology and results, this NHTSA report also includes three pages of references related to risk, driver response and behavior from a
variety of sources, including SAE technical papers, Ergonomics, Accident Analysis and Prevention, Human Factors, and national and international technical conferences and presentations. We recommend review and analysis of this study in the application of perception and reaction time to the time and distance analyses that must be done in any motor vehicle liability assessment.

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Critical Self-Analysis Privilege

Many trucking companies appoint accident review boards or committees to study and analyze accidents involving the company’s drivers and equipment. Although no longer required by DOT regulations, some companies still insist that the accident review board make a determination as to whether the accident was “preventable” or “non-preventable.” As a general rule, the accident review board holds the company driver to a much higher standard of care than the standard the driver is held to in a negligence lawsuit. The accident review board will typically conclude that an accident was preventable if there was anything the driver could have done to avoid the accident. On the other hand, to find a driver negligent, a jury must evaluate the driver’s actions in light of what a reasonably prudent truck driver would have done under the same or similar circumstances. Unfortunately, a document is typically generated to reflect the accident review board’s conclusion and a copy is then placed in the driver’s personnel file. The board may also generate other reports regarding their analysis of an accident and what action to take as a result of their investigation.

In the discovery process, most plaintiffs’ attorneys seek the production of the accident review board’s preventable ruling as well as any other reports or documents generated by the board in their analysis of the accident that resulted in litigation. Plaintiff’s counsel will then blow up the written preventable ruling or report as an exhibit and argue to the jury that even the company concluded that its driver was negligent.

Counsel for the trucking company can petition the court in a motion in limine to keep plaintiff’s counsel from making this invalid argument or alternatively a company representative can explain to the jury the difference in the standard used by the accident review board. However, the preference is to keep the preventable ruling and any other reports created by such a board from ever making their way into the hands of the plaintiff’s attorney. Unfortunately, post-accident preventable rulings and other self-analysis reports do not typically fit into the attorney-client or work product discovery privileges. As an alternative, or in addition to these traditional privileges, trucking companies and their counsel may want to consider asserting the critical self-analysis privilege to resist discovery of such documents.¹

HISTORY OF THE PRIVILEGE

Because of growing litigation and risk management concerns, many individual companies and some industries as a whole have developed programs to critically analyze their operations to insure they are conducted efficiently and within the boundaries of the law. Although there are many benefits of such an analysis, companies sometimes find that their self-analysis investigations and conclusions are later used against them in civil litigation. To counter the discoverability of these internal investigations, the common law privilege of critical self-analysis has evolved primarily

¹ The critical self-analysis privilege is also referred to as the self-critical analysis privilege. The terms are used interchangeably but for consistency, this paper will refer to the privilege as the critical self-analysis privilege.
The critical self-analysis privilege is primarily a creature of the federal common law. The privilege has its roots in the case of *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 24 (D.D.C. 1970). In *Bredice*, the plaintiff filed a medical malpractice action against Doctors Hospital. Among other things, the plaintiff sought in discovery “[m]inutes and reports of any Board or Committee of Doctors Hospital or its staff concerning the death of Frank J. Bredice on December 11, 1966.” To improve overall patient care, a committee of medical staff had previously been formed by the hospital to consider certain matters for review including deaths of patients. It was understood that the committee’s communications and findings were confidential to encourage openness and candid examination and evaluation. In concluding that the plaintiff was not entitled to discover the minutes and findings of the committee, the court held as follows:

> The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.

*Bredice*, 50 F.R.D. at 250.

In *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992), the Ninth Circuit discussed four factors that a court should weigh in determining whether the critical self-analysis privilege should apply. The Dowling factors are as follows:

1. whether the information sought in discovery results from a critical self-analysis undertaken by the party seeking protection;
2. whether the public has a strong interest in preserving the free flow of the type of information sought;
3. whether the free flow of that information would be curtailed if discovery were allowed; and
4. whether the information sought was intended to be confidential and has been kept confidential.

*Dowling*, 971 F.2d at 426.

In essence, the court must balance the competing interests of the public in protecting candid corporate self-analysis with the private interest of the litigant in obtaining all relevant documents through discovery. *Id.; Tharp v. Sylvire Steel Corp.*, 149 F.R.D. 177 (S.D. Iowa 1993).

In more recent decisions discussing the critical self-analysis privilege, courts have generally held that in order to qualify for critical self-analysis protection, the party seeking protection must establish: (1) that the material in question was prepared for mandatory governmental reporting, or for a self-critical analysis undertaken by the party seeking protection; (2) that the material sought to be protected contained subjective, evaluative materials, not simply objective data; and (3) the policy favoring exclusion must clearly outweigh the plaintiff’s need for the documents. *In re McAllister Towing and Transp. Co.*, No. 02-858, 2004 U.S. Dist. LEXIS 9921, 2004 WL 1240667 (E.D. Pa. May 7, 2004) (*citing Melhorn v. N.J. Transit Rail Operations, Inc.*, No. 98-6687, 2001 U.S. Dist. LEXIS 6320, 2001 WL 516108 (E.D. Pa. May 15, 2001)).

Most courts addressing the issue still require the party seeking protection to demonstrate that the document was prepared with the expectation of confidentiality, and that the document was in fact kept confidential. *Stabnow v. Consolidated Freightways Corp.*, 2000 U.S. Dist. LEXIS 13612, 2000 WL 1336645 (D. Minn. Aug. 15, 2000) (*citing Spencer Savings Bank v. Excell Mortgage Corp.*, 960 F.Supp. 835 (D. N.J. 1997)).

**APPLICATION TO THE TRUCKING INDUSTRY**

In one wrongful death action against a trucking company, the company sought to protect documents relating to the post-accident termination of its driver involved in the accident. The company argued that the documents relating to the termination of the driver’s employment were protected under the critical self-analysis privilege. Recognizing that the applicable state law had not “warmly embraced” the privilege, the Court concluded that the circumstances did not warrant its application, as the company’s election to terminate its driver was not self-critical, as it was not “an exercise in which [defendant] sought, collegially, to assess the pros and cons of its hiring practices.” The court also noted that absent the privilege argued by the company, as a matter of “corporate self-interest,” the company should not employ drivers that pose a threat to the public. Stabnow, 2000 U.S. Dist LEXIS 13612.

In a lawsuit arising out of a motor vehicle accident whereby an individual was struck and killed by a tractor trailer, the plaintiffs brought product liability claims against the manufacturer of the truck. The truck manufacturer argued that certain records and reviews by the company were protected under the critical self-analysis privilege. The Court rejected defendant’s privilege claim because the defendant did not submit any evidence or arguments on the merits of the applicability of the critical self-analysis privilege. The court further noted that the records appeared to be “routine internal corporate reviews of matters related to business operations, recalls and safety concerns.” However, the court noted that it was not holding that the critical self-analysis privilege would never preclude disclosure of evidence in a products liability suit. Carlson v. Freightliner, LLC, 226 F.R.D. 343 (D. Neb. 2004).

In In re McAllister Towing and Transp. Co., 2004 U.S. Dist. LEXIS 9921, the court addressed the applicability of the privilege to a report prepared for the Navy after an accident involving the towing of a ship. The court compelled production only of the objective materials contained in the report, including observations of the failed roller guide, the tow wire, and a summary of the accident itself. The subjective analysis and evaluation contained in the report were protected by the privilege. In holding that the majority of the post-accident investigative report was protected by the critical self-analysis privilege, the court noted that the privilege is “based upon the concern that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law or with professional standards.” The court, after reviewing the report, noted that the investigative process employed by the Navy was designed to promote safety and to eliminate the possibility of future similar accidents, which “is the basis for the privilege.” Id. (citing Clarke v. Mellon Bank, N.A., No. 92-4823, 1993 U.S. Dist. LEXIS 6680, 1993 WL 170950 (E.D. Pa. May 11, 1993)).

In a personal injury suit against a railroad for injuries to its employee engineer, plaintiff sought discovery of a supervisor’s investigation report. After an in camera inspection, the court held that the critical self-analysis privilege did not protect the report, because the information contained in the report appeared to be objective, and did not meet the requirements of the critical self-analysis privilege. Melhorn, 2001 U.S. Dist. LEXIS 6320. However, the privilege has been applied to portions of another railroad accident investigation report. See Granger v. National Railroad Passenger Corp., 116 F.R.D. 507 (E.D. Pa. 1987).

In Spencer v. Sea-Land Service, Inc., 2000 A.M.C. 104, 1999 U.S. Dist. LEXIS 12608, 1999 WL 619637 (S.D. N.Y. 1999), the plaintiff sought production of a redacted portion of an investigation report prepared after a crew member was injured on a vessel. The defendant failed to justify the application of the privilege to the redacted portion of the report because the information was routinely available for public
inspection, and therefore was not confidential. Additionally, because the information was available for public viewing, the production of the report would not produce a "chilling effect" and discourage the defendant from engaging in critical self examination in the future.  

Although there are no favorable opinions directly on point, when examined in light of the original four Dowling factors and the subsequent case law involving other industries, a colorable argument can be made that preventable rulings and other reports from trucking companies’ accident review boards should be exempt from discovery by the critical self-analysis privilege. First, a post accident analysis and preventable/non-preventable determination is typically undertaken by a trucking company as a means of candidly and subjectively evaluating and analyzing the company and its drivers’ performance. Second, the public has a strong interest in preserving this type of information so trucking companies can make open and candid evaluations to assist in preventing similar accidents in the future. Third, the production of the preventable accident rulings and other post accident analysis in discovery could have a chilling affect on the openness and candidness of the companies’ evaluation. Finally, in most instances, the trucking companies intend that the information be kept confidential.

As a practical note, if a trucking company has not already done so, it should develop a written policy for the accident review board stating that the purpose is to evaluate accidents to improve company safety and prevent similar accidents and also state that the conclusions and findings of the board are to remain confidential. The company should also take steps to keep the findings and reports confidential. In addition, the board conducting post-accident reviews should ensure that the reports generated contain critical subjective analysis, findings and opinions and limit the pure objective facts contained in the report.

As mentioned above, the critical self-analysis privilege has primarily developed through federal common law. Other than in the medical peer review context, a limited number of state courts or legislatures have analyzed, much less adopted, the critical self-analysis privilege. The federal court cases that have addressed this privilege can provide a good starting point for analyzing whether the privilege might apply to a particular factual scenario. Of course, in most trucking accident cases it will be state law privileges that apply, even if the case is pending in federal court on diversity grounds. As with any legal principle, the trucking company’s counsel must thoroughly research the applicable state law on critical self-analysis and see if the state common law or state statutes have recognized the privilege in any situation. Counsel can then determine whether an argument can be made to extend the privilege to the preventable accident rulings or other reports issued by the trucking company’s accident review board.
A New Uncertainty: Center for Medicare and Medicaid Services Reporting Requirements Necessitate Diligence, Prognostication

On December 29, 2007, President, George W. Bush signed the Medicare/Medicaid and SCHIP Extension Act of 2007 into law, making it mandatory to report judgments, settlements and third party payments for covered medical care to the Center for Medicare and Medicaid Services (CMS). Under 42 U.S.C. § 1395y(b)(2)(a) the federal government cemented its interest in third party payments, liability settlements, workers’ compensation payments and the like for what it considers to be Medicare covered medical expenses by providing a statutory basis for what amounts to a “super-lien” on third-party payments which overlap healthcare covered by Medicare.

Under the Medicare Secondary Payor Act and the new SCHIP Extension Act, Medicare is given express authority to collect past payments and avoid future payouts or overpayments when there is a compensable injury or illness that is arguably simultaneously compensated by a third-party and Medicare. The effect of this Act is to make Medicare’s obligation to cover costs secondary to certain group health plans, such as employer sponsored health plans liability insurance (including self-insurance), no fault insurance (i.e., automobile insurance) and workers’ compensation. As a result, the third-party fiscal sources will be primarily responsible for paying covered medical expenses associated with a Medicare beneficiary’s injury or illness. By way of example, if a Medicare beneficiary suffers from an injury which resulting from alleged medical negligence and a third party payment is made (either through the mechanism of settlement/judgment or third party payment), Medicare may recoup or avoid medical expenses which it deems to have been covered by those primary payments.

IT’S NOT OVER ‘TILL IT’S OVER: MEDICARE’S AUTHORITY TO REACH BACK IN TIME

The Medicare Secondary Payor rules are triggered in certain circumstances when Medicare does not have the primary responsibility to cover medical expenses of any Medicare beneficiary and those expenses are, in Medicare’s opinion, contemplated by the aforementioned third party payments. Not insignificantly, Medicare is given specific authority to recoup past payments for covered illnesses or injuries if it determines that one of the above entities is responsible as the primary payor. Accordingly, if there is a settlement with a beneficiary that covers a Medicare covered medical expense, Medicare may seek to recoup payment and avoid future payments until the settlement funds designated for future care are exhausted. The goal obviously is to avoid double payments for a Medicare beneficiary (one payment from a third party payor and one payment from Medicare).

A NEW ERA OF MANDATORY REPORTING

As stated, the Medicare rules allow for the avoidance or recoupment of payments which Medicare deems to be secondary to another payor’s source. This right of recoupment or avoidance is not new; rather, Medicare has been a statutory secondary payor since 1965. What is unique (and potentially disastrous) about Section 111 of the Medicare/Medicaid and SCHIP Extension Act of 2007 (MMSCA) is that it makes mandatory the reporting of such payments by third party payors. Significantly, Section 111 applies equally to group health plans (GHP), as well liability insurers, self-insurers, no fault insurers and workers’ compensation plans. For group health plans, the reporting requirement became active on January 1, 2009. For other payment providers, the reporting requirement will go live on July 1, 2009. Importantly, while the reporting requirement likely applies to a plaintiff’s attorney, the duty does not extend to the plaintiff himself. Unavoidably, a potential payor must analyze matters on a case-by-case basis and determine if the claimant is or will become eligible for Medicare within the timeframe contemplated by a settlement or judgment.

Under the mandatory reporting requirement of Section 111 of the MMSCA, third party payors are required to provide CMS or its agents with a minimum of information so that Medicare may determine if its duty to cover Medicare covered medical
expenses is secondary to some primary payor. These reports are made on a quarterly basis. The institutions required to report are referred to as RREs (responsible reporting entities), and commonly make payments to a third party claimant or representatives regardless of their third party status.

Not insignificantly, CMS has precluded a reporting entity from limiting or transferring its reporting duties. However, it does allow for the reporting entity to contract with a third party to prepare and file the report with CMS or its agent. The responsibilities for RREs and attorneys under the Medicare Secondary Payor Act should be considered in tandem. As a group health care plan administrator or insurer, reports of payments to a Medicare beneficiary must be made electronically to CMS’ Coordination of Benefits Contractor (COBC). For non-group healthcare plan insurers, contact should be made with the coordination of benefits contractor immediately when an insured individual is also a Medicare beneficiary and a payment is planned.

For attorneys, including plaintiff attorneys and captive counsel, it is required that contact be made with a coordination of benefit contractor about a potential liability lawsuit and full disclosure as to the nature and extent of the injury is reported to CMS at the earliest possible stage. This effectively puts in affirmative responsibility on the attorneys to notify CMS of not only payments that have been made which will extend beyond July 1, 2009, but potential payments that could be made in the future. Also complicating the matter is when there is a potential for a claimant to become a Medicare beneficiary in the future and payments for that beneficiary may overlap with potential future CMS payments. This effectively requires the forward thinking of the insurer and/or the attorney to contemplate prospective changes in a plaintiff’s status and make arrangements for payment of future medical costs to inure to the interest of CMS. Based on this authority, CMS may attack prior settlements to recoup monies that were paid in the past which arguably overlap with past CMS payments. This may make past payment agreements potentially exposed to renegotiation.

PLANNING AHEAD: THE MEDICARE SET ASIDE

One mechanism provided by CMS to ensure future third party payments do not overlap Medicare payments is the Medicare Set Aside system (MSA) which allows for the primary payor (i.e., the insurance company) and CMS to coordinate the creation of an account for future payments which, once approved, will theoretically protect the third party payor from future action by CMS. Accordingly, the primary payor must confer with CMS and reach an accord as to the appropriate set aside (amount and system) for a given compensable injury, thereby binding the primary payor and ostensibly CMS. The set aside should be agreed to in writing for obvious reasons. However, in the event that the agency refuses to review the settlement structure and approve a set-aside, it is imperative that the payor take it upon itself to create its own set aside account for the beneficiary. Furthermore, it would be advisable to request and receive court approval of that set aside amount, pleading facts and circumstances consistent with the Medicare Secondary Payor Act.

In the event that a set aside arrangement is not approved by CMS, money for the settlement for future medical needs should be allocated into an interest bearing account or trust. Consequently, that money may be used before the claimant becomes a Medicare beneficiary if the settlement is based on life expectancy from the date of settlement. This scheme would necessarily contemplate payment for medical needs that arise before the claimant is Medicare eligible, but will have to be paid out of a separate fund. Money allocated for care after the claimant becomes Medicare eligible may only be used for Medicare covered medical expenses. Consequently, a review of the claimant’s medical needs will have to be compared to the schedule of compensable injuries and illnesses under the Medicare Act. Furthermore, plans for future medical services or ancillary services may not exceed the workers’ compensation fee schedule, absent contrary state law and CMS approval. By extension, an accounting must be made annually to CMS until the funds are depleted wherein Medicare would, as the secondary payor, take over payments. Furthermore, legal and administrative fees may not be paid from the set aside account and should be contemplated prior to the placement of funds in that account.
AVOIDING POTENTIAL PITFALLS: CONDUCTING DISCOVERY TO DETERMINE IF A PLAINTIFF IS MEDICARE ELIGIBLE

In liability cases, liability carriers must now report all settlements involving a Medicare beneficiary or Medicare eligible plaintiff. This requires diligence on behalf of the carrier or the attorneys to conduct discovery and determine the plaintiff’s eligibility. Though the agency offers no guidance for reviewing settlements of future payments, it is worth pointing out that the office of CMS is not bound by the structure of liability damages contained within a settlement agreement, verdict or contract. Therefore, if CMS determines that those payments designated only for non-medical expenses are, in fact, to be used for future medical needs, CMS may pierce that agreement, determine and seek recoupment and penalties accordingly. Furthermore, Section 111 allows for a direct right of action against claimant’s attorneys, consultants, and medical providers for failing to contemplate CMS’ interest and report pursuant to the aforementioned guidelines. This also allows for the recovery of monies owed, penalties up to the amount of the recoupment plus interest, as well as a $1,000.00 per day sanction for non-reporting (ostensibly beginning on the date the settlement was signed).

THE UNCERTAIN FUTURE: RECOMMENDATIONS

Though Medicare set aside arrangements has emerged as the standard funding mechanism to account for settlement money allocated to future medical expenses otherwise covered by Medicare, this mechanism is still in its infancy. Consequently, neither CMS nor the code of federal regulations defines any specific type of funding arrangement which would be acceptable under the SCHIP Extension Act of 2007.

Though this area of the law is still emerging, there are a few recommendations for personal injury attorneys and primary payors which may offer some assurance. When a plaintiff or claimant is eligible for Medicare or will become eligible in the foreseeable future, it is essential to create and fund some kind of Medicare set aside arrangement. This may include either a trust or account created in the interest of the beneficiary on the payor’s own or with the involvement of CMS, pending obvious approval mentioned above. If a MSA is to be created and funded with the proceeds of a settlement, the claimant’s attorney or plan administrator should obtain a Medicare set aside allocation report from a professional with experience in projecting future injury or illness related needs, Medicare approved expenses and acceptable costs for same under CMS guidelines. Settlement document should contain language which clearly implicates Medicare’s interest in the Medicare Secondary Payor statute, and articulate that the agency’s interests are being reasonably considered throughout the creation and funding of a MSA, account, and/or trust. It should also clearly state the amount in which the account will be funded and that the amount will represent the entire settlement allocation for future medical needs.

In terms of reporting, CMS requires that all information be submitted electronically to CMS coordination of benefits contractor. This entails responsible reporting entities (RRE) to register online through a secured website. Once registration is complete, the coordination of benefits contractor will begin working with the responsible recording entity to set up the date of reporting and response process. In the event the case only involves past medical payments, it is also important to communicate with the coordination of benefits contractor and request an accounting of Medicare’s past conditional payments to avoid post-settlement/verdict recoupment.

Nonetheless, before any of the above plans can be contemplated, the third-party payor must ensure that steps are taken to establish if and when a claimant may become Medicare eligible during or after the claim is settled. In-house counsel, adjusters and defense attorneys must make efforts during the early stages of a case to determine this fact through informal and formal discovery. If it is determined that the claimant is Medicare eligible and damages will encompasses Medicare-covered costs, correspondence should be sent to both CMS and Plaintiff’s counsel informing them of such. By taking these steps early, third-party payors may avoid the re-emergence of a case after its historical disposition.
While the future of the Medicare Secondary Payor Act and the Medicare/Medicaid and SCHIP Extension Act of 2007 is uncertain, Medicare suggests frequenting its informational website at https://www.cms.hhs.gov/mandatoryinsrep/. In order to facilitate this new regulation, all reporting entities should register with Medicare between May 1, 2009 and July 1, 2009 to avoid penalties. Self-insured entities should discuss these changes with their broker or TPA about how it must meet the reporting requirements.

In conclusion, the passage of the SCHIP Extension Act provides CMS with the power to both monitor and enforce its interests as to settlements of both workers’ compensation and liability matters. In order to avoid accountability, early determination of CMS’ interests will be necessary, as well as ongoing communication with the coordination of benefits contractor.
ARTICLES

e-Discovery: The Rules and Their Practical Applications for the Trucking Industry

At the end of 2006, the Federal Rules of Civil Procedure were amended to add specific dictates concerning electronic discovery. In reality, electronic discovery issues were being addressed long before that time. This portion of the program and this paper will address the Federal Rules relating to electronic discovery and the practical effect of those rules on the commercial transportation industry in the United States.

I. THE RULES

When examining the electronic discovery rules and seeking comments concerning them, I learned quickly that one of the finest compilations of the rules and their history was prepared by fellow ALFA lawyer Joe Swift of the Brown & James firm in St. Louis, Missouri for the recent ALFA International Products Liability Seminar. Rather than “reinvent the wheel,” Joe has provided me with permission to incorporate his earlier paper into this report. A complete copy of Joe’s paper, in its entirety, is attached for your review. It addresses, in detail, the history and requirements of the Federal Rules of Civil Procedure concerning electronic discovery. Likewise, it sets forth a number of practical considerations when dealing with clients concerning electronic discovery issues.

II. THE PRACTICAL EFFECTS OF THE RULES

Without question, strict compliance with the electronic discovery rules can be cumbersome and expensive. For several years, particularly after 2006, there have been many issues addressed by the courts affecting the trucking industry. In examining these issues, I determined that it would be most illustrative to ask a series of questions concerning electronic discovery issues and use case law to discuss each answer. A listing of issues is as follows.

A. Is it a defense for the producing party that the request for the electronic data is too cumbersome?

In Tulip Computers Int’l B.V. v. Dell Computer Corp., 2002 U.S. Dist. LEXIS 7792 (D. Del. 2002), the court considered a patent dispute involving a large computer manufacturer which became embroiled in a large e-discovery battle after the Defendant was not fully upfront about its electronic records search capabilities. In fact, the Defendant originally failed to produce a number of electronic documents by voicing cumulative and cumbersome objections. Yet the Court gave little weight to those objections when ordering the production of executive email records that matched certain search terms provided by the Plaintiff.

B. When do electronic documents need to be produced?

In CP Solutions PTE, Ltd. v. GE, 2006 U.S. Dist. LEXIS 27053 (D. Conn. 2006), the primary issue was a contractual dispute between the Plaintiff and the Defendant. A discovery dispute arose after the Defendant’s supplemental production of 301,539 pages of largely emails in response to the Plaintiff’s written discovery requests. “Plaintiff's motion to preclude [was] premised solely on the assumption that all of the 300,000+ documents should have been produced as part of the mandatory initial disclosure under Rule 26(a)(1).” Because the documents were ultimately produced during discovery, the Court denied the Plaintiff’s motion to preclude but ordered the Defendant to re-produce some of the documents in the manner kept in the ordinary course of business.

C. Who will bear the costs of the production of electronic discovery information that is sought in discovery?

Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568 (N.D. Ill. 2004) involved a case where the Plaintiffs filed sexual harassment and hostile work environment claims based on the receipt of allegedly pornographic emails. The Plaintiffs’ electronic discovery motion centered on cost issues, not production issues. Specifically, the Plaintiffs argued that the Defendant “should bear the costs of searching e-mail backup tapes to find documents containing pornographic terms and images.” After several discovery conferences and understandings, the Defendant eventually agreed to produce email backup tapes from eleven offices at an estimated cost of $249,000.00. Of course, the court first noted the “general presumption in discovery that
the responding party must bear the expense of complying with discovery requests.” Yet “if the responding party asks the court for an order protecting it from ‘undue burden or expense,’ the court may shift the costs to the non-producing party, rather than just disallowing the requested discovery.” Also noting that electronic discovery can often be more expensive, the court considered several factors before ordering the Defendant to “bear 25% and Plaintiffs 75% of the discovery costs of restoring the tapes, searching the data, and transferring it to an electronic data viewer.” The factors considered were as follows:

1) the likelihood of discovering critical information; 2) the availability of such information from other sources; 3) the amount in controversy as compared to the total cost of production; 4) the parties’ resources as compared to the total cost of production; 5) the relative ability of each party to control costs and its incentive to do so; 6) the importance of the issues at stake in the litigation; 7) the importance of the requested discovery in resolving the issues at stake in the litigation; and 8) the relative benefits to the parties of obtaining the information.

D. What analysis will be used in analyzing a request for a cost shifting of the burden of an electronic discovery production?

In Rowe Entertainment, Inc. v. William Morris Agency, Inc., 2005 F.R.D. 421 (S.D. N.Y. 2002), the plaintiffs, who were African American concert promoters, “contend[ed] that they [were] frozen out of the market for promoting events with white bands by the discriminatory and anti-competitive practices of the defendants.” Defendants moved for a protective order relieving them of the obligation of producing e-mails. The district court refused to totally absolve them of the obligation to produce e-mails but held that the plaintiffs shall bear the costs of production. However, the defendants were responsible for the costs associated with reviewing e-mails for privileged or confidential material. The court analyzed the issue of costs by utilizing a balancing approach that included consideration of the following factors:

1) the specificity of the discovery requests; 2) the likelihood of discovering critical information; 3) the availability of such information from other sources; 4) the purposes for which the responding party maintains the requested data; 5) the relative benefit to the parties of obtaining the information; 6) the total cost associated with production; 7) the relative ability of each party to control costs and its incentive to do so; and 8) the resources available to each party.

E. Will the court ever order production of the documents even if they are not reasonably accessible because of undue burden and cost, and will the court shift the burden of bearing that cost?

In Petcou v. Robinson Worldwide, Inc., 2008 U.S. dist. Lexis 13723 (N.D. Ga., Feb. 25, 2008), the Plaintiffs were seeking to obtain any e-mails of a “sexual or gender derogatory nature” sent between the defendant’s approximately 5,300 employees from 1998 to 2006. Defendant would have incurred a cost of approximately $79,300 just to retrieve the e-mails of one employee for a two-year period. The court determined that the deleted e-mails from the relevant period were “not reasonably accessible because of undue burden and cost.” In addition, the court noted that discovery of these e-mails may still be ordered “if the requesting party shows good cause, considering the limitations of Rule 26(b) (2)(C)” of the Federal Rules of Civil Procedure. However, the court found that “the burden or expense of the proposed discovery as a whole outweigh[ed] its likely benefit.”

F. Must the documents be produced as they are stored in the ordinary course of business?

In Bergersen v. Shelter Mut. Ins. Co., 2006 U.S. Dist. LEXIS 17452 (D. Kan. 2006), the Plaintiff brought an employment based lawsuit against the Defendant on claims of wrongful termination. Specifically, the Plaintiff claimed retaliation after he reported allegedly racist insurance practices to the Kansas Department of Insurance. During discovery, the Defendants “provided Plaintiff with three CDs containing a total of 7,253 documents which, according to Plaintiff, [were] not ‘kept in any perceivable sequential order.’” The Plaintiff then objected that said documents were not produced just as they had been stored in the ordinary course
of business. The court agreed, but denied the Plaintiff’s motion because he failed “to file and serve this motion to compel within the requisite 30 days of receiving Defendants’ discovery responses.”

G. Must the documents be produced in their native, electronic format?

In Superior Production Partnership v. Gordon Auto Body Parts Co., 2008 U.S. Lexis 975535 (S.D. Ohio, December 2, 2008), the Plaintiff alleged that, when it entered the market for manufacturing and selling replacement automobile hoods, the Defendant began selling its product below cost in an effort to drive the Plaintiff out of the market. There was a discovery dispute concerning the production of various documents in their native, electronic format. The court agreed with the Plaintiff’s argument that electronic documents are more conveniently stored and manipulated. Because there were no apparent obstacles to the production of the documents in their native, electronic format, the court directed the Defendant to produce them in their native format.

Although defendant has created CDs of its e-mail, I will not order them disclosed. Defendant’s attorneys had them made solely for work product purposes and they are over-inclusive. Counsel have provided affidavits reporting that the process of re-reviewing and then producing these internal CDs would consume extraordinary amounts of time and money. Under the circumstances presented here, I will not put defendant to this expense.

The upshot of all this is that plaintiff’s motion to compel is denied. Each side shall bear its own costs on this motion.

I. What must a party show to establish that a request for electronic discovery is unduly burdensome?

The case of Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649 (D. Kan. 2004), stemmed from a dispute between a film producer and distributor. Therein, an electronic discovery issue arose after the Plaintiff “attempted to provide electronic copies of the documents requested within its ‘knowledge or expertise’ of how to retrieve such documents from the company’s two computers.” Rather than fully comply, however, the Plaintiff “argue[d] that it d[id] not have the expertise to recover any further electronic documents and the court’s order requiring such production would be unduly burdensome.” Unfortunately for the Plaintiff, a “court cannot relieve a party of its discovery obligations based simply on that party’s unsupported assertion that such obligations are unduly burdensome.” A party “opposing electronic discovery on the grounds of undue burden must ‘provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure which would be required to produce the requested documents.’” It is apparent that a party does not provide sufficient explanation by simply asserting that it is without the knowledge or expertise to respond as requested; however, the court did not offer further guidance as to what constitutes a sufficient description of the burden, other than to say that the moving party must demonstrate the nature of the burden in terms of time, cost, and procedure.

J. Is it a defense that electronic documents sought in discovery were “deleted as a matter of course?”

In MasterCard Int’l, Inc. v. Moulton, 2004 U.S. Dist. LEXIS 11376 (S.D.N.Y. 2004), an intellectual property dispute involving copyright infringement, the Plaintiff sued after a pornographic website used MasterCard’s “Priceless” trademark. The Plaintiff “sought all e-mails received by Defendants that concern their website.” The Defendants then admitted, however, that they failed to retain any e-mails
during the period from May 2003 -- when Plaintiff filed this lawsuit -- until September 22, 2003. With that, the Plaintiff sought spoliation sanctions. Although many of these emails were deleted as a matter of course, the court held that the Defendants “plainly had an obligation to preserve the e-mails in question, since they were relevant to the pending litigation and had been requested.” As a spoliation remedy, the court allowed “inferences that the public was confused and that the MasterCard marks were diluted and tarnished.”

K. What is the appropriate consequence when the Defendant failed to retain documents after learning that the deletion of the documents was in violation of the court’s order?

In U.S. v. Philip Morris U.S.A., Inc., 327 F. Supp. 2d 21 (D.D.C. 2004), the Defendant failed to comply with a court order concerning retention of documents that could potentially be relevant to the lawsuit. Specifically, several individuals, who held some of the highest and most responsible positions within the company, continued to delete e-mails on a monthly basis for four months after learning that their deletion policy was not in compliance with the court’s order. The court, reasoning that it would be impossible to fashion an evidentiary sanction that could “accurately target the discovery violation,” imposed both evidentiary and monetary sanctions on the Defendant.

L. How extensively will the scope of the terms of the electronic document request be construed?

In Playboy Enters. v. Welles, 60 F. Supp. 2d 1050 (S.D. Cal. 1999), the Plaintiff set forth a number of discovery complaints during this trademark action brought by Playboy against former Playmate of the Year, Terri Welles. Specifically, the Plaintiff requested “access to Defendant’s hard drive to attempt to recover e-mails Defendant deleted which may be relevant for discovery in this action.” This early opinion on electronic discovery acknowledged that “[t]he inclusive description of ‘documents’ is revised to accord with changing technology.” As such, the Plaintiff’s request for documents included “information stored in electronic form.” That broad reading led the court to determine that information on the Defendant’s hard drive was discoverable.

M. Are cell phone photographs susceptible to production as electronic discovery?

In Smith v. Cafe Asia, 246 F.R.D. 19 (D.D.C. 2007), the issue stemmed from sexual orientation discrimination claims filed by Andrei Smith against former employer, Café Asia. An electronic discovery issue arose after the Defendant filed a motion to compel seeking the production of images allegedly stored on the Plaintiff’s cell phone. That cell phone allegedly contained sexual photos of the male genitalia that were shown to his co-workers at Café Asia. Although the court noted its ability to order the production of those images, it also noted the importance of weighing said production against the Plaintiff’s privacy rights. This led the court to allow one of the Defendant’s attorneys to inspect the photos, but stopped before ordering their outright production.

N. Are personal e-mails subject to production in a request for electronic data?

In National Econ. Research Assoc., Inc. v. Evans, 21 Mass. L. Rep. 337, (Mass. Super. Ct. 2006), the issue centered around e-mail communications between the Defendant and his private attorney. The Defendant used his company computer to correspond on a yahoo e-mail account. The Plaintiffs were able to retrieve the e-mails with the assistance of a computer forensic expert who was able to pull up a “screen shot” of the internet sites that the Defendant visited on his company computer. The Plaintiffs sought to compel production of these communications on the basis that the communications were not privileged because (1) they were not made in confidence and/or (2) privilege was waived. The court denied the Plaintiffs’ motion to compel because its policy manual did not put the Defendant on notice that his e-mail could be “overheard” when he was using a yahoo email account with password protection. Moreover, the court held that, for the communications to fall outside of the attorney-client privilege, the employer must have provided adequate notice in its policy manual as follows:
1. all such e-mails are stored on the hard disk of the company’s computer in a “screen shot” temporary file; and

2. the company expressly reserves the right to retrieve those temporary files and read them.

O. Even if Plaintiff issues a preservation letter before litigation begins, will the Defendant trucking company be sanctioned where it did not preserve QualComm data?

In Frey v. Gainey Transportation Services, Inc., 2006 U.S. Dist. LEXIS 59316 (N.D.Ga., 2006), the Plaintiff brought a claim for damages for her injuries received in an accident occurring on November 10, 2003. Ten days after the accident, Plaintiff’s counsel sent a letter to the safety director of the Defendant company demanding that certain documents be preserved. Many documents were produced, but the requested QualComm documents were not produced. The safety director testified that the documents were not preserved because he did not believe the incident was sufficiently serious based upon Plaintiff’s conduct after the accident. Plaintiff argued that the Defendant should be sanctioned. Defendant responded that the court should not apply a spoliation sanction because there was no evidence of bad faith. Further, the Defendant argued that there was no prejudice resulting from the failure to save QualComm records.

The court found that the satellite communications would not be able definitively to demonstrate the speed at which the truck was traveling at the time of the accident, and the Plaintiff admitted that the QualComm satellite tracking data was not crucial for the resolution of her claims. The court noted that 90 days after the accident, the QualComm data was automatically deleted from the system and that the safety director did not direct that the information be deleted immediately upon learning of the accident. Further, at the time the records were deleted in the normal course of business, no lawsuit had been filed; hence, the court could not determine that the safety director acted in bad faith. The court did find that the safety director had culpability because he made his own assessment that the accident was not serious enough to warrant preservation of the data. Of course, the court noted that the prudent course of action would have been to preserve the requested data, but it balanced the low level of prejudice with the conduct. Finally, the court noted that the legal system did not permit discovery to begin in a lawsuit until after a party had been served with a complaint and answer. As a result, it was difficult to allow a potential plaintiff to make an “end run” around the Federal Rules of Civil Procedure by filing a preemptive letter concerning spoliation of evidence. The court ultimately denied Plaintiff’s motion.

P. Can a trucking company rely upon the Federal Motor Carrier Safety Carrier regulations when it destroys hours of service records after six months despite receiving a request to preserve the documents?

In Ogin v. Ahmed, et al., 563 F.Supp.2d 539 (M.D. Penn., 2008), the case involved an accident between a commercial tractor-trailer and the Plaintiff’s vehicle. This matter was before the court on the Plaintiff’s motion for spoliation charges. The accident occurred on October 4, 2005, and on December 6, 2005, Plaintiff’s counsel sent a letter to the company requesting that it not destroy certain documents, particularly logs and vehicle positioning records. A lawsuit was subsequently filed on January 15, 2006, and the first request for production of documents was served on January 21, 2006. Defendants ultimately produced a driver’s log summary from September 5, 2005 until September 26, 2005. There were only eight days of actual driver’s logs that were retained. The Defendant carrier stated that the driver’s logs for September 4 through 26 were inadvertently purged in the ordinary course of business in compliance with the Federal Motor Carrier Safety Regulations. The court analyzed the conduct of the company based upon the Third Circuit’s four factor test in permitting whether to permit an adverse inference or jury instruction. The court considered whether the evidence was within the party’s control, whether it appeared that there had been actual suppression

1. all such e-mails are stored on the hard disk of the company’s computer in a “screen shot” temporary file; and

2. the company expressly reserves the right to retrieve those temporary files and read them.

O. Even if Plaintiff issues a preservation letter before litigation begins, will the Defendant trucking company be sanctioned where it did not preserve QualComm data?
deserved sanctions for destroying the ECM data. It asserted that because litigation was likely, Greyhound had a duty to preserve the ECM data. The court noted that the ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth and not the prospect of litigation. The court refused to grant sanctions.

** * * *

These are only a few examples of how courts around the country have treated practical issues involving e-discovery affecting litigants. Although many of these cases are not involving trucking companies, their principles are applicable. The law concerning electronic discovery is certainly developing rapidly, and we can expect more and more decisions on these issues. As members of an industry that have a great deal of electronic data, we have no choice but to become familiar with these rules and decisions and meet the challenges that they present.

Q. Will a trucking company receive sanctions if the ECM is downloaded before the case is filed?

In Greyhound Lines, Inc. v. Robert Wade, 485 F.3d 1032 (8th Cir. 2006), the court considered the effect of a company’s erasure of the electronic control module (ECM) data. This case originated in the United States District Court for the District of Nebraska and involved a truck that rear ended a Greyhound bus. The bus had an ECM that stored relevant information. Ten days after the accident, Greyhound removed the ECM and retrieved the information. The ECM indicated that a speed sensor failure caused the slow speed of the bus, and it then sent the ECM to the engine manufacturer, who erased the information before the case was filed. Defendant contended that Greyhound

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Note: The author also wishes to express thanks to Matthew Stephens and Christopher McCarty who assisted in the preparation of this paper.
e-Discovery: The Canadian Perspective

I. INTRODUCTION

Electronic discovery or “e-Discovery” refers to the discovery of electronically stored information (ESI). Discovery processes include the search, retrieval, preservation, exchange and production of documents from electronic sources. Such documents include e-mail, text messages, web pages, word processing files, computer databases, and any other information that is stored on a computer or other electronic device. The last decade has brought with it a noticeable shift towards a paperless society and legal counsel have been forced to re-examine issues related to the discovery process. It is estimated that 90% of all communications are originated electronically. As such, the production of ESI can be a vast, onerous and costly undertaking. The role of counsel is to think strategically about e-discovery. Specifically, counsel should assess what electronically stored information needs to be produced and how it should be produced. This paper will provide a general overview of the Canadian perspective on e-Discovery through a discussion of the Sedona Canada Principles and applicable jurisprudence. Lastly, practical suggestions to assist counsel and organizations in developing their own e-Discovery policies and best practices will be presented.

II. E-DISCOVERY AND THE TRANSPORTATION INDUSTRY

The use of technology in the trucking industry is increasing, and, the function of the majority of these new technologies is promoting road safety. Such devices include collision avoidance systems, electronic control modules and driver risk management systems. Collision avoidance systems use radar, laser or video to detect forward, rear and blind spot hazards and inform the driver of such hazards. Electronic control modules (also known as event data recorders) govern the mechanical operation of trucks. For example, the device can prevent the driver from exceeding a set speed. In addition, as the name implies, event data recorders, can record operator activity including speed, braking effort, engine throttle, seat belt use and hard brake events, information which can be used in reconstructing an accident and which can reveal unsafe driving practices.

In the United States, two major forces drive the push to equip trucks with electronic devices that encourage road safety. The Intelligent Vehicle Initiative (IVI) was introduced by the Department of Transportation in 1997. The Program has focused on accelerating the development and commercialization of vehicle-based driver assistance products that warn drivers of dangerous situations, recommend actions, and even assume partial control of vehicles to avoid collisions. In addition, the US Department of Defense continues to encourage the rapid deployment of driver assistance devices in the commercial transportation industry.

As the types of driver assistance devices available on the market increase, and the use of such devices becomes more prevalent, the effective and cost-efficient management of such ESI will become a priority for organizations in the industry. Accessing the data within driver assistance devices requires compatible software and a personal computer. However, some devices will only be accessible with the use of proprietary, manufacturer-specific equipment. It is important to note that the data within the device is not stored indefinitely. As such, in the event of an accident that ultimately leads to litigation, the automatic deletion of data could give rise to issues of preservation and spoliation. Therefore, it is imperative that organizations in the transportation industry proactively manage the ESI in their driver assistance devices. The discussion below will provide

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1 This paper includes, with permission, materials prepared by Robert Deane, Borden Ladner Gervais LLP (Vancouver) and Trish Morrison, Borden Ladner Gervais LLP (Calgary).
3 Susan Wortzman, The Sedona Canada Principles and Their Adoption in Canadian Courts, Insight Information, Electronically Stored Information (ESI) and Electronic Discovery (April 17-18, 2008) at 3.
4 David Outerbridge, Law & Technology Forum, Insight Information.
6 Ibid. at 1.
an overview of the issues related to e-discovery and offer practical strategies for addressing these concerns.

III. DEFINING THE SCOPE OF E-DISCOVERY

a. Canadian Guidelines and Best Practices

Unlike our neighbour to the South, e-Discovery in Canada is a relatively new and emerging issue within the practice of law. The Ontario based e-Discovery Subcommittee of the Discovery Task Force published the first Canadian e-Discovery guidelines in 2005. These guidelines provide recommendations for the preservation and production of relevant documents from electronic sources and how to improve the cost-effectiveness of the discovery process. Subsequently, the British Columbia courts released a Practice Direction with respect to e-Discovery and effective September 007, Practice Note 14: Guidelines for the Use of Technology in any Civil Litigation Matter was adopted in Alberta.

In January 2008, The Sedona Canada Working Group 7 (WG7) published the Sedona Canada Principles. Modelled after the Sedona Principles: Best Practices, Recommendations and Principles for addressing Electronic Document Production (US), The Sedona Canada Principles, consists of 12 Principles, with commentary and are as follows:

1. Electronically stored data is discoverable.

2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court’s adjudication in a given case; and (iv) the cost, burden and delay that may be imposed on the parties to deal with electronically stored information.

3. As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.

4. Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.

5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

7. A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and process such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content, and organization of information to be exchanged in any required list of documents as part of the discovery process.

9. During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

10. During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place,
while appreciating the impact any decision may have in related actions in other forums.

11. Sanctions should be considered by the court where a party will be materially prejudiced by another party’s failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

12. The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

Currently, the Sedona Canada Principles is the only Canadian national guideline with respect to the management and disclosure of ESI. As such, it has been widely cited by Canadian courts and has been generally accepted as an appropriate approach to managing e-Discovery. However, in order to determine issues such as whether ESI is a “document” which must be produced, or the required scope of disclosure, reference must still be made to the applicable Rules of Court, Rules of Civil Procedure and jurisprudence; these issues are explored below.

b. Defining the Electronic Document

Electronic documents are “documents” within the meaning of the various Rules of Court and Rules of Civil Procedure throughout Canada. Many provinces explicitly define “document” in their rules and in almost every case, the definition includes either “electronic” documents, or documents or records “in any format”, which ostensibly includes electronic documents. Generally, an electronic document can be defined as information that “is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device.” It includes, but is not limited to, e-mails, text messages, word processing files and databases.

Because electronic documents themselves constitute “documents” within the meaning of the Rules of Court, discovery of electronic documents cannot generally be resisted on the ground that hardcopy versions have already been produced. Moreover, ESI may contain information that is relevant and not otherwise visible in a paper format, for example electronic documents generally contain metadata which can identify the author of the document, any reviewers of the document, date and time of creation and other like information which, depending on the nature of the claim could be both relevant and material.

This issue arose in Hummingbird v. Mustafa12, where the Respondents/Plaintiffs opposed an application to produce a disk image of their hard drive on the basis that the metadata was not relevant, that certain documents on the hard drive were not relevant, and that the relevant metadata had already been produced. The court rejected the Respondents’ position. Furthermore, the court also held that without evidence of an agreement between the parties conceding the authenticity of the documents located on the hard drive, it could not accept that the metadata was not relevant. The court ordered production of the disk image, stating that once the respondent determined that a particular document is relevant, the metadata for that document should be produced, as the metadata is “akin to a ‘time/date stamp’ affixed to a letter or the “fax header” that indicates the time/date of faxing and receipt”.13 It is for these reasons, among others, that the production of electronic documents in electronic format is assuming such critical proportions.

c. Rules of Disclosure

Documentary discovery is a liberal exercise. For example, in British Columbia Rule 26(1) of the British Columbia Supreme Court Rules14 provides that a party to the litigation has the right to demand all documents “relating to any matter in question in the action”. This approach is mirrored by Rule

12 2007 CanLII 39610 (ON S.C.) (“Hummingbird”).
13 Hummingbird, supra note 12.
30.02(1) Ontario Rules of Civil Procedure. The Alberta Rules of Court take a narrower approach to document disclosure, requiring that documents be both relevant and material to be producible.17

Madame Justice Conrad, in speaking for the Alberta Court of Appeal in Innovative Health Group Inc. v. Calgary Health Region, succinctly addressed the effect of society’s ever-increasing use of technology on the already expansive discovery process. At paragraph 23 of the decision she held:

The widespread use of computers for record keeping, communication and information storage has vastly expanded the breadth of potential discovery in litigation. Although technology is helpful in the sense that it makes fuller disclosure possible, it also creates an unfortunate paradox. The cost of sorting and producing all the relevant information in a party’s possession may put litigation beyond the economic ability of a vast number of litigants.

In recognition of the unreasonable burdens, financial

or otherwise, that may be placed on litigants, courts have begun to advocate for proportionality in disclosure. The principle of proportionality is similarly paralleled in the Sedona Canada Principles.

Principle 2 of the Sedona Canada Principles provides:

In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court’s adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information. (see also Page 4, infra)

In Spar Aerospace Ltd. v. Aerowerks Engineering Inc., Madam Justice Veit held that the principle of proportionality required a consideration of not only whether a document was relevant and material, but also whether a document was reasonably accessible.20 In determining whether a document is reasonably accessible, one would consider the costs, burden and delay that would be imposed on the party making production. In addition, the size and nature of the claim, along with the capabilities of the organization to make such disclosure, should also be considered. Lastly, Veit J. held that the party seeking to be relieved of production would bear

the onus of satisfying the court that in the given circumstances, production is otherwise unreasonable.21

Generally, the breadth of discovery is broad and far-reaching. However, in light of the challenges presented by the discovery of ESI, the obligation of discovery is to be tempered by the principle of proportionality.22

IV. MAKING DISCLOSURE

Every organization needs to have policies that address the preservation, identification, collection and production of ESI. Such policies will enable the organization to minimize the costs associated with e-Discovery and avoid costly mistakes.

a. Records Management & Retention Policy

Records management and retention policies should address the preservation, identification, and collection of information within the organization. Generally speaking, a proper document management plan has two objectives: to retain only the bare minimum necessary to comply with pre-determined retention periods; and, to preserve documents that may assist with the defense in the event of a lawsuit. In addition,

15 R.R.O. Reg 194/2008. Specifically, Rule 30.02 provides that: (1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. (2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.
17 Ibid at 186.1.
18 2008 ABCA 219.
19 2007 ABQB 543 (“Spar Aerospace Ltd.”).
20 Ibid at para. 57.
21 Ibid at para. 58.
22 Spar Aerospace Ltd., supra note 17 at para. 57.
23 The retention and management of electronic documents is also the subject of a separate September 2005 report by one of the Sedona Conference’s other working groups, The Sedona Conference Guidelines for Managing Information and Records in the Electronic Age: http://www.thesedonaconference.org/dlForm?did=TSG9_05.pdf.
a comprehensive and enforced records management and retention policy may protect an organization from the allegation that evidence was spoliated.

1. Document Preservation

Parties to (potential) litigation have a duty to preserve potentially relevant ESI; where such information is intentionally or negligently destroyed or “spoliated”, it may give rise to serious consequences, including costs.

Principle 11 of the Sedona Canada Principles provides:

Sanctions should be considered by the court where a party will be materially prejudiced by another party’s failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless. (See also Page 4.)

This principle is modelled on the US “safe-harbour” rules of procedure, which provide that where a corporation has a document retention policy that includes a destruction date in the normal course of business, in subsequent litigation, if the corporation can show that it acted in accordance with that policy, sanctions will rarely follow. In Canada, the law is less clear on whether the destruction of relevant evidence in the normal course of business would constitute spoliation. However, there are some indications that Canada will likely follow the U.S. model.

A recent decision of the Alberta Court of Appeal, McDougall v. Black & Decker Canada Inc., confirmed the definition of spoliation as the intentional destruction of relevant evidence when litigation exists or is pending. In her reasons, Madame Justice Conrad stressed that spoliation should not be confused with the unintentional destruction of evidence. Furthermore, in order to constitute spoliation, a party would have to have intentionally destroyed the evidence for the purposes of gaining an advantage in the litigation.

A records management and retention policy does not obviate the need for the proactive management of ESI. Specifically, once litigation can be reasonably anticipated, an organization has a duty to preserve all potentially relevant ESI in addition to or in spite of a records management and retention policy. Guidance can be had from certain U.S. decisions.

In Zubulake v. UBS Warburg LLC, Scheindlin J. outlined the general principles regarding the duty to preserve electronic documents, including the following:

(a) The duty to preserve arises when litigation is reasonably anticipated.

(b) Each party must suspend its normal document retention policy and establish a “litigation hold” over relevant electronic records.

(c) A litigation hold should extend to categories of electronic.

(d) All relevant electronic documents must be retained, even if they come into existence after the action is commenced, including (depending on the circumstances), backup tapes, mirror of computer systems at the operative time, and subsequently created electronic documents.

In the same decision, Scheindlin J. set forth some specific principles applicable to backup tapes, namely:

(a) If backup tapes are used for active retrieval purposes, the tapes should be preserved.

(b) If backup tapes are not used for active retrieval purposes but can be used to identify documents of key players, the tapes should be preserved.

(c) Other backup tapes should continue to be subject to the routine document retention policy, including recycling as appropriate.

Because Canadian law on sanctions as a result of the failure to preserve documents is in its infancy, reference must be made to American decisions for guidance.

In Qualcomm Inc. v. Broadcom Corp., Qualcomm failed to produce over 46,000 e-mails.

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and committed other discovery misconduct. The court concluded that Qualcomm intentionally withheld the decisive documents from its opponent in an effort to win the case and gain a strategic business advantage. As a result, Qualcomm was ordered to pay costs of $8.5 million for its monumental and intentional violations. Moreover, many of the lawyers were reported to and faced sanctions from their governing bodies.

Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.,27 involved allegations of accounting fraud and conspiracy. The court ordered Morgan Stanley to restore its back-up tapes and produce a series of relevant e-mail. Morgan Stanley failed to comply with the order and its failure caused evidence to become either lost or destroyed and resulted in severe consequences. Not only did the trial judge instruct the jury to draw an inference adverse to Morgan Stanley, she sanctioned Morgan Stanley by requiring it to disprove that it was aware of the fraud and that it had conspired with the third party. Furthermore, at trial, Morgan Stanley was ordered to pay damages of more than $1.4 billion.

While Canadian jurisprudence regarding the obligation to preserve electronic documents is not well established, there are signs that similar to our American counterparts, the obligation to preserve ESI could be very broad.28

b. E-Discovery or Litigation Readiness Plan

Ensuring the preservation of relevant ESI is only one component to managing e-Discovery. In addition, counsel and organization should be able to quickly and confidently act when faced with a reasonable prospect of litigation.

Principle 3 of the Sedona Canada Principles provides:

As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information. (See also Page 4)

In addition, Principle 4 of the Sedona Canada Principles recommends that:

Counsel and parties should meet and confer as soon as practicable and on an ongoing basis, regarding the identification, preservation, collection review and production of electronically stored information. (See also Page 4)

The most critical step for any organization is to create and implement a comprehensive litigation readiness plan. Taking such a proactive step will mitigate the time, internal resources and costs of E-Discovery. Critical to such a plan is knowing what ESI you have, who has it, what form it is in, whether or not it is accessible, and, if so, what the organization proposes to do in order to produce it.

1. Litigation Hold

The use of a litigation hold is one way in which to ensure that relevant ESI is not intentionally or negligently destroyed. A litigation hold is an internal order to suspend all data destruction activities. The Sedona Conference (US) has published a paper on the topic entitled, The Sedona Conference – Commentary on Legal Hold (US)29 which provides recommendations regarding litigation hold best practices, including that all litigation holds must be in writing, clearly identify individuals who are most likely to have the relevant information, clearly communicate preservation notice to those persons, define what is to be preserved and how the preservation is to be undertaken.

Generally, key steps in implementing a litigation hold include the following:

1. Inform key people that a litigation hold is in place.

2. Suspend destruction policies. Address the recycling of backup tapes and the automatic purging of e-mail files.

3. Designate a file path on the server for data relevant to the litigation.

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27 2005 WL 679071 (Fla.15th Jud.Cir.) (March 1, 2005).
28 See CIBC World Markets Inc. v. Genuity.
29 The Sedona Conference Commentary on Legal Holds, The Trigger & The Process, online: http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf
4. Document what you do to preserve the litigation hold.

An important consideration will always be the reasonableness of the steps taken. Flexibility will be required if it is simply too costly to produce documents. To date, it appears that the Canadian courts are taking a practical and fair approach to electronic discovery. Therefore, if parties take the appropriate steps to ensure that they retain electronic documentation and can show that they have taken reasonable steps to search their records to produce the relevant records, the courts do not appear to impose onerous obligations for additional production.

V. CONCLUSION

e-Discovery continues to be an emerging and evolving issue in Canada. However, the Sedona Canada Principles and various provincial practice directives, Rules of Court and Rules of Civil Procedure, provide practical guidelines and instruction on how to best manage e-Discovery within an organization and in the course of litigation. While Canadian case law is evolving, the available jurisprudence offers valuable insight into the future of e-Discovery in Canada. One thing, however, is clear: the efficient and cost effective management of e-Discovery will require the prepared, dedicated and on-going efforts of both legal counsel and organizations.

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-The Editors

Defending the Dangerous Trucking Case
Trial Strategies to Short Circuit the Plaintiff®

INTRODUCTION

This article attempts to furnish a blueprint for successfully handling the defense of a motor carrier in a catastrophic truck or bus case. Generally, a “catastrophic case” can be defined in a wide variety of ways but would certainly include a case in which the plaintiff(s) died or had any of a variety of “catastrophic” injuries, including, among others, severe closed head injury, amputation of one or more limbs, paraplegia or quadriplegia. A separate category of catastrophic injuries would be those in which there is a realistic opportunity for plaintiff’s counsel to obtain an award of punitive damages. Cases which would fall into the catastrophic category via plaintiff’s viable claim for punitive damages typically involve injuries which are at least severe to very severe. Cases in which the driver is arrested at the scene or shortly thereafter constitute a significant subset of catastrophic cases.

Preparation prior to an accident and an immediate thorough investigation are key elements in the defense of catastrophic cases. Articles which deal in detail with these topics are included in this book and are essential reading for those who are handling catastrophic cases for any party. During the early phases of the litigation process defense counsel must lay the foundation for a comprehensive pretrial motion practice. It is our experience that motions in limine which limit the admissibility of irrelevant evidence are the single best trial tool for counsel for motor carriers. Catastrophic cases can only be brought to a successful conclusion by settlement or trial if extraneous material is filtered out pretrial and as early in the process as is feasible.

The plaintiff’s case in a catastrophic trucking or bus action will be based on various degrees of outrage and natural sympathy, or both. The only successful way to defend cases of this kind is through a comprehensive operating plan by the motor carrier and equally comprehensive investigation utilizing all of the skills of specialists in motor carrier litigation. To win catastrophic trucking cases, motor carriers must have safe and efficient operations. Motor carriers who combine these characteristics with immediate and comprehensive investigation of all major accidents will have a decided advantage in defending catastrophic cases and over time will have fewer cases to defend.

The entire trucking industry benefits when a motor carrier culls mediocre or slipshod drivers from their personnel roles. Comprehensive reporting of the problems of mediocre drivers to future potential employers is also an important strategy for avoidance of catastrophic injuries for diligent motor carriers and of course the motoring public as well. While you may have to defend an occasional case by a dismissed driver, juries are simply not going to be sympathetic to those individuals as long as you are thorough in your evaluation and discipline process. While defense of such cases can be expensive, it is not as expensive to a company as the defense of severe or catastrophic cases that arise from accidents caused by mediocre drivers.

OPERATIONS

Preparation for the defense of a catastrophic trucking case involves an analysis of several factors of a motor carrier’s operations. While good drivers occasionally have catastrophic accidents, over time they have them far less often than mediocre and unsafe drivers.

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1 In the interest of full disclosure, the authors routinely represent motor carriers and their drivers, and this article is intentionally written from that perspective at the request of the Editor.
Experienced defense counsel does not have the ability to run a well-oiled motor carrier. Unfortunately, we get to see the overlooked aspects of motor carrier operations. The focus of plaintiff’s counsel in catastrophic cases, especially where they are attempting to establish a case for punitive damages and/or a cause of action against the company directly, will focus heavily on operations. The hiring and retention of drivers will be scrutinized in detail.

Any arguable breach of the federal motor vehicle safety standards by the driver or the company will receive tremendous scrutiny. As the mileage of truck and bus drivers is extremely high and American drivers are increasingly aggressive about pulling in front of trucks, regardless of the amount of room available, truck and bus drivers will have accidents. Accordingly, in your operations you must spend money on safety and regularly audit logs, especially with drivers who are new to your company. These operational steps are extremely important to the successful defense of catastrophic truck and bus cases.

**DOCUMENT RETENTION**

You must have a comprehensive document retention policy to significantly increase your chances of successfully defending a catastrophic case. The successful defense of many serious and catastrophic trucking cases is severely hampered by slipshod document retention. Do not fall into the trap of assuming that the appropriate retention of documents jeopardizes the defense of trucking cases. Our experience indicates that an intelligently designed document retention policy assists in the defense of trucking cases far more often than it hurts. A comprehensive and thoughtful document retention policy clearly takes into account the flood of paper and electronic documents that all businesses must retain under the federal regulations and need to run an efficient operation.

Juries and judges understand that many documents have no significance whatsoever for any purpose, including litigation, after a certain period of time. On the other hand, as soon as any “accident” that is reportable under the DOT occurs, failure to keep certain operational documents involving the driver, the vehicle, and the accident itself will lead to a charge of spoliation which could be fatal to the defense of any case and particularly catastrophic cases.

Nothing is more frustrating to defense counsel who are trying to defend a case that can be won than the unnecessarily aggressive destruction of information which can fairly be said to be the kind of information that a prudent company realizes should be preserved in the event that litigation arises so that both sides in the litigation will have a fair opportunity for the review and analysis of that information. If your hiring and retention policies for drivers, safety procedures, and maintenance are up to snuff, such documents will not likely damage the defense of the case.

The retention of documents not only will shield you from shrieks of “spoliation of evidence,” they are often essential to the defense of cases in the affirmative sense. Some companies seem to disregard the importance of the ability to establish the “good company” defense. When claims are made that the company was negligent in its hiring and firing, an excellent paper trail is one of the best of all possible defenses of the company. If that paper trail is destroyed or incomplete through poorly considered document retention, you are tying your defense counsel’s hands behind their back in many cases.

**BE PREPARED**

An essential part of the preparation by any motor carrier for the defense of a catastrophic case is to have in place a system for identifying significant cases immediately. In accidents
on the road today, one of the major problems for defense is that skid marks, which often provide tremendous detail about how an accident occurred, are much fainter than in the past due to the widespread use of ABS brake systems in the current commercial truck and bus fleet. Accordingly, it is important to gather that information as soon after an accident as is feasible. Comprehensive scene photos which place the photos (if any) of officials in context are essential, particularly as many accidents giving rise to catastrophic cases occur at night and are very difficult to photograph. The best way for a jury to completely understand the actions of a truck or bus driver are to assist them with comprehensive photos and surveys of the physical evidence at the scene. If this information is not gathered contemporaneously to the accident, it will be difficult for defense counsel to “paint the picture” for the jury. To gather this information, highly skilled individuals in the field of accident reconstruction need to be available to the motor carrier to do on-scene investigations as soon as possible after an accident in all serious “accidents.”

Many motor carriers have on call a Ready Response Team of in-house personnel who can be called by dispatchers whenever a serious accident occurs involving a driver for the motor carrier. An essential part of this system is to have identified before an accident occurs lawyers throughout the area served by the motor carrier who can coordinate the necessary investigation. Several groups of defense counsel throughout the country specialize in litigation of this kind. Those attorneys are prepared to go to an accident scene on short notice and locate for the motor carrier specialists in accident scene investigation such as accident reconstructionists, biomechanists, and experts in the mechanics of trucks and trailers.

It is our experience that the efforts of investigators of catastrophic cases should be coordinated by experienced defense counsel. There are many adjusters and private investigators who specialize in truck accidents and are highly qualified. Motor carriers should be aware of the identity of these high skilled professionals prior to the occurrence of a catastrophic accident. Motor carriers need to understand the direct relationship between the quality of a good defense of a catastrophic case and the quality of the immediate investigation of these accidents. Trial counsel would be severely handicapped if a motor carrier has not initiated an immediate comprehensive investigation of a catastrophic accident. Counsel for motor carriers should consider conjuring the image of the lane “darting” impatient driver. This image is supported by scholarly studies and is at least as familiar to jurors as the “rogue” truck driver. Many police officers appear somewhat prejudiced against truck drivers, and you should consider using this theme in their cross-examination.

4 Articles on the investigation of catastrophic truck accidents are found elsewhere in this book.

MOTIONS IN LIMINE AND TRIAL THEMES

TRIAL THEMES

Numerous articles exist on the need to counter the concerted efforts of adverse counsel to demonize truck drivers and the trucking industry in general. In motor carrier litigation, adverse counsel often conjure images of the “rogue” truck driver in depositions and at trial. One important trial theme in catastrophic injuries certainly needs to be the humanization of truck drivers, the motor carrier and the trucking and busing industry in general. The posture of many catastrophic truck and bus cases allows ample room for the development of the trial theme of the “good company defense.” If appropriate, counsel for the defense in catastrophic cases should emphasize, for example, the number of applications that are received by a particular motor carrier to fill each open position. We have experienced numerous catastrophic cases against companies who have as many as 80 to 100 applicants for each job they fill and have very low turn over for this industry. The fact is that drivers who have hundreds of thousands of miles of safe driving can and do become involved in catastrophic cases.

One of the reasons for this phenomenon is the increasingly aggressive driving of cars on the nation’s interstates. We have all seen aggressive lane changing by cars in interstate traffic as they jump into perceived “gaps” in front of tractor trailer rigs.
and buses. The drivers of the commercial vehicles leaves these gaps because of their understanding of the greater stopping distance they need due to their weight. An increasing number of drivers of cars simply ignore the laws of physics and make bad lane changes just as traffic is decelerating in an attempt to get into a lane which appears to be moving faster than their own lane.

This phenomenon has been documented in a recent article “Identifying Unsafe Driver Actions that Lead to Fatal Car-Truck Crashes.” Lidia P. Kostyniuk, Frederick M. Streff, Jennifer Zakrjasek, Identifying Unsafe Driver Actions that Lead to Fatal Car-Truck Crashes, Prepared for AAA Foundation for Traffic Safety, (Washington, DC, April, 2002). As of March 2006 this article was available in its entirety at the web site of the AAA Foundation for Traffic Safety. Accident reconstructionists should be familiar with this article. Research of this kind can be used as a theme in an appropriate case to counter the demonization of motor carriers and their drivers.

This study’s examination of Fatality Analysis Report System records for two vehicle fatal crashes from 1995 to 1998 revealed to UMTRI’s researchers that driver factors related to unsafe driver actions were much more likely to be recorded for car drivers than truck drivers. In addition, during this period the FARS Data showed that unsafe lane changes by car drivers were a major contributor to fatal accidents by drivers of cars in car/truck accidents.

A second trial theme that counsel for motor carriers and their drivers should consider is the “rush to judgment.” Juries engage in this, and if the sloppy science that we see in expert depositions and the courtroom is any indication, so do adverse experts.

In 1975 Baruch Fischhoff published an article on a phenomenon he called “hindsight bias.” Essentially he determined in a study that groups are twice as likely to believe a result or outcome is foreordained (or arguably “reasonably foreseeable”) if they know the outcome. Thus juries who are emotionally upset about catastrophic injuries of sympathetic plaintiffs also have a psychological predisposition to believe that your driver should have anticipated exactly the accident that did in fact occur and therefore must have been negligent. One of Fischhoff’s principal conclusions was: “Those who know how things turned out have trouble believing others did not see what was coming.”


5 He “… is Howard Heinz University Professor, in the Department of Social and Decision Sciences and Department of Engineering and Public Policy at Carnegie Mellon University. He holds a B.S. in mathematics and psychology from Wayne State University and a MA and Ph.D. in psychology from the Hebrew University of Jerusalem. He is a member of the Institute of Medicine of the National Academy of Sciences, and has served on some two dozen NAS/NRC/IOM committees. He is a Fellow of the American Psychological Association and recipient of its Early Career Awards for Distinguished Scientific Contribution to Psychology and for Contributions to Psychology in the Public Interest. He is a Fellow of the Society for Risk Analysis and recipient of its Distinguished Achievement Award. Dr. Fischhoff’s research includes risk perception and communication, risk management, adolescent decision making, medical informed consent, and environmental protection.” See biography section of the American Psychology Association web site.

6 Fischhoff, B., The Silly Certainty of Hindsight, Psychology Today, Vol. 8, No. 11, April 1975, pp. 70-76.

Counsel should use this perspective throughout the investigation of the case. The secondary literature cited by Dilich and others offers many ideas for counsel to use in voir dire, opening statement, cross examination and closing in trials. A persistent theme of counsel for motor carriers should be to ask the jury (particularly in *voir dire*) to gird their loins for the assault that they will receive from adverse counsel who will ask them repeatedly throughout a trial to engage in the use of hindsight bias. You should consider simply telling the jury that they are in effect hard wired to engage in this kind of reasoning and that they must make a repeated conscious effort to avoid it and to decide the case objectively.

We tried a case about 20 years ago where a corollary of this approach was used extremely effectively against us by Plaintiff’s counsel. We had two superb experts who were both extremely knowledgeable and good looking. In *voir dire* Plaintiff’s counsel told the jury in effect the following: Mr. A and Mr. B are engineers who will testify for the defendant. They are tall, handsome and blue eyed. Mr. A is very poised and extremely smooth as you might expect from a fellow who lives in California. Mr. B is the really interesting fellow however. He can draw any part of a machine as well as the best artist, he has a pack of 3 x 5 cards in his shirt pocket he can fold to look like the part, he has a head of distinguished silver hair and he will make you think that black is white. When Engineer B went on the witness stand the jury knew from his silver hair that he would ask them to believe that black was white. Everyone in the jury box crossed their arms and leaned back. The first question on direct was “Engineer B is black really white?”

Armed with the analysis which Fishhoff, Dilich and others have done of the phenomenon of hindsight bias, counsel for motor carriers should aggressively attack the pseudo science of accident reconstructionists and others who improperly attempt advocacy with a cloak of selective filtering of physical evidence.

**MOTIONS IN LIMINE**

Motions in limine are, in our experience, the best tool for counsel for truck and bus companies in the successful defense of catastrophic cases. There are many types of motions in limine which appear frequently in these cases. Several that occur with high frequency in all trucking cases and simply occur more frequently in catastrophic cases are the demonization of trucking companies, the admissibility of irrelevant driver logs, the exclusion of irrelevant black box data, and punitive damages. A frequent tactic in the demonization of trucking companies involve violations of “The Golden Rule” in *voir dire*, opening statement, and closing statement. Virtually all jurisdictions have a variant of The Golden Rule. In situations where an adverse attorney (this group often includes a co-defendant) as clearly developing this argument in pretrial procedures or where counsel is known to regularly violate The Golden Rule, we often file a motion in limine on the subject.
As counsel who utilizes the tactic often violates orders of this kind in limine, the principle benefit is that it may be possible to get a strong admonition. Most judges will not, even where their order has been violated, declare mistrial.

Motions in limine are also necessary concerning driver’s logs, particularly where there is no evidence of a driver working more than the appropriate number of hours in the two week period prior to the accident. Plaintiff’s counsel nevertheless usually are successful in discovering driver’s logs for periods as long as three months, and they will attempt to use any logs that show the driver exceeded the appropriate number of hours on the theory that they either lied about it in the two weeks prior or as evidence of negligence on the part of a motor carrier in retaining such a driver. These motions are so fact specific that we do not attempt to cover them in detail here.

We routinely produce data from engine control modules (ECM) on board the commercial vehicle in discovery and litigation. The ECM is commonly referred to as a “black box.” This data should certainly be preserved in all serious accidents, and many motor carriers routinely download it in any “accident” as defined by 49 CFR §390.5. This data often includes speed information since the last time the ECM was downloaded and reset. Often this period can be 20,000 miles or indeed much more. The frequency with which motor carriers reset the “trip” function of the ECM varies widely as this data is used by the motor carriers primarily for maintenance only. The fact that the truck at some point during this period was going 85 miles an hour is simply not relevant to any particular time or place, including the accident which preceded the download of the ECM data. Usually there is nothing about the ECM data that indicates when in the period or “trip” the speeding occurred. Thus, data of this kind can be treated much like a recall letter in that it can be highly confusing and prejudicial, requires an explanation in detail, and has little relevance.

Motions in limine in any case that has even a chance of going to the jury on the subject of punitive damages are essential in all catastrophic cases. As the evidence marshaled for punitive damages is often extremely sketchy, the typical goal is to knock this claim out completely by crafting a motion in limine on this subject. In cases where there is a colorable case for punitive damages, the motion in limine concerning the claim(s) of punitive damages against a motor carrier or driver for a motor carrier should also attempt to limit those damages against the motor carrier to a consideration of profits only from the jurisdiction in question.

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8 ECM data capacity varies among engine manufacturers and owners can request that same data be stored and not others. The trend appears to be the storage of an increasing amount of data. Generally, it is best to have the data download done.

9 The admissibility of recall letters is analogous to many of the issues raised here because (a) the field is heavily regulated; (b) recall letters are not truly admissions; (c) it takes a minitrial to explain the process sufficiently to put it in context; and (d) the admission of a recall letter is extremely prejudicial without putting it in context (if it is admissible at all).

The U. S. Supreme Court has held on two occasions that a state cannot impose punitive damages on a defendant for acts which occurred outside its jurisdiction, even if those acts may be unlawful or grossly negligent where they occurred. First in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) and more recently in State Farm v. Campbell which was decided by the United States Supreme Court on April 7, 2003. 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). State Farm strongly reaffirms the holding that profits under consideration in gauging punitive damages are limited to the jurisdiction of the case. 155 L.Ed.2d at 603. The Court also emphasized that the jury must be instructed that it may not use evidence of out-of-state conduct to punish a defendant for action in the jurisdiction where it occurred. Id. at 604.

Motions in limine concerning punitive damages should also attempt to limit the amount of punitive damages to an amount equal to the compensatory damages awarded. The Court in State Farm reiterated its pronouncement in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) that the amount of punitive damages awarded must be “reasonable and proportionate” to the amount of harm to the plaintiff and the amount of compensatory damages awarded. The Court declared that a constitutionally permissible ratio will seldom exceed single digits, or a nine to one ratio. 155 L.Ed.2d at 606. The State Farm Court recognized that in some cases
-- for example, cases in which the defendant’s conduct is particularly egregious and where the plaintiff’s damages are small – a ratio of more than single digits may be permissible. On the other hand, when compensatory damages are substantial, then a lesser ratio of perhaps only one to one may be the most that due process will permit.\(^\text{10}\) For a case in which an award was reduced to a ratio of 1 to 1 see Williams v. Con Agra Poultry Co. 378 F.3d 790, 799 (8th Cir. 2004).

**PREVENTABLE ACCIDENT DETERMINATIONS**

A key piece of evidence plaintiffs will want to introduce is the findings of a safety review board.\(^\text{11}\) Safety review boards and/or safety directors in the motor carrier industry conduct a specialized inquiry known as a preventable accident ruling. The purpose of the board’s investigation is to determine whether a given accident was “preventable.” The board evaluates a driver’s conduct far more stringently than would a jury instructed to apply the negligence standard of “ordinary care.” Indeed, some companies express the objective that all accidents are “preventable” to some degree unless the vehicle is legally parked. A determination that follows such a standard sheds no light upon the legal determination of liability for negligence.

These companies will scrutinize accidents to isolate their root cause in an effort to determine how the driver might have avoided the accident if possible irrespective of the question of “fault” in the sense of American tort law. The goal of motor carriers in this exercise is to educate drivers in an effort to prevent future accidents. Given the prejudice that motor carriers and their drivers would face if a safety review board’s findings were admitted into evidence, it is extremely important to move for its exclusion before trial. Arguments which can be made include the fact that a board’s findings are privileged, subject to the work-product doctrine, and are inadmissible under Federal Rules of Evidence 103(c), 401, 403, 407, and 701.

A. **A preventable accident ruling is protected by privilege.**

The critical self-analysis doctrine protects the conclusions of a post-accident safety review board from discovery in some jurisdictions. See, e.g., Granger v. Nat’l Railroad Passenger Corp., 116 F.R.D. 507, 510 (E.D. Penn. 1987) (holding that the analysis and conclusions of a railroad’s Investigation Committee relating to accident resulting in personal injury to the plaintiff were protected from discovery). The doctrine protects “certain information from discovery particularly in instances where public policy outweighs the needs of litigants and the judicial system for access to information relevant to the litigation. The doctrine is designed to encourage self analysis and self-criticism.” Id. at 508 (citing application of the doctrine in decisions involving medical and employment review boards).

The policy in support of the critical self-analysis doctrine is particularly applicable to a safety review Board’s preventable v. non-preventable determination. The “need to promote candid and forthright self-evaluation” outweighs any possible benefit the disclosure of the documents at issue may have. Granger, 116 F.R.D. at 509. Where a motor carrier endeavors to ensure the safety of its drivers and others who share the road, it should be free to honestly evaluate an accident without the fear that its conclusions will be used as a weapon against it in future litigation. A safety review board’s findings or conclusions are calculated to improve the safety practices of the company’s drivers and the company as a whole, to the benefit of the driving public. Disclosure of such documents would severely hamper an otherwise good faith endeavor to promote public safety.

The critical self-analysis doctrine shields motor carriers against the extreme prejudice that would result from the discovery of preventable accident rulings. The critical self-analysis doctrine applies with particular force to companies that are required by law to create and maintain detailed safety records such as motor carriers and manufacturers of cars and consumer products. The structure of legislation and regulation governing commercial motor carriers calls for companies to maintain careful records and take precautions to ensure the safe operation of their drivers. See, e.g., 49 U.S.C. §§ 31131-31504; 49 C.F.R. §§ 385-391. The overall purposes of these regulations include the promotion of “safe operation of commercial motor vehicles” and the assurance of “increased compliance with traffic laws and with the commercial motor vehicle safety and health regulations.” See 49 C.F.R. § 31131(a). The regulations provide for certain civil penalties for motor carriers who fail to keep certain records or file necessary reports to the Secretary of Transportation. See 49 U.S.C. § 521(b)(2)(B).

Motor carriers are subject to safety ratings based on factors such as adequacy of safety management controls, frequency and severity of regulatory violations, and preventable accident rates. 49 C.F.R. § 385.7(a)-(f). Allowing the discovery of investigatory reports would have a chilling effect on a motor carrier’s good faith efforts to comply with the regulatory purposes and goals and would encourage motor carriers to only comply with the minimum standards of the statutory scheme.

B. A preventable accident ruling is protected from discovery by the work product doctrine.

Federal Rule of Civil Procedure 26(b)(3) provides, in pertinent part: a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(emphasis added.) The Sixth Circuit has interpreted Rule 26(b)(3) to create a detailed, five-part inquiry for the application of work product doctrine. See Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335, 339-40 (6th Cir. 1988). Each of the four relevant portions of the Toledo Edison inquiry weighs in favor of the application of the doctrine to prevent discovery of a safety review board’s preventable accident ruling in a trucking case:

1. “The party requesting the discovery must first show that, as defined in Rule 26(b) (1), the materials requested are ‘relevant to the subject matter involved in the pending litigation’ and not privileged.” Id. at 339.

As discussed above, a safety review board’s conclusions are privileged and irrelevant to litigation. The critical self-analysis doctrine protects the documents from discovery. Moreover, evidence of this determination is not relevant because they do not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable.”
Federal Rule of Evidence 401. The conclusions of a preventable accident ruling bear no relation to a determination of liability for negligence. The inquiry into whether an accident was “preventable” relies upon a standard that is different and utterly unrelated to the negligence standard of ordinary care. The safety review board conclusions are therefore irrelevant to litigation. They are not discoverable under Rule 26(b)(1).

2. “If the party requesting discovery meets this burden and the court finds that the claimed material is relevant and not privileged, the burden shifts to the objecting party to show that the material was ‘prepared in anticipation of litigation or for trial’ by or for that party or that party’s representative, including that party’s attorney, consultant, surety, indemnitor, insurer or agent.” Toledo Edison, 847 F.2d at 339.

In a catastrophic case, given the serious nature of the accident and the resulting injuries, it will be clear to a motor carrier that litigation will ensue. Therefore, it can be shown that a preventable accident ruling contains the mental impressions and conclusions of the motor carrier’s employees as they relate to anticipated litigation. The conclusion of the safety review board can therefore be argued to have been prepared in anticipation of litigation.

3. “If the objecting party meets its burden as indicated above and the court finds that the material was prepared in anticipation of litigation or for trial by one of the persons named in the rule, the burden shifts back to the requesting party to show that the requesting party (a) has substantial need of the materials in preparation of the party’s case, and (b) that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Toledo Edison, 847 F.2d at 339-40.

Plaintiffs will have trouble showing “substantial need” of the conclusions of the safety review board in the preparation of their case. As demonstrated above, the conclusions are not only irrelevant, but also prejudicial to defendants. Plaintiffs merely want this information to use as an “admission against interest” or de facto “admission.” Moreover, any factually relevant information that may be contained in the conclusions is equally available to plaintiffs by a variety of other means. Plaintiffs should depose all witnesses and hire their own accident reconstructionist.

4. “After the application of the shifting burdens, even if the court determines that the requesting party has substantial need of the materials in the preparation of its case and that the requesting party is not able, without undue hardship, to obtain the substantial equivalent of the materials by other means, the rule flatly states that the court is not to permit discovery of ‘mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.’” Toledo Edison, 847 F.2d at 340.

A safety review board’s conclusions are the very sort of “conclusions” and “opinions” the work product doctrine seeks to protect. A safety review board conducts a very limited investigation of the accident that gives rise to the litigation. Often this typically includes obtaining only the police report and any state DOT report. The investigation serves the purpose of arriving at conclusions regarding the cause of the accident and educating the motor carrier’s drivers in an effort to prevent future accidents. These mental impressions of the motor carrier’s employees are not the proper subject of discovery. Therefore, the work product doctrine should apply to protect them.

C. A preventable accident ruling is inadmissible under FRE 401.

The conclusions of a safety review board are not relevant because they do not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” See Federal Rule of Evidence 401. The conclusions of a preventable accident ruling bear no relation to a determination of liability for negligence. As discussed in detail above, the inquiry into whether an accident was “preventable” relies upon
According to controlling case law, evidence of manufacturer recalls involving dissimilar vehicles and/or dissimilar alleged defects are precisely the type of irrelevant and unfairly prejudicial “dynamite” that a trial judge should exclude. For example, in Calhoun v. Honda Motor Co., Ltd., 738 F.2d 126 (6th Cir. 1984), the plaintiff alleged that a motorcycle’s brakes were defective. The plaintiff could not recount the specific occurrences or attendant circumstances surrounding his accident; nevertheless, he hypothesized that the brakes failed to perform properly because the brake pads became wet when he took his motorcycle to a car wash earlier during the day of the accident. 738 F.2d at 130. Without introducing independent evidence of the alleged brake defect (id. at 133-34), the plaintiff proffered a recall letter sent by the manufacturer to all owners of the model of motorcycle at issue. The letter stated that there existed “a defect which related to motor vehicle safety” and that, specifically, “[w]hen the rear disc brake is applied during operation in heavy rain, there may be noticeable initial reduction in effectiveness of the brake.”

Judge Johnstone, of the U.S. District Court for the Western District of Kentucky, admitted the recall letter into evidence. The jury should not be expected to differentiate between the negligence standard they are to apply and the far more stringent preventable accident standard. Because the jury may consider both inquiries as a means of determining fault, there is a high risk of confusion of legal standards and issues. The jury will certainly be misled by the introduction of an alternative standard for the evaluation of the conduct of the drivers. The prejudice that would result substantially outweighs any probative value the review board’s findings may have.

Certainly a determination that an accident is “preventable” is highly prejudicial if misconstrued by a jury. Its introduction would require an admonition and several unnecessary witnesses for the defense to merely explain the context to the jury. In this sense it is much like a recall letter in a product liability case which is equally misleading and prejudicial. Such letters are generally inadmissible under FRE 403 and under additional grounds such as FRE 103(c).

According to the applicable Federal Rule of Evidence,

[j]ury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

FRE 103(c) (emphasis added). Stated more succinctly, a trial court must insulate the jury from inadmissible evidence. Leading commentators, in the portion of their treatise concerning this rule, have stated that

there are some kinds of evidence that can be so damaging as to require consideration of a mistrial.

The judge is justified in taking heroic measures to keep this dynamite out of the hands of the jury. It is, of course, up to the parties to alert the judge to the need for protective measures . . . .

An analogous issue is found in product liability law related to the admissibility of recall determinations by automobile manufacturers. Courts have uniformly recognized the desirability of encouraging settlement by fostering free and full discussion, without fear that such settlement and negotiations will later prejudice a person or entity. Perhaps the court in Vockie v. General Motors Corp., 66 F.R.D. 57 (E.D. Pa. 1975), aff’d, 523 F.2d 1052 (3d Cir. 1975), said it best when it refused to admit a General Motors recall letter into evidence for the purpose of establishing negligent design. That court said:

If such statements are admissible on a wholesale basis, manufacturers will be reluctant to come forth and make a full unqualified disclosure of any potential safety hazards which they discover. Manufacturers should not be inhibited in, or prejudiced by, a good faith effort to protect the public safety and comply with their statutory duty. In any event, such evidence has minimal probative value to the existence of a defect in a particular vehicle.

F. A preventable accident ruling is inadmissible under FRE 407.

Federal Rule of Evidence 407 provides, in pertinent part:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence [or] culpable conduct.

Indeed, the investigation and conclusions of a safety review board’s findings reflect the results of a preventable accident ruling. The Board’s findings are used to educate drivers in an effort to prevent future accidents. This is consistent with the policy of FRE 407, which seeks to encourage companies to take precautionary steps without fear of incurring greater liability. See Wright and Graham, Federal Practice and Procedure: Evidence § 5282; Maddox v. City of Los Angeles, 792 F.2d 1408, 1417 (9th Cir. 1986); Martel v. Mass. Bay Transp. Auth., 403 Mass. 1, 525 N.E.2d 662, 664 (Mass. 1988); Specht v. Jensen, 863 F.2d 700 (10th Cir. 1988); but see Fox v. Kramer, 22 Cal. 4th 531 (Cal. 2000); Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26, 33 (1st Cir. 1988); Rocky Mountain Helicopters, 805 F.2d at 907; Westmoreland v. CBS Inc., 601 F. Supp. 66, 67-68 (S.D.N.Y. 1984). These cases stand for the proposition that the rule’s scope is limited to improvements actually implemented. Under this reasoning, an investigation or recommendation is not a concrete action.

On appeal, the Sixth Circuit agreed with Judge Johnstone’s ruling that the recall letter was inadmissible. Because the recall letter stated that the brake pad problems were dependent upon brake application under certain conditions, and because the plaintiff did not establish that those conditions were present at the time of his accident, the recall letter was irrelevant and, therefore, inadmissible as evidence. Id. at 133-34 (citing Farner v. Paccar, Inc., 562 F.2d 518, 525-26 (8th Cir. 1977) and Fields v. Volkswagen of America, Inc., 555 P.2d 48, 58 (Okla. 1976)). The recall evidence “worked a grave prejudice” to the manufacturer because the jury may have misinterpreted the admission of the letter as the trial court’s ruling that car washing had the same detrimental effect on the motorcycle’s brakes as did operating the brakes under heavy rain. Id. at 134.
(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact at issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

No safety director or member of a safety review board charged with the determination of whether or not an accident is preventable ever witnesses the accident. Typically, they are not directly involved with the investigation of accidents. Nor are the board’s opinions typically based on witness statements made at the time of the accident. Therefore, any reports, conclusions, or findings a board may produce are the product of an investigation conducted by individuals with no first-hand knowledge of the traffic accident at issue. The opinions of a board are not in any way based on their perception of events relevant to the litigation. They are therefore inadmissible under Federal Rule of Evidence 701.

NEGLIGENT HIRING/RETENTION

As the driver in a catastrophic case will most likely lack the resources to pay a judgment granted to a seriously injured individual, plaintiffs routinely make claims against the motor carrier for independent acts of negligence such as negligent hiring or retention. A cause of action for negligent hiring or retention is not based upon respondeat superior, but instead is an independent claim against the motor carrier for negligently hiring or retaining a driver who is unfit for the position.

Case law on the necessary threshold for a claim of this kind gives ample fodder for motions in limine by the defense that can substantially limit the assertion of the claim at trial. As an example, Kentucky recognized this independent cause of action in Oakley v. Flor-Shin, Inc., 964 S.W.2d 438 (Ky. Ct. App. 1998). The Court found that Kentucky “cases emphatically affirmed that ‘every person owes a duty to every other person to exercise ordinary care in his activities to prevent any foreseeable injury from occurring to such other person.’” Id. at 441 (citation omitted); see also, Garcia v. Duffy, 492 So.2d 435 (Fla. App. 1986) (negligent hiring or retention, allows for recovery against an employer for acts of an employee committed outside the scope and course of employment); Smith v. Tommy Roberts Trucking Co., 209 Ga.App. 826, 435 S.E.2d 54 (Ga.App. 1993) (in cases involving a claim for negligent hiring and retaining, the court has held it is necessary to show the employer knew or should have known of the employee’s dangerous propensities); Ramada Inns, Inc. v. Dow Jones & Co., Inc., 1988 WL 15825, *1 (Del. Super. Ct.); Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

In Flor-Shin the plaintiff, Oakley, was sexually assaulted by William Bayes, an area supervisor for Flor-Shin. Id. at 439. The assault occurred at the K-Mart store where Oakley was employed, and where Bayes was employed by Flor-Shin to clean the floors. Id. Not only did Oakley sue Bayes, but she sought damages from Flor-Shin based on “its negligence in hiring Bayes, a person she alleged was ‘incompetent and unfit to perform in the capacity he was hired’ because of his ‘malicious, dangerous, and violent nature[.]’” Id.

In addition to agreeing with Oakley’s argument regarding the interpretation of common law tort principles, the Court found that the tort of negligent hiring was defined by Restatement (Second) of Agency § 213 (1958) as follows:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: … (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]

Id. at 442.

The Western District of Kentucky in Estate of Presley v. CCS of Conway, 2004 U.S. Dist. LEXIS 9583 (W.D. Ky. 2004), followed Flor-Shin to analyze a negligent retention of truck driver claim. Estate of Presley involved a multiple vehicle accident in which two semi-tractor trailers collided with another vehicle. The plaintiff filed suit against both trucking defendants, CCS of Conway and Shaffer Trucking, for negligent retention of the drivers.

In determining whether the defendants negligently retained the drivers the court held that Kentucky “Courts evaluate whether the employer knew, or
reasonably should have known, that (1) the employee in question was unfit for the job for which he or she was employed, and (2) the employee’s ‘placement or retention in that job created an unreasonable risk of harm’ to a third party.”  Id. (quoting, Flor-Shin, 964 S.W.2d at 445.).  

In a footnote the Court noted that while Oakley v. Flor-Shin made no distinction between a negligent retention claim and a negligent hiring claim, the Kentucky Court of Appeals had made a distinction in an unpublished opinion, Airdie Stud, Inc. v. Reed, 2004 Ky. App. Lexis 42.  In that opinion the Appellate Court stated:

“[a] claim for negligent hiring arises when an employer negligently places a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which it should have been foreseeable that the individual posed a threat of injury to others.”  Id.  

A claim of negligent retention arises when an employer is “aware, or should have been aware, that an employee poses a threat and fails to take remedial measures to ensure the safety of others.”  Id.  

In Estate of Presley the plaintiff argued that CSS of Conway had negligently retained its driver since it did not have any written policies in place concerning driver safety or training and because it failed to follow the Federal Motor Carrier Safety Regulations mandatory background check before allowing the driver to drive.  Id.  The Court, however, found this proof to be irrelevant.  “Plaintiffs must submit proof that [the driver’s] employer knew or should have known that [the driver] was unfit in some relevant way for the job.”  Id  

Although CSS of Conway may have negligently performed a background check, plaintiff produced no proof that the driver had any prior accidents or other adverse marks on his driving record.  Id.  Therefore, the Court dismissed the negligent retention claim against CSS of Conway.

On the other hand, the driver for Shaffer Trucking did have previous marks on his record.  In fact, that driver had previously been arrested and fined for driving under the influence (“DUI”), arrested for public drunkenness, had been convicted of running a red light while driving a semi-tractor trailer, and had several speeding tickets.  The traffic citations for running a red light and speeding occurred while [the driver] was on the job for Shaffer Trucking.  

Id.  Although the Court found this evidence relevant to whether the Shaffer Trucking driver was “unfit” to be a truck driver, it did not find that the evidence made this particular accident foreseeable.  In fact, the Court held that “the particular unfitness of an employee for the job must render the injury foreseeable to an ordinary, reasonable person.”  Id.  

The Court stated that the question to be answered is “whether these offenses created the particular risk present in this case.”  Id.  (emphasis added).  The Court found the answer, in this particular circumstance to be no since: (1) the driver was not under the influence of alcohol when the accident occurred; and (2) he did not run a red light or speed at the time of the accident.  Id.  Therefore, the Court also dismissed the negligent retention and hiring claim against Shaffer Trucking.

By making a motion in limine to eliminate these claims before trial the defense can substantially limit its potential liability.

**SUBSTANTIAL SIMILARITY OF OTHER INCIDENTS**

Evidence presented by plaintiffs regarding prior accidents or moving violations can be extremely prejudicial to a defendant in a catastrophic trucking case.  Although this evidence may be admissible, similar evidence has been excluded from products liability actions.  It is therefore important to look to products cases when drafting motions in limine to exclude this type of evidence.

Federal courts, in products actions have resorted to the general law of relevancy, as set forth in FRE 401, 402 and 403, to determine whether to admit prior occurrences in a given situation.  See Lawson, The Kentucky Evidence Law Handbook, (3d ed. 1993), § 2.40, p. 123.  Stated differently, there exist two prerequisites to the admission of evidence of “other occurrences”: (1) that such evidence is relevant; and (2) that the introduction of the evidence would not create a
substantial danger of unfair prejudice, confusion of the issues, or misleading of the jury. Id.

Kentucky law on this issue is absolutely clear. Evidence of “other occurrences” does not satisfy the above-specified admissibility test “unless the [occurrences] are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.” Massie v. Salmon, 277 S.W.2d 49, 51 (Ky. 1955) (emphasis added); see also, Hampton v. Kroger Co., 618 F.2d 498, 499 (8th Cir. 1980) (the accidents must be sufficiently similar in time, place, or circumstances to be probative). In a product liability case, evidence of other accidents may be relevant to show the causation of the accident or notice to the manufacturer of a defect. Rhodes v. Michelin Tire Corp., 542 F. Supp. 60, 62 (E.D. Ky. 1982).

“[A]s a threshold matter, prior accidents must be substantially similar to the one at issue before they will be admitted into evidence.” Rye v. Black & Decker Mfg. Co., 889 F.2d 100, 102 (6th Cir. 1989) (emphasis added). The proponent of such evidence bears the burden of proving substantial similarity. Id.; see also Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 783 (Ky. 1984); Harris v. Thompson, 497 S.W.2d 422, 429 (Ky. 1973). However, the extent of the similarity needed to be proved can vary depending on what the plaintiff is attempting to establish. See Ponder v. Warren Tool Corp., 834 F.2d 1553 (10th Cir. 1987) (if used to establish notice then proof in the similarity is needed to a lesser degree); Busse v. BMW, 1997 WL 167616 (E.D. La. 1997) (if used to establish causation then the standard is “closely similar”).

According to Rye, substantial similarity “means that the accident must have occurred under similar circumstances or share the same cause.” Rye, supra, at 102. Moreover, it is generally recognized that evidence of other incidents is not admissible unless the proponent rules out possible causes other than the defect being alleged in the case at bar. See Lewy v. Remington Arms Co., 836 F.2d 1104, 1108-09 (8th Cir. 1988); Brooks v. Chrysler Corp., 786 F.2d 1191, 1195 (D.C. Cir. 1986), cert. denied, 479 U.S. 853 (1987). If the “other incident” could have resulted from causes other than the alleged defect, evidence of the prior incident is not admissible.

Because of the stringent “substantial similarity” requirement, courts often refuse to admit evidence of other occurrences. For example, in Rye, supra, the plaintiff brought suit against the manufacturer of a saw. The plaintiff alleged two design defects, one relating to “kickback,” and the other to the lack of a guard on the lower blade. In that case, the court refused to allow the plaintiff to introduce evidence of fifteen “prior complaints” because the plaintiff failed to establish that the prior injuries were caused by the exact design defects alleged by the plaintiff in his own action. 889 F.2d at 102. Many of the prior accidents involved “kickbacks,” but the prior claims “did not describe in sufficient detail the circumstances causing the kickbacks.” Id. at 102-03. Consequently, the court held that the plaintiff’s mere allegations that there had been prior accidents involving “kickbacks” and that the guard was defective were not sufficient to establish the requisite “substantial similarity.” Id. The Sixth Circuit approved the reasoning of the trial court, Judge Simpson, who excluded other incidents because:

[I]n all of these [“other incidents”] I find there is some difference in this case and/or just not a sufficient showing of the facts in these cases, which would bring them into substantial similarity.

Rye, 889 F.2d at 102, (quoting U.S.D.C., W.D. Ky., Charles R. Simpson, Ill., J., emphasis added). In other words, the trial court’s finding of “some difference” between the proffered “other incidents” and the fact situation at issue in Rye was enough to exclude the other incidents. Therefore it should be argued that where there is “some difference,” the plaintiff has failed to show “substantial similarity.”

In Rhodes v. Michelin Tire Corp., 542 F.Supp. 60 (E.D. Ky. 1982), the court agreed that substantial similarity was necessary in order to make evidence relevant and cited Ramos v. Liberty Mutual Insurance Company, 615 F.2d 334, 339 (Fifth Cir. 1980) for the proposition that prior accidents must “not have
occurred at too remote a time” in order for there to be similarity. “Substantially similar” accidents must involve similar vehicles, similar circumstances, and a time period which is not too remote from plaintiff’s accident.

“Substantial similarity has been limited to the same or similar model.” Kawasaki Corp. U.S.A. v. Ryan, 777 S.W. 2d 247 (Mo. 1984). The Kawasaki court found similarity required consideration of:

1. Time frame;
2. Production model;
3. The issues raised in the petition and the allegations asserted therein; and
4. Accidents under same or similar occurrences.

Similarity between incidents has been found to mean that there must be similarity in:

1) How the accident or injury occurred;
2) Similarity between the products being compared;
3) Similarity in the alleged defect complained of; and,
4) The other incident must not have occurred at a point in time too remote than the one under the courts consideration.

American Law of Product Liability, heard, § 1413 at 36-38.

Also motor carriers may be able to argue that the plaintiff failed to establish substantial similarity where the alleged other incidents are not described with particularity. In Rye, the Sixth Circuit approved Judge Simpson’s exclusion of other incidents where the information available did “not really [tell] us the mechanism of how the injury occurred ....” 889 F.2d at 102. Therefore, the plaintiff has the burden of showing that, as between the other incidents and the instant case, the alleged defects are the same and the mechanism of injury is the same. If there is “some difference,” there is no substantial similarity, and the other incidents must be excluded.

In trucking cases, defendant’s motion should request that the court not permit the plaintiff to allude to other accidents, claims or lawsuits unless the court first determines, during a hearing outside the presence of the jury (or, in the case of voir dire, outside the presence of the venire), that the circumstances in those other accidents were substantially similar to the circumstances surrounding the accident at issue. The factors to be considered should include, but should not be limited to, the particular circumstance of the accident, the mechanism of injury, including driver behavior, vehicle speed and orientation.

Furthermore it should be argued that evidence of other incidents is unfairly prejudicial. In Brooks, where the plaintiff alleged a defective braking system in a 1979 Chrysler LeBaron, the court excluded evidence of other accidents as unfairly prejudicial:

With respect to exhibits 17 and 24, the questionnaires are riddled with complaints about problems with other automobiles, unrelated to brake piston seizure, by customers dissatisfied with Chrysler’s refusal to extend the warranty to cover the repairs of the dust boot; highly inflammatory remarks about Chrysler, including comments about poor workmanship in general and about Chrysler’s failure to cover the problem under the warranty; and third-party hearsay comments by the owners, mechanics and friends regarding the prevalence of brake piston seizure in Chrysler cars. As such, these exhibits were “unfairly prejudicial” within the meaning of Rule 403.

786 F.2d at 1198.

Admission of such evidence thrusts upon defendants the burden of defending itself not only against the accident at issue, but also against the allegations of the other incidents. It will then be necessary for the defendant to present as much evidence as is available to show the jury why each other incident lacks probative value, which will waste considerable time in the consideration of collateral matters:

Defendant, in order to minimize the prejudicial effect of these reports, would have to go through each one individually with the jury. The result would have been a mini-trial on each of the 35 reports offered by plaintiffs. This would lengthen the trial considerably and the minds of the jurors would be diverted from the claim of the plaintiffs to the claims contained in those reports.
feels are discoverable. Well prepared motions in limine will weed out the relevant material prior to trial and allow the jury to focus on only truly relevant evidence.

Catastrophic cases are difficult to defend in the best of circumstances. If the steps that are suggested in this article and throughout this book are taken by the motor carrier, the motor carrier will have its best chance for the fair resolution of the case.

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Uitts v. General Motors Corp., 411 F. Supp 1380, 1383 (E.D. Pa. 1974), aff’d, 513 F.2d 626 (3rd Cir. 1975). See also Brooks, 786 F.2d at 1198 (“It cannot be doubted that the trial inevitably would have been delayed as Chrysler would have attempted to rebut the substance of each of the 330 complaints or to distinguish the nature of the complaints contained therein from the alleged defect in this case”) (emphasis in original). Such mini-trials concerning each alleged incident would confuse the jury. See Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1269 (7th Cir. 1988) (“The jury would be confronted with additional technical evidence on a collateral issue that would have unnecessarily prolonged the trial and created a risk of confusion of the issues”); Rye, 889 F.2d at 103. These concerns outweigh any limited probative value.

As such a motion in limine seeking to exclude other accidents or marks on a driver’s record are crucial in limiting a motor carrier’s potential liability.

CONCLUSION

The successful defense of catastrophic motor carrier cases must be based on a multifaceted approach. Much of the work must be done before suit is ever filed. It starts with the retention of the best drivers. A safety program must not only be devised, but also regularly monitored by top personnel in the motor carrier’s organization. Even experienced drivers need regular training and updates on the rules incorporated in the motor carrier regulations of the federal government.

Document retention is also an important aspect of the preparation for the defense of a catastrophic case. If you follow excellent maintenance policies but do not document them well, from a trial lawyer’s point of view, the maintenance might as well have not been done. Even if it can be demonstrated that the commercial vehicle was in good mechanical condition, this failure can provide cumulative evidence adverse to the motor carrier. Closing the paper trail is an essential technique in the preparation for the defense of catastrophic cases.

Motor carriers must also be prepared to immediately respond to the scene of a catastrophic accident and be in a position to bring to the scene skilled investigators and accident reconstructionists to gather evidence before that evidence is simply unavailable. Evidence must also be preserved as appropriate. In effect, motor carriers should pick their trial team and begin the process of picking their trial experts before a catastrophic accident occurs. Only in this way will they be able to marshal the evidence necessary to fully defend themselves in a catastrophic case.

Motions in limine are essential to the defense of catastrophic cases. The groundwork for these motions is laid by the thorough practitioner starting with the pretrial investigation in the case. That investigation necessarily includes preservation of ECM data and all documents which are reasonably likely to be necessary in the defense or a reasonable court
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