TRANSPORTATION matters
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DOT/FMCSA - Noteworthy Updates

Allen C. Smith, acsmith@hedrickgardner.com; Austin R. Walsh, awalsh@hedrickgardner.com


Smith


Walsh

The Federal Motor Carrier Safety Administration (FMCSA) has formed a 26-member panel to include stakeholders from associations representing trucking, school buses, motor coach lines, driver training schools, government agencies, and safety advocates, for the purpose of creating a negotiated rule on entry-level driver training standards. The panel met six times between 6/26/15 and 5/29/15 and recently announced that the focus of the curriculum will be practical, behind-the-wheel instruction to include at least 30 hours on the road. The panel's greatest hurdle has been the lack of data correlating new training standards with improved safe driving performance but final votes on the core curriculum were held on 5/28/215. The rule will cover Class 7-8 trucks, trucks with gross-vehicle-weight ratings in excess of 26,000 pounds and light- and medium- duty trucks if transporting hazardous material. In 2007, the FMCSA issued a notice of proposed rulemaking on a similar rule that drew 700 comments and was withdrawn in 2013 over concerns including accreditation of driver-training schools.

On 3/16/15, Congressman Lou Barletta (R-Pa.) introduced the Safer Trucks and Busses Act of 2015 to prevent publication of Compliance, Safety, Accountability (CSA) data on the FMCSA's Safety Management System's (SMS) website until the National Academy of Public Administration completes a study on the reliability of CSA safety scores. The bill was originally introduced on 9/18/14 but stalled in the Committee on Transportation and Infrastructure. The 2015 bill was referred to the House Transportation and Infrastructure Subcommittee on Highways and Transit on 3/17/15.

On 3/17/15, the FMCSA announced "QCMobile," a new smartphone app that provides a summary of carriers' authorizations and inspection results. The app also provides a portal to access carriers' Behavior Analysis and Safety Improvement Categories (BASICs) data. On 4/9/15, Deb Fischer (R-Neb.) penned an open letter to Transportation Secretary Anthony Foxx requesting that the FMCSA remove CSA safety scores from the app until the CSA methodology has been overhauled to reflect a Government Accountability Office (GAO) study finding inaccuracies in the scoring system. The QCMobile app is free and available to the public for download on iTunes or Google Play.

On 3/19/15, Senator John Boozman (R-Ark.) introduced legislation cosponsored with Sens. Joe Manchin (D-W.Va.) and Heidi Heitkamp (D-N.D.) to allow carriers to use hair testing in place of urinalysis for drug tests. A similar bill was introduced in the House by Reps. Rick Crawford (R-Ark.), Dan Lipinski (D-Ill.), and Eleanor Holmes Norton (D-D.C.). Currently, urinalysis is the only acceptable method for

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Client Alert on Atiapo v Goree Logistics Inc


Glidewell

Matt Glidewell, mglidewell@hedrickgardner.com

The North Carolina Court of Appeals has applied N.C. Gen. Stat. § 97-19.1 to a motor carrier broker in the recent case of Atiapo v. Goree Logistics, Inc., & Owen Thomas, Inc., & The N.C. Industrial Commission v. Goree Logistics, Inc., & Owen Thomas, Inc., & Mandieme Diouf, No. COA14-977 (Mar. 17, 2015). Broker Owen Thomas, Inc. ("Owen Thomas"), acting on behalf of its client Sunny Ridge Farms ("Sunny Ridge"), entered into a "Broker-Carrier Agreement" with Goree Logistics, Inc. ("Goree") to procure transportation for Sunny Ridge's goods. By merit of that Agreement, Goree exercised full control over the transportation of the goods and assumed responsibility

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Developing Legal Framework for Testing AVs

Andy Stein, astein@hedrickgardner.com

Stein

On May 6, 2015, ABC's "Good Morning America" broadcast a live segment on Freightliner's new autonomous driving truck, Inspiration, as it rode down a Nevada highway at 57 MPH. The autonomous truck was the first of its kind licensed for operation in the United States. But it may be a long time before we actually see a fleet of autonomous trucks driving over the roads and highways.

Currently the commercial use of a purely "autonomous vehicle" (AV) is not allowed in any state, and only Nevada, California, Florida, and Michigan allow a company to test these vehicles. Generally, an AV is defined as a motor vehicle equipped with autonomous technology that can drive the vehicle without the active physical control of a human for any duration of time. Because there is no human control of an AV, even testing them may prove to be a dangerous affair. [1]

Regulations in Nevada, Florida and California require that a testing company provide $5 million in insurance coverage. Michigan only requires a certificate of insurance to be provided to the Secretary of State. [2] The regulations also require that the test driver or "operator" must be in a position to maintain immediate control over the AV. [3] Nevada requires that two test drivers be available to take control of the AV if necessary. [4]

The testing must also be performed with the required technological crash data recording equipment. The Nevada Administrative Code requires the mechanism to capture and store the sensor data for at least 30 seconds before a collision occurs, and the data must be preserved for 3 years after the date of the collision. NAC 482A.110. California requires crash data recorders be sold with AVs but does not actually require their use in testing. Cal. Vehicle Code §38750(c)(1)(G). The Florida statute governing AV testing is silent to any requirement for using crash data recorders. See FLA Stat §316.86.

Now that four states have authorized the testing of AVs, the question remains what will one day be required for pure AVs to operate on the roads? The Technology Law and Policy Clinic at the University of Washington School of Law has made several recommendations of the requirements AVs should meet before they become street legal. [5] A few requirements are to insure the technology is sufficient to make the AV: 1) obey all speed limits, 2) read traffic lights and road signs, 3) observe lane markings, 4) observe and respond to turn signals of other vehicles, and 5) yield to pedestrians and avoid collisions. Another requirement that has been recommended is a mechanism to give control back to a human when appropriate.

Because regulations for the testing of AVs are still in the infant stages, it will likely be many years before we see the vehicles being used for commercial purposes. Furthermore, if the testing regulations are in anyway a precursor to the regulations for the operation of pure AVs we will likely see regulations requiring strict compliance with statewide motor vehicle laws. The regulations could even require an operator in the cockpit of an AV while it is being operated autonomously. In the future AVs may create efficiencies and lower the cost of commercial trucking, but it is difficult to see a time where pure AVs overtake the road without some form of human control and intervention.

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[1]University of Washington, Technology Law and Policy Clinic, "Autonomous Vehicle Law Report and Recommendations to the ULC," p. 1

[2]Id at P. 3.

[3]Id at P. 4.

[4]Id at P. 10.

[5]Id at Pgs. 13-14.

Client Alert *cont. from page 1*

for payment of workers' compensation. Plaintiff Atiapo drove a tractor trailer for Goree and was transporting Sunny Ridge's goods when he was involved in a motor vehicle accident, and Goree did not have workers' compensation insurance at that time. Goree denied Plaintiff's workers' compensation claim, contending Plaintiff was not an employee of Goree but rather an independent contractor. Plaintiff filed his workers' compensation claim against both Goree as his alleged employer and Owen Thomas as a principal contractor under N.C. Gen. Stat. § 97-19.1.

Owen Thomas argued the Industrial Commission lacked jurisdiction over it essentially because it was a broker and not a principal contractor. Under N.C. Gen. Stat. § 97-19.1, a principal contractor who contracts with an individual in the interstate or intrastate carrier industry who operates a truck licensed by the U.S. Department of Transportation and who has not secured the payment of compensation for his employees and subcontractors is liable for workers' compensation benefits if the subcontractor does not have proper insurance. The N.C. Court of Appeals held that Owen Thomas was as a principal contractor hired by Sunny Ridge on the basis of the facts that Owen Thomas was paid by Sunny Ridge to deliver its goods, exercised discretion in hiring Goree to perform the delivery and controlling the method of Goree's delivery, and provided Goree with 1099 tax forms for the money paid by Owen Thomas, such that Owen Thomas's self-identification as a broker did not bar the application of N.C. Gen. Stat. § 97-19.1 to Owen Thomas. And since Owen Thomas contracted with Goree, a subcontractor without workers' compensation insurance, Owen Thomas was liable for Plaintiff's claim against Goree pursuant to N.C. Gen. Stat. § 97-19.1.

Owen Thomas also argued it was exempt from N.C. Gen. Stat. § 97-19.1 because, pursuant to 49 U.S.C. § 14501(c)(1), a state may not enact or enforce a law or regulation related to a price, route or service of any motor carrier or broker. The court held that the federal preemption established in § 14501(c)(1) did not apply to N.C. Gen. Stat § 97-19.1, however, due to an exception to the rule with specific regard to insurance requirements at 49 U.S.C. § 14501(c)(2)(A). Owen Thomas argued that the exception in § 14501(c)(2)(A) did not apply because § 14501(c)(1) contains language including motor carriers and brokers and § 14501(c)(2)(A) contains language including only motor carriers. The court concluded that Owen Thomas went beyond its role as a broker and acted as a principal contractor - and even as a motor carrier, despite owning no vehicles itself – specifically because it contracted with Goree.

Finally, the N.C. Court of Appeals held that penalties were properly imposed against Goree and its principal pursuant to N.C. Gen. Stat. § 97-94 for failure to procure workers' compensation insurance. The court pointed out that § 97-19.1 requires "any principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees" to secure workers compensation insurance coverage for any individual contracted with. Accordingly, the court opined that it was of no consequence Goree had only two drivers in its employ (for purposes of the definition of "employment" at N.C. Gen. Stat. § 97-2(1). And the court further refused to construe N.C. Gen. Stat. § 97-19.1 to relieve an entity like Goree from penalties for failure to perform the statutory duty of providing workers' compensation insurance for the drivers with whom it contracts.

Court of Appeals Compels Discovery of Defendant-Driver's Medical Records in Wrongful Death

Allen C. Smith, acsmith@hedrickgardner.com; Austin R. Walsh, awalsh@hedrickgardner.com

Smith

Walsh

On April 21, 2015, the N.C. Court of Appeals issued a decision affirming the order of a Martin County, N.C. Superior Court judge compelling a defendant tractor-trailer driver to turn over medical and pharmacy records for a period of 5 years preceding the accident and 6 months following the accident.

Key Facts

The case of Rasberry v. Jacobs, et al. arose from a 11/19/12 collision between a tractor-trailer operated by Defendant Jacobs and a farm tractor operated by Plaintiff's decedent, Henry Kornegay, that resulted in Kornegay's death. Following the accident, Jacobs was charged with DWI, which Jacobs contested, arguing that he was only taking a prescribed dosage of Lorazepam at the time of the accident. (Lorazepam is a benzodiazepine used to treat anxiety. Other benzodiazepines include Xanax and Valium.)

The subsequent wrongful death action alleged that Jacobs was driving erratically and impaired at the time of the collision. Plaintiff sought punitive damages from Jacobs and his employer due to Jacobs' purported impairment. Plaintiff served Defendant Jacobs with requests for production of documents that sought Jacobs' medical records from five years before the accident. Jacobs objected citing physician-patient privilege under N.C. Gen. Stat. § 8-53 through § 8-53.13. The trial court granted Plaintiff's motion to compel discovery, ordering production of Jacobs' medical records from five years pre-accident to six months post-accident, subject to a confidentiality agreement. Jacobs appealed. (Although the appeal was interlocutory, the court heard it since it affected a substantial right that would be lost in the absence of the appeal -production of records protected by the physician-patient privilege.)

Ruling by NC Court of Appeals

The Court of Appeals reviewed the case on an abuse of discretion standard – whether the trial court's ruling was "manifestly unsupported by reason . . ." In reaching its decision, the Court of Appeals relied on State v. Efird, 309 N.C. 802, 806, 309 S.E.2d 228, 231 (1983), which held N.C. Gen. Stat. § 8-53 is a qualified privilege that may be waived by the patient or that may be pierced if, in the court's discretion, production of medical records "is necessary for proper administration of justice." Because a key factual issue was whether Jacobs was under the influence of a drug at the time of the collision, the trial court was within its discretion to grant the discovery. Further, because the punitive damages claim involved consideration of the duration of a defendant's alleged wanton conduct and the existence and frequency of similar conduct, the period of 5 ½ years was not overly broad.

Jacobs further argued that production of 5 ½ years of records was an abuse of discretion without an in camera review to determine the documents' relevancy. Although the Court of Appeals agreed with Jacobs that an in camera review is the better practice, a trial court is not required to conduct the review.

Conclusion

Because the case is unpublished, it does not constitute controlling legal authority. In other words, this decision is not binding precedent when the same or similar circumstances arrive in another case. However, the ruling by the Court of Appeals will be persuasive, as there are relatively few appellate decisions addressing production of medical records. The decision will give trial judges a basis to order the production of medical records by defendant drivers.

We envision personal injury attorneys using this decision to force commercial drivers to produce medical records not only in cases in which intoxication or impaired driving is an issue but also in

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Expert Winesses - Bodily Injury and Wrongful Death Claims

Andy Stein, astein@hedrickgardner.com

Stein

Generally, trucking accident claims create higher stakes than the more frequent auto vs. auto accident claims that are litigated. In many cases, the property and personal injury damages that flow from trucking accident are more severe, and Plaintiffs always look at the trucking company for a "deep pocket" recovery. Consequently trucking litigation normally begets the need for both sides to employ expert witnesses to assist in prosecuting and defending these matters.

To first examine the issue of whether any of the parties may be at fault for the accident, both plaintiffs and defendants may retain an accident reconstruction engineer. These experts should be employed as soon as possible after an accident to investigate the scene. At the scene the engineers search for physical evidence, examine the property damage to the vehicles involved, and collect data from the accident data recorder if the vehicles have one. Many engineers will also reach out to the investigating police

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Attorney Spotlight: Kristie H. Farwell

Kristie is a partner in the firm's Raleigh office. Her civil litigation practice focuses in the areas of motor vehicle negligence, premises liability, construction litigation, general tort liability, insurance coverage disputes and Medicare compliance. Kristie has defended cases to verdict in state court as well as arbitration forums in various counties in the State. She serves as a lecturer to both fellow attorneys and clients regarding continuing legal education topics. Kristie is recognized in the legal community as an attorney who is dedicated to her clients and takes pride in the quality of legal services she provides.

Q: Why did you become a lawyer?

KHF: Growing up in a small town in North Carolina, I looked up to a family friend named Fielding Clark, who was a self-described country lawyer and gentleman farmer. Fielding was my real life Atticus Finch from To Kill A Mockingbird, a book Fielding gave to me before he passed not fully knowing how much I looked up to him as my local hero and role model. Long after his death, family members and other people back home still share stories of Fielding's prowess in the courtroom. I like to think that he and I would pass hours sharing stories of our joint love of practicing law if we had the chance.

Q: What keeps you busy on the weekends?

KHF: My weekends are often made up of a mixture of service opportunities dear to my heart and precious time spent with friends and family. Whether I am developing a new friendship with someone from the homeless community, dancing with one of "my" 4 and 5 year olds in a preschool class of KidCity at church, or fostering close relationships in my life, I also find time for quiet and reflection to recharge for the usually busy week ahead.

Q: What is your proudest moment?

KHF: This is a tough one. I would say my proudest moment surrounds the year before I made partner. It was personally the most difficult year of my life, yet I was able to succeed professionally and grow as a person.

Q: What is your favorite vacation destination?

KHF: This is an easy one. Belize. After that difficult period of my life, I started a journey of multiple mission trips to this beautiful country in Central America. Although I did not go to the traditional "vacation" spots of Belize, I was able to enjoy the country's best asset in its people.

Q: What motivates you?

KHF: Serving others. Helping clients, aggressively defending cases, serving my community, helping a friend, providing an answer to a difficult problem that calms the person seeking advice - these are all things that motivate me to work as hard as I do and give as much as I can.

Court of Appeals *cont. from page 4*

cases in which plaintiffs allege fatigue, hypertension, and other physical conditions contributed to an accident. Plaintiffs routinely request medical records in discovery and defendants almost universally object. See, e.g., Mims v. Wright, 157 N.C.App. 339, 578 S.E.2d 606 (2003) (defendant's denial of plaintiff's allegation of negligence in answer and assertion of contributory negligence did not constitute a waiver of physician-patient privilege)

Defendants, on the other hand, can use the case to their advantage when seeking a plaintiff's prior medical history. Specifically, they can argue a request for medical records for 5 years preceding an accident is reasonable in scope.

Expert Witnesses *cont. from page 5*

officers to obtain the police file in hopes of collecting additional physical evidence. After the engineer has collected physical evidence he can provide an assessment of or reconstruct the accident by calculating the speed of the vehicles and reaction time of the drivers involved. Computer technology has improved to the point where many reconstruction engineers can create detailed video recreations of the accident based on the physical evidence and data they collect. In cases involving questionable liability a good accident reconstruction engineer is a must have for an attorney to demonstrate how the accident occurred.

Other experts that may be helpful to assess the issue of liability are trucking safety experts and/or human factors experts. Safety expert have experience, skill and knowledge in the practice of safely operating commercial vehicles. They would offer opinions on matters such as hours of operation and rest between shift assignments or compliance with Federal Motor Carrier Safety Regulations. A human factors expert may be helpful in opining about visibility at the accident scene and reaction time for a person to respond to some visual or auditory cue.

Expert witnesses of the type described here are frequently used by the attorneys to prosecute or defend trucking accidents. Consequently it is important to understand the rules of evidence which precipitate admissibility of expert witnesses at trial. Before expert testimony is admissible in trial an attorney must lay a proper foundation to show: 1) the expert is qualified to offer an opinion, and 2) the testimony is sufficiently reliable based on the review of the facts and data of the case at hand. The seminal case that provides a framework for expert testimony in Federal Court Case is Daubert v. Merrill Dow Pharmaceuticals. See 509 U.S. 579, 113 S. Ct. 2786 (1993). In Daubert, the United States Supreme Court held that the proponent of the expert testimony must show that the opinions are scientifically reliable and based on some recognized scientific methodology. Id at 589. The U.S. Supreme Court even extended the Daubert rule in 1999 in the case of Kuhmo Tire vs. Carmichael. See 526 U.S. 137 (1999). In Kuhmo, the Court held that all expert opinions must pass some test to demonstrate reliability of the opinion whether it by the use of a scientific methodology or not. Id at 141. These cases apply to lawsuits in the federal court.

In the years since the United States Supreme Court issued the Daubert opinion states were left to develop their own law regarding the admissibility of expert opinions. Case law from North Carolina expressly rejected the rigidity of the scientific methodology espoused by Daubert and instead developed the test of whether the expert opinion is: 1) reliable based on the area of the expertise, 2) the qualifications of the expert, and 3) the relevance of the testimony. Howerton v. Arai Helmet, 358 N.C. 440, 597 S.E.2d 674 (2003), State v. Goode, 341 N.C. 513, 461 S.E2d 631 (1995). In 2011, however the North Carolina legislature approved a change to North Carolina Rule of Evidence 702, which now state the foundation for admitting expert testimony at trial is that the testimony must: 1) be based upon sufficient facts or data, 2) in the product of reliable principles and methods, and 3) the witness has applied the principles and methods to the facts of the case. The new Rule 702 brings North Carolina closer to the scientific methodology standard applied by Daubert, but until there is more case law interpreting this new rule of evidence, the trial judges will be the gate keeper of evidence and will apply the standard as they see fit.

pre-employment and random drug screenings and is generally considered less reliable than hair testing. The bill was referred to the House Transportation and Infrastructure Subcommittee on Highways and Transit on 3/20/15.

On 4/13/15, the FMCSA published its final rule outlining requirements for urinalysis chain of custody when using electronic forms. The rule requires adequate confidentiality and security measures to prevent unauthorized use of driver information. The electronic form requires collection of the same information as the paper version but alters the method for collecting and transmitting the information. The rule, 49 CFR Part 40, went into effect 4/13/15.

On 4/29/15 the House's Transportation, Housing and Urban Development subcommittee voted to add a rider to the House appropriations bill that prevents the Hours of Service (HOS) 34-hour restart provision from being reinstated until a study shows statistically significant correlation between the new provision and driver safety. The bill also permits trucks from pulling two 33-foot trailers on highways where there is a 28-foot limit. The HOS restart provision is currently pending reinstatement on or before 9/30/15. On 5/13/15, the House Appropriations Committee approved the subcommittee's appropriations bill with the HOS restart rider intact. The bill is now awaiting a vote by Congress and, if passed, would delay reinstatement of the HOS restart provision. A vote is expected prior to 10/1/15.

The FMCSA has rejected the Association of Independent Property Brokers and Agents' (AIPBA) request for an exemption to the FMCSA's $75,000 bond requirement. The bond, which was increased from $10,000 to $75,000 in October 2013, was first required by MAP-21 in 2012 to assist carriers in satisfying claims against brokers and freight forwarders. In November 2013, the AIPBA filed a petition of review in the 11th U.S. Circuit Court of Appeals alleging inadequate notice and comment for the bond increase. That case has been stayed pending the FMCSA's decision on the AIPBA's request for an exemption.

On 4/3/15, the FMCSA issued a final rule increasing civil penalties for violation of federal regulations and which went into effect 6/3/15. For example, penalties for a driver operating while placed out of service was increased to $3,100 from $2,100 per day, knowingly falsifying records increased to $11,000 from $10,000, violations related to loading and unloading increased to $16,000 from $11,000, and carrier responsibility violations increased to $21,600 from $16,000.

On 5/4/15, the FMCSA issued a Notice of Proposed Rule Making removing the exemption requirement for drivers with diabetes. Currently, diabetic drivers are banned from operating commercial motor vehicles without an exemption from the FMCSA. The proposed rule removes the ban and exemption requirement in favor of diabetic drivers obtaining documentation from a medical examiner confirming that the driver's diabetes is stable and well-controlled. The comment period is open until July 6, 2015. Since January 2014, the FMCSA has granted more than 1,000 exceptions for diabetes.

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Hedrick Gardner Trucking & Transportation Team

Allen C. Smith
Practice Group Leader
Civil Litigation
Charlotte
704.319.5449

R. Daniel Addison
Workers' Compensation
Columbia
803.727.1201

Jeffrey H. Blackwell
Civil Litigation
Wilmington
910.795.2208

Matthew D. Glidewell
Workers' Compensation
Charlotte
704.319.5432

Hatcher B. Kincheloe
Civil Litigation
Charlotte
704.319.5442

David L. Levy
Civil Litigation
Charlotte
704.319.5426

Thomas W. Page
Workers' Compensation
Charlotte
704.319.5446

Kristie H. Farwell
Civil Litigation
Raleigh
919.719.3718

S. Reid Russell
Civil Litigation
Raleigh
919.719.3720

Gerald A. Stein, II
Civil Litigation
Charlotte
704.319.5464

Martha W. Surles
Workers' Compensation
Charlotte
704.319.5438

Austin R. Walsh
Civil Litigation
Charlotte
704.602.8010

Jerry L. Wilkins, Jr.
Workers' Compensation
Wilmington
910.795.2223