TRANSPORTATION matters

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DOT/FMCSA - Noteworthy Updates

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The Department of Transportation/Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, and Accountability (CSA) program remained at the forefront of the news over the past few months. For the most part, motor carriers, brokers, and shippers have been highly dissatisfied with implementation of the CSA program.

In July 2012, a group of shippers and motor carriers (led by Alliance for Safe, Efficient and Competitive Truck Transportation – ASECTT) filed a lawsuit in the D.C. Circuit Court of Appeals against the FMCSA seeking judicial review of a fact sheet issued by FMCSA in May 2012. For relief, ASECTT asked the D.C. Circuit Court of Appeals to enjoin FMCSA "from advising the public to rely on the CSA [program] and [the Safety Measurement System (SMS)] for purposes of making safety fitness determinations . . . and from making SMS data available to the public . . ." Briefs were filed by the parties in December 2012 and January 2013.

In January 2013, the DOT Office of Inspector General initiated an audit of the program to assess whether CSA has adequate controls to ensure the quality of the data used to evaluate motor carrier performance and risk. Also in January 2013, FMCSA posted materials on the Safety Management Cycles (SMC) for seven BASICs of the SMS: Unsafe Driving, Hours-of-Service Compliance, Driver Fitness, Controlled Substances/ Alcohol, Vehicle Maintenance (both Cargo Related and Inspection-Repair-Maintenance), Hazardous Materials Compliance, and Crash Indicator. These can be found at http://csa.fmcsa.dot.gov/About/SMC_Overview.aspx.

Speaking of the Safety Measurement System, FMCSA implemented 11 changes on December 3, 2012. Those

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Shared Drivers - Avoiding Exposure in Liability Actions for Personal Injury to Lent Employees

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Renegar

In the event a motor carrier chooses to enter into an arrangement whereby it utilizes lent employees as drivers, there is a potential increase in exposure to negligence and personal injury lawsuits where a motor carrier could face liability not normally encountered in the typical employee-employer relationship. For example, in North Carolina an employee driver is limited to the recovery set forth in the Workers' Compensation Act as a result of an injury in the course and scope of his employment. See N.C. Gen. Stat. § 97-10.1 ("If the employee and the employer are subject to and have complied with the . . . then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies . . . .)

However, if a lent employee slips on the loading dock or is struck by a forklift while walking through the warehouse area, the motor carrier faces exposure to a personal injury lawsuit and may not benefit from the protections afforded by the Workers' Compensation Act.

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In this Edition

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Case Law Update - Legal Outcomes and Rules of the Road

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Stein


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In this case law update, we highlight strategies to avoid awards of punitive damages and spoliation sanctions. We also describe recent cases addressing scope of employment issues.

Punitive damages

Challenge a claim for punitive damages from the outset. In North Carolina, a plaintiff must prove the defendant's conduct rose to the level of "fraud, malice, or willful or wanton conduct." N.C.G.S. § 1D-15. The defendant has a good chance of prevailing in a motion to dismiss for failure to state a claim when the plaintiff uses these magic words but provides no facts that meet this standard. See Carland v. Jordan, No. 1:12-cv-82, 2012 WL 3262939 (W.D.N.C. Aug. 8, 2012). Allegations of falling asleep at the wheel or FMSCA violations are not enough for punitive damages without pleading facts that defendant acted deliberately or recklessly. See George v. Greyhound Lines, Inc., 708 S.E.2d 201 (N.C. App. 2011). Specifically, if a carrier knows of a driver's accident history and fails to provide adequate interventions, a punitive damages claim will likely reach the jury. Springs v. City of Charlotte, 730 S.E.2d 803 (N.C. App. 2012).

Even when a punitive damages claim avoids dismissal, proving punitive damages by clear and convincing evidence is a difficult hurdle for plaintiffs to overcome. Evidence should "fully convince" the jury that the defendant must be punished in order to deter similar, wrongful acts. See George, supra at 204. This standard is higher than finding liability. Finding an example from outside the state, a West Virginia driver's failure to use his vehicle's VORAD radar-based collision-detection system constituted negligence but did not meet the standard for punitive damages ("wanton, willful, or reckless conduct") when the driver had no training on the system. Hurley v. Averitt Express, Inc., No. 2:11-cv-00624 (S.D.W. Va., Oct. 3, 2012).

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Renegar cont.

In Anderson v. Demolition Dynamics, Inc., the Court of Appeals noted:

> Situations may exist under which an employee may properly be considered to be in the joint employment of two employers so that both become jointly responsible to pay compensation if the employee is injured by accident arising out of and in the course of such employment. (Citation omitted) Our courts utilize the following three-prong 'special employer' test to determine whether an employee may be deemed to have joint employers for purposes of the Act.
>
> When a general employer lends an employee to a special employer, the special employer becomes liable for [workers'] compensation only if:
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;
> (b) the work being done is essentially that of the special employer; and
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for worker's compensation.

136 N.C. App. 603, 606, 525 S.E.2d 471, 474 (2000) (emphasis added) (internal citation omitted). When these three conditions are met, a plaintiff is barred from proceeding against either of his employers at common law. See Brown v. Friday Service, Inc., 119 N.C. App. 753, 759, 460 S.E.2d 356, 360 (1995).

When entering into arrangements for lent employee drivers, the motor carrier employer needs to consider whether the contract for the lent drivers adequately protects the carrier from exposure to civil liability and whether modifications to the contract are practical in the scope of the arrangement.

Smith cont.

changes include the following:

- Aligning violations that are included in the SMS with Commercial Vehicle Safety Alliance inspection levels by eliminating vehicle violations derived from driver-only inspections and driver violations from vehicle-only inspections;
- Changing the name of the "Fatigued Driving (HOS) BASIC" to the "Hours-of-Service (HOS) Compliance" BASIC;
- Separating crashes with injuries from crashes with fatalities on the display of a motor carrier's profile (http://ai.fmcsa.dot.gov/sms);
- Removing speeding violations that are only 1 to 5 mph in excess of the posted limit;
- Lowering the severity weight for generic speeding violations;
- Aligning the severity weight of paper and electronic logbook violations.

In February 2012, the American Trucking Associations filed a lawsuit against FMCSA in the D.C. Circuit Court of Appeals asking that the court overturn the Hours-of-Service (HOS) Final Rule published in December 2011. That rule limited the 34-hour restart provision to once in a seven-day period and required that the 34-hour restart include two periods between 1:00 a.m. and 5:00 a.m. (A summary of the HOS changes can be seen at http://www.fmcsa.dot.gov/rules-regulations/topics/hos/index.htm.) The D.C. Court of Appeals will hear oral arguments on March 15, 2013. With some of the changes scheduled to go into effect on July 1, 2013, it is not clear that the court will make a ruling prior to the effective date. On January 25, 2013, the American Trucking Associations wrote the administrator of FMCSA to request delay of enforcement until three months of the court issuing its ruling. FMCSA is in the process of reviewing this request.

ADA Prohibits the Use of Maximum Leave and "Full Duty" Return-to-Work Policies

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Murray

This past October, the Equal Employment Opportunity Commission (EEOC) secured a settlement in excess of $4.8 million from Interstate Distributor Co. based on Interstate Distributor's policies to (a) terminate employees after 12 weeks of leave and (b) not allow an employee to return to work after taking an extended leave unless the employee has "no restrictions." During the past several years, the EEOC has focused its enforcement efforts on companies with these no-exception maximum leave and full duty release policies that violate the Americans with Disabilities Act (ADA). The Interstate Distributor settlement is the fourth multi-million dollar settlement the EEOC has obtained based on these policies; these settlements are some of the largest ever obtained by the EEOC—Verizon alone paid $20 million.

The ADA prohibits employers from discriminating against qualified, disabled employees in the terms, conditions, and privileges of employment. To avoid such discrimination, an employer must make, if necessary, "reasonable accommodations" to allow a disabled employee to continue to work unless such an accommodation would impose an "undue hardship" on the employer's business. A reasonable accommodation can include a range of modifications and adjustments to an employee's position. The reasonable accommodation assessment should involve two-way communication between the employer and employee and the process should take account of an employee's specific situation.

Under the ADA unpaid leave can be a reasonable accommodation. The employer must grant unpaid leave even if the return-to-work date is uncertain. However, if unpaid leave will be indefinite, then the request is unreasonable and the employer does not have to provide leave. Note that even if the unpaid leave is

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Workers' Compensation: NC Court of Appeals Avoids Addressing Statutory Employment of Truck Driver

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Jones

In an unpublished opinion, Parker v. Big Rock, __ N.C. App. __, 729 S.E.2d 128 (2012), the Court of Appeals sidestepped an opportunity to clarify the interplay, if any, between N.C. Gen. Stat. §§ 97-19 and 97-19.1 and how one determines which party is liable for coverage of a workers' compensation claim between a principle contractor and a subcontractor.

The dispute in this matter centered on an insurance carrier which provided a workers' compensation policy to a trucking company (WH Services). The insurance carrier primarily argued that the policy was ineffective; however, the insurance carrier also raised the issue of a second trucking company (Big Rock) being the statutory employer for the injured employee. Big Rock argued to the North Carolina Industrial Commission that 97-19.1 alone was applicable, as the entities involved were in the trucking industry. According to 97-19.1, a principle contractor or subcontractor who contracts with a individual trucker licensed by the US DOT is liable under the Workers' Compensation Act if the independent trucker is injured in the course of performing the work if the individual did not have workers' compensation insurance.

The Industrial Commission agreed that 97-19.1 governed the liability of the employers in the matter. On appeal to the Court of Appeals, the co-defendants argued for a hybrid interpretation of the two statutes. However, the Court of Appeals did not address which statute controlled, only determining that if 97-19 were applicable it did not matter, because under that scenario the subcontractor (W.H. Services) had workers compensation insurance; therefore, the general contractor (Big Rock) would not be liable as a statutory employer.

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Murray cont.

a reasonable accommodation, an employer does not have to provide the leave if it is an undue hardship. Factors supporting undue hardship include the costs to the employer, the complexity of the employee's work, the difficulty in replacing the employee, and the difficulty in redistributing the employee's work.

Maximum leave policies are not prohibited under the ADA, but an employer must provide an exception that acknowledges the employer's obligation to make a reasonable accommodation assessment prior to terminating an employee. The employer must also follow through with the reasonable accommodation assessment.

Unlike maximum leave policies, "no restriction" or full duty release policies will always violate the ADA because such policies fail to allow a reasonable accommodation assessment. Unless federal law or regulations provide otherwise, an employer must make the reasonable accommodation assessment and provide the reasonable accommodation unless it is an undue hardship. Ultimately, there is no way to have a "no restriction" or full duty release policy that is not eviscerated by the ADA requirements.

Employers in the trucking and transportation sector are able to place some restrictions on a qualified, disabled employee's ability to return to work or work in the first place despite the ADA. Trucking and transportation sector employers can require employees to meet all Federal Motor Carrier Safety Regulations if the employee's position is covered by the Federal Motor Carrier Safety Regulations. For job duties and positions not covered by the Federal Motor Carrier Safety Regulations, the employer must perform the reasonable accommodation assessment.

The EEOC's focus on maximum leave and no restriction policies give warning to all employers that such policies will not be allowed under the ADA. Employers need to immediately revise such policies so that they are in compliance with the ADA. Further, an employer must undertake the reasonable accommodation assessment when it has knowledge that a disabled employee needs such an accommodation. The Employment Practice Group at Hedrick Gardner can help you revise your policies and ensure that you are compliant with the ADA.

Jones cont.

As such, general contractors and sub-contractors in the trucking industry remain having no definitive decision on this issue from the Court of Appeals. Pursuant to Big Rock's interpretation of the statutes, based upon 97-19.1, the ultimate responsibility for procuring workers' compensation rests upon any principle contractor, intermediate contractor, or subcontractor who contracts with a party in the "interstate or intrastate carrier industry" which operates a truck licensed by the US Department of Transportation. The primary contractor will be held liable for the workers compensation injury if the secondary contractor does not have workers' compensation insurance, regardless of whether the secondary contractor produced a certificate of insurance, valid or invalid, to the primary contractor.

It is important for employers in the truck industry to be aware of the uncertainty. When contracting with another motor carrier, please be aware that your potential liability for workers' compensation claims for the subcontractor's employees may not be relieved by the presentation of a valid certificate of insurance. Your liability may depend strictly upon whether or not the subcontractor has workers' compensation insurance. If not, you may be responsible.

Stein/Walsh cont.

Spoliation

It is important that carriers investigate an accident as soon as possible after it occurs and avoid the destruction of any important items or documents. In Florida, a plaintiff moved for spoliation sanctions for defendant's failure to preserve information from a tractor-trailer's ECM. Vanliner Ins. Co. v. ABF Freight Sys., Inc., No. 5:11-cv-122-Oc-10TBS (M.D. Fl., March 8, 2012). Sanctions were denied because the ECM information was not essential to the plaintiff's claim. See id. An owner must also ensure that a vehicle is not destroyed before all parties have had an opportunity to inspect it. Even the negligent destruction of an impounded vehicle may warrant sanctions. See Klett v. Green, et al., No. 3:10-cv-02091 (D. NJ., June 27, 2012).

Liability for Driver Conduct

The traditional rules hold true regarding the level of control necessary to establish an agency relationship. To determine whether a driver is an employee or independent contractor for purposes of civil liability, courts look at factors such as an employer's right to control the manner of performance, the right to discharge the individual, the method of payment, which party provides the tools, and the level of skill required. Importantly, the contracting party has no liability for an independent contractor's negligence unless the contractor's work is inherently dangerous.

In an Illinois case, Dowe v. Birmingham Steel Corp., a manufacturer set rules governing contracted-drivers' conduct and had the ability to replace impaired or underperforming drivers. See 2011 IL App (1st) 091997, 963 N.E.2d 344, 357 (2011). However, because the drivers controlled their routes, hours, and equipment, the drivers were held to be independent contractors. See id.

If a driver is considered an employee, the employer is unlikely to be liable for a driver acting outside the scope of his employment. For instance, a South Carolina carrier was not liable when its driver assaulted a man at a truck stop. See Kase v. Ebert, 392 S.C. 52, 707 S.E.2d 456 (S.C. App. March 9, 2011). The carrier was also not liable for negligent supervision because the driver was neither on its premises nor using its property to further the assault. See id.

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Meet the Team

Our highly-experienced attorneys regularly defend civil claims involving death and serious bodily injury and workers' compensation claims against motor carriers and their insurers. Hedrick Gardner's Trucking & Transportation attorneys are available around the clock to serve clients involved in serious accidents. Immediately following an accident, our attorneys arrange for engineers and investigators to travel to the scene, meet with drivers, assist in the retention of criminal defense attorneys, identify witnesses, secure evidence to protect against claims of spoliation, and ensure that the accident scene and vehicles are photographed and documented.

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