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DOT/FMCSA - Noteworthy Updates

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The long awaited Electronic Logging Device (ELD) rule takes effect 12/18/17. In August, a bill presented by Brian Babin (R-TX) to delay the ELD mandate quietly gained traction in Congress with 43 co-sponsors, including high-ranking Kevin Brady (R-TX), and from outside Capitol Hill with the support of the Owner-Operator Independent Drivers Association (OOIDA). Babin ultimately withdrew the bill but offered an amendment to the House Transportation, Housing and Urban Development Appropriations Bill (T-HUD) bill to delay the ELD mandate for 1 year by prohibiting the Department of Transportation (DOT) from funding any ELD regulation. The Amendment was ultimately rejected by the House 246-173 on 9/6/17 with 67 Republicans voting to reject the delay.

After 12/18/17, carriers using automatic onboard recording devices (AOBRDs) will be allowed to continue using the devices until 2020. ELDs are expected to decrease freight hauling capacity 2.5% - 5% across the industry but ultimately make carriers more efficient through improved logistical planning. The Federal Motor Carrier Safety Administration (FMCSA) is reminding carriers to register the ELDs and that carriers must repair or replace malfunctioning ELDs within 8 days of being alerted of an error.

On 9/6/17, the House passed the SELF DRIVE Act, a bill to increase federal oversight over non-commercial, self-driving vehicles. The bill calls for the creation of a Highly Automated Vehicle Advisory Council to make recommendations to the DOT on the capabilities and limitations of automated vehicles. The DOT will also be required to set rules of the road for self-driving cars within 1 year and to develop safety assessment protocols, including cyber security, within 2 years. This federal law will preempt state vehicle standards and regulations for these new vehicles. The bill has been received in the Senate and referred to the Committee on Commerce, Science, and Transportation.

On 8/17/17, the Environmental Protection Agency (EPA) issued a notice of its plan to revisit regulations regarding trailers and glider kits as a part of Phase 2 of the federal rule on greenhouse gas emissions. The Phase 2 rule, which was finalized in October 2016 (after Phase 1, for vehicles model year 2014-2018, took effect in 2014 and January 2017), tightens emissions standards and mpg requirements for medium- and heavy-duty trucks, including glider kits and trailers. Glider kits are primarily original equipment chassis and cab assemblies in which used engines and (pre-exhaust emissions standards) exhaust systems are installed. The Phase 2 rule would have capped the number of complete glider kits (complete vehicles)

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Reigning in the Parsons Presumption, Part II

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In the Summer, 2016 Edition of this Publication, we addressed certain recent developments with regard to the "*Parsons* presumption." Since that time, a decision by the North Carolina Supreme Court and subsequent action taken by the General Assembly of North Carolina has further clarified the extent to which the "*Parsons* presumption" will be applied.

By way of review, the "*Parsons* presumption" is an evidentiary presumption resulting from the Court of Appeal's decision in *Parsons v. Pantry, Inc*., 126 N.C. App. 540, 485 S.E.2d 867 (1997). The presumption was created to protect employees from having to re-prove medical causation with regard to additional treatment being sought for injuries that had already been deemed compensable. Once the Industrial Commission judicially determines that a particular injury is compensable, the burden then shifts to the employer to show that any treatment involving that injury is unrelated to the compensable injury.

Following *Parsons*, several Court decisions addressed the applicability of the presumption in differing circumstances. For example, in *Perez v. Am. Airlines*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), the Court found that the presumption extended to any injury accepted by an employer on a Form 60.

The issue of the expansiveness of the *Parsons* presumption was somewhat settled until the North Carolina Court of Appeals issued an opinion in *Wilkes v. City of Greensville*, __ N.C. App. ___, 777 S.E.2d 282 (2015). In *Wilkes*, the employee had sustained injuries as a result of a work-related motor vehicle accident. The employer accepted injuries to the "ribs, neck, legs and entire left side" as compensable via Form 60. The employee then sought compensation for treatment of anxiety and depression. The Court of Appeals held that since the employer accepted the compensability of injuries employee sustained directly in the motor vehicle accident on a Form 60, the employee was entitled to the *Parsons* presumption that his subsequently-diagnosed anxiety and depression were also compensable.

The decision by the Court of Appeals led to great uncertainty for employees and employers alike. Knowing this, the North Carolina Supreme Court granted Defendant's Petition for Discretionary Review. At the time of our last writing, briefs were being submitted to the Supreme Court and the hope was that a decision would be forthcoming that clarified the limitations of the *Parsons* presumption.

On June 9, 2017, the Supreme Court issued an opinion, authored by Justice Hudson, which affirmed the decision of the Court of Appeals with regard to the *Parsons* presumption. In affirming the decision of the Court of Appeals, the Supreme Court viewed the plain language of N.C. Gen. Stat. § 97-82(b) as dispositive.

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A Defendant's Answer to Reptile Litigation

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In today's world of litigation strategy and tactics have evolved into more than putting your evidence on at trial and making good arguments on behalf of your clients to achieve the desired outcomes. Occasionally, lawyers may retain jury consultants to help pick a jury that may be best suited to hear a particular case, but more recently plaintiff lawyers have begun to utilize a method of psychological manipulation that is known as the Reptile Theory for litigating and trying cases. Indeed, the Reptile Theory is based on the psychological theory that jury members respond to a danger stimulus by wanting to correct dangerous behavior and in doing so protect the general public at large. Plaintiff attorneys argue that the only way a jury can protect the public from unreasonably dangerous activity is to award large sums of money to their clients in order to send a message that similar dangerous activity will not be tolerated in the future. It is theorized that this form of psychological manipulation affects the part of the brain that triggers a survival instinct when a person is faced with danger. The plaintiff attorney's job is to connect the dangerous activity with the possible harm of danger to the community at large and, therefore, convince the jury to award damages based on an emotional response rather that a reasonable application of the law.

What makes the Reptile Theory potentially dangerous is that it attempts to convince a jury to focus on what could happen instead of what actually happened. The tactics of the theory work to establish danger in the community by focusing on the defendant's violation of a safety rule, which in turn empowers the jury to improve community safety. Some plaintiff attorneys may go so far as to suggest the jury punish the defendant for its unreasonably dangerous conduct which puts us all in harm's way. The developers of the Reptile Theory even promote the success of their work which can be seen in more detail at www.reptileverdicts.com.

Generally speaking, the plaintiff attorney starts to develop this theory in written discovery and depositions by posing hypothetical questions such as:

- Keeping a reasonable lookout while driving keeps people safe from accidents?
- Failing to keep a reasonable lookout while creates a risk of harm to others on the road?
- Creating a risk of harm by failing keep a reasonable lookout can put the public in danger?

The most logical, and common sense, answer to these questions are "yes" – failing to keep a reasonable lookout does create the possibility an accident. However a good reptile lawyer drives the message home by repeated references to putting the public in danger. This in turn starts activate the part of a jurors mind that will illicit an emotional reaction to the defendant allegedly endangering the public at large. The theory is that the jurors will feel vulnerable and, in order to reduce the risk of danger they will send a message to the defendant that similar conduct will not be tolerated. This approach is also successful at convincing the defendants to make large settlement offers in order to avoid the risk of a catastrophic trial verdict.

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Reptile Litigation *cont. from page 3*

The defense bar is now becoming savvy to this reptile approach and have begun to develop strategies to counteract it. The Reptile Theory plays on the emotional reaction of a jury, so conversely the defense lawyer must point out that the case is about law and reason – not emotion. There are several ways the defense can counter the reptile approach.

First, the defense has to point out where the reptile plaintiff lawyer is substituting ambiguous community and social standards for the law and the facts of the case. This generally starts with answering discovery and preparing witnesses to testify in deposition. Defense attorneys need to recognize the broad hypothetical questions posed by the reptile lawyer and state the proper objections. To the extent a fact witness may be required to answer these hypotheticals they need to be prepared to also recognize the reptile questions and answer by explaining that a safety rule hypothetical may not in all cases apply, and then relate the questions to the facts and circumstances of the individual case. As always, the witness must be prepared to answer honestly as it pertains to the individual case, but not blindly agree with every hypothetical question.

Second, defense attorneys must be prepared to educate the judge about what is going on during pre-trial motions. The Reptile Theory of litigation is nothing more than a disguised method of attempting to get the jury to make a decision based on sympathy, anger, or passion which in and of itself is improper. It is also another method for utilizing the improper "Golden Rule Argument" at trial. Prior to trial the defense attorney needs to point in a motion in limine that Plaintiff may trial to utilize the Reptile Theory in trial. I suggest using question from deposition transcripts and/or the plaintiff's own interrogatories to support your arguments. It is likely the reptile lawyer's cross exam questions will be at trial will be the exact same questions he asked in depositions. If so, the judge should quickly recognize the tactic and be educated on how to rule.

Third, starting in voir dire, defense attorneys have to begin developing the theme of reasonableness, and that the case is about the facts of the case, and nothing more. In one trial, I turned the plaintiff's reptile argument around on the plaintiff by telling the jury that opposing counsel may attempt to play to your emotions and even try to make you mad at the defendant for causing the accident. After the plaintiff's attorney utilized her reptile questions in trial, I told the jury in closing that the case was an accident and that was it, and that the plaintiff attorney's attempt to denigrate my client because he caused an accident was nothing more than her attempt to stir them up and make them mad in hopes they would punish my client for the accident. This was not what the law contemplated and their job was to follow the law.

Finally, if you can't beat them join them. In jurisdictions with contributory or comparative negligence, it may be helpful to the Reptile Theory around on the plaintiff.

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Reigning in the Parsons Presumption, Part II *cont. from page 2*

At the time of the decision, N.C. Gen. Stat. § 97-82(b) read, in part,

> "Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made."

The Supreme Court in *Wilkes* stated, "Continually placing the burden on an employee to prove that his symptoms are causally related to his admittedly compensable injury before he can receive further medical treatment ignores this prior award."

Following the decision by the Supreme Court in *Wilkes*, the law appeared to be that if a Defendant accepted the compensability of an injury or claim on a Form 60 or Form 63 (Section 1, without denying the claim within period of time provided), then an employee would be entitled to the *Parsons* presumption for any injuries later alleged to be related; no matter what specific injuries were listed on the Form 60 or Form 63.

In response to the decision by the Supreme Court in *Wilkes*, which predictably caused great consternation in the business community, the General Assembly of North Carolina passed a bill (Session Law 2017-124, House Bill 26), which was signed into law by Governor Roy Cooper on July 20, 2017. The new law amended N.C. Gen. Stat. § 97-82(b) as follows:

> "Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury *as reflected on a form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d)* for which payment was made. *An award of the Commission arising out of G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury*.
>
> (emphasis added to reflect changes to N.C. Gen. Stat. § 97-82(b).)

The amendment of N.C. Gen. Stat. § 97-82(b) now makes clear that the *Parsons* presumption will only apply to specific injuries or conditions identified on a Form 60 or Form 63. If the injury or condition is not specially identified on a Form 60 or Form 63, the *Parsons* presumption does not apply and it is employee's initial burden to prove that the alleged injury or condition is causally related.

While it has taken approximately twenty years, it appears that the uncertainty surrounding the *Parsons* presumption has finally been resolved. Given this clarification, it is critical that when a Form 60 or Form 63 is prepared, that only the specific injuries or conditions being accepted as compensable are listed.

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at the greatest number built between 2010-2014 and required used engines compliant with current emissions standards. According to the EPA's release, the agency intends to initiate the rulemaking process but did not provide a time frame for doing so.

On 8/4/17, the FMCSA announced its withdrawal of the 3/10/16 advanced notice of proposed rulemaking (ANPRM) regarding standards to assess the risks of sleep apnea. Citing over 700 comments to the ANPRM, including those from the National Transportation Safety Board (NTSB), the FMCSA will not issue a notice of proposed rulemaking at this time. Instead, the FMCSA is satisfied that any issues with sleep apnea can be addressed through current safety programs and the Federal Railroad Administration's (FRA) rulemaking addressing fatigue risk. Currently, there are no regulations providing guidance for assessment of sleep apnea risks. Medical examiners are left to make individual determinations based on their own medical judgment.

On 8/1/17, the FMCSA began its 2-year crash preventability demonstration program that will allow carriers to make requests for data review (RDR) for crashes on or after 6/1/17 to have crashes classified as "not preventable." Crashes that are ultimately found to have been not preventable will result in recalculation of a carrier's Behavioral Analysis Safety Improvement Category (BASIC) score. To be classified as not preventable, an accident must have resulted in a fatality or bodily injury requiring immediate medical treatment away from the scene or a vehicle being towed from the scene. Accidents eligible for review must fit into one of eight categories:

1) A commercial motor vehicle (CMV) is stuck by a driver under the influence.
2) A CMV is struck by a driver traveling the wrong way.
3) A CMV is rear-ended.
4) A CMV is struck while legally parked.
5) A suicide by CMV where a pedestrian steps onto the highway.
6) A CMV strikes an animal in the roadway.
7) A CMV is struck by infrastructure such as fallen trees.
8) A CMV is struck by equipment dropped from another vehicle.

Previously, on 6/30/17, the FMCSA announced that it would be following the recommendations of a National Academy of Sciences 12-member panel ("Panel") to overhaul the FMCSA's Compliance, Safety, Accountability (CSA) program's Safety Management System (SMS). The Panel concluded that the SMS scores lacked a "statistically principled approach" to measure the performance of drivers and carriers and recommended an "item response theory" (IRT). The Panel defined the IRT only as a more detail data-oriented approach. The FMCSA will be left to interpret the scope of the Panel's IRT approach and fashion regulations to meet the recommendations. IRTs have been used with success in the medical industry with regard to hospital rankings. In March, the FMCSA withdrew a proposed motor carrier safety fitness rule pending the outcome of the Panel's study.

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On 7/27/17, the FMCSA announced a revision to a 2015, proposed rule eliminating the requirement that insulin-treated diabetics seek a one-year, formal medical exemption. The current exemption process requires a medical examiner to automatically disqualify a diabetic driver and requires the driver to then seem exemption from the FMCSA, which can take up to 6 months. The proposed rule would allow a full assessment by the driver's treating physician to be considered by the medical examiner to determine whether the diabetes is treated and stable. The applications for exemption to the FMCSA grew by 67% from 2013 to 2015 with the approval rate growing from 39% to 52% over the same period. Public comments are due by 9/25/17.

Commercial freight brokers are beginning to see peer-to-peer competition with companies such as Uber Freight and the technology startup, Convoy, coming into the marketplace. Convoy, first launched in 2015, is a mobile application that matches carriers and drivers with loads based on the type of haul and driver preferences. Convoy currently has 300 shippers and 10,000 trucking companies registered with the app.

Reptile Litigation *cont. from page 4*

For example, in North Carolina, where pure contributory negligence applies, all drivers have a duty to keep a reasonable lookout in order to avoid an accident. If there is evidence of a plaintiff's contributory negligence, the same questions can be asked to him as well. If the same safety standard applies to both the plaintiff and defendant, then plaintiff cannot be entitled to a favorable result if he is violating the same standards he accuses the defendant of violating.

In conclusion, the Reptile Theory is a creative spin of the old plaintiff technique on appealing to a jury's emotion rather than reason. It hopes to make a jury angry with the defendant in order to send a strong message through its verdict. Defense attorney must recognize these tactics, and be prepared to deal with them from the outset of the case.

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