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Tractor-Trailer Torts

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Current Developments

Details of Proposal Relative to Drivers with Insulin-Treated Diabetes Available — FMCSA Seeks Comments. As readers will recall, in May 2015, FMCSA published a notice of proposed rulemaking in the Federal Register to allow drivers with stable, well-controlled insulin-treated diabetes mellitus (ITDM) to be qualified to operate commercial motor vehicles (CMVs) in interstate commerce. The comment period closed on July 6, 2015. FMCSA received over 1,250 comments. In that same month, FMCSA requested the Medical Review Board (MRB) to provide the Agency with advice by reviewing and analyzing the comments and providing recommendations to FMCSA for its consideration. On September 9 the Agency announced the availability of the MRB's report and requests comments on the MRB recommendations. The Final MRB Task 15-01 Report is posted in the docket at FMCSA-2005-23151.

Inasmuch as diabetes mellitus is a disease manifested by the body's inability to maintain normal function of insulin, a substance that controls glycemic levels in the blood, it presents a major health challenge, particularly those who drive CMVs in interstate commerce. Under 49 CFR 391.41(b)(3), a person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control. Since 2003, FMCSA has maintained an exemption program for individuals that use insulin to treat their diabetes mellitus, that allows them to drive in interstate commerce if their diabetes is stable and they meet criteria of the program. 68 FR 52441 (Sept. 3, 2003), as revised, 70 FR 67777 (Nov. 8, 2005).

In an effort to assist in the development of the final rule, on July 15, 2015, FMCSA requested advice from the MRB for the Agency to consider. Specifically, FMCSA asked the members to review and analyze all comments from medical professionals and associations, and identify factors the agency should consider when making a decision about the next steps in the diabetes rulemaking. A public meeting to discuss this matter was held by the MRB on July 21 and 22, 2015. FMCSA received the MRB's final report on September 1, 2015. etails of the meeting, including the original task, final report and supporting materials used by the MRB are posted on the Agency's public Web site.

The MRB's final report is available in the docket for this rulemaking (in addition to being available on the Agency's public Web site). The final report contains a

number of detailed recommendations for FMCSA to consider as it develops a final rule. The Agency believes that public comment on the recommendations will assist it in evaluating the advice it has received from the MRB. Comments must be limited to addressing the recommendations in the MRB final report. A summary of the report's major recommendations is set out below:

The MRB recommended that ITDM drivers be medically disqualified **unless** they meet the following requirements demonstrating their stable, well-controlled ITDM:

- The driver must provide an FMCSA Drivers With Insulin Treated Diabetes Mellitus Assessment Form (set out in the recommendations) to a medical examiner that has been completed and signed by the treating clinician. The treating clinician must be a Doctor of Medicine, a Doctor of Osteopathy, a Nurse Practitioner or a Physician's Assistant who prescribed insulin to the driver and is knowledgeable regarding the treatment of diabetes.
- The driver must receive a complete ophthalmology or optometry exam, including dilated retinal exam, at least every 2 years documenting the presence or absence of retinopathy/macular edema and the degree of retinopathy and/or macular edema if present (using the International Classification of Diabetic Retinopathy and Diabetic Macular Edema).

The MRB recommended that medical examiners be allowed to certify an ITDM driver as medically qualified for a time period of no longer than 1 year only if the driver has not experienced any of the 8 disqualifying factors below (which the MRB believes should be listed in 49 CFR 391.46):

1. Any episode of severe hypoglycemia within the previous 6 months.

2. Blood sugar less than 60 milligrams per deciliter (mg/dL) demonstrated in current glucose logs.

3. Hypoglycemia appearing in the absence of warning symptoms (i.e., hypoglycemic unawareness).

4. An episode of severe hypoglycemia, blood sugar less than 60 mg/dl, or hypoglycemic unawareness within the previous 6 months; the driver should be medically disqualified and must remain disqualified for at least 6 months.

5. Uncontrolled diabetes, as evidenced by Hemoglobin A1c (HbA1c) level greater than 10 percent. A driver could be reinstated when HbA1c level is less than or equal to 10 percent.

6. Stage 3 or 4 diabetic retinopathy; a driver should be permanently disqualified.

7. Signs of target organ damage; a driver should be disqualified until the Start Printed Page 62450matter is resolved by treatment, if possible.

8. Inadequate record of self-monitoring of blood glucose; a driver should be disqualified for inadequate records until the driver can demonstrate adequate evidence of glucose records (minimum 1 month).

In addition, the MRB stated that, if a driver is medically disqualified due to not meeting the ITDM criteria listed above, the driver should remain disqualified for at least 6 months.

FMCSA is requesting comments on any and all of the recommendations provided in the advisory final report from the Medical Review Board but only on those recommendations. To the extent possible, comments should include supporting materials, such as, for example, data analyses, studies, reports, or journal articles. FMCSA will consider these comments, in addition to the comments submitted in response to the NPRM, in determining how to proceed with this rulemaking. Comments must bear the Federal Docket Management System (FDMS) Docket No. FMCSA-2005-23151 and may be submitted by any of the following methods:

- Federal eRulemaking Portal: Go to www.regulations.gov. Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- Fax: 1-202-493-2251.

TTT No. CD17715

Verdicts and Settlements

12-Wheeler Runs Over Ninety Year-Old Man — Death — $4.5 Million Pennsylvania Settlement. The plaintiff's decedent, a ninety year-old man, was walking along Oxford Avenue in Northeast Philadelphia when he was hit by a 12-wheel truck pulling out of a parking lot. The defendant crushed decedent's left leg and dragged him into the street. He did not lose consciousness during the accident and was aware of the nature of his injuries. Decedent suffered a series of fractures and was given an above-the-knee amputation of his left leg, as well as an amputation of one of his fingers. He remained hospitalized for two weeks, developed sepsis and died. Decedent's fifty-seven year old son witnessed the accident and suffered from flashbacks, nightmares, depression and feelings of guilt and anxiety. Plaintiff alleged defendant drove forward without knowing whether anyone was in front of this vehicle, and did not sound a horn to warn pedestrians he was going to move. Defendant admitted that he should have asked for a flagman to wave him out of the parking lot. Plaintiff's expert opined that the defendants violated industry safety standards. Defense denied liability and causation. Defense contended there were multiple versions of the events regarding decedent's path of travel prior to the accident and that the area appeared to be clear before defendant pulled out.

The parties reached a settlement for $4.5 million.

Martin Lisker v. John E. Herrmann. Phhiladelphia Co. (PA) Court of Common Pleas No. 140902588. Edward F. Chacker, Gay, Chacker & Mittin, Philadelphia, PA for plaintiff. Seth J. Schwartz, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia; Thomas F. Reilly, Chartwell Law Offices, Philadelphia, PA for defendants.

TTT No. VS17710

Defective Trailer Hitch Led to Separation – Multiple Injuries – $1.3 Million Michigan Settlement. The plaintiff, a fifty year-old electrician, was driving west in a work truck with a trailer. During this time, defendant was traveling in a rig with an attached trailer, traveling east on the same highway. The trailer disconnected from defendant's truck, crossing over a grassy median and striking the front diver's side of the plaintiff's vehicle. Plaintiff's trailer overturned and pinned him inside his truck by defendant's vehicle. Plaintiff was taken to the ER via ambulance, where he was hospitalized for one week. He was diagnosed with a fracture of his left femur as well as a fracture of the inferior pole of the left patella. Plaintiff underwent open reduction with internal fixation, and in-patient rehabilitation for two weeks. He required arthroscopic knee surgery and eventually underwent a total left knee replacement. He was later diagnosed with a sacroiliac joint injury, which required fusion surgery. He underwent more than two years of physical therapy. Plaintiff alleged defendant's negligence resulted in a defective and dangerous condition. He alleged that the trailer hitch used by defendants was in a state of disrepair and was not properly secured to defendant's truck. Defendants denied liability, contending that the trailer had been properly secured prior to the collision. Defense contended that the separation occurred due to an unforeseeable malfunction of the trailer hitch.

The parties reached a $1.3 million settlement prior to trial.

Roger Jacobs and Shirley Jacobs v. Anthony K. Lambert, Vanaire, Inc. and Master Lock Company, LLC. Delta County (MI) Circuit Court NO. 14-022291-NI. Thomas J. Wuori, Ringsmuth, Wuori Traverse City, MI for plaintiff. Robert J. Johnson, Hackney, Grover, Hoover & Bean, Grandville, MI (Anthony K. Lambert, Vanaire Inc.); William J. Leeder, III, Barnes & Thornburg, Grand Rapids, MI (Master Lock Company) defendants.

TTT No. VS17713

Rig Rear-Ends SUV on I-69 — Traumatic Brain Injury — $80,000 Indiana Verdict. The plaintiff, a thirty-eight year old corporate electrical engineer, was traveling on I-69, as he began to slow down for traffic. At the same time, defendant was operating a tractor-trailer in the scope of his employment. Defendant became distracted by other vehicles gawking at another vehicle accident, and took his eyes off the road. Defendant crashed hard into plaintiff's SUV. Plaintiff was knocked off the road into a grassy median, where the SUV struck restraining cable posts. Plaintiff was briefly knocked unconscious. Paramedics were called to the scene. Plaintiff was taken via ambulance to the hospital. He was treated for a concussion and a cut to his head along with other soft-tissue symptoms. Since the accident, plaintiff complained of symptoms of a TBI. Plaintiff was treated by a neuropsychologist, who noted plaintiff's symptoms included memory loss, chronic headaches, fatigue and trouble communicating and finding words. He underwent an MRI which concluded there was evidence of brain damage. Defendants admitted fault for the accident. Defense conceded that there was a TBI, but took the position that the condition was mild. De-

fense contended plaintiff's TBI was imposed on a pre-existing personality disorder and conversion disorder.

The jury awarded plaintiff $80,000.

Jeffrey Ryg v. Great American Lines et al. U.S. District Court N.D. Indiana No. 1:14-971. Daniel J. Buba and Kirk A. Jocham, Doehrman Buba, Indianapolis, IN for plaintiff. Carlton D. Fisher, Chicago, IL and Jennifer J. Kalas, Schererville, Hinshaw & Culbertson for defendants.

TTT No. VS17706

Green Light Dispute Over Tractor-Trailer Collision — Texas Defense Verdict. The plaintiff, a thirty-one year old, warehouse worker, was driving westbound in his vehicle to work. The defendant was traveling northbound in a tractor-trailer truck. Plaintiff approached an intersection and claimed his light was green and the defendant's light was red. The front right bumper of plaintiff's sedan struck the right rear quarter of defendant's trailer. Plaintiff was taken via ambulance to the ER. He sustained a closed distal fracture of the left clavicle; broad 1ml disc bulges at C5-6 and C6-7; soft-tissue lower back injuries, neck, right knee and right ankle injuries; and headaches. Plaintiff alleged defendant ran a red light; failed to yield the right of way; failed to keep a proper lookout; and failed to brake or turn to avoid the accident. The defense denied negligence and contended that the police report was against plaintiff, for driver inattention. The defense noted that the tractor-trailer was almost completely through t intersection when the collision occurred.

The jury found that the plaintiff was negligent and a defense verdict was returned.

Ramon Medrano-Games v. Robert E. Buckalew and Holland Enterprises Inc. Dallas County (TX) District Court No. DC-14-05006. Robert Alvarcz, LAWRH, Garland, TX for plaintiff. Michael J. Noordsy, The Bassett Firm, Dallas, TX for defendants.

TTT No. VS17709

Other Big Rigs

Elderly Woman's Vehicle Rear-Ended by U-Haul Truck – Multiple Injuries – $1.5 Million Pennsylvania Verdict. The plaintiff was a back seat passenger in a car when defendant's U-Haul truck collided with the rear of the stopped vehicle. Plaintiff suffered life-altering injuries, and had to be cut from the vehicle. She was taken to the hospital where it was determined she sustained fractures to her jaw, ribs, right femoral neck and pelvis, a C7 spinal fracture, left hip dislocation and lung contusion with right hemothroax.

The plaintiff was awarded $1.5 million in damages.

Plaintiff's Experts: Steven Levin, M.D., Warminster; Jeffrey Vakil, orthopedist, Willow Grove.

Defendant Expert: James Bonner, M.D., Chester.

Lillian Parola v. Steven Inlander. Philadelphia (PA) Court of Common Pleas No. 1409-03533. Thomas F. Sacchetta, Sacchetta & Baldino, Media, PA for plaintiff. John A. Livingood, Jr., and Gerard Bruderle, Margolis, Edelstein, Philadelphia, PA for defendant.

TTT No. OR17703

Dump Truck Collides With Small Truck — Multiple Injuries and Death — $915,000 Virginia Settlement. The plaintiff's decedent, an eighty-two year old man, was a passenger in a Toyota Tundra truck when defendant's 70,000 pound dump truck crashed into the pickup them on I-95 on December 2, 2013. Defendant was in the scope of his employment when he made a left turn from the middle lane, crossing into the path of the plaintiff. Decedent sustained a right clavicle second rib fracture, multiple low back fractures and a right chest hematoma. He was taken to the hospital and later transferred to a rehabilitation hospital until December 24, 2013. Upon discharge decedent had multiple limitations, requiring daily life assistance. He struggled to improve but never really recovered and suffered a downward and painful course. On March 17, 2014 decedent was admitted to the hospital with pneumonia secondary to aspiration. Following a fall on April 6, 2014 his health rapidly declined, and he died on April 13, 2014.

The case settled for $915,000.

Plaintiff's Experts: Dennis M. O'Neill, M.D.; Richard Ameen, M.D.; Jonathan L. Arden, M.D.; Jorge Dolojan, M.D.

Melanie Martyak, Individually and on behalf of the Estate of Donald Namuth, et als. V. Hands on Trucking LLC and Burnett Aresheio Roane. U.S. District Court of Maryland No. 1:15-CV-02377-JKB. John E. Zydron, Virginia Beach, VA; Edward L. Norwind, Rockville, MD for plaintiff. Paul M. Finamore and Dalene A. Radcliffe, Baltimore, MD for defendant.

TTT No. OR17704

Vehicle Rear-Ended by Dump Truck – Mild Brain Injury – $350,000 Virginia Settlement. The plaintiff was rear-ended by a dump truck while traveling along Virginia Beach. He was taken to the ER where he was treated for head and neck pain, but was not diagnosed a concussion. Later that week, plaintiff presented to a different ER with complaints of continuing headaches. He underwent a CT scan, which was negative. The ER recorded that plaintiff did not have any loss of consciousness and no direct blow to the head. Plaintiff was diagnosed with post-concussion syndrome and a cervical strain. Plaintiff continued to suffer from headaches, trouble focusing, and photosensitivity from the MTBI. Plaintiff returned to his employment with strong performance reviews. Defense disputed the mild traumatic brain injury diagnosis, and claimed plaintiff's symptoms were minor. A $350,000 settlement was reached at mediation two months before trial. **Anonymous Brain Injury Patient v. Anonymous Dump Truck Driver.** _____ County (VA) Circuit Court No. ____. John M. Cooper and Jim Hurley, Norfolk, VA for plaintiff.

Tow Truck Rear-Ends SUV, Which Rear-Ends Pick-Up — Neck/Back Injuries — $350,000 New Jersey Settlement. The plaintiff, a forty-four year old woman, was rear-ended while stopped at a red light near an intersection. An SUV hit the rear end of plaintiff's truck, after it had been rear-ended by a tow-truck. Plaintiff presented to an ER, where she was examined and released. She complained of pain to her neck and back, and treated with a chiropractor and physical therapist. Tests results revealed herniations at multiple cervical intervertebral discs, bilateral radiculopathy stemming from lumbar vertebra L4, bulging at lumbar discs L4-5 and L5-S1, and an annular tear at disc L4-5. After unsuccessful conservative treatment, plaintiff underwent a bilateral laminectomy and discectomy with foraminotomy at L4-5, with a small fusion and instrumentation.

Plaintiff alleged the driver of the SUV and tow-truck driver were negligent in the operation of their respective vehicles. Defendants contended plaintiff's complaints were related to a pre-existing degenerative disc disease.

The parties settled for $350,000.

Virginia Williams v. Taylor Elrod, Keith Motors, Kathleen Ottinger, and USB Leasing LT. Gloucester County (NJ) Superior Court No. GLO-L-1559-14. Sean M. Fulmer, Schatz & Steinberg, Philadelphia, PA for defendant. Frank A. LaSalvia, Campbell, Lipski & Dochney, Marlton, NJ (Keith Motors & Taylor Elrod) defendants.

TTT No. OR17707

Trucker Plaintiffs

Back Injuries Sustained in Collision of Two Commercial Trucks — $29,871 Florida Verdict. The plaintiff was driving a commercial truck in the scope of his employment when his truck collided with another commercial truck. Plaintiff alleged that defendant was negligent and caused the collision. He sustained a herniated disc in his lumbar spine. Defendant admitted liability but disputed causation and damages. Plaintiff was awarded $29,871 in damages.

Plaintiff's Experts: Farhad Booeshagi, Ph.D., accident reconstruction, Tallahassee, FL; Michael Freeman, M.D., Biomechanics, Portland, OR.

Defendant's Experts: David Delonga, M.D., biomechanics, Gulf Breeze, FL; Donald J. Fournier, Jr., accident reconstruction, Lake Mary, FL; Reginald Tall, M.D., Winter Park, FL; George A. Stanley, M.D., radiology, Winter Park, FL.

Rene Iglesias v. Andy Martinez and All Star Choice Transportation, Inc. Orange County (FL) Circuit Court No. 2013-CV-009203-O.

TTT No. TP17701

Bus Transportation

Fall Aggravated Pre-Existing Injuries — $2 Million California Verdict. The plaintiff, a seventy-one year old retired and disabled woman, was attempting to exit a transit bus at a bus stop in Apple Valley, when she sustained injuries from a fall. The defendant driver was a floating bus driver who had never dropped someone off at that stop before. Defendant attempted to pull over where plaintiff instructed him to do. Plaintiff was using a power scooter to ambulate, and descended the bus's disabled passenger ramp. The scooter's last wheel hit the ground and the scooter tipped over, causing plaintiff to fall onto her right side. Plaintiff sustained injuries to her neck and right shoulder. Plaintiff alleged the accident aggravated her prior cervical fusion and injured her arthritic shoulder, which she previously dislocated in a prior fall. She underwent shoulder replacement surgery several months later. Plaintiff alleged that driver of the bus was unfamiliar with the subject bus stop and pulled too far to the right, passing the stop. According to plaintiff, the driver lowered the ramp down in an area comprised of uneven, soft sand. Plaintiff maintained that as a result, there was no traction for her scooter, which caused it to tip over. Plaintiff alleged the driver was negligent for dropping her off in a location that was not suitable for the exiting ramp and that his employer was liable for the driver's actions. Defendant contended that he dropped plaintiff off on a flat surface that was comprised of compacted gravel and dirt. The defense contended plaintiff was negligent in the operation of her power scooter. The defense also claimed that plaintiff's shoulder surgery and neck issues were pre-existing and had no relation to the bus fall. Finally, the defense contended plaintiff's fractured leg she sustained more than a year after the bus incident, was in no way related to the bus fall.

The jury determined defendant's employer was 60% liable and plaintiff was 40% liable. The jury awarded plaintiff $2.04 million. After a comparative-fault reduction, plaintiff recovered $1,224,000 in damages.

Plaintiff's Experts: Brad P. Avrit, safety, Marina del Rey, CA; Harvey D. Cohen, M.D., geriatrics, Rancho Cucamonga, CA; David R. Patterson, M.D., Pomona, CA; Kendall Wagner, orthopedist, Fullerton, CA.

Defendant's Expert: Gary L. Painter, orthopedist, Loma Linda, CA.

Marline Moore v. Victor Valley Transit Authority; County of San Bernardino; Veolia Transportation Services, Inc.; Transdev Inc.; and Veolia Transportation Maintenance and Infrastructure, Inc. San Bernardino County (CA) Superior Court No. CIVDS1313681. Fenja Klaus, Russell & Lazarus, Newport Beach, CA for plaintiff. Norman R. Nadel, Los Angeles, CA for defendants.

TTT No. BT17702

Fatigued Bus Driver Rear Ends Rig on I-80 — Four Passengers Severely Injured — $5 Million Pennsylvania Verdict. On October 9, 2013 a Greyhound bus carrying 46 passengers collided with a tractor-trailer on I-80. Plaintiffs alleged defendant bus driver had not slept enough before leaving for the drive and was driving recklessly. Plaintiffs alleged Greyhound Lines Inc., allowed defendant bus driver to drive while tired and speeding by establishing an over-night route with insufficient breaks. One plaintiff, a twenty-eight year-old woman, suffered shoulder and spine injuries. A second plaintiff, a twenty year-old woman, was airlifted from the scene and suffered tibia and foot fractures, spine and ligament injuries, facial fractures and a brain injury. A third plaintiff, a thirty-five year-old man, had orthopedic injuries and injuries to his mouth and teeth, as well as neuro-cognitive and psychological injuries. The fourth plaintiff, a thirty-four year-old woman, had injuries to her shoulder, lumbar spine and cervical spine. Plaintiffs contended defendant bus driver was driving 16 mph at the time of the accident, and did not have the hazard lights activated, because the switch that would activate the lights was not functional. Defendants denied allegations of recklessness' and negligence.

The jury found defendant bus driver 55% liable and defendant Greyhound 45% liable for the accident. The jury awarded plaintiff's a total of $5 million.

Plaintiff's Experts: Mark Edwards, visibility, St. Augustine, FL; John J. Smith, accident reconstruction, Parker, CO.

Defendant's Experts: Robert C. Sugarman, visibility, Buffalo, NY; George H. Meinschein, engineering, Freehold, NJ.

Faithlee Brown, Elora Lencoski, Brandon Osborn and Tatiana Liakh v. Greyhound Lines. _____ County (PA) Court of Common Pleas No. 002598. Jonathan Ostroff, William, Coppol, Louis, Ricciardi, Richard, Godshall; Ryan Jablonski, Ostroff Injury Law, Plymouth, PA for plaintiff. Paul Troy and Justin Bayer, Kane, Pugh, Knoell, Troy & Kramer, Norristown, PA (Greyhound & Sabrina Anderson); Louis Hockman, Mintzer, Sarowitz, Zeris-Ledva & Meyers, Philadelphia (Akos Gubica and C.A.V. Enterprises) defendants.

TTT No. BT17705

Teen Collides Head-On With Left Turning Bus — Multiple Injuries — $1.1 Million New Jersey Settlement. The plaintiff, a nineteen year-old college student, was driving to classes at a local college when he collided head-on with a bus operated by the South Jersey Transportation Authority. Plaintiff alleged the bus was making an improper left turn at an excessive rate of speed. Plaintiff underwent an emergency fusion procedure to the lumbar spine due to temporary paraplegia. He also suffered rib fractures, psychological injuries and severe scarring.

The parties settled for $1.1 million.

Malav Patel v. South Jersey Transportation Authority. Atlantic County (NJ) Superior Court No. _____. David Wheaton and Kimberly Gozsa, Levinso, Axelrod, Edison, NJ for plaintiff. Christopher Fusco, Callahan & Fusco, Roseland, NJ for defendants.

TTT No. BT17711

Passenger Sustains Injuries in Rear-End Collision — $30,750 Tezas Verdict. The plaintiff, a forty year-old passenger on a bus, sustained injuries when the bus collided with a stopped vehicle. Plaintiff alleged defendant had been negligent in the operation of the bus. She presented evidence of the police accident report, which concluded the bus driver was responsible for the collision. Defendants denied liability, and contended that the collision occurred, in part, because a vehicle came to a sudden stop ahead of the bus in heavy traffic. Plaintiff was taken by ambulance the ER. Plaintiff was diagnosed with bulges at lumbar intervertebral discs L3-4 and L5-S1. She also claimed aggravation of degenerative cervical conditions. Defendants contended that the impact was minor, noting there was minimal damage to the bus and the non-party vehicle.

The jury awarded plaintiff $30,750.

Natasha Grant v. Dallas Area Rapid Transit. Dallas County (TX) District Court No. DC-15-03498. Briana L. Crozier, Ben Abbott & Associates, Garland, TX for plaintiff. Higinio Gene Gamez, Dallas Area Rapid Transit, Dallas, TX for defendants.

TTT No. BT1708

Appellate Rulings

Werner Rig Driver Has Heart Attack and Slams into BNSF Tanker Car Carrying Benzene — Minnesota Jury Returns Defense Verdict in Railroad's Attempt to Recover Some $8 Million in Cleanup Costs — Eighth U.S. Circuit Court of Appeals Finds No Error. At approximately 3:20 a.m. on March 31, 2012, Dale Buzzell was driving a Werner-owned truck northbound on U.S. Highway 59 toward Plummer, Minnesota. At the same time, a train operated by Canadian Pacific, consisting of some 106 cars and a head-end and a trailing locomotive, was in the process of switching from one track to another in order to make room for another train headed in the opposite direction. The track that the train was switching to intersected with Highway 59. As the train approached the intersection, it was traveling at approximately five miles per hour to the southeast, and its engineer sounded the train's horn multiple times to signal the train's presence at the intersection. The intersection was equipped with crossing-guard signals, which began flashing as the train approached the intersection, and the locomotive was equipped with two sets of headlights that illuminated the area ahead of the train for approximately one-half mile.

South of the highway-railroad intersection, Highway 59 curves slightly to the right for northbound drivers and straightens out approximately 535 feet from the intersection. Buzzell successfully navigated the curve leading to the railroad crossing, but did not slow down after the curve. He struck the ninth car of the train at approximately fifty-five miles per hour, derailing the train and puncturing the tanker car, which spilled aromatic concentrate (a 50% benzene solution) on the ground. Buzzell's truck caught fire, causing Buzzell to die from smoke inhalation.

Emergency responders extinguished the fire using chemical foam and water. The train's engineer, conductor, and a superintendent for Canadian Pacific testified that they observed skid marks leading up to the intersection, indicating that Buzzell had attempted to swerve to avoid the collision. State police completed a fatality report and an accident reconstruction report. The reconstruction report noted no skid marks or other evidence that Buzzell had attempted to avoid the collision. Dr. Mark Koponen, the medical examiner who performed Buzzell's autopsy, concluded that he died from smoke inhalation soon after the collision. The autopsy further revealed that Buzzell's heart exhibited signs that a blood clot had obstructed the blood flow in Buzzell's right coronary artery, which indi-

cated the beginning stages of a heart attack. Dr. Koponen testified that the blood clot occurred before the collision and that it could have caused Buzzell to become incapacitated, but that he might not have experienced symptoms before becoming incapacitated. After ruling out other possible causes of the accident, including the possibility that the truck had experienced a mechanical failure, that Buzzell had committed suicide, or that Buzzell had been distracted or had fallen asleep, Dr. Koponen concluded that the "totality of the evidence" indicated that the collision was caused by Buzzell's experiencing "an acute cardiac event which led to his inability to control his motor vehicle."

Canadian Pacific incurred costs of $7.76 million in cleaning the hazardous materials from the accident site. After Werner refused a request for indemnification, Canadian Pacific brought suit, alleging that Werner was vicariously liable for the damages caused by Buzzell's negligence and directly liable for its negligent supervision and retention of Buzzell. Canadian Pacific later amended its complaint to include nuisance and trespass claims.

Before the parties completed discovery, Canadian Pacific moved for summary judgment on all of its claims, arguing that Buzzell violated state traffic laws requiring drivers to yield to trains at a crossing and that the state-law violation constituted per se negligence. The district court denied the motion, holding that violations of state traffic laws are only prima facie evidence of negligence and that genuine disputes of material fact remained with respect to each of Canadian Pacific's claims. At the close of discovery, Werner moved for summary judgment on all claims, arguing that Canadian Pacific had not presented evidence sufficient to satisfy all of the necessary elements of its trespass and nuisance claims and that Werner's evidence that Buzzell was medically incapacitated at the time of the accident was sufficient to defeat Canadian Pacific's negligence claim. Canadian Pacific responded that Department of Transportation (DOT) regulations promulgated under authority granted by the Federal Motor Carrier Safety Act of 1984 § 206 (FMCSA), 49 U.S.C. § 31136, preempted Werner's state-law sudden-incapacitation defense. The district court granted Werner's motion on the nuisance and trespass claims and denied Werner's motion with respect to the negligence claim. It rejected Canadian Pacific's preemption argument, but concluded that there remained a genuine dispute over whether Buzzell was negligent.

The parties did not dispute the amount of damages, so the trial was limited to the issue of liability. Canadian Pacific proceeded on its claim that Buzzell was negligent in his driving and in his failure to report fatigue to his DOT-licensing physician. Both Werner and Canadian Pacific introduced expert testimony, with Werner's experts supporting the sudden-incapacitation defense and Canadian Pacific's experts concluding that it was impossible to rule out alternative explanations, such as driver fatigue or distraction. The parties also disputed the significance of Buzzell's medical records, which included a diagnosis of "fatigue" in his primary care doctor's progress notes from August 13, 2010, September 2010, and December 2011; lab results from a blood test ordered because of the fatigue diagnosis; a list of medications indicating that Buzzell took vitamin supplements for fatigue; and rehabilitation-center progress notes from January 2012 noting that Buzzell had difficulty sleeping on his left side because of pain in his left shoulder. None of Buzzell's medical records, however, indicated that Buzzell had been diagnosed with a sleep disorder, nor did they provide context for whether his fatigue diagnosis affected his ability to drive. Canadian Pacific introduced a medical questionnaire from Buzzell's August 3, 2010, DOT-required driver-fitness examination, in which Buzzell indicated that he did not experience fainting, dizziness, "sleep disorders, pauses in breathing while asleep, daytime sleepiness, [or] loud snoring." Canadian Pacific presented testimony from an occupational medical physician, who testified that Buzzell violated federal regulations by failing to report to the DOT that his primary care physician diagnosed him with fatigue on August 13, 2010, and that Buzzell violated the regulations by denying having a sleep disorder during his driver-fitness medical examination with a DOT physician ten days earlier. Werner presented testimony challenging the accuracy of Buzzell's medical records, highlighting that they did not provide context for whether his fatigue diagnosis affected his ability to drive, and asserting that Buzzell's fatigue diagnosis did not constitute a sleep disorder.

The jury indicated on its special verdict form that Buzzell was not negligent in operating his truck and that he was not "negligent in failing to report fatigue to his [DOT]-licensing physician and to Werner Enterprises." Canadian Pacific then moved for judgment as a matter of law or for a new trial, arguing that Werner had not presented sufficient evidence to support its sudden-incapacitation defense, that the evidence permitted only the conclusion that Buzzell negligently failed to report a fatigue diagnosis, and that the district court had improperly denied its per se negligence instruction for violations of federal regulations. The district court denied the motion.

The railroad appealed, asserting that it presented adequate evidence to survive summary judgment on its trespass claim because it showed that Buzzell intentionally

hid his fatigue diagnosis from his DOT physician. According to Soo Line, regulatory violations constitute negligence *per se* under Minnesota law rather than only *prima facie* evidence of negligence and that the regulations promulgated under the FMCSA preempted state-law defenses. The railroad also claimed that it was entitled to judgment as a matter of law on its negligence claim because Werner did not present evidence sufficient for a reasonable jury to conclude that Buzzell was suddenly incapacitated.

A panel of the U.S. Court of Appeals for the Eight Circuit rejected Soo Line's arguments and affirmed the judgment on June 7. With respect to the district court's dismissal of the trespass claim the court noted that under Minnesota law, violations of state traffic laws are prima facie evidence of negligence [citing Minn. Stat. § 169.96(b) ("In all civil actions, a violation of any of the provisions of this chapter . . . shall not be negligence per se but shall be prima facie evidence of negligence only."] While the statute referred only to violations under Chapter 169, Minnesota courts have extended the rule to violations of FMCSA regulations [pointing to *Ruhland v. Smith*, Nos. C7-91-668, C4-91-675, 1991 WL 257962, at *3 (Minn. Ct. App. Dec. 10, 1991) ("It would be anomalous to differentiate between traffic violations occurring under Minnesota law and those occurring under federal law.")] . However, the court concluded, even assuming that Canadian Pacific preserved its negligence *per se* argument and that it was correct about the proper standard, it nevertheless would not have been entitled to summary judgment because a genuine dispute of material fact existed over whether Buzzell was incapacitated at the time of the accident.

As to the railroad argument that section 392.2 of the FMCSA regulations expressly preempted the sudden-incapacitation defense by providing that "if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with," [49 C.F.R. § 392.2], the court ruled that the sudden-incapacitation defense is a **defense**, not a "**standard of care**," so that section 392.2 did not apply. Moreover, the court continued, in light of Congress's express intent to avoid preemption of state law [49 U.S.C. § 31136(c)(2)(B)] the FMCSA regulations did not foreclose state-law defenses to negligence claims.

As to the railroad assertion that it was entitled to judgment as a matter of law on the negligence claim because Werner failed to present sufficient evidence of sudden incapacitation, the court observed that its task was to interpret the record in the light most favorable to the prevailing party. Viewed in that light, the court pointed to the expert testimony of both Dr. Shannon Mackey-Bojack, a cardiovascular pathologist, and, Dr. Koponen, the medical examiner who performed the autopsy on Buzzell's body. Both doctors concluded that Buzzell suffered from "an acute cardiac event" that caused him to lose consciousness, which ultimately caused the truck he was driving to collide with the train. In reaching that conclusion, both testified that, after taking into account the state's accident reconstruction report and other available documents, they had ruled out other potential explanations for the collision, including mechanical failure, suicide, distraction, and driver fatigue. Werner also introduced expert testimony from Ken Drevnick, an accident reconstructionist, who testified that incapacitation was the most likely cause of the collision. In reaching that conclusion, Drevnick reviewed the medical examiner's report and the state trooper's investigation report and opined that Buzzell did not apply the truck's brakes before hitting the train, that it was unlikely that water or firefighting foam would wash away skid marks, and that sudden incapacitation was the only plausible explanation for the collision. Such evidence was sufficient to support the jury verdict.

The court also rejected the railroad's alternative argument that Buzzell violated FMCSA regulations by failing to disclose his fatigue diagnosis to a DOT physician. In that regard, the court noted that Werner presented testimony from Jamie Maus, Werner's Vice President of Safety and Compliance, who stated that under company policy and federal regulations, Buzzell was required to report potential fatigue problems **only** if his doctor ordered a sleep study, diagnosed him with a sleep disorder, or placed him on a work restriction, and that he was not required to report fatigue that developed after his examination by a DOT physician unless fatigue would have "impair[ed] his ability to safely operate a vehicle." Moreover, Werner disputed the accuracy of Buzzell's medical records, suggesting that the fatigue diagnosis was listed as an active problem in his medical record only because of a clerical error and noting that his primary care physician did not include any treatment notes discussing the fatigue diagnosis, that fatigue is not a sleep disorder and was not listed on the DOT questionnaire, and that Buzzell's medical records lacked sufficient detail to determine whether Buzzell experienced fatigue while driving. Taken in the light most favorable to Werner, this evidence was sufficient to enable a reasonable jury to find that Buzzell did not suffer from a condition that he was required to report, the court concluded. **Soo Line Railroad Comapny, d/b/a Canadian Pacific v. Werner Enter-**

prises, U.S. Court of Appeals for the Eighth Circuit No. 15-1373.

Filings

Angela Valenzuela-Pearce, et al v. XPO Logisitics Incorporated, et al, U.S. District Court D. Arizona No. :16-cv-02969. Robert W. Boatman, Shannon L. Clark, William Charles Thomson of Gallagher & Kennedy, Phoenix, AZ for plaintiff. David F. Gaoha, Phoenix, AZ for defendant.

Ruthie Agravante, et al v. MJ Transportation, Inc., et al, U.S. District Court S.D. Florida No. 1:16-cv-23935-DPG. Aaron P. Davis of Davis, Goldman, Miami, FL for plaintiff. Bruce M. Trybus, Matthew R. Wendloer of Cooney, Trybus, Kwanick, Peets, Fort Lauderdale, FL for defendant.

Alan Burrichter v. U.S. Xpress, Inc., et al, U.S. District Court N. D. Illinois No. 1:16-cv-08950. Michael J. Brennan, Orland Park, IL for plaintiff. Michael J. Mullen, Daniel J. Donnelly of Kralovec & Marquard, Chicago, IL for defendant.

Michael R. Lewis, Jr., et al v. WL Logan Trucking Company, et al, U.S. District Court N.D. Indiana No. 2:16-cv-00397-JD-JEM. Bryan L. Bradley, Kenneth J. Allen Law Group, Valparaiso, IN for plaintiff. Paul T. Belch, Travelers Staff Counsel Office, Indianapolis, IN for defendant.

Willecius P. Moffett v. Swift Transportation Company of Arizona, LLC, et al, U.S. District Court S.D. Mississippi No. 1:16-cv-003326-HSO-JCG. Benjamin Noah Philley, Kolb & Philley, Madison, MS for plaintiff. David C. Dunbar, Suzanne Hudson, DunbarMontroe, Ridgeland, MS for defendant.

Russell R. Kalis, et al v. Lucky Trans Inc, et al, U.S. District Court N.D. Ohio No. 3:16-cv-02307-JZ. John T. Murray, Linda T. Moir, Sandusky, OH for plaintiff.

Steven Vale, et al v. Olson Motor Lines, Inc., et al, U.S. District Court M.D. Pennsylvania No. 3:16-cv-01827-RDM. Michael A. Dempsey, Terrence E. Dempsey, Scraton, PA for plaintiff. Timothy J. Schipske, John E. Salmon, Salmon, Richezza, Singer & Turchi, Philadelphia, PA for defendant.

Juan A. Lopez v. Werner Enterprises, Inc., et al, U.S. District Court S.D. Texas No. 5:16-cv-00260. Michael R. Cowen, Malorie J. Peacock, Cowen, Mask, Blanchard, Brownsville, TX for plaintiff. Larry D. Warren, Naman, Howell, Smith & Lee, San Antonio, TX for defendant.

Jeremiah J. Glenn v. FedEx Custom Critical, Inc., et al, U.S. District Court W.D. Texas No. 6:16-cv-00357-RP-JCM. Steve W. Dennis, Reid & Dennis, Dallas, TX for defendant.

Brenda Gordo v. TGR Logistics Inc., d/b/a TGR Transport, et al, U.S. District Court D. Wyomiing No. 2:16-cv-00238-NDF. Noah W. Drew, Tyson Logan, The Spence Law Firm, Jackson, WY for plaintiff.