PRACTICE TIP

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Evidentiary Issues in Trucking Cases

By Anthony J. Novak

According to the Federal Motor Carrier Safety Administration (FMCSA), in 2011 there were 273,000 police-reported crashes involving large trucks.[1] Of these crashes, 3,341 (1 percent) resulted in at least one fatality, and 60,000 (22 percent) resulted in at least one nonfatal injury.[2] Like any other types of accident, more trucking crashes create more trucking litigation. There are, however, certain evidentiary issues unique to trucking cases that attorneys should keep in mind from the outset. This article focuses on four issues of significant importance: spoliation of evidence, event data recording, admissibility of driving history, and FMCSA safety rating systems.

Spoliation

Spoliation is the intentional or unintentional failure to preserve evidence that is relevant to a legal proceeding. As a defense lawyer in a trucking accident, opposing counsel will often attribute the destruction or manipulation of evidence to your client, so it is important for industry members to understand the rules and repercussions surrounding spoliation of evidence. The laws and applicable standards vary among the states. In states like Mississippi, if evidence is missing, a driver must prove the evidence is absent for a justified reason (e.g., natural disaster).[3] If the facts show the evidence was deliberately or negligently destroyed, the court will instruct the jury to assume or infer the missing evidence is unfavorable to the driver. Along with this negative presumption, the court may impose disciplinary or discovery sanctions, criminal penalties, and contempt of court.[4]

This scenario occurred recently in Texas. After an unrelated accident, the plaintiff exited his car and was on the roadway when the defendant's truck struck and killed the plaintiff.[5] The truck then continued driving approximately 1,400 miles to a different state, where the driver replaced the truck's two front tires—the carrier authorized and paid for the replacement. After the original tires were removed, they were lost.[6] Finally, the driver abandoned the truck in a parking lot in California. The carrier retrieved the truck and took it to one of its yards, where it sat outdoors for three months. During that time, the carrier's lawyer and investigator allegedly inspected the truck and removed "substances" from its body.[7] The Texas district court held that spoliation had occurred and struck down all of the defendants' pleadings and defenses in regard to liability.[8]

Plaintiffs often send letters to defense attorneys in an effort to record their attempts to preclude any acts of spoliation. In these letters, the plaintiff asks the defendant to maintain evidence relevant to a contemplated case. However, these letters often make the mistake of asking the defendant to maintain an unnecessary or cumbersome amount of documents. These unnecessary requests often contain categories of information that in no way affect the litigation or underlying issues. Defense attorneys should compare the request to their client's company policy for retention of documents and FMCSA regulations and ensure all documents required to be retained by the policy and regulations are retained. Lastly, the defense should respond to this letter with its own letter, requesting that the plaintiff maintain certain documentation and inform the opposing party when repairs need to be made to the plaintiff's vehicle, and expressing the client's refusal to comply with any cumbersome and unnecessary portions of the plaintiff's requests. This response letter could preserve relevant evidence and show the opposing party's request was immediately believed to be overly burdensome.

Regardless of the posturing, both defense and plaintiffs attorneys should take all necessary steps to avoid spoliation of evidence, as it could have an adverse effect on both parties.

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Event Data Recorder

In many trucking cases, the event data recorder (EDR) causes significant controversy and is often used to support the plaintiffs' driving claims against drivers. The EDR is installed in the vehicle and oftentimes maintains records regarding the condition of the truck (e.g., maintenance issues), the driver's performance (e.g., sudden braking, speeding, improper clutch use, following distance), and other modes of electronic communication. This EDR data is important because the trier of fact is more likely to be persuaded by raw data or an expert relying on that data compared to other witnesses. In 2005, a Florida district court upheld the admissibility of EDR data that gave the speed of the defendant's vehicle just before it struck and killed two individuals.[9] The court explained that EDR data is generally accepted in relevant scientific fields, and was thus admissible.[10]

EDR data can be very beneficial to an expert witness's reconstruction of an accident. In fact, a recent case has shown that in the absence of any physical examination, an expert can give his or her opinion based on data from an EDR.[11] The court held the fact that an expert witness did not personally examine the scene of the accident does not necessarily undermine the validity or usefulness of the data provided in part by the EDR, so physical examination of the scene is not always required. It's important to keep in mind, however, that if requests are overly broad or not causally related to the subject incident, they may be dismissed at trial. For example, an Indiana district court excluded EDR data showing the driver's history of speeding without any correlation to the time of the accident.[12]

Admissibility of Driving History

Generally. Generally, testimony concerning the issuance or nonissuance of a traffic citation is inadmissible because it is irrelevant and potentially prejudicial to the issues in the subsequent civil action.[13] However, there are other ways to admit this information. The FMCSA requires employers of truck drivers to perform background investigations of prospective employees and to keep an updated driver qualification file after the driver is hired.[14] Often plaintiffs use those requirements to assert a claim of negligent hiring, training, or retention in order to allow otherwise inadmissible evidence of previous driving history into a case. In a majority of jurisdictions, however, when the employer has admitted the requisite agency relationship necessary to establish respondeat superior liability, federal procedural and policy concerns favor excluding prior-act evidence.[15]

Criminal convictions. Most jurisdictions allow "guilty" pleas in traffic and criminal courts to be admitted in subsequent civil proceedings.[16] By contrast, many jurisdictions do not admit "not guilty" or "no contest" pleas in traffic and criminal courts in subsequent civil proceedings.[17] This is often the reason companies enact policies that advise their drivers not to admit fault at the time of the accident.

In most states, paying a traffic fine is not an admission of guilt and is thus inadmissible evidence.[18] Some states, however, have admitted evidence of traffic fine payment when it was made "because [the driver] understood or thought that he was guilty."[19]

Both prior driving history and criminal convictions can be very prejudicial, so attorneys for either party should be up to date on local rules to ensure the trier of fact is only allowed to hear admissible information.

Safety Rating Systems

Safety Status Measurement System. Until 2010, the FMCSA used the Motor Carrier Safety Status Measurement System (SafeStat) to assign motor carriers a ranking for Department of Transportation compliance reviews. Like many other evidentiary issues in the trucking industry, the reliability of these SafeStat scores, however, is repeatedly challenged. Federal courts are inconsistent regarding the admissibility of SafeStat data. Some federal courts have considered SafeStat data in deciding whether to grant summary judgment in negligent hiring cases.[20] Other federal courts preclude SafeStat reports as evidence.[21] The FMCSA's decision to enact a new safety analysis system may have been in response to these inconsistencies.

Comprehensive Safety Analysis. After the persistent scrutiny of SafeStat, in 2010 the FMCSA enacted a new system, the Comprehensive Safety Analysis (CSA). This system was created to provide comprehensive monitoring of drivers and to identify problems before they cause future accidents. This score is updated every 30 days and is based on seven different categories: (1) unsafe driving; (2) fatigued driving; (3) driver fitness; (4) drug and alcohol use; (5) vehicle maintenance; (6) load securement, and size and weight faults; and (7) crash history. There are almost 900 infractions within these seven categories that can be counted against motor carriers.[22] If a driver's score is unsatisfactory, there is typically an initial warning, followed by an intervention, investigation, and follow-up action. With the FMCSA's new system, there is hope that more accurate data will result in more courts allowing CSA data. Whether it will be more beneficial to plaintiffs or defendants, however, is yet to be seen.

Defense attorneys should anticipate that plaintiffs attorneys will try to introduce a driver's poor score into evidence, and motion practice will be necessary to exclude that information as irrelevant and prejudicial.

TIP
Educate yourself and your clients about your case's key evidentiary issues. Decisions made before litigation even begins could end up determining the outcome.

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Conclusion

Attorneys in trucking cases should continually monitor their ever-changing evidentiary landscape. Spoliation of evidence could render your client's claims or defenses destitute. However, if you know the rules of your jurisdiction, you could use that spoliation as a means to reach your desired result. Event data recording can assist your expert witness in the reconstruction of an accident or help prove that the accident was the fault of the opposing party; however, the court must believe that the specific data is relevant and reliable. A party's driving history could be admitted if there is a cause making that history relevant. Typically, this would involve a separate additional claim, but it is important to remember that the evidence may be admitted for a limited purpose. Lastly, FMCSA safety rating systems could help show the trier of fact the outstanding or poor driving history of the defendant, and help prove one party's theory of the case. ■

Notes

1. Fed. Motor Carrier Safety Admin., Large Truck and Bus Crash Facts 2011, at 45 (2013).
2. *Id.*
3. Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1127 (Miss. 2002).
4. *Id.*
5. Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 775 (N.D. Tex. 2011).
6. *Id.* at 777.
7. *Id.* at 779–80.
8. *Id.* at 775.
9. Matos v. State, 899 So. 2d 403, 408 (Fla. Dist. Ct. App. 2005).
10. *Id.* at 407.
11. Hiropoulos v. Juso, No. 2:09-CV-307 JCM RJJ, 2011 WL 3273884 (D. Nev. July 29, 2011).
12. McQuiston v. Helms, No. 1:06-CV-1668-LJM-DML, 2009 WL 554101 (S.D. Ind. Mar. 4, 2009).
13. Chewakin v. St. Vincent, 275 N.W.2d 300, 301 (N.D. 1979).
14. *See* 49 C.F.R. pt. 391.
15. Scroggins v. Yellow Freight Sys., Inc., 98 F. Supp. 2d 928, 932 (E.D. Tenn. 2000).
16. *See, e.g.*, Crane v. Dunn, 854 A.2d 1180, 1186 (Md. 2004).
17. *See, e.g.*, Waszczak v. City of Warner Robins, 471 S.E.2d 572, 574 (Ga. Ct. App. 1996).
18. *See* Eubanks v. Waldron, 587 S.E.2d 253 (Ga. Ct. App. 2003).
19. Turner v. Silver, 587 P.2d 966 (N.M. Ct. App. 1978).
20. *See, e.g.*, Jones v. C.H. Robinson Worldwide, Inc., 558 F. Supp. 2d 630, 654 (W.D. Va. 2008); Schramm v. Foster, 341 F. Supp. 2d 536, 552 (D. Md. 2004).
21. *See, e.g.*, Frederick v. Swift Transp. Co., 591 F. Supp. 2d 1156, 1161 (D. Kan. 2008); FCCI Ins. Grp. v. Rodgers Metal Craft, Inc., No. 4:06-CV-107 (CDL), 2008 WL 4185997 (M.D. Ga. Sept. 9, 2008).
22. Chad C. Marchand, Ashley P. Griffin & Tamara L. Warn, *Assessing the Federal Motor Carrier Safety Administration's Comprehensive Safety Analysis 2010 Initiative*, Brief, Fall 2011, at 14.

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