

# COMMERCIAL TRUCK LITIGATION 2007

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## COMMERCIAL TRUCK LITIGATION

### I INTRODUCTION.

Commercial truck litigation constantly presents new challenges for attorneys hired to prosecute and defend motor carriers. Emerging technology utilized by motor carriers requires attorneys for both the motorist and commercial carrier to become familiar with new tracking and communication systems, computerized logbooks, and the intricacies of onboard data recorders. It is also imperative to have an understanding of the voluminous Federal Motor Carrier Safety Regulations (“federal regulations”), their application to your case, and how state motor carrier regulations are intertwined with the federal regulations.

This paper will begin by discussing the vital investigative tools at your disposal in preparing to prosecute or defend a commercial truck collision. The discussion on investigation is followed by a lengthy discussion of the federal regulations and how they dovetail with Texas law on purely intrastate commerce. Finally, this paper will discuss cases addressing vicarious and direct liability claims against a motor carrier for the conduct of a driver. The paper contains several recent cases on these issues so you as the practitioner can appreciate how current courts have been analyzing the legal issues in commercial truck collisions.

### II. INVESTIGATION.

The key to properly evaluating your claim or defense in a commercial truck case is investigation. Commercial truck cases offer a myriad of investigative avenues that require thorough and complete investigation.

#### A. Accident Scene.

The accident scene must be surveyed as soon as possible. Counsel for motor carriers is often retained within minutes of a collision and is requested by the carrier to inspect the scene. An early examination of the scene will allow counsel to inspect the physical evidence on the roadway and at times observe the vehicles in their post-collision positions before being towed or driven away. An early scene inspection also allows counsel to appreciate all visual obstructions in and around an intersection, notice the level of traffic in the vicinity of the collision, and observe all road signs existing at the time of the collision.

Counsel for the motorists may not be hired for several months or for over a year after the collision. By that time, the scene is stale and usually all markings of evidence no longer exist due to the passage of time. However, on-site inspections of the scene must be performed.

Early scene inspection also allows the respective parties to have accident reconstructionists survey the scene for case development. Obviously, the earlier a reconstructionist can visit the scene, the better evidence that consultant will have in putting together the sequence of events. The reconstructionist can also take aerial photographs that are critically important in explaining to the jury how a particular collision occurred.

#### B. Vehicle Inspections.

A prompt vehicle inspection is vitally important. There are obvious reasons for vehicle inspections, such as taking photographs before the vehicle is salvaged. In some instances, a party might want to purchase the vehicle and store it during the pendency of the proceeding, particularly if the vehicle is to be evaluated for a potential auto crashworthiness claim. In addition, the vehicle itself could contain valuable evidence in backtracking the chronology of events leading up to the collision. In a recent case, a Whataburger receipt found in the floorboard explained where the deceased driver had been minutes before the collision. In addition, a “Gold Member” patron card for a local gentleman’s club found in the glovebox led law enforcement and the attorneys to the bar where the deceased had been drinking for several hours before the collision.

#### C. Law Enforcement Investigation File.

It is imperative to investigate the complete law enforcement file on any commercial truck collision. Investigation of the law enforcement file should include:

1. all accident reports including major collision reports and supplemental reports;
2. witness statements;
3. diagrams;
4. measurements;
5. photographs and videotapes;
6. dispatch records including 911 call sheets;
7. toxicology reports; and
8. all in-car videos, including audio, taken by law enforcement at the scene.

This information can be obtained by an open records request. Tex. Gov’t. Code Ann. §§ 552.001 - 552.353. See Addendum No. 1 containing a form open record request.

The in-car videotape will not only contain video footage of the scene, but many contain audio generated from a cordless microphone worn by the officer during the investigation. The audio can contain critical admissions by the drivers, observations of witnesses, and conclusions of law enforcement.

Similarly, you should discover the 911 call list and accompanying tape recording to discover the identity of witnesses to the collision that do not stay at the scene and have their name listed by law enforcement on the accident report. The 911 call tape can also contain informative observations by witnesses to the collision and scene.

Finally, discover the investigative files from all aspects of emergency response personnel, including the fire department, ambulance service, and law enforcement on the local, county, and statewide level.

#### **D. Criminal and Driving Background.**

A complete criminal background check should be performed. Any investigator can check the criminal background on a driver for a small fee. There are also databases an attorney can subscribe to for the same information, such as Accurint. In addition, counsel should request a driver abstract from Texas on all drivers involved in the collision. The driver abstract will provide a complete history of the driver's driving record in Texas. See Addendum No. 2 for a form driver abstract request.

#### **E. Electronic Control Module.**

Most commercial trucks are equipped with a device generically referred to as the Electronic Control Module ("ECM"). The ECM will record information about the truck and the driver's actions leading up to, during, and following the collision. The ECM will record information such as vehicle speed, engine speed, heavy braking (also called sudden decelerations when the vehicle speed drops seven miles per hour in one second), throttle position, brake pedal status, clutch status, governor settings, and maximum vehicle speed, to name a few. The tractor must be secured so all available data can be downloaded immediately so as to avoid contamination to the data as it existed at the time of the collision. Any download of ECM data should be conducted under a protocol by a certified consultant. This will make certain that all available data is downloaded and the consultant can lay the necessary predicate to get the data into evidence.

A thorough ECM investigation includes not only a complete download of all ECM data from the tractor, but also all documents necessary to interpret the downloaded information. This includes the data itself, error codes, fault codes, software upgrades and patches, manuals, and modifications to the tractor. There are two primary reasons to have the complete ECM information and supporting documentation. First, your ECM expert can lay the predicate for the evidence and translate the information from raw data to a complete story of the collision. Second, the supporting data can sometimes either confirm or discredit the raw ECM data taken from

the onboard recorder. For example, if the motor carrier fails to install software upgrades, then the motor carrier's expert may claim all ECM data is flawed, because it does not contain the latest computer patch or system upgrade. Likewise, a modification to the tractor itself that is out of compliance with the factory ECM settings can form a basis to discredit the ECM data. For this reason, no one can rely upon the raw ECM data alone. A complete picture must be obtained including the data itself and all supporting documentation.

In addition to the commercial truck having an ECM, most passenger automobiles have a "blackbox" of some variety that records engine data much like a commercial truck ECM. You should employ the same methods and protocol for downloading the passenger vehicle's blackbox as you do with a commercial truck ECM.

Finally, Texas law imposes restrictions on who can download information from an onboard recording device. Effective September 1, 2005, the Texas Legislature passed a statute that governs the downloading of recording devices contained in motor vehicles. A "recording device" is defined by the statute as a feature installed by the manufacturer that records information from the vehicle after an accident, including: speed and direction, location, steering performance, brake application and performance, safety belt status, or transmission of accident information to a central communication system. Tex. Transp. Code § 547.615(2) (Vernon 2006). The statute provides the recorded information may not be retrieved by someone other than the owner except:

1. on court order;
2. with the consent of the owner for any purpose, including for the purpose of diagnosing, servicing, or repairing the motor vehicle;
3. for the purpose of improving motor vehicle safety, including for medical research on the human body's reaction to motor vehicle accidents, if the identity of the owner or driver of the vehicle is not disclosed in connection with the retrieved information; or
4. for the purpose of determining the need for or facilitating emergency response in the event of a motor vehicle accident.

*Id.* at § 547.615(c). Therefore, be certain the proper authorization is obtained prior to downloading information from a vehicle your client does not own.

#### **F. Onboard Communication Systems, Logbooks, and Time-Dated Documents.**

An audit of the onboard communication systems, logbook entries, and time-dated documents will identify

whether the driver has misrepresented any of the logbook information and hours of service.

### 1. Onboard Communications Systems.

Qualcomm is one of several mobile communication systems for the transportation industry. Qualcomm establishes a link via satellite between the truck and dispatch. A driver is required to login to the Qualcomm system for it to activate. The login is time and date recorded. The Qualcomm system can provide the driver with: (a) email access between the tractor and dispatch, (b) diagnostic information on the tractor including the percentage of time for overspeed, miles per gallon, engine speed, and remaining fuel, (c) diagnostic information on the trailer including the temperature of the reefer, (d) the number of hours of service with software that is compliant with the latest Federal Motor Carrier Safety Regulations, (e) directions and routing to the destination, and (f) a G.P.S. history for the tractor in longitude/latitude plus the common name of the location. The position histories generated by the G.P.S. allow an easy cross-reference with the driver logbook to check for falsification.

### 2. Logbooks.

Every motor carrier shall require every driver to record his/her duty status for each 24 hour period. 49 C.F.R. § 395.8(a). The logbook requires specific detail that can be compared to other documents to verify the driver is providing a correct log. The driver must record his/her duty status, in duplicate, for each 24-hour period. *Id.* at (a)(1). The duty status time shall be maintained on an automatic onboard recording device or recorded on a specified grid. 49 C.F.R. § 395.8(a)(1)-(2). The grid must contain the items specified below:

- a. Date;
- b. Total miles driving today;
- c. Truck or tractor and trailer number;
- d. Name of carrier;
- e. Driver's signature/certification;
- f. 24-hour period starting time (e.g., midnight, 9:00 a.m., noon, 3:00 p.m.);
- g. Main office address;
- h. Remarks;
- i. Name of co-driver (if any);
- j. Total hours; and
- k. Shipping document number(s), or name of shipper and commodity. 49 C.F.R. § 395.8(d)(1)-(11).

Because the logbook requires specific details of a driver's location on a 24 hour basis, it is essential to compare the entries in the logbook with other time-dated information to ascertain whether the logbook has been

falsified. If there is a co-driver, then you must also request the co-driver's log for the specific time period. There are exceptions to the logbook requirement namely for short haul operations as defined in the Federal Motor Carrier Safety Regulations. 49 C.F.R. § 395.1(e).

An exemplar logbook page is attached as Addendum 3. There is additional discussion about logbooks in Section III below.

### 3. Time-Dated Documents.

A load will generate a number of potentially time-dated documents that provide a cross reference to the logbook. Such documents include: fuel receipts, COMDATA checks, bills of lading, and cell phone records. *See also* 49 C.F.R. § 395.8 (Question 10—list of documents). A comparison of logbook entries versus time-dated receipts will reveal whether the driver made any misrepresentations in the logbook. *See* Addendum 3 where the driver logged being in the sleeper berth in Lubbock, Texas from 10:30 p.m. through midnight. However, the time-dated fuel receipt (photocopied below the logbook) shows the driver was purchasing fuel 240 miles away in Boise City, Oklahoma at 11:11 p.m.

### G. Websites.

Most commercial carriers, like all businesses, have websites that educate readers about their business. Counsel should review the website and save any pages that pertain to your claim. During the course of a lawsuit, a carrier might change or update the website. Saving the web pages on your computer will preserve the evidence.

## III. FEDERAL MOTOR CARRIER SAFETY

### REGULATIONS—THE STATUTORY FRAMEWORK.

#### A. Applicability—Interstate versus Intrastate.

The threshold question on the application of the Federal Motor Carrier Safety Regulations (the “federal regulations”) is whether the truck driver was operating on an “interstate” versus “intrastate” haul at the time of the collision. Interstate commerce means:

trade, traffic, or transportation in the United States—

- (1) Between a place in a State and a place outside of such State (including a place outside of the United States);
- (2) Between two places in a State through another State or a place outside of the United States; or
- (3) Between two places in a State as part of trade,

traffic, or transportation originating or terminating outside the State or the United States.

49 C.F.R. § 390.5. Therefore, an interstate trip occurs when the driver crosses an international border, a state line, or a driver within one state picks up a load that originated in another country or state. For example, a trip originating in New Mexico and terminating in Texas is interstate commerce. If the trip originated with one carrier in Santa Fe, New Mexico, and was transferred to a new carrier in Amarillo, Texas that then drove the load to Dallas, Texas, then the second carrier is also engaged in interstate commerce, because the load originated in a state outside Texas. *Id.*

By exclusion, “intrastate commerce” means any “trade, traffic, or transportation in any State which is not described in the term ‘interstate commerce.’” 49 C.F.R. § 390.5.

### 1. Federal regulations apply to interstate commerce.

It is axiomatic that the federal regulations apply if the load is engaged in “interstate commerce”. 49 C.F.R. § 390 *et seq.* However, states are not precluded from establishing or enforcing State or local laws relating to safety, “the compliance with which would not prevent full compliance with the federal regulations.” 49 C.F.R. § 390.9.

### 2. Federal regulations apply to intrastate commerce with certain exceptions.

Federal regulations still apply to intrastate hauls in Texas. Texas has adopted the following federal regulations in intrastate commerce: “Title 49, Code of Federal Regulations, Parts 40, 380, 382, 385, 386, 387, 390-393, 395-397, and all interpretations thereto pertaining to interstate drivers and vehicles . . . except as otherwise excluded.” 37 Tex. Admin. Code § 4.11(c)(3). If you have a vehicle engaged in intrastate commerce, then you should consult sections 4.11 and 4.12 of Title 37 of the Texas Administrative Code to determine whether any specific exemptions or exclusions apply to your case. Some examples are below:

- **Certain Intrastate Vehicles.** Machines, generally consisting of a mast, engine, draw works, and chassis permanently constructed or assembled to be used in oil or water well servicing or drilling; a mobile crane that is an unladen, self-propelled vehicle constructed as a machine to raise, shift, or lower weight; and a vehicle transporting seed cotton, or concrete pumps. Tex. Transp. Code § 644.052 (Vernon Supp. 2006); 37 Tex. Admin. Code § 4.12(a)(1)(A)-(D).
- **Daily Hours of Service.** Intrastate drivers can: (a) drive twelve hours after eight consecutive hours off duty, and (b) be on duty for fifteen hours after eight consecutive hours off duty. 37 Tex. Admin. Code § 4.12(a)(2); *see also* Tex. Admin. Code § 4.12(a)(5)(providing the hours of service rules of 49 C.F.R. § 395 do not apply to drivers transporting agricultural commodities during harvest season within a 150 air-mile radius).
- **70/7 Hour Requirement.** Intrastate drivers shall not be permitted to drive after having driven and/or worked 70 hours in any consecutive 7 day period. A driver may restart the 70 hours after having taken 34 consecutive hours off duty. 37 Tex. Admin. Code § 4.12(b)(2).
- **Logbook Requirement Exemption.** Intrastate drivers are not required to maintain a logbook under certain circumstances if the truck is operated within a 150 air-mile radius of the driver’s normal work reporting location and (a) the driver returns to the normal work reporting location and is released from work within twelve hours, (b) the driver has at least eight consecutive hours off duty separating each twelve hours on duty, (c) the employer maintains for at least six months records showing the time the driver reports to work, the hours on duty, the time the driver is released, total time on duty for the preceding seven days for first time or intermittent drivers, and the employer maintains business records of product delivery. Tex. Transp. Code § 644.053(3) (Vernon Supp. 2006); 37 Tex. Admin. Code § 4.12(a)(4), (b)(3).
- **Minimum Age and Examination Requirements.** An intrastate driver must be at least 18 years of age, not at least 21 years of age as required by 49 C.F.R. § 391.11(b)(1). 37 Tex. Admin. Code § 4.12(b)(4). The intrastate driver must also pass the examination for a Texas Commercial Drivers License. *Id.* at § 4.12(b)(5).
- **Medical Requirement Exemption.** Intrastate drivers not transporting hazardous materials that were continuously employed in Texas as a commercial driver prior to August 28, 1989 are exempt from the medical requirements under the federal regulations unless the driver turned eighteen on or after August 28, 1989. However, a qualified intrastate driver is not

exempt from drug and alcohol testing in 49 C.F.R. § 380. Tex. Transp. Code § 644.053(2) (Vernon Supp. 2006); 37 Tex. Admin. Code § 4.12(a)(3).

## **B. Document Retention.**

The federal regulations impose a document retention policy on the carriers subject to their jurisdiction. Some examples of the particular documents carriers are required to retain are provided below.

### **1. Accident Register.**

49 C.F.R. § 390.15(b) requires motor carriers to maintain an accident register for three years after the date of each accident. The register must contain:

- a. Date of accident;
- b. City or town, or most near, where the accident occurred and the State where the accident occurred;
- c. Driver Name;
- d. Number of injuries;
- e. Number of fatalities; and
- f. Whether hazardous materials, other than fuel spilled from the fuel tanks of the motor vehicle involved in the accident, were released.

49 C.F.R. § 390.29 specifies where the records or documents must be kept. This section requires the carrier to maintain the documents at its principal place of business, a regional office, or driver work-reporting station.

### **2. Alcohol and Controlled Substances.**

Records and test results for alcohol and controlled substances are to be kept for five years if the alcohol test returned positive indicating a .02 concentration or higher and if the driver tested positive for the presence of a controlled substance. 49 C.F.R. § 382.401(b)(1). Negative test results are to be kept for one year. 49 C.F.R. § 382.401(b)(1).

### **3. Driver Record of Duty Status.**

49 C.F.R. § 395.8(k)(1)-(2) requires motor carriers to maintain records of duty status and all supporting documents for each driver for a period of 6 months from receipt. The driver is also required to retain a copy of each record of duty status for the previous 7 consecutive days.

### **4. Driver Qualification File.**

49 C.F.R. § 391.51 mandatorily requires a motor carrier to maintain a driver qualification file for each

driver it employs. The motor carrier must keep possession of the DQ file for the entire time the driver is employed, as well as for three years after the driver leaves its employment. The DQ file must contain:

- a. Application for Employment (49 C.F.R. § 391.21).
- b. State agencies' responses concerning the driver's 3 year driving record (49 C.F.R. § 391.23).
- c. The record of the road test form and certificate of road test (49 C.F.R. § 391.31(g)). However, in lieu of the road test and certificate, a copy of the commercial driver's license or certificate may be acceptable as equivalent to the driver's road test (49 C.F.R. § 391.33).
- d. Driver's Medical Examiner's Certificate (49 C.F.R. § 391.43(h)).
- e. State agencies' responses concerning the driver's annual driving record. (49 C.F.R. § 391.25).
- f. Certification of Violations/Review of Driving Record (49 C.F.R. §§ 391.25, 391.27).
- g. A letter granting a waiver of a physical disqualification. (49 C.F.R. § 391.49) 391.43(h).

### **5. Financial and Operation Records.**

49 C.F.R. § 379 provides a comprehensive list of various retention times for the motor carrier's financial and operational records.

### **6. Vehicle Inspection and Repair Records.**

49 C.F.R. § 396 mandates the inspection and maintenance of commercial motor vehicles. Part 396 also requires maintenance and inspection records to be maintained for 1 year while the vehicle is under the carrier's control, and 6 months after the motor vehicles leaves the carrier's control. 49 C.F.R. § 391.43(c).

## **C. Minimum Requirements for Commercial Drivers.**

### **1. Basic Driver Qualifications.**

The minimum requirements to operate a commercial vehicle are set forth in 49 C.F.R. § 391.11. The federal regulations require a person to satisfy the following criteria:

- a. be at least 21 years old;
- b. can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to

respond to official inquires, and to make entries on reports and records;

- c. Can, by reason of experience, training, or both, safely operate the type of commercial motor vehicle he/she drives;
- d. Is physically qualified;
- e. Has a currently valid commercial motor vehicle operator's license issued by only one State or jurisdiction;
- f. Has prepared and furnished the carrier that employs him/her with a list of violations or provide certification as provided in 49 C.F.R. § 391.27;
- g. Is not disqualified to drive under the rules listed in 49 C.F.R. § 391.15; and
- h. Is certified to have successfully completed a road test.

## 2. Job Application.

49 C.F.R. § 391.21(b)(1)-(12) lists the information that must be contained in the application. The mandatory information includes: residences for the past 3 years, the nature of the applicant's driving experience, a list of all motor vehicle accidents in the past 3 years, a list of all violations of motor vehicle laws or ordinances for the past 3 years, the names and addresses of previous employers for the prior 3 years (expanded to 7 years if the applicant is applying to drive a commercial motor vehicle). The applicant is also required to certify the information contained in the application is true.

## 3. Pre-Employment Carrier Investigation.

49 C.F.R. § 391.23 (a) places the burden on the motor carrier to, within 30 days from the date the driver's employment begins, obtain the driver's driving record for the preceding 3 years from the appropriate agency of every state in which the driver held a motor vehicle operator's license during that three year period and investigate the driver's safety performance with previous DOT regulated employers for the past 3 years. Counsel for the passenger motorist should always follow-up with prior employers that do not respond to the new carrier's inquiry.

## 4. Physical Requirements.

49 C.F.R. § 391.41 requires a person to be physically qualified to drive a commercial vehicle, and to carry a valid medical examiner's certificate making such a certification. There is a laundry list of thirteen physical requirements to qualify as a commercial driver. *Id.* at (b)(1)-(13). For example, the applicant cannot have a medical history of respiratory dysfunction or high blood pressure to the point it is likely to interfere with his/her ability to safely control and drive a commercial vehicle. *Id.* at (b)(5)-(6).

## 5. Driving Knowledge.

49 C.F.R. § 110 states "all drivers of commercial motor vehicles shall have knowledge and skills necessary to operate a commercial motor vehicle safely[.]" A driver must also have knowledge to safely control the vehicle in areas such as speed management, space management, night operation, extreme driving conditions, and emergency maneuvers. 49 C.F.R. § 383.111(c). Finally, the driver must score 80% or better on each knowledge test. Part 383 is must reading in preparation for the commercial truck driver's deposition.

## D. Hours of Service of Drivers.

Part 395 of the federal regulations imposes the hours of service of drivers. The hours of drivers is predominantly keyed by the "on-duty" time of the driver. On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from all responsibility of work. 49 C.F.R. § 395.2. The on-duty time includes all driving time, waiting on dispatches, inspecting the tractor, all time in the truck except while in the sleeper, loading/unloading, and providing samples for alcohol/drug tests. *Id.* at 395.2(1)-(9).

**1. Summary.** With this backdrop, the general hours rules for property-carrying commercial vehicles are as follows<sup>1</sup>:

- (1) The driver may drive up to 11 hours after 10 consecutive hours off-duty.
- (2) The driver may not drive once the driver has been on duty for 14 hours following 10 consecutive hours off-duty.
- (3) The driver may not drive after 60 hours on duty in any consecutive 7 days.
- (4) The driver may not drive after 70 hours on duty in any consecutive 8 days.

**2. Statutory Language.** The federal regulation reads in pertinent part:

- (a) For motor carriers transporting property, no motor carrier shall permit or require a driver to drive a property-carrying commercial vehicle:

- (1) more than 11 cumulative hours following 10 consecutive hours off duty; or

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<sup>1</sup>The hours of service rules for passenger-carrying vehicles is contained in 49 C.F.R. § 395.5.

- (2) for any period after the end of the 14<sup>th</sup> hour after coming on duty following 10 consecutive hours off duty, unless the driver complies with certain exemptions listed in § 395.1(o) or § 395.1(e)(2).

49 C.F.R. § 395.3(a)(1)-(2). The limitation in subpart (1) is based on pure driving time while subpart (2) includes all on-duty time—both driving and not driving. A driver may stay on duty for more than 14 hours, but cannot *drive* after the 14<sup>th</sup> hour after coming on duty. 49 C.F.R. § 395 FMCSA Frequently Asked Questions—D.1.

- (b) For motor carriers transporting property, no motor carrier shall permit or require a driver to drive for any period after—

- (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
- (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3(b)(1)-(2). The difference between subpart (1) and (2) is whether or not the carrier operates every day of the week although a carrier operating every day of the week may elect the 60/7 rule. 49 C.F.R. § 395.3, DOT Interpretations Questions 1, 6. A six days per week carrier cannot use the 70/8 rule. *Id.* In addition, the motor carrier has discretion to assign individual drivers within the company different rule designations, i.e. 70/8 or 60/7. *Id.*

The driver may restart the 7 or 8 consecutive day period after taking 34 or more consecutive hours off-duty. 49 C.F.R. § 395.3(c)(1)-(2).

The driver may invoke some exceptions to the hour requirement, such as adverse driving conditions and emergency conditions. These exceptions allow a driver to exceed the maximum driving times and not be in violation. The definition for each exception is delineated in the federal regulations. 49 C.F.R. § 395.1(b)(1)-(2).

### 3. International Boundaries.

A driver from a foreign country, when in the U.S., must produce a current record of duty status (logbook), and sufficient documentation to account for duty time for the previous six days. 49 C.F.R. § 395.8—DOT Interpretations Question 15. A driver is not required to

prepare a logbook while operating outside the jurisdiction of the U.S. However, according to the DOT Interpretations, “it may be advantageous for any driver (U.S. or foreign) to prepare records of duty status for short-term foreign trips. Upon entering the U.S., each driver must either: (a) have in his/her possession a record of duty status current on the day of the examination showing the total hours worked for the prior seven consecutive days, including time spent outside the U.S.; or (b) demonstrate that he/she is operating as a “100 air-mile radius driver” under § 395.1(e).”

Mexican and Canadian drivers operating in the United States must comply with the federal regulation’s hours of service requirements. Although compliance with the hour of service regulations is checked by looking backward in time, and activity occurring outside the U.S. may be taken into account, state and federal officials may only impose penalties for violations that occurred in this country. The driver must maintain a current record of driver status for the previous seven consecutive days while in the U.S. 49 C.F.R. § 395.8(k)(2).

### 4. Ramifications for Violating the Hours of Service Rules.

A motor carrier is liable for hours of service violations if it had or should have had the means by which to detect the violations. 49 C.F.R. § 395.3, DOT Interpretations. Liability under the federal regulations is not dependent on actual knowledge. Carriers are liable if they “permit” hours of service violations by failing to have in place management systems that will prevent such violations. *Id.*

An hour of service violation can also create an argument that loss of sleep and fatigue caused the collision. Studies have shown that long haul truck drivers obtain less sleep than is required for alertness on the job. Mitler, M., et al., *The Sleep of Long-Haul Truck Drivers*, 337 NEW ENGLAND J. MED. 755 (1997). The greatest vulnerability is in the late night and early morning. *Id.* The study stated the “findings underscore the need to educate workers and schedulers about the importance of adequate sleep with respect to public safety.” *Id.* at 761. Researchers have also concluded the “economic incentives for driving long hours are compelling and the time-on-task guidelines and regulations promulgated in the 1930s are inadequate in the face of current knowledge of sleep physiology and the forces affecting trucking.” Mitler, M., *Sleep and Fatigue in Forensics*, THE FORENSIC EXAMINER (May-June 1996), p. 17. While this article was written prior to the recent changes in hour of services rules, the principles of sleep deprivation as a causal link to truck collisions still exists. *See also* Mitler, M., et al.,

*Catastrophes, Sleep and Public Policy: A Consensus Report*, 11 SLEEP 100 (1988).

A logbook violation coupled with prevalent knowledge within the trucking industry that collisions are more likely to occur when a driver is sleep-deprived, provides two avenues to directly link a collision to truck company management and personnel policies.

## **E. Controlled Substances and Alcohol Use and Testing.**

### **1. General Rules.**

49 C.F.R. § 382.101, *et seq* is the federal framework for controlled substances and alcohol use and testing. This “part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State”. Therefore, this part applies to American, Mexican, and Canadian drivers. 49 C.F.R. § 382.103(a)(1)-(3). The regulations prohibit a driver from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. An employer that has actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall not permit the driver to perform or continue to perform safety-sensitive functions. 49 C.F.R. § 382.201. No driver can use alcohol while performing safety-sensitive functions. Nor can a driver perform a safety-sensitive function within four hours after using alcohol. 49 C.F.R. § 382.207.

A driver shall not report for duty or remain on duty performing safety-sensitive functions when the driver uses controlled substances. Nor shall an employer with actual knowledge that a driver has used a controlled substance permit the driver to perform or continue to perform a safety-sensitive function. 49 C.F.R. §§ 382.213, 382.215.

### **2. Pre-employment Testing.**

An employer must test a driver for drugs prior to the driver performing any safety-sensitive function. 49 C.F.R. § 382.301. However, if the driver has participated in a controlled substances testing program within the previous 30 days and (a) was tested for controlled substances within six months from the job application, or (b) participated in the random controlled substances testing program for the previous 12 months from the job application, then a pre-employment screen is not required. 49 C.F.R. § 382.301(a)-(b). A pre-employment alcohol screen is not required by the federal regulations.

### **3. Post-collision Testing.**

**Summary.** As soon as practicable following an occurrence involving a commercial vehicle operating on a public roadway, the employer shall test its surviving

employees for alcohol and controlled substances under certain circumstances. 49 C.F.R. § 382.303(a)-(b). In summary, post-collision testing must be performed: (a) in a fatality, and (b) when a citation is issued to the commercial driver following a collision where either: (i) bodily injury is sustained with immediate medical treatment away from the scene, or (ii) there is disabling damage to any motor vehicle requiring a tow away. *Id.*

**Alcohol.** An employer must test its driver for *alcohol* if: (1) the accident involved the loss of human life and the driver was performing safety-sensitive functions with respect to the truck; or (2) the driver received a citation within 8 hours of the occurrence for a moving violation arising from the accident if the accident involved: (a) bodily injury requiring immediate medical treatment away from the scene, or (b) disabling damage to the motor vehicles requiring them to be towed from the scene. 49 C.F.R. § 382.303(a).

The post-collision alcohol test must be administered within two hours of the accident. 49 C.F.R. § 382.303(d)(1). If the test is not administered within two hours, then the employer shall prepare and maintain a record stating the reasons the test was not timely administered. *Id.* If the test is not administered within eight hours of the collision, the employer shall cease attempts to obtain the test and prepare and maintain the same type of record. *Id.*

**Controlled Substances.** Similarly, an employer must test its driver for *controlled substances* if: (1) the accident involved the loss of human life and the driver was performing safety-sensitive functions with respect to the truck; or (2) the driver received a citation within 32 hours of the occurrence for a moving violation arising from the accident if the accident involved: (a) bodily injury requiring immediate treatment away from the scene, or (b) disabling damage to the motor vehicles requiring them to be towed from the scene. 49 C.F.R. § 382.303(b).

If the test is not administered within 32 hours of the collision, the employer shall cease attempts to obtain the test, and prepare and maintain on file a record stating the reasons the test was not timely administered. 49 C.F.R. § 382.202(d)(2).

### **4. Random Testing.**

The employer is required to conduct random drug and alcohol testing during the course of the year. 49 C.F.R. § 382.305. Ten percent of the average number of driver positions, at a minimum, must be randomly tested for alcohol. 49 C.F.R. § 382.305(b)(1). Fifty percent of the average number of driver positions, at a minimum, must be randomly tested for controlled substances. 49 C.F.R. 382.305(b)(2). The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a

random number table or a computer-based random number generator that is matched with the drivers' social security numbers, payroll identification numbers, or other comparable identifying numbers. 49 C.F.R. § 382.305(i)(1). The random testing must be unannounced and spread reasonably throughout the calendar year. 49 C.F.R. § 382.305(k)(1).

### 5. Reasonable Suspicion Testing.

An employer shall require a driver to submit to an alcohol test or drug test when the employer has reasonable suspicion to believe the driver has used alcohol or controlled substances. 49 C.F.R. § 382.307(a)-(b). The test may only be conducted when a trained supervisor of the employer has observed specific, contemporaneous, articulable appearance, speech, body odor, or behavior indicators of alcohol or drug use.

### F. Insurance.

No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in 49 C.F.R. § 387.9. The minimum levels of insurance depend on whether the haul is intrastate or interstate, the equipment, and the cargo. Section 387.9 provides a schedule of required minimum insurance limits:

- \$750,000. For hire carriers<sup>2</sup> in interstate or foreign commerce with a gross vehicle weight rating of 10,000 pounds or more carrying nonhazardous cargo.
- \$1,000,000. For hire and private carriers<sup>3</sup> in (a) interstate or foreign commerce in any quantity or (b) intrastate commerce in bulk only with a gross vehicle weight rating of 10,001 pounds or more that transport oil as defined in 49 C.F.R. § 172.101, hazardous waste, hazardous materials, and certain hazardous substances as defined in 49 C.F.R. § 171.8 and listed in 49 C.F.R. § 172.101, but not listed in the \$5 million requirement list.

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<sup>2</sup> A for-hire carrier means the business of transporting, for compensation, the goods or property of another. 49 C.F.R. § 387.5.

<sup>3</sup> A private motor carrier is a person, other than the motor carrier (a person providing commercial motor vehicle transportation for compensation), transporting property by commercial motor vehicle in interstate or foreign commerce when the person is the owner, lessee, or bailee of the property being transported, and the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise. 49 U.S.C. §§ 13102(14), 13102(15).

- \$5,000,000. For hire and private carriers in interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,001 pounds or more carrying: (a) hazardous substances as defined in 49 C.F.R. § 171.8 transported in cargo tanks, portable tanks, or hopper type vehicles with capacities in excess of 3,500 water gallons, (b) in bulk Division 1.1, 1.2, or 1.3 (explosives), Division 2.3 (poisonous gas), Hard Zone A, or Division 6.1 (poisonous material), Packing Group I (classified as high danger), Hazard Zone A (isolation and protective action distances for gases poisonous on inhalation), (d) In bulk Division 2.1 (flammable gases) or 2.2 (nonflammable gases), or (e) highway route controlled quantities of a Class 7 material, as defined in 49 C.F.R. § 173.403 (hazardous material transportation guide).
- \$5,000,000. For hire and private carriers in interstate or foreign commerce with a gross vehicle weight rating of less than 10,000 pounds carrying: (a) *any quantity* of Division 1.1, 1.2, or 1.3 (explosives), (b) *any quantity* of Division 2.3 (poisonous gas), Hazard Zone A (isolation and protective action distances for gases poisonous on inhalation), or Division 6.1 (poisonous material), Packing Group I (classified as high danger), Hazard Zone A material (related to isolation and protective action distances), or (c) highway route controlled quantities of Class 7 material as defined in 49 C.F.R. § 173.403 (hazardous material transportation guide).

49 C.F.R. § 387.9. Therefore, the minimum insurance requirements for nonhazardous materials is \$750,000 while hazardous materials require a \$5 million minimum. If the cargo is hazardous then Section 387.9 should be consulted for the mandated minimum limit.

### IV. VIOLATIONS OF THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS.

Failing to adhere to the minimum requirements of the federal regulations will render the driver disqualified to operate a commercial vehicle. 49 C.F.R. §§ 391.11, 391.15. In addition, violating the federal regulations can form the basis for either a negligence per se claim against the motor carrier or a simple negligence case.

The failure to follow the federal regulations requiring emergency warning devices to be placed behind a disabled commercial motor vehicle within ten minutes of becoming disabled provides the basis for a negligence per se jury instruction. *Reinicke v. Aeroground, Inc.*, 167 S.W.3d 385, 389 (Tex.

App.–Houston [14<sup>th</sup> Dist.] 2005, pet. denied). The truck in *Reinicke* was parked on the shoulder after running out of fuel. Emergency cones were not placed as required by 49 C.F.R. § 392.22(b)(2)(v). A passing motorist drifted onto the shoulder and struck the trailer. *Id.* at 387. The jury found the truck company liable, but the trial court entered judgment notwithstanding the verdict concluding there was no evidence that any negligence of the truck company proximately caused the collision. *Id.* at 386-87. A plurality of the court of appeals affirmed. *Id.* at 390. Yet, this case does stand for the proposition that violation of the federal regulations can be submitted to the jury as negligence per se.

A negligence per se instruction is proper in connection with the federal regulation's prohibition against an employer knowingly allowing a person to operate a commercial vehicle without a commercial license. In *Northern Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 113 (Tex. App.–Beaumont 2001, pet. denied), a commercial moving van carrying an intrastate shipment was found liable for rear ending a passenger vehicle. On appeal, the moving company claimed the trial court committed error by instructing the jury that violations of certain federal regulations constituted negligence per se. The regulations at issue included 49 C.F.R. § 383.23 (requiring drivers of commercial vehicles to possess a CDL), 49 C.F.R. § 395.8 (requiring commercial drivers to log their driving and duty hours), and 49 C.F.R. 390.11 (requiring motor carriers to have their drivers comply with federal regulations). The court of appeals held that all three regulations applied to both interstate and intrastate commerce and concluded the trial court did not commit error in instructing the jury the motor carrier was bound by these regulations. *Emmons*, 50 S.W.3d at 123-24.

However, the court of appeals in *Freudiger v. Keller*, 104 S.W.3d 294, 298 (Tex. App.–Texarkana 2003, pet. denied), affirmed a trial court's refusal to submit a negligence per se instruction on using extreme caution when hazardous conditions exist. The requested instruction was taken from 49 C.F.R. § 392.14. The court of appeals stated that to submit a negligence per se instruction the regulation must create a special standard of care. Since there was no case or legislative enactment recognizing that Section 394.12 created such a special standard of care, the trial court did not err in refusing the requested instruction. *Id.*

In *Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828, 835-36 (Tex. App.–Fort Worth 2006, no pet.), a multiple vehicle collision occurred when two wheels separated from the lead tractor in a convoy. The jury returned a verdict for the plaintiffs. The truck companies appealed complaining of charge errors and sufficiency of the evidence. *Id.* The charge errors focused on the trial court's instructions on negligence

per se and refusal to instruct on excuses to negligence per se. Three different provisions of federal regulations were involved.

First, 49 C.F.R. § 393.205 provides standards applicable to wheels and requires, among other things, that lug nuts must not be "loose". *Id.*; see also *Omega Contracting*, 191 S.W.3d at 841. The court of appeals held the term "loose" was vague and not susceptible of precise meaning. For this reason, the instruction was error. *Id.* at 842-43. In addition, the trial court did not include an excuse instruction as requested by the truck company pursuant to *Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 696 (Tex. 1972), which listed five categories of excuses to negligence per se. *Id.* A correct instruction would have omitted the reference to "loose" nuts or bolts and included an instruction on excuse. *Id.*

The final two instructions in the charge came from 49 C.F.R. § 396.3 (inspection, repair, and maintenance) and 49 C.F.R. § 396.13 (driver inspection). The defendants argued these sections were not appropriate bases for negligence per se, because they incorporate the ordinarily prudent person standard. *Id.* at 842. "When a statute incorporates the ordinarily prudent person standard, negligence per se does not apply, because the statute does not establish a specific standard of conduct different from the common law standard of ordinary care." *Id.* The court of appeals agreed and concluded these instructions were error, because they require a motor carrier to maintain vehicles "in safe and proper operating conditions" and a driver to "be satisfied the motor vehicle is in safe operating condition"—neither of which imposes anything more than a standard of ordinary care. *Id.* at 843.

In conclusion, the violation of a federal regulation is admissible, because it is evidence of a driver's and carrier's failure to act with ordinary care. The violation can also, in certain circumstances, form the basis of negligence per se. In either case—simple negligence or negligence per se—the violation of the regulation is relevant and admissible.

## V. LEGAL CLAIMS AGAINST THE CARRIER/EMPLOYER.

### A. Vicarious Liability as the Statutory Employer.

Texas law recognizes that an interstate carrier must assume complete responsibility for the operation of leased equipment for the duration of the lease making the carrier vicariously liable as a matter of law for the negligence of any individual operating the truck. *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 37-38 (Tex. App.–Fort Worth 2002, pet. denied). Statutory employment is a theory of vicarious liability created by the Federal Motor Carrier Safety Regulations. Under the regulations, motor carriers have both a legal right

and duty to control leased vehicles operated for their benefit. *Id.*; see also *Omega Contracting*, 191 S.W.3d at 848. The federal regulations create a statutory employment relationship between the employee of the lessor-owner and the lessee. *Id.* “An interstate carrier’s liability for equipment and drivers covered by leasing agreements is governed by the [regulations] rather than common law doctrines of respondeat superior.” *Id.* The purpose of statutory employment regulations is to ensure that carriers will be fully responsible for the maintenance and operations of leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing public confusion about who is financially liable if accidents occurred, and providing financially responsible defendants.” *Omega Contracting*, 191 S.W.3d at 848 (citing *Morris*, 78 S.W.3d at 38). The *Morris* opinion is the best case on the books explaining the statutory employee relationship in commercial trucking cases, and the underlying legal and policy rationales for that doctrine.

### **B. Vicarious Liability under Agency.**

The court of appeals in *Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d 879, 886 (Tex. App.–Dallas 2006, n.p.h.) relied upon agency principles to reverse a summary judgment in favor of a non-statutory employer, because the non-statutory employer exercised control over the driver’s actions. The driver was employed by MTR Trucking. MTR made hauls for Higgins Trucking. The driver was involved in a collision while transporting cargo for Higgins in an MTR truck. Higgins filed a motion for summary judgment claiming it could not be responsible for the driver’s negligence since MTR was the driver’s statutory employer. The trial court granted the motion. *Id.* The court of appeals noted that just because Higgins and MTR had not entered a written lease agreement, Higgins should not be allowed to hide behind the federal regulations claiming the statutory employment relationship between MTR and the driver insulated Higgins from liability if Higgins was controlling the driver’s conduct at the time of the collision. *Id.* at 885. The test was whether Higgins had the right to control the driver’s activities at the time of the collision allowing the imposition of vicarious liability. *Id.* (citing *Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998)). This includes control over the specific injury causing activity. *Hogan*, 197 S.W.3d at 885 (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 195 (Tex. 1995)). Because more than a scintilla of evidence existed to create a material issue of fact on Higgins’ right of control, the court of appeals reversed and sent the case to trial. *Id.* at 886.

### **C. Direct Liability for Negligent Entrustment.**

An employer has a duty to hire a safe employee. See *Wise v. Complete Staffing Servs., Inc.*, 56 S.W.3d 900, 902 (Tex. App.–Texarkana 2001, no pet.). The five elements for negligent entrustment promulgated by the supreme court are: (1) entrustment of a vehicle owned by the owner, (2) to an unlicensed, incompetent, or reckless driver, (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless, (4) the driver was negligent on the occasion in question, and (5) the driver’s negligence proximately caused the accident. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987); *Williams v. Steves Indus., Inc.*, 699 S.W.2d 570, 571 (Tex. 1985), *overruled on other grounds*, *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 20 (Tex. 1994); *Yap v. ANR Freight Systems, Inc.*, 789 S.W.2d 424, 428 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1990, no writ). It is important to note the supreme court tied the causation element to the negligence of the driver at the time of the collision, not the act of negligent entrustment itself. *Williams*, 699 S.W.2d at 571; *Bedford v. Moore*, 166 S.W.3d 454, 459 (Tex. App.–Fort Worth 2005, no pet.); *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431 (Tex. App.–Texarkana 1992, no writ). This issue arises in commercial truck cases where the passenger motorist sues the motor carrier for negligently entrusting the tractor to a driver that is an unlicensed, incompetent, or reckless driver by virtue of some violation of the federal regulations. The motor carrier will argue the regulatory violation did not cause the collision and, therefore, evidence of the violation should not be admitted before the jury and the negligent entrustment claim should not be submitted to the jury. Counsel for the motorist must delineate the distinction between the act of negligent entrustment and the act of negligence giving rise to the case. The two acts or failures to act do not have to be the same.

The Fort Worth Court of Appeals made this clear in the case of *Bedford v. Moore*, 166 S.W.3d 454, 462-63 (Tex. App.–Fort Worth 2005, no pet.). The court of appeals wrote that to impose liability under a negligent hiring and negligent entrustment theory of recovery, “the factfinder must conclude that a preceding independent action occurred that caused the plaintiff harm even though the required causal link focuses on the act of the driver.” *Id.* Like a Dram Shop Act case, if the hiring or entrusting employer is negligent, its liability for the acts of the driver is established, and the liability between the driver and employer is apportioned based on the percentages of responsibility assessed by the jury. *Id.*

A negligent entrustment claim provides the avenue for admission of federal regulations where a violation of the regulation forms the basis for the direct liability claim. In *Yap v. ANR Freight Systems, Inc.*, 789 S.W.2d

424, 426-27, n. 3 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1990, no writ), a southbound 18 wheeler crossed over the center line of a wet roadway in an attempt to avoid a vehicle pulling into its path and struck a northbound motorist. On the negligent entrustment claim, the jury charge contained provisions of the federal regulations setting out standards of operation under hazardous conditions and driver qualifications. *Id.* n. 3. The jury found neither the truck driver's or the northbound motorist's negligence proximately caused the collision. The jury also found the motor carrier did not negligently entrust the truck. *Id.* at 425

This past year, the Texas Supreme Court affirmed a trial court's decision to refuse a negligent entrustment instruction, not a separate question, because the jury's negative finding on the broad form negligence question negated "the unsubmitted negligent entrustment issue as a matter of law." *Shupe v. Lingafelter*, 192 S.W.3d 577, 577-78, 580 (Tex. 2006). The collision occurred when a pickup driven by Heppler rear-ended a van and then swerved into the oncoming lane and into the path of a tractor. The tractor driver then lost control and struck Lingafelter's vehicle. Lingafelter and Heppler sued the tractor driver and motor carrier. *Id.* At trial, the plaintiffs requested an instruction, not a separate question, on negligent entrustment to be included with the single broad form negligence question. The jury found no negligence was committed by the tractor driver or motor carrier. *Id.* The court of appeals reversed the trial court's refusal to submit an instruction on negligent entrustment. The supreme court determined the error, if any, in failing to submit the instruction was harmless reasoning the jury "provided its answer to the negligent entrustment issue—and the vicarious liability issue—elsewhere in the verdict" in response to the broad form negligence question.

There are some older cases that hold negligent entrustment should be dismissed if the parties stipulate to course and scope of employment by the truck driver. In the opinion of *Frasier v. Pierce*, 398 S.W.2d 955, 957-58 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.), the court of appeals affirmed the trial court's striking of negligent entrustment pleadings when the parties had stipulated the commercial driver was in the course and scope of employment at the time of the collision. *See also Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.) (exclusion of evidence of owner's alleged negligent entrustment was not error where owner admitted liability for employee's acts); *Estate of Arrington v. Fields*, 578 S.W.2d 173, 175 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (holding evidence on negligent hiring is limited to the issue of punitive damages). Therefore, depending on whether you are suing or defending the commercial carrier, these

opinions might provide strategic considerations on whether to stipulate on course and scope.

#### **D. Direct Liability for Negligent Hiring, Retention, and Supervision.**

The elements of negligent hiring, retention, and supervision are similar to the elements of proof for negligent entrustment. The tort of negligent hiring, retention, and supervision is a direct liability claim that arises from an employer owing a duty to its other employees and to the general public to ascertain the qualifications and competence of the employees it hires, especially when the employees are engaged in occupations that require skill or experience and that could be hazardous to the safety of others. *Morris*, 78 S.W.3d at 49. Therefore, an employer is liable for negligent hiring, retention, or supervision if it hires an incompetent or unfit employee whom it knows, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others. *Id.* The purpose of the duty giving rise to these direct liability claims is to promote highway safety and prevent motor vehicle accidents. *Id.* (citing *Guidry v. Nat'l Freight, Inc.*, 944 S.W.2d 807, 810 (Tex. App.—Austin 1997, no writ); 49 C.F.R. § 383.1(a) (2000)).

In a recent opinion, the Fort Worth Court of Appeals simplified the elements of proof in a negligent hiring case. The court held a plaintiff must prove the following two elements: (1) the employer owed a legal duty to protect third parties from the employee's actions, and (2) the third party's sustained damages were proximately caused by the employer's breach of that duty. *TXI Transp. Co. v. Hughes*, —S.W.3d—, 2007 WL 1502074, \*18 (Tex. App.—Fort Worth May 24, 2007, n.p.h.). On appeal, the truck company claimed a charge error for the trial court omitting an element of the negligent hiring claim, namely, that the employer knew or should have known the driver was an incompetent or unqualified driver. *Id.* The court of appeals held this was not an express element of a negligent hiring action. *Id.* The court further held a broad form negligence question including the standard instructions for "negligence", "ordinary care", and "proximate cause" correctly submitted the negligent hiring claim. *Id.* at \*19. The court explained that a breach of the duty to protect third parties from an employee's actions can occur if the employer hires an incompetent or unfit employee whom it knows, or by the exercise of reasonable care should have known, was incompetent or unfit. *Id.* at \*18. However, other facts may also establish a breach of the employer's duty and the method of the breach is not an element of the negligent hiring action any more than the method of breach for any other simple negligence cause of action. *Id.*; *see*

also *Bedford v. Moore*, 166 S.W.3d 454, 464 (Tex. App.–Fort Worth 2005, no pet.)(holding proper submission in a single negligent entrustment or negligent hiring case is to submit the negligent entrustor or negligent hiring employer in the general liability and comparative questions).

## VI. CONCLUSION.

The statistics on truck collisions are staggering: 5,190 fatalities in 2004 representing twelve percent of all traffic fatalities while commercial trucks only account for four percent of all registered vehicles and seven percent of all miles traveled. An additional 116,000 were injured in truck collisions during that same time period. National Highway Traffic Safety Administration, *Traffic Safety Facts*, (August 2005); National Highway Traffic Safety Administration, *Large Truck Crash Overview*, (March 2006); Jarossi, L., “*Trucks Involved in Fatal Accidents Factbook 2003*”, Center for National Truck and Bus Statistics, (April 2007). The historical data supports the conclusion that commercial truck collisions and the resulting fatalities and injuries will continue into the foreseeable future. Likewise, motor carriers and passenger motorists will need counsel to investigate and pursue their claims in the ever evolving area of commercial truck litigation.



Date

Texas Department of Public Safety  
P.O. Box 4087  
Austin, TX 78752

Attn: Open Records

Re: Driver:  
Deceased:  
Location:  
DOA:

Dear Open Records:

Pursuant to the Texas Open Records Act, Tex. Gov't Code Ann. §§ 552.001 to 552.353, I write to request access to and a copy of the following documents related to the above collision:

1. The Texas Peace Officer's Accident Report, supplements to the Texas Peace Officer's Accident Report, offense report, Texas Highway Patrol Major Accident Investigation, property inventories, arrest reports, and any other reports or incident reports;
2. All photographs (including digital);
3. All video recordings (including the in-car video with audio)
4. All highway department maps;
5. All highway department drawings;
6. All diagrams;
7. All results from alcohol testing;
8. All results from drug testing;
9. All investigative notes of the investigating officers;
10. All measurements;
11. All documents pertaining to the accident reconstruction team;

12. License and weight regulations pertaining to this accident;
13. Inspection reports, investigation reports, and any reports pertaining the truck and trailer involved in this accident;
14. All documents forming the basis of allegations against [the driver] and any documentation pertaining to any special traffic team or other related investigation;
15. All witness statements;
16. All documents pertaining to chain of custody of any samples taken for drug and/or alcohol testing;
17. All documents pertaining to the method of transport of the containers holding the samples for any and all drug and/or alcohol testing;

If you have any questions, please do not hesitate to contact me. Your cooperation is greatly appreciated.

Sincerely,

**REQUEST FOR A CERTIFIED ABSTRACT OF AN OPERATING RECORD  
AS PROVIDED IN SECTION 601.022 OF THE TEXAS MOTOR VEHICLE SAFETY RESPONSIBILITY ACT**

Please complete the spaces provided below and return this form to the Texas Department of Public Safety. Be advised, the Department cannot be responsible for accuracy of certification when complete information is not furnished.

In addition, a fee of **\$20.00** is required for the furnishing of a certified abstract of the operating record and upon receipt of same, along with the other data, the record will be forwarded to you.

Mail to: Driver Records Bureau, Texas Department of Public Safety, Box 15999, Austin, Texas 78761-5999  
**MAKE CHECK or MONEY ORDER PAYABLE TO: TEXAS DEPARTMENT OF PUBLIC SAFETY**  
Any questions regarding the information on this form should be directed to Customer Service at 512/424-2600.

MAIL DRIVER RECORD TO: Requestor's Name \_\_\_\_\_ DL Number \_\_\_\_\_  
(PLEASE TYPE OR PRINT)  
Address \_\_\_\_\_  
City, State, Zip Code \_\_\_\_\_ Telephone # \_\_\_\_\_

If requesting on behalf of a business, organization, or other entity, please include the following:

Name of business, organization, entity, etc. \_\_\_\_\_  
Your Title or Affiliation with above \_\_\_\_\_  
Type of business, organization, etc. \_\_\_\_\_  
(i.e. Insurance provider, towing company, private investigation firm, etc.)

<b>INFORMATION REQUESTED ON:</b>	
Texas Driver License # _____	Date of Birth (Month/Day/Year) _____
Last Name _____	First Name _____ Middle/Maiden _____

<b>INDIVIDUAL'S WRITTEN CONSENT FOR ONE TIME RELEASE TO ABOVE REQUESTOR</b>	
<small>(Requestor, if you do not meet one of the exceptions listed on the back of this form, please be advised that without the written consent of the driver license/ID card holder, the record you receive will not include personal information.)</small>	
I, _____, hereby certify that I grant access on this one occasion to my Driver License/ID Card record, inclusive of the personal information (name, address, driver identification number, etc.), to _____	
Signature of License/ID Card Holder or Parent/Legal Guardian _____	Date _____

**State and federal law requires requestors to agree to the following:**

In requesting and using this information, I acknowledge that this disclosure is subject to the federal Driver's Privacy Protection Act (18 U.S.C. Sect. 2721 et seq.) and Texas Transportation Code Chapter 730. False statements or representations to obtain personal information pertaining to any individual from the DPS could result in the denial to release any driver record information to myself and the entity for which I made the request. Further, I understand that if I receive personal information as a result of this request, it may only be used for the stated purpose and I may only resell or redisclose the information pursuant to Texas Transportation Code §730.013. Violations of that section may result in a criminal charge with the possibility of a \$25,000 fine.

I certify that I have read and agree with the above conditions and that the information provided by me in this request is true and correct. If I am requesting this driver record on behalf of an entity, I also certify that I am authorized by that entity to make this request on their behalf. I also acknowledge that failure to abide by the provisions of this agreement and any state and federal privacy law can subject me to both criminal and civil penalties.

\_\_\_\_\_  
Signature of Requestor \_\_\_\_\_  
Date

**If you are not requesting a copy of your own record or do not have the written consent of DL/ID holder, you must provide the information requested on the reverse.**

The Texas Department of Public Safety may disclose personal information to a requestor without written consent of the DL/ID holder, on proof of their identity and a certification by the requestor that the use of the personal information is authorized under state and federal law and that the information will be used only for the purpose stated and in complete compliance with state and federal law.

You must meet one or more of the following exceptions if you do not have written consent of the DL/ID holder to be entitled to receive personal information on the above named individual. Please initial each category that applies to the requested driver record.

- \_\_\_\_\_ 1. For use in connection with any matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle emissions; (d) motor vehicle product alterations, recalls, or advisories; (e) performance monitoring of motor vehicles or motor vehicle dealers by a motor vehicle manufacturer; or (f) removal of nonowner records from the original owner records of a motor vehicle manufacturer to carry out the purposes of the Automobile Information Disclosure Act, the Anti Car Theft Act of 1992, the Clean Air Act, and any other statute or regulation enacted or adopted under or in relation to a law included in the above.
- \_\_\_\_\_ 2. For use by a government agency in carrying out its functions or a private entity acting on behalf of a government agency in carrying out its functions.
- \_\_\_\_\_ 3. For use in connection with a matter of (a) motor vehicle or motor vehicle operator safety; (b) motor vehicle theft; (c) motor vehicle product alterations, recalls, or advisories; (d) performance monitoring of motor vehicles, motor vehicle parts, or motor vehicle dealers; (e) motor vehicle market research activities, including survey research; or (f) removal of nonowner records from the original owner records of motor vehicle manufacturers.
- \_\_\_\_\_ 4. For use in the normal course of business by a legitimate business or an authorized agent of the business, but only to verify the accuracy of personal information submitted by the individual to the business or the authorized agent of the business and to obtain correct information if the submitted information is incorrect to prevent fraud by pursuing a legal remedy against, or recovering on a debt or security interest against the individual.
- \_\_\_\_\_ 5. For use in conjunction with a civil, criminal, administrative, or arbitral proceeding in any court or government agency or before any self regulatory body, including service of process, investigation in anticipation of litigation, execution or enforcement of a judgment or order, or under an order of any court.
- \_\_\_\_\_ 6. For use in research or in producing statistical reports, but only if the personal information is not published, redisclosed, or used to contact any individual.
- \_\_\_\_\_ 7. For use by an insurer or insurance support organization, or by a self insured entity, or an authorized agent of the entity, in connection with claims investigation activities, antifraud activities, rating or underwriting.
- \_\_\_\_\_ 8. For use in providing notice to an owner of a towed or impounded vehicle.
- \_\_\_\_\_ 9. For use by a licensed private investigator agency or licensed security service for a purpose permitted as stated on this page.
- \_\_\_\_\_ 10. For use by an employer or an authorized agent or insurer of the employer to obtain or verify information relating to a holder of a commercial driver license that is required under 49 U.S.C. Chapter 313.
- \_\_\_\_\_ 11. For use in connection with the operation of a private toll transportation facility.
- \_\_\_\_\_ 12. For use by a consumer-reporting agency as defined by the Fair Credit Reporting Act (15 U.S.C. §1681 et seq.) for a purpose permitted under the Act.
- \_\_\_\_\_ 13. For any other purpose specifically authorized by law that relates to the operation of a motor vehicle or to public safety.  
Please state specific statutory authority \_\_\_\_\_
- \_\_\_\_\_ 14. For use in the preventing, detecting, or protecting against identity theft or other acts of fraud. The Department prior to release of personal information may require additional information.

# LOG BOOK

## DRIVER'S DAILY LOG (ONE CALENDAR DAY - 24 HOURS)

ORIGINAL - File each day at home terminal  
DUPLICATE - Driver retains in his possession for eight days

07 124 1999 SA  
(MONTH) (DAY) (YEAR)

437  
TOTAL MILEAGE TODAY

certify that all entries are true and correct VEHICLE NUMBERS - (SHOW EACH UNIT)

(DRIVER'S SIGNATURE IN FULL)

(NAME OF CARRIER OR CARRIERS)  
Jewelland, Inc.  
(MAIN OFFICE ADDRESS)

(NAME OF CO-DRIVER)  
none  
(HOME TERMINAL ADDRESS)

	MID-NIGHT											NOON	MID-NIGHT											TOTAL HOURS
	1	2	3	4	5	6	7	8	9	10	11	1	2	3	4	5	6	7	8	9	10	11		
1: OFF DUTY																								0
2: SLEEPER BERTH																								9.5
3: DRIVING																								13.5
4: ON DUTY (NOT DRIVING)																								1
REMARKS																								24

REMARKS: Denver Co. - sleep Denver Co. - W.F. Jewelland Goodrich Pa. - partial Juback, Inc.

Specifying document, manifest number, or name of a shipper and commodity. Check the time and enter name of place you reported and where released from work and when and where each change of duty occurred. Explain excess hours.

FROM: Denver Co. (STARTING POINT OR PLACE) TO: Juback, Inc. (DESTINATION OR TURN AROUND POINT OR PLACE)

USE TIME STANDARD AT HOME TERMINAL  
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13-MP

RECAP
6 DAY NO.
13.5 DRIVING TIME TODAY TOTAL LINE 3
0 OFF-TRIP VIOLATION TODAY TOTAL LINE 4
17.5 ON-DUTY TIME TODAY TOTAL LINE 5 & 4
70 HRS/7 DAY DRIVERS
55 TOTAL HRS ON DUTY LAST 7 DAYS INCLUDING TODAY
15 TOTAL HRS AVAILABLE TO BE USED
55 TOTAL HRS ON DUTY LAST 7 DAYS INCLUDING TODAY
60 HRS/7 DAY DRIVERS
A. TOTAL HRS ON DUTY LAST 7 DAYS INCLUDING TODAY
B. TOTAL HRS AVAILABLE TO BE USED
C. TOTAL HRS ON DUTY LAST 7 DAYS INCLUDING TODAY

## TIME DATED FUEL RECEIPT

DATE: 08/28/99 TIME: 21:11:06

BLACK MESA TRUCK STOP  
1000E MAINST  
BOISE CITY, OK 73933  
580 594 2811