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Trucking Accident Litigation: Not Just Another Auto Case

SUBMITTED BY THE DUFFY LAW FIRM

Special to the Legal

When evaluating liability in a car accident case, it is important to have knowledge of and access to the available tools — the rules of the road. There is the potential for negligence per se if a driver is speeding, failing to keep an assured clear distance or violating other Vehicle Code provisions. The introduction of a tractor-trailer or a bus into the accident adds even more “tools.” There are hundreds of potentially applicable regulations, significantly different accident dynamics and evidence that may be lost or destroyed in short order. The important thing is to know where to look for the tools that might help in your evaluation.

Any driver of a tractor-trailer must have a special license that can only be obtained through special training — a Commercial Driver’s License (CDL). In 1986, the federal government adopted the Commercial Motor Vehicle Safety Act of 1986. However, it was not until 1992 that drivers were required to have a CDL. In furthering the interest of safe driving of commercial motor vehicles (CMVs), the Federal Motor Carrier Safety Regulations (FMCSR) were adopted to identify the minimum standards required to be followed by commercial drivers and their employers.

The FMCSR places these minimum licensing and operating requirements “to help reduce or prevent truck and bus accidents, fatalities and injuries.” While there are certain exceptions (i.e., firefighters), the regulations impose sanctions against the driver and employer for a violation. This applies to any CMV, which includes vehicles weighing in excess of 26,001 pounds, carrying hazardous materials or having the ability to transport 16 or more passengers.



TOM DUFFY'S FIRM regularly handles motor vehicle and trucking accident litigation, obtaining an \$11.4 million jury verdict recently in a case against a local Toyota dealer. Visit duffyfirm.com/news to read about the case.

Drivers of tractor-trailers are not only specially licensed but are required to pass Department of Transportation physicals. As of August 2012, the driver is required to submit proof of passing his or her physical with the DOT of his or her CDL state. The DOT physical requires the driver to have unimpaired upper and lower extremities (at least insofar as the impairment cannot affect grip or “normal tasks” associated with truck driving). Further, the driver should have no vision or hearing impairments and no respiratory issues, among other health issues. Thus, while a defendant’s medical history is often not in play in a personal injury action, his or her need to be certified

“healthy” may very well call into question the truck driver’s medical condition. If the driver is just recovering from an impairment, such as a torn rotator cuff, that driver should be recertified by a physician before returning to operating a truck and should receive an updated physical card. These physical cards, normally valid for three years, must be pulled from a driver in the event of an injury that would no longer qualify the driver to possess a DOT physical card. This should be done by his or her employer.

As such, when you obtain the driver’s personnel file from his or her employer, a photocopy of his DOT card should be in the file. If it is not, the driver can certainly produce a copy of his or her DOT card. The medical provider who performed the DOT physical may be subpoenaed to verify the validity of the DOT card (as this author has seen forged DOT cards from drivers who, previously injured, never returned to the physician to be re-evaluated for an updated DOT card).

In addition to evaluating the driver, it is important to evaluate the vehicle. When a CMV is involved in an accident, depending upon the manner in which the accident occurred, certain accident-related data may be stored. Vehicles are equipped with electronic information that may be referred to as an ECM, an airbag module, an EDR or something else. The point of these devices is to record a hard brake or fault codes, as well as other things. However, the data stored is limited. If a truck is involved in a hard brake concerning an accident, it may record the truck’s speed, throttle application, brake application, cruise control, RPMs and other pertinent information for every second up to approximately one minute prior to the brake application (and it should be noted the zero point is the brake application, not the moment of the accident). It will con-

tinue to record this data for a very brief period of time after the accident. While there can be issues with this data, the electronic control data may very well tell the tale of what the CMV operator was doing in the short time leading up to and following the accident.

However, this hard brake data is not saved forever. Often, these devices record three hard-brake events. If there are three additional hard-brake events after an accident, the accident may be erased. This writer has seen hard-brake applications that occurred during the moving of a truck in the impound lot after an accident, thus erasing evidence (fortunately, the evidence erased were older hard brakes and not the hard brake at issue). It is imperative to have a qualified expert with the proper equipment to download the electronic data before it is lost. Trucking companies often want to have their vehicle back out on the road as soon as possible, as they are not making money while that truck is sitting in a parking lot. However, a well-drafted evidence preservation letter should notify the defendant not to move, alter, damage, destroy, tamper with or perform any action whatsoever with the truck, the electronic data or any hard data until there has been a protocol established for inspection of the truck, the download of electronic data and the review of paper data.

As far as paper data is concerned, drivers must keep records of their hours of operation. Certainly, this does not exist in the noncommercial motor vehicle world. These records must be kept for six months pursuant to the FMCSR. Again, a properly drafted letter of preservation will support a later claim of spoliation in the event litigation is not instituted within six months of the accident and the driver has since destroyed his or her logs. The handwritten logs are important to compare to the computer data to determine whether or not the driver's hours are consistent with the FMCSR. There are various rules, including the 11-hour rule, the 14-hour rule and the 60-hour rule, that limit the amount of hours a tractor-trailer operator can drive during a day, a week, etc. These hours-of-service rules are important to evaluate, especially when considering if the accident occurred because of operator fatigue.

There are also issues of pleading against tractor-trailer operators that may also apply to other commercial operators. You

should consider pleading what "HIRTS" against the tractor-trailer company. Such pleadings would include theories of Hiring, Investigation, Retention, Training and Supervision. The employer may have failed to properly investigate the qualifications of its truck drivers. Truck drivers are required to notify prospective employers of prior traffic convictions, even if they are not from truck driving. Additional information regarding the driver's past employment history is required as well. The employer should carefully screen or investigate the driver before hiring him or her. Failure to do so may result in the hiring of an unfit operator.

Turnover is very high in the trucking industry. Drivers are often paid by the mile and will leave one company for another for an extra half-cent a mile. Employers are looking to save that half-cent when possible. There are companies in the United States that are known for hiring the "green" and the "gray." That is, they hire less-skilled truck drivers who are right out of school or those who are on their last mile. This saves them from paying the higher-priced better drivers. The problem is, a lot of these green drivers do not know the rules or are more willing to bend them to make early money. A lot of the gray drivers may not even care so much anymore. Additionally, older drivers may not have the stamina to comply with the hours of operation. Driving a truck for eight hours straight is difficult, but to be profitable, it is often necessary. As such, older drivers may need to take more breaks, which means they have to make up the miles by working overtime. There is no overtime in truck driving (with limited exceptions), and by working overtime, they are violating the hours-of-operation rules.

Companies should endeavor to obtain the driver's employment file, which would also reflect the companies for which he or she previously worked. Was the driver discharged from those companies for violation of the hours of service or for being involved in preventable accidents? Preventable and unpreventable accidents are terms used by the trucking industry to establish whether or not it was the particular truck driver's fault. An accident being preventable in the general sense may not identify who is at fault. However, when a trucking company decides that the accident was preventable, that means the company is blaming

its truck driver. By obtaining his or her employment file, the company can evaluate whether or not the current employer had obtained the records from the driver's prior employers, the reasons the driver left prior jobs and any discipline issues. With a negligent hiring theory, a company should be able to obtain those records that are important for evaluating this issue.

It is important to consider how the truck driver acts and reacts at the accident scene. Truck drivers are trained in how to respond to accidents. They are provided specific training not to discuss responsibility with anyone. They are provided a hotline where they will be placed in touch with a representative who will explain to them how to answer every question. In fact, if a company obtains the driver's telephone records, it will see they typically will call their hotline before the police. They may have legal counsel at the accident scene, depending upon the severity of the accident. When speaking to a police officer, they are trained how to answer the questions. Before a police officer arrives, they may use "exoneration cards," specific cards placed in their accident kit. They will go around the accident scene looking to find witnesses who will exonerate them from liability and sign one of their exoneration cards. While most cell-phones have cameras, a driver's accident kit will also have a camera, so look for those photographs that should have been taken at the scene.

There are a number of issues that arise with trucking accidents that may not arise with auto accident cases. If you know where to look, you've increased your chances of obtaining the information you need to fully evaluate your case. •