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TRANSPORTATION LAW UPDATE

PENNSYLVANIA GOOD AND BAD

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The "Good" and the "Bad" in Pennsylvania for trucking companies was evidenced recently in a memorandum opinion by U.S. District Court Judge James Munley in the Middle District of Pennsylvania (Scranton). In ***Chisdock v. Monk***, *No. 3:10 cv1941 (M.D.Pa. August 25, 2011)*, plaintiffs alleged that they were traveling in a construction zone near Dupont, Pennsylvania when they were rear-ended by a tractor trailer driven by defendant Monk and owned by defendant Alabama Motor Express.

The "Good"

About one month after the accident, plaintiffs' counsel sent a letter to the trucking company requesting that all information, including witness reports, be preserved. After suit was initiated and discovery was complete, plaintiffs filed a motion for sanctions alleging that defendants destroyed, or failed to retain, the driver's handwritten statement and the ECM, and that defendants falsified the driver's logs.

In Pennsylvania, spoliation of evidence is the destruction of evidence relevant to the dispute. Spoliation of evidence may lead to sanctions including the dismissal of claim, exclusion of countervailing evidence, or a jury instruction on the "spoliation inference." The "spoliation inference" is that the destroyed evidence would have been unfavorable to the offending party. Before granting sanctions, the court must determine whether the evidence was in the party's control and whether the party actually suppressed or withheld evidence. The burden to establish spoliation of evidence is on the party asserting that the spoliation occurred.

Statement By Driver

The driver testified that immediately after the collision, she filled out an accident report which was provided in a "kit" the company provided to its drivers. She hand-delivered the statement and photos to the company with attention to the safety director. The safety director did not have it in his file and did not know if it was misplaced or never received. Plaintiffs argued that since the photos were produced, the company must have had the report and destroyed it or failed to turn it over.

Judge Munley noted, however, that the report could have been misfiled, never turned in, or inadvertently discarded. Plaintiffs had not established that the defendants destroyed evidence and a jury could draw its own inferences based upon the evidence provided at trial.

We often face similar situations where photos are reportedly taken by a driver and sent in with logs and other trip information. Invariably, if photos or documents are not found in the course of discovery, plaintiffs' attorneys start screaming "spoliation." Judge Munley's opinion recognizes the human factor in handling the paperwork involved in the trucking industry. While the issue is still presented to the jury, it should not be accompanied by a negative inference.

ECM

Plaintiffs also argued that defendants should be sanctioned because they failed to provide ECM printouts or the device itself. The safety director admitted that he knew the trucks were governed at 64 mph, but did not know if the tractor had an ECM. The safety director testified that he spoke with its shop foreman, who indicated that they did not have the capability to determine the speed of the tractor at the time of the collision.

Judge Munley found that plaintiffs failed to establish that defendants destroyed or withheld information. Each side presented its version of events and it was the jury's task to determine the facts after hearing testimony and argument. This ruling allowed the trucking company to present testimony about what they knew and did not know about ECMs and leave the issue for the jury.

Driver's Logs

Finally, plaintiffs sought sanctions against defendants because they believed that the driver's logs were falsified despite the safety director's testimony that the logs were audited. Plaintiffs argued that the company did not audit the false logs and did not prevent the driver from continuing to submit false logs. Once again, Judge Munley found that plaintiffs' allegations did not support a finding of spoliation. Rather, it was a question for the jury.

The plaintiffs' bar is constantly trying to set up the defendants for spoliation by sending preservation letters. They argue that if they demand the company to preserve everything, then anything not produced, regardless of the reason or even the existence thereof, must have been intentionally destroyed, thus warranting a finding of spoliation. Judge Munley clarified in this opinion, however, that there actually has to be a finding that the evidence was within the party's control and that the party destroyed said evidence. The argument that the evidence should have existed and therefore it must have been destroyed is not sufficient. Plaintiff must prove that it was both in the defendant's control and it was actually destroyed.

The "Bad"

In the same opinion, Judge Munley addressed defendants' motion for partial summary judgment on the issue of punitive damages. The court noted that punitive damages may be awarded for conduct that is outrageous because of the defendant's evil motive or reckless indifference to others. The state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious. There must be sufficient evidence that a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that he acted or failed to act in conscious disregard of that risk. Defendants argued that they did not possess the requisite state of mind to support an award of punitive damages.

Despite admitting that it was "not at all clear" how the accident occurred, Judge Munley pronounced defendants' position "baseless." He noted that it was undisputed that the tractor trailer driver attempted to change lanes in a construction zone. Plaintiffs' trucking expert opined that any attempt to change lanes in a construction zone manifested a reckless disregard for safety and travel laws and jeopardized others' safety. He also noted that plaintiffs had evidence that the driver drove 64 miles per hour in a 55 mph construction zone and was using her mobile phone at the time of the collision.

This opinion is troubling because the court merely relied upon an expert's "opinion" that the driver's conduct manifested a reckless disregard. It appears that court relied, at least somewhat, upon the presence of these magic words to deny defendants' motion. We expect that more plaintiffs will make sure that these "magic words" appear in reports in an attempt to survive motions for partial summary judgment on the issue of punitive damages. Motions *in limine* to strike similar expert opinions are appropriate. It should be argued to the court that an "opinion" that a defendant manifested a reckless disregard is not one for an expert, but is ultimately a question of fact for a jury. A trial judge has discretion to admit or exclude opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice.

Judge Munley also found a basis for punitive damages because the defendant was traveling 9 miles over the speed limit and was on her cell phone. We expect plaintiffs' lawyers will attempt to use this opinion to argue that any speeding or use of a cell phone should be a basis for punitive damages. Unfortunately, we expect that both the state and federal courts of Pennsylvania will begin using these factors, alone or with other factors, as a basis to keep punitive damages claims in a lawsuit.

While Judge Munley's opinion on spoliation was good for the trucking industry, his opinion on punitive damages was bad for the trucking industry. As such, defendants will need to continue filing appropriate motions to limit the testimony of experts who attempt to speak beyond that which is appropriate for an expert, in an effort to prevent the result from becoming "ugly."

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