VOLUME 15 | NUMBER 1 | 2014

# TRANSPORTATION LAW UPDATE

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## PENNSYLVANIA

## Defense Verdict: Smoke & Mirrors

Gary N. Stewart

On the morning of December 7, 2007, our client's truck driver was operating a loaded tractor trailer on I-81 southbound when, without warning, the engine turbo "blew", resulting in an immediate loss of power and the release of oil into the engine compartment. This caused a cloud of dense, gray/white smoke to billow out, engulfing the roadway and resulting in what witnesses described as "white-out" conditions.

Plaintiff was a pediatric nursing supervisor who regularly made home visits to her clients in the Wilkes-Barre/Scranton, Pennsylvania area. This area, in the northeastern portion of the state, is traditionally a "plaintiff-friendly" jurisdiction. While traveling on one of those visits, she noticed our client's tractor trailer from approximately 100 yards away, sitting entirely on the side of the road spewing smoke. At that time, she claims the smoke had not moved across the three travel lanes. She voluntarily chose to proceed and found herself in the middle of smoky conditions, which she and others called a white-out. Plaintiff entered the smoky area, dramatically slowed her vehicle, and struck a vehicle in front of her before being rear-ended by another tractor trailer.

Plaintiff's counsel sued our trucking company and its driver as well as the motor carrier that hit her from behind, alleging negligence and recklessness on the part of the striking tractor trailer for speeding and losing control. Plaintiff sued our client for negligent and reckless conduct in (1) failing to maintain and inspect the tractor and (2) failing to move the vehicle immediately to the side of the road, driving down the highway while knowing that the smoke from the blown turbo could cause a dangerous condition, and carelessly disregarding that condition. Plaintiff sought punitive damages from both trucking companies.

When the turbo exploded, our client's driver checked his mirrors and maneuvered the rig—according to plaintiff—negligently, and also continued to travel on the highway after his

engine blew instead of immediately shutting off his tractor and coasting to the side of the road. Prior to trial, plaintiff's settlement demand was $1.3 million. Defendant made a minimal offer, which was rejected. However, before trial, plaintiff settled with the other motor carrier for $85,000. Plaintiff then prepared for a singular attack on our client.

Plaintiff's claims of negligence were two-fold. First, plaintiff attacked the company maintenance procedures and record-keeping on the tractor, claiming that the motor carrier failed to maintain and inspect the tractor and that proper maintenance and upkeep would have prevented the "failing" turbo. Second, plaintiff attacked the actions of our client's driver in not reasonably and safely responding to the emergency condition and protecting against harm to other drivers.

The first defense was to obtain the company's maintenance records and to inquire about maintenance policies and plans. The motor carrier had exceptional record-keeping as well as detailed statements of the work performed on the tractor. The company also maintained a strict maintenance policy and ensured that the driver followed these policies. The records of maintenance and policies regarding timely and periodic maintenance provided an exceptional defense against the claims of negligence against the company.

The law in Pennsylvania with respect to an owner's duty to maintain a vehicle is as follows:

> "Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers. To this end, the owner or operator of a motor vehicle must exercise reasonable care in the inspection of the machine and is **chargeable with *notice* of everything that such inspection would disclose.**" *Dobb v. Stetzler, 369 Pa. 554, 559, 87 A.2d 308, 310 (1952), quoting Delair v. McAdoo, 324 Pa. 392, 395, 188 A. 181, 183 (1936)*

Despite plaintiff's allegations, the defense demonstrated to the jury that there was no evidence that either the company or the driver failed to ensure the tractor was in reasonably good condition and reasonably inspected.

Our client's driver testified in great detail about his pre-trip inspection and described his daily inspections in the weeks leading up to the turbo explosion. He testified that he did not *notice* anything unusual about the running or idling of the engine or the sound of the turbo. Further, the driver testified in the days before the accident he had traveled from Massachusetts to Pennsylvania and did not hear anything unusual about the manner in which the engine was running. The driver explained that the turbo makes a very distinctive sound and that if there was something wrong, it could be heard. However, that sound did not exist at any time prior to the turbo blowing.

In terms of maintenance, the driver testified about the regular service plans and company inspections on the tractor by mileage and days, as well as immediate correction by the company of mechanical problems discovered during normal use and pre-trip inspection. This was documented in computerized records. This illustrated that neither he nor the company had any advance notice that the turbo would fail and explode.

The law in Pennsylvania is that the mere happening of an accident does not establish that one of the parties was negligent. This is one of the reasons for the defense to use the term "accident" and not "crash" to describe the occurrence before a jury. In order to recover, plaintiff must prove by a preponderance of the evidence that defendant had a duty of care to plaintiff, that defendant in some fashion breached that duty of care, that the breach of the duty caused the injuries complained of, and that plaintiff did in fact suffer those injuries. If any of those elements are missing, then a finding must be in favor of defendant and against plaintiff.

The defense was able to maintain that the truck driver, through no fault of his own, encountered a sudden emergency—an unexpected mechanical condition that neither he nor the motor carrier could have foreseen. Under Pennsylvania law, a sudden emergency excuses a driver from a mistake in judgment after encountering an unexpected condition. Mechanical failures such as brake issues are covered under this doctrine. We noted that the facts of a lack of notice of any potential mechanical condition and an abrupt and obvious engine explosion fell within this defense.

Knowing that plaintiff's case was in jeopardy and having no evidence of wrongdoing on the part of our client's driver or company since plaintiff herself could not point to any action of the driver, plaintiff enlisted the services of a "mechanical expert" and also filed a pretrial motion to attempt to preclude the defense from presenting its own defense—lack of notice and sudden emergency. The expert opined that the trucking company's driver 1) did not encounter an engine explosion and 2) would have known the smoke would disperse across all three travel lanes and should have shut off his vehicle immediately and coasted to the berm. The court split the difference, and allowed the defense to properly argue a lack of notice, but refused to allow the sudden emergency defense.

At trial, plaintiff claimed the entirety of the accident was due to the truck driver, who "kept on trucking" after his engine blew. He also challenged the severity of the engine failure and blown turbo, claiming through his expert that the turbo did not explode and as such, the truck driver could have easily coasted to the side of the road, but failed to do so.

As expected, the mechanical expert who claimed that the truck driver did not encounter a catastrophic engine failure also critiqued every action of the driver. Plaintiff's expert opined that the driver should have shut off his engine and coasted to the side of the road. The expert also claimed that the smoke from the blown turbo would have immediately ceased as soon as the driver turned his engine off. However, on cross-examination, we were able to establish that the expert never operated a tractor trailer, and did not possess a commercial driver's license. We also noted that plaintiff's expert never inspected the vehicle or engine post-accident, and that the truck driver would lose brakes and power steering were he to shut off the engine on the highway. Last, the expert admitted there was no study or article in the United States that supported his opinions that the driver should turn off his vehicle on a busy uphill highway.

The truck driver testified regarding the severity of the blown turbo: an engine explosion with metal shrapnel spraying throughout the entire engine compartment that damaged other engine components. He was able to take the jury through a detailed account of how he "safely and prudently" moved his vehicle off the road. The driver was

also able to explain that he did not shut off his engine immediately because he saw a vehicle spinning out of control toward the rear of his vehicle and moved his tractor trailer forward to lessen the impact between his trailer and that vehicle.

After about an hour deliberation, the jury returned with a question. They asked: "If the smoke caused the 'accident', do we have to find that the driver [with the blown engine] was negligent?" The judge offered no guidance. We surmised that the jury had determined that the accident was caused by the smoke and was not due to the fault of our client's driver. After another hour and a half, the jury returned a unanimous verdict in favor of defendant, finding that neither the motor carrier nor the truck driver was negligent or at fault for the accident.

***Deborah A. Lavan and John P. Lavan v. Jeremy Hankey, William B. Altman, Inc., Gerald Tomenski and Dart Transit Company (Luzerne County, C.C.P. No: 8829-2008)***

**Gary N. Stewart** is a partner in the Commercial Motor Vehicle Section in our Harrisburg office. Gary is admitted to practice in Pennsylvania, New Jersey, Massachusetts, Connecticut, Vermont and Rhode Island as well as before the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the District of New Jersey, the District of Massachusetts, the District of Rhode Island, the District of Connecticut and the U.S. Court of Appeals for the First and Third Circuits.

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# ABA JOURNAL:
## *The Old One – Philly firm's history dates back to Ben Franklin*

The February 2014 issue of the ***ABA Journal*** includes a feature story on Rawle & Henderson, recognizing us as the oldest law practice in the United States. ***"The Old One: Philly firm's history dates back to Ben Franklin"*** chronicles Rawle & Henderson's history, which dates back to 1783. The ***ABA Journal*** article is available on Rawle & Henderson's website:

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