

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2008

PHILADELPHIA, APRIL 11, 2008

An **ALM** Publication

Establishing Liability and Punitive Damages Using FMCSR

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Ever since the 3rd U.S. Circuit Court of Appeals' decision in *Burke v. Maassen*, 904 F.2d 178 (3d Cir.1990), plaintiffs have been reluctant to pursue punitive damages based upon violations of the Federal Motor Carrier Safety Regulations.

In *Burke*, the plaintiff was standing on the shoulder of the road when the truck driver struck him while traveling faster than 60 mph. The driver admitted to exceeding the speed limit. The plaintiff presented uncontradicted evidence that he had driven more than 14 hours that day, in violation of FMCSR, and falsified his log to make it appear that he had complied. There was circumstantial evidence that the driver fell asleep at the wheel. The driver was employed by Steven Emken Trucking, which operated under a fleet contracting agreement with Malone Freight Lines. The driver had lied about his experience to get his job. Malone's department of safety performed a perfunctory verification of his application and approved it in spite of the falsehoods. The plaintiff claimed punitive damages, and the jury awarded both compensatory and punitive damages. Despite all the evidence of extreme wrongdoing and rule violation, the 3rd Circuit reversed the punitive damages award. The *Burke* court did a detailed examination of the Pennsylvania law of punitive damages and described it as a very strict interpretation of Restatement (Second) of Torts Section 908. They ruled that, under Pennsylvania law, "there must be some evidence that the person actually realized the risk and acted in conscious disregard or indifference to it."

Despite noting the driver's false application helped put him behind the wheel, and then, on the day of the accident, the same driver had: (1) driven over 14 hours knowingly in violation of the FMCSR; (2) fallen asleep at the wheel; (3) admitted he was speeding; and (4) wrote false entries after the accident, the court, nevertheless, stated, "the record is critically deficient of evidence showing [the driver] consciously appreciated the risk of fatigue and the potential for fatal accidents that accompanies driving for more than ten hours." Evidence showed the driver was provided with a copy of the FMCSR, and he admitted he read them and knew the 10-hour rule.

The court continued:

"The 10-hour regulation, itself, makes no mention of its purpose to avoid driver fatigue and accidents, nor is this purpose set forth elsewhere in the part containing that regulation. It can be argued that a reasonable man in [the driver's] position after reading the ten-hour rule may have realized the risk the regulation was designed to avoid. The record contains no evidence, however, that [the driver] himself appreciated the risk. Nor could a jury infer from the evidence that [the driver] consciously appreciated the risk of prolonged driving without relying on some conception of what a reasonable man's [the driver's] position might have thought."

The court points out in a footnote that the driver's knowledge might have been proved by: (1) an admission that he knew the 10-hour rule was designed to prevent fatigue and accidents, or (2) asking the employer whether anyone had ever specifically told him that if he drove for more than 10 hours he might fall asleep and cause an accident. The

court noted that other methods of proof were possible, such as proving that he should have learned about the danger when studying to get his CDL license by putting into evidence his CDL manual. The court ruled that there was no doubt the driver had behaved reprehensively, but unfortunately, he was not conscious of his risky behavior.

Despite this appellate authority, plaintiffs should not be dissuaded from relying on the FMCSR to prove punitive damages. A critical element in *Burke* is the court's concentration on the conscious disregard of the safety of others in the punitive damages equation. Many trial courts have noted this distinction and found otherwise.

CAME V. MICOU

A classic example, also interpreting Pennsylvania law, is the unreported decision in *Came v. Micou*, 2005 U.S. Dist. LEXIS 40037 (M.D.Pa.). In this case, the plaintiff alleged that the tractor trailer driver violated regulations by: (1) operating the rig in violation of hours of service regulations, 49 CFR 395.3, and when too tired to do so safely, 49 CFR 392.3; (2) failing to properly record his duty status, 49 CFR 395.8; (3) failing to properly inspect the rig prior to operation, 49 CFR 396.13, and operating the rig in an unsafe condition, 49 CFR 396.7; and (4) failing to properly report the results of the inspections, 49 CFR 396.11. Plaintiff also asserted that the trucking company improperly supervised the driver while he violated the above-referenced six regulations.

Plaintiff relied upon expert liability reports that determined the violations and opined that, in combination, these violations were precipitating factors

leading to the collision. These conclusions included the following: (1) the driver had been on duty for 75.5 hours in the eight days prior to, and including the day of the collision, and that the owner should have been aware of the hours of service violations; (2) the driver was in a state of low mental arousal or fatigue at the time of the collision; (3) the driver falsified his duty logs; (4) the trucking company failed to have an effective procedure in place to verify drivers' hours of service compliance, and the trucking company's flawed auditing system allowed drivers to exceed hours of service limitations; (5) the driver's conduct, while employed by defendant trucking company, was outrageous, as they knew the hours of service violations were in place to prevent fatigued employees from operating large and heavy commercial vehicles; and (6) the trucking company's policies, procedures and actions were outrageous because their management and employees knew the hours of service regulations were in place to protect the safety of the motoring public, and the hours of service were a problem in their operations. Plaintiff offered a second expert, who connected the accident with the collision by stating the driver momentarily fell asleep just prior to the collision.

The trucking company argued the expert reports lacked sufficient factual foundation; assigned arbitrary lengths of time for the driver to perform on-duty non-driving activities, such as pre- and post-trip inspections; erroneously replied upon entries in the movement records documenting the driver's travels prior to the accident, which were not entered via the GPS system; and offered their own expert report in rebuttal. All are standard defense arguments.

The court ruled that there was a genuine issue of material fact as to whether the defendant's conduct was outrageous. It also ruled that, based upon the following combination of facts, a jury could conclude that the driver's conduct constitutes reckless indifference: (1) the driver's inability to take proper steps to avoid the collision with a slower moving vehicle traveling ahead; (2) his inability

to perceive the passage of time from the point when he realized the vehicle ahead was moving slowly to the collision; (3) his failure to disengage the cruise control; and (4) his falsifying logs in violation of FMCSR.

A reasonable jury could similarly find that the following actions by the trucking company could also constitute reckless indifference: (1) failure to monitor the driver's conduct; (2) failure to make adequate and proper investigation and inquiry into his driving and employment record despite awareness of his prior preventable accidents; (3) failure to conduct any investigation into the driver's hours of service; (4) re-dispatching him even though he had exceeded his hours of service limitations; and (5) failure to have effective procedures in place to verify the driver's hours of service when they knew that those hours of service regulations were in effect to protect the safety of the motoring public. The court specifically found that *Burke v. Maassen*, 904 F.2d 178 (3d Cir.1990) was inapposite.

OBTAINING AWARENESS AND OBTAINING EVIDENCE

In *Came*, the plaintiffs provided testimony that the driver was aware the hours of service regulations were in place to prevent drivers from falling asleep. See also, *Wang v. Marziani*, 885 F. Supp. 74(S.D.N.Y. 1995) (applying Pennsylvania Law). It was this awareness, and record evidence of it, that distinguishes *Burke* from *Came*. This evidence is easy to obtain. Drivers and company officials will always admit they knew the purpose of the rules. Safety officials will always say they teach it to the drivers. All trucking company employees are supposed to be familiar with the FMCSR and the CDL manual, which covers all these matters. All drivers are supposed to study the manual to be tested on it, and most trucking companies have an internal manual, which warns of the dangers posed by giant trucks. There are many ways to prove "awareness" as well as showing the inherent danger of big trucks because of their mass, lack of maneuverability, articulation, and other factors.

IMPORTANCE OF PROPER PREPARATION

When preparing for deposition, intimate knowledge of the FMCSR and its regulatory guidance is mandatory to establish awareness of danger. For examples of deposition testimony, visit <http://www.anapolschwartz.com/pa-truck-accident/deposition-testimony.asp>. There is no question that proper preparation and questioning at depositions can set the table for a viable punitive damages claim.

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