

Truck Wars: THE RISE OF THE DARK SIDE

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In a galaxy not so far away, at a time that is very much the present, an organization has arisen from the bowels of the American Trial Lawyers Association. Where once there was only the TLA, a collegial alliance of attorneys who “assist providers and users of logistics and transportation services,” there has arisen an imperial force known as ...The Association of Plaintiff Interstate Trucking Lawyers of America (“APITLA”). It is clear that the Transportation Lawyers Association (“TLA”) has grown so strong in the force that a counter force has arisen comprised of hundreds of plaintiffs attorneys who have joined together to thwart the thousands of transportation companies that move freight and promote prosperity in this country. The APITLA is a national association of lawyers who have joined together as an organization that uses “learning, litigation and legislation” to make America’s highways a safer place.¹ Fear not members of the TLA Alliance, all is not lost.

I. A Glimpse Into The Dark Side: Know Thine Enemy

To defeat the Empire it is sometimes necessary to become, for a short time, Darth Vader. Recently the founder of the AIPTLA wrote an article for the American Trial Lawyers Magazine that set forth some basic tenets for handling a personal injury claim against a trucking company.² The article posits that every accident involving a truck is a fatigued truck driving case and should be handled as such until proven otherwise. It argues that fatigued driving equals greedy driving which equals

predictable, preventable and punishable catastrophe. The article sets forth what the author describes as “Dan’s Ten Commandments,” which should be assumed as “absolutely true” until proven otherwise. The commandments are:

1. In every truck crash the driver of the truck was fatigued and operating the vehicle in violation of the FMCSA hours of rules and regulations, as well as in violation of many other FMCSA regulations.
2. The trucking company, driver and insurance company will try to, or have already, altered, destroyed some or all evidence adverse to them.
3. The driver’s log books are false, and there are two sets of logbooks...
4. The driver’s knowing violations of the FMSCA rules were the result of “pressure for profit” put on the driver by the trucking company to get loads delivered on time or in accordance with an unlawful or unreasonable dispatch schedule.
5. Fatigue is the root cause of the crash...
6. The trucking company’s “unofficial” official policy manual says to the drivers: “BREAK THE FMCSA HOS RULES TO MAKE US MORE MONEY.”
7. The truck driver’s qualifications file contains amongst other falsified information, a false employment history and false medical information, and the current employer has not checked it out or, alternatively, has checked it out and took no appropriate action. The driver has untreated

sleep apnea or some other sleep disorder.

8. The violations of the hours of service rules occur while knowing the safety purpose of the hours of service rules, the catastrophic damages and injuries that occur when the hours of service rules as [sic] are violated, and that they are intentionally violated anyway for greedy, profit driven motives.
9. There are a multitude of inexpensive technologies and safety devices which, if implemented, would nearly cut in half the total number of fatigued trucking crashes that occur each year, but this trucking company made the conscious choice not to purchase them because they (sic) just didn’t care and safety was not a priority for them.
10. This is a huge punitive damages case. The insurance company will lie to you about the amount of insurance coverage that exists, and both they and the trucking company, will also lie to you and attempt to hide who, how many, and which corporations and person actually own the trucking company.

As Yoda would say, “Strong is the zealotry of the Empire.” The article is an educational glimpse of opposing counsel’s strategy in handling a case involving injury and a commercial vehicle.

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II. Blowing Up the Death Star

There are three keys to countering the diabolical strategy of the Empire and blowing up the Death Star.

A. Positioning of the Alliance Fleet: Evidence Preservation

The Alliance cannot afford to sit and wait for the Death Star to move into position, it must engage the enemy before the threat manifests itself. Being forewarned concerning the opposition's goals means that the transportation company must counter and neutralize these issues before they are even raised. One way to render "Dan's Ten Commandments" a non-issue is to aggressively and proactively gather records and information after an accident and then analyze them to identify any issues. Motor carriers, their insurers and their lawyers, both in-house and outside, must be willing to aggressively retain documents and information after an accident. A post-accident check list of documents and information to retain is as follows:

1. Driver's logs for the six months prior to the date of the accident and any log audits;
2. Any and all photographs of the accident scene that may be in Carrier's possession;
3. The bill of lading for the load being transported by Driver at the time of the accident;
4. All receipts, including toll and fuel receipts for Driver for the week prior to the day of the accident;
5. All citations arising from the accident;
6. All vehicle inspection reports (such as pre-trip, roadside, post-trip, etc.) for the tractor and trailer involved in the accident;
7. All dispatch/trip records for Driver for this particular trip and for thirty days prior to the accident;
8. All maintenance records for the tractor;
9. All maintenance records for the trailer;

10. Driver's qualification file;
11. Driver's personnel file;
12. Driver's medical file;
13. All technical information available from the tractor including any and all ECM data and QualComm or other satellite communications device;
14. All drug and/or alcohol tests results concerning Driver;
15. A copy of any transport police report, if any;
16. A copy of Driver's driving record (presumably contained within his personnel file/driver file);
17. A copy of Carrier's accident file for this accident;
18. A copy of Carrier's accident register as it existed on the date of the accident;
19. A copy of Carrier's employee manual and driver manual;
20. A copy of Carrier's safety manual;
21. A copy of Carrier's driver training policies and procedures; and
22. A copy of the lease agreement between Carrier and Driver, if any.

Although this list of documents appears voluminous, in today's information age they will likely all fit on one DVD. We have all been asked, "Why take the time and make the effort to collect these documents if they prove the claimant's case?" The answer is simple. If you don't retain these documents, you will drive up the level of risk associated with a claim and ultimately the value of the claim. It is almost a certainty that opposing counsel, especially members of the AIPTLA, will ask for these documents. If the accident was of a nature that a claim was likely to result from it, whether for property damage or personal injury, then a court may hold that the motor carrier had a duty to retain these records. As such, failure to retain them could result in a spoliation charge to the jury. This consequence is particularly frustrating if the records would have been of

no importance or even supported the defense theory. Even if the records are adverse to the company it is possible to mitigate what initially appears to be damaging evidence and, as discussed below, establish inadmissibility.

B. Shutting Down the Empire's Force Field and the Diversionary Attack: Responding to and Countering the Evidence Preservation Letter

To blow up the Death Star you first have to shut down its force field and utilize a diversionary attack. It is common for members of the AIPTLA to send an evidence preservation demand letter. The purpose of the letter is in part to preserve evidence, but primarily it is a set up letter. Sending this letter enables opposing counsel to argue that a specific preservation request was submitted for certain evidence and that evidence was destroyed. Opposing counsel is thrilled if the letter is ignored by the company and a majority of the irrelevant documents listed on it are not preserved, because it sets up the spoliation argument.

The company through its own counsel should aggressively respond to any such contrived letter. Respond to it in writing and assert that the company will not intentionally alter, spoil, or destroy any items or documents which may be pertinent to the incident, the claimant's claims, or the company's defenses against any such claims. It is important to also inform opposing counsel, and subsequently a court, that the preservation letter is virtually identical to form letters routinely sent by numerous other plaintiff's attorneys attempting to pursue monetary claims against motor carriers. It is important to object to the broad categories of items to be retained and the information listed in the letter, and argue that it is impossible to determine what the opposing side considers relevant or at issue concerning any potential claims. Assert that the scope, breadth, generality and

vagueness of the requested documents far exceed what any party would be required to produce or maintain if the matter were in litigation. Set forth all appropriate objections pursuant to the Rules of Civil Procedure. It can also be useful to assert that from the breadth of the requested retention it appears that opposing counsel is not so much concerned about preserving evidence as creating a false issue of spoliation to argue to a jury.

Finally, launch a diversionary attack to blunt the Empire's offensive. Counter the opposition's demand with a counter preservation demand that is as broad and potentially as burdensome as that served on the company. Most claimants in today's information age have computers, e-mail accounts, credit card records, vehicle maintenance and title records, and telephone records. They are also capable of taking photographs, statements and measurements. Demand that they preserve those records from six months before the accident until the date of the accident and possibly beyond. Sometimes a diversionary attack such as a counter preservation demand can develop significant issues at a plaintiff's deposition and can assist in the defense of the case.

C. Torpedo The Reactor!

1. There is no law that fatigue is assumed or presumed.

After deactivating the force field and putting the Empire on its heels, the Alliance should now use the law as a torpedo to blow the Death Star's reactor. Just because the documents exist and are possibly harmful, does not mean they or opposing counsel's fatigue theory are admissible. Torpedos away! Past hours-of-service violations and log book falsifications by a driver, coupled with an accident involving that driver, does not mean the driver was fatigued or at fault. In addition, even when a driver has surpassed the maximum number of hours allowed under federal regulations, there must

be more evidence than simply an hours of service violation to conclude that the driver or carrier knowingly or recklessly operated, or allowed operation of, a commercial motor vehicle in an impaired state.

In circumstances where a driver has numerous log violations, courts have held that, *even assuming* a driver has violated hours of service regulations *and* was fatigued at the time of the accident, a claim for punitive damages cannot stand where the plaintiff has failed to show, by clear and convincing evidence, that the driver or his employer was *consciously aware* that his conduct was likely to cause injury to another. For instance, in *Purnick v. C.R. England, Inc.*,³ a tractor-trailer collided with a vehicle in the roadway, causing the plaintiff injuries. The tractor-trailer driver had violated federal hours-of-service regulations by driving more than 10 hours at a stretch several times during the week prior to the collision. At the time of the collision, the driver had even admitted that he had become "mesmerized" by the road such that he did not brake until after impact, and could not recall when he first saw the plaintiff's vehicle. There was evidence that the driver had intentionally falsified his log books so as to enable him to drive in excess of these hours of service regulations; however, the Qualcomm data showed the driver had not driven for 17 hours before the trip that ended in the crash. The plaintiff sued the driver and his employer, and sought punitive damages, arguing that the driver's "intentional falsification of log books and habitual deprivation of sleep the week before the crash culminated in his dangerous fatigue at the time of the crash."⁴ The defendants moved for summary judgment on plaintiff's claim for punitive damages, and the trial court granted the defendants' motion.

In upholding the trial court's granting of the defendants' motion for summary judgment, the Seventh Circuit held that "[e]ven assuming

that [the plaintiff] has shown that [the driver] falsified his logs, drove beyond the 10-hour limit several times in the week preceding the crash, and was fatigued when he hit her car, she presents no evidence that [the driver] actually knew that his misconduct would probably result in injury."⁵ The court observed that even if it could be argued that a "reasonable person" would know that exceeding the regulatory limits for hours of service could lead to a level of fatigue that would likely result in injury to others, negligence is not enough to support an award for punitive damages.⁶ The court found that the plaintiff "simply cannot show that [the driver] actually knew that he was so tired that continuing to drive would likely cause injury..."⁷

With regard to the driver's alleged falsification of his log books, the court found that:

[t]he log violations, even when construed in the light most favorable to [the plaintiff], are merely evidence that [the driver] drove beyond the 10-hour limit earlier in the week and, therefore, may have been tired when he hit [the plaintiff's] car. They do not show [the driver's] knowledge that an accident would probably occur, however.

The Court found it important that the driver had rested for 17 hours before the trip, which had a positive impact on the driver's assessment of his own fatigue. Rejecting the plaintiff's argument that, by falsifying his log books the driver intentionally and systematically caused himself to become fatigued, the court found that the plaintiff had presented no evidence as to the amount of sleep the driver had obtained in the several days prior to the crash.⁹ Consequently, the court found that the plaintiff had failed to present any evidence, much less clear and convincing evidence, that the driver engaged in any

conduct which he knew would result in injury, and that the defendants were entitled to summary judgment on plaintiff's punitive damages claim.¹⁰

Other courts have also followed this line of reasoning with regard to punitive damage assessments. In *Burke v. Massen*,¹¹ the plaintiff's decedent was killed after being struck by a tractor-trailer. At the time, the tractor-trailer was moving in excess of the speed limit, and the driver had driven over fourteen hours that day, in excess of federal motor carrier safety regulations. There was evidence indicating that the driver had fallen asleep at the wheel and that he had falsified his log books to make it appear that he was driving within the hours of service guidelines of the federal regulations. The driver had also falsified information concerning his prior employment and driving experience on his employment application, and gave false deposition testimony, all of which the Court held evidenced an intent to cover up his wrongdoing. The plaintiff sought an award of punitive damages against the driver and his employer, alleging that the driver knowingly violated the hours of service regulations, which resulted in his fatigue and the fatal accident at issue. The defendants moved for Judgment N.O.V. on the plaintiff's claim for punitive damages, and the trial court denied this motion.

In reversing the trial court's denial of the defendant's motion for Judgment N.O.V. as to punitive damages, the Third Circuit found that 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 10 hours."¹² While the driver had read the federal motor carrier safety regulations and was aware of the 10-hour rule set forth in those regulations, there was no evidence that the driver *consciously appreciated the risk of a fatal accident* occurring by virtue of his driving in excess of the

10-hour rule.¹³ Consequently, absent a conscious realization that his conduct was likely to result in serious harm to another, there was inadequate proof to support an award of punitive damages against the driver.¹⁴ The court stated, "[i]t is impossible to deter a person from taking risky action if he is not conscious of the risk."¹⁵ Finally, the court found that the falsification of the log books was also insufficient evidence to show that the driver consciously appreciated the risk of serious harm befalling another as a result of driving more than 10 hours, given that "punitive damages are intended to deter risky behavior that causes harm; they are not a sanction for obstruction of justice."¹⁶

The key point to take away from these decisions is that past hours-of-service violations and log book falsifications, coupled with an accident occurring when a driver has surpassed the maximum number of hours allowed under federal regulations, is insufficient to support the conclusion that the driver or carrier knowingly or recklessly operated, or allowed operation of, a commercial motor vehicle in an impaired state. Courts have found this evidence insufficient to clear the evidentiary hurdle that there be "clear and convincing evidence" that a defendant was aware his conduct would result in injury, with the emphasis on "aware." When successfully argued, these cases can nullify the plaintiff's fatigued driver theory of punitive damages.

2. If possible, take Negligent Entrustment, Supervision and Retention out of the Equation.

Luke stood a chance of defeating the Emperor only when he accepted that Darth Vader was his father. Sometimes it is tactically important to accept that the driver was within the course and scope of his employment, even if he is a bad guy. In alleging a theory of negligent entrustment, negligent supervision or negligent

retention, plaintiff's counsel seeks to introduce evidence of "prior bad acts" which would otherwise be inadmissible under Rule 404(b) of the Federal Rules of Evidence.¹⁷ However, the rule adopted by many jurisdictions states that where an employer has admitted that it *may* be vicariously liable for the acts of an employee performed in the scope and course of his employment, any additional claim against the employer under the theories of negligent entrustment, negligent retention, negligent supervision or the like cannot stand. This is the majority rule.¹⁸ As explained by the Missouri Supreme Court in *McHaffie v. Bunch*:

If all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose. The energy and time of courts and litigants is unnecessarily expended. In addition, potentially inflammatory evidence comes into the record which is irrelevant to any contested issue in the case.¹⁹

The key point to take from these cases is that, under the majority rule, a carrier can defuse a plaintiff's claims of negligent supervision or retention by admitting that, assuming the driver was found to have been negligent, it would be vicariously liable for the driver's negligence under a theory of *respondeat superior* or similar agency theory. Whether the driver was an employee of the company or acting within the course and scope of his employment at the time of the accident is often not in dispute, or alternatively, would not be difficult for plaintiff's counsel to establish. Thus, in the right circumstances, by making this tactical concession, the defendant carrier does not concede anything that is not, or would not be, already

established. At the same time, the defendant carrier gains a strong basis for defeating a plaintiff's claim of negligent supervision or retention, and the inflammatory evidence which can be introduced into evidence in support of such claims. The defendant carrier can make this simple, yet tactical, concession without conceding that the driver in fact was negligent at the time of the accident, or that any alleged negligence was the proximate cause of the accident. This tactic can go a long way toward eliminating prejudicial evidence introduced primarily to inflame the sentiments of the jury, while enabling the carrier to keep the jury's focus on critical facts necessary for its defense.


It should be noted that, while a powerful tool, this tactical concession does not necessarily mean that evidence of an hours-of-service violation at the time of the accident will be excluded. However, prior violations or incidents remote in time and place to the accident, such as log book violations and falsifications two

weeks, a month, or six months prior to the accident, prior accidents, prior tickets, or other remote "prior bad acts," should arguably be inadmissible as irrelevant to whether the driver caused the accident in question.

Another important line of cases to consider in attacking these types of claims by plaintiffs is set forth in the decision of the United States Supreme Court in *State Farm Mut. Aut. Ins. Co. v. Campbell*.²⁰ There, the United States Supreme Court held that the general conduct of a particular defendant, aside from the acts upon which liability is based in the case at hand, may not serve as the basis for punitive damages. The reasoning behind the Court's holding is that a defendant should be punished for the conduct that was the cause of harm to the Plaintiff, as opposed to being punished for being an "unsavory" individual or business. Evidence of other bad conduct unrelated to any damages to the Plaintiff should be inadmissible under Rule 404(b) of the Federal Rules of Evidence and should not be

allowed into evidence even if allegedly submitted to support an award of punitive damages.²¹ This line of cases holding that prior bad acts unrelated to the Plaintiff's claim should not be admitted as a basis for a punitive damages claim is important to consider in attacking claims premised on negligent supervision and retention.

III. The Final Chapter

The APITLA is a national association pooling resources to insure a swift and deadly attack against trucking companies. It wishes to build its Empire on the remains of thriving motor carriers. But within the TLA resides the resources and knowledge to counter the rise of the APITLA. Proactive, aggressive and thoughtful action taken soon after an accident, along with strong tactical use of the law, will hopefully result in an exploding Death Star and the Alliance parting with the Ewoks. 

Endnotes

1. See www.apitlamerica.com.
2. Dan Ramsdell, *What To Do In Every [Fatigued] Trucking Case*, *American Trial Lawyer*, pp. 20-22.
3. 269 F.3d 851 (7th Cir. 2001).
4. *Id.* at 852.
5. *Id.* at 853.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Purnick*, 269 F.3d at 853.
10. *Id.* at 853-54.
11. 904 F.2d 178 (3d Cir. 1990).
12. *Id.* at 183.
13. *Id.*
14. *Id.*
15. *Id.* (internal citations omitted).
16. *Id.*; see also *Lemaire v. Younger Transp., Inc. of Texas*, 443 So.2d 662 (La. App. 1983) (intentional dispatch of driver so as to require him to drive beyond hours of service limits set forth in federal regulations insufficient to support claim for punitive damages, as it must be shown that trucking company knew that injury or death would likely arise from its conduct).
17. Most states have a counterpart to FED. R. EVID. 404(b) limiting the admissibility of "prior bad act" as evidence.
18. See e.g., *Willis v. Hill*, 159 S.E.2d 145, 158 (Ga. App. 1968) *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968); *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995).
19. *McHaffie*, 891 S.W.2d at 826; see also *Libersat v. J & K Trucking, Inc.*, 772 So. 2d 173, 179 (La. App. 2000) (where a trucking company was responsible for conduct of its driver under a theory of respondeat superior, Plaintiff's claims for negligent hiring and training of drivers were

superfluous and would only serve to confuse the issues); *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. App. 1951) (where Plaintiff alleged negligence as to driver and also claimed driver's employer was negligent "in selecting or retaining truck driver...known to be incompetent and reckless," Plaintiffs claims for negligent hiring and retention were properly dismissed when employer admitted agency); *Hackett v. Washington Metro. Area Transit Auth.*, 736 F. Supp. 8, 11 (D.D.C. 1990) (holding that negligent entrustment claim is "unnecessary, prejudicial and redundant" when defendant employer admits that the employee was acting within the scope of employment); *Hood v. Dealers Transport Co.*, 459 F. Supp. 684, 685-86 (N.D. Miss. 1978) (where vicarious liability of the carrier is established by admission of the parties in the pleadings, a negligent entrustment act of the carrier "would add nothing to the case" and is not relevant); *Elrod v. G&R Construction Co.*, 628 S.W.2d 17, 19 (Ark. 1982) (following the majority rule barring a plaintiff from alleging multiple theories for recovery when liability is admitted as to one theory); *Tittle v. Johnson*, 185 S.E.2d 627, 628 (Ga. App. 1971) (holding that an admission of an agency relationship by a defendant wife in allowing her husband to drive her car will bar the plaintiff from asserting a cause of action for negligent entrustment); *Cole v. Alton*, 567 F. Supp. 1084, 1086 (N.D. Miss. 1983) (granting summary judgment on a claim of negligent entrustment where vicarious liability was not disputed); But see *Breeding v. Massey*, 378 F.2d 171 (8th Cir. 1967)(where a defendant employer denies liability, the plaintiff is entitled to proceed on theories of respondeat superior as well as negligent entrustment); *Plummer v. Henry*, 171 S.E.2d 330 (N.C. App. 1969)(holding trial court erred in striking portions of the complaint alleging negligent entrustment by defendant owner/father to son, even though defendant father had admitted liability under the family purpose doctrine).

20. 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003)

21. See also *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003) (evidence of other "bad conduct," typically inadmissible under Rule 404(b) of the Federal Rules of Evidence, cannot be used to support an award of punitive damages).