J. Kent Emison

Trial Strategies for Holding Trucking Companies Responsible for Their Employee's Negligent Conduct

by J. Kent Emison & Mark Emison

Mark Emison

I. Introduction

The vast majority of trucking accidents are caused by truck drivers with the following traits:

- Fatigue
- A history of prior accidents
- A history of driving violations
- A lack of experience
- A lack of training

Sole blame should not always be placed on the individual truck drivers; in most cases, trucking companies place the driver in a position to fail. Trucking companies notoriously cut corners and do the absolute minimum required by federal and state law when they do background checks on new drivers and train new drivers. Truck drivers who lack training, have been involved in prior serious trucking accidents, and have a history of driving violations are routinely fired by one trucking company, only to be hired again and again by other companies. Ultimately these bad truck drivers cause collisions that severely injure or kill motorists who share the highways with them.

Unfortunately, Illinois law bars claims of negligent hiring, supervision, retention, and entrustment against employers – trucking companies in the context of this article – if the employer admits to vicarious liability for the driver.[1] Given the current state of Illinois law, plaintiffs in trucking cases often face obstacles in their efforts to admit evidence of the trucking company's negligent conduct. We recently faced this dilemma in *Reagan v. Dunaway Timber*, a case in Arkansas Federal Court.[2] Arkansas law mirrors Illinois on this issue. The court barred evidence going solely to support the trucking company's negligent hiring and entrustment, but as discussed below, we were able to admit many facets of the trucking company's direct negligence into evidence. This included the company's negligent practices and procedures in hiring and supervising drivers and facts that the company hired the defendant driver despite a serious prior trucking accident, his sparse training and experience, and two license revocations, including a lifetime commercial driver's license. As a result, the federal court jury awarded these clients a very fair verdict *(see endnote 4)*. The scope and purpose of this article is to examine current Illinois law and to discuss various ideas regarding methods to maximize the instances of negligent conduct by trucking companies into evidence.

II. Illinois Law Regarding the Viability of Direct Negligence Claims Against an Employer when the Employer Admits Being Vicariously Liable for the Employee-Tortfeasor

This issue was first addressed in *Neff v. Davenport Packing Co.*,[3] while Illinois was still under a contributory fault regime – which barred a plaintiff's recovery if the jury assessed any fault to the plaintiff. In *Neff*, the Illinois Court of Appeals ruled that negligent entrustment claims were barred when "the party so charged has admitted his responsibility for the conduct of the negligent actor."[4] The Illinois Supreme Court[5] later explained *Neff's* reasoning:

> [When a] defendant-principal acknowledge[s] his responsibility for the alleged negligence of the tortfeasor-agent. . .no reason exist[s] to allow the plaintiff to introduce proof of the negligence of the defendant-principal in the form of potentially inflammatory evidence concerning the defendant's knowledge of prior misconduct on the part of the tortfeasor.

In 1981, Illinois abandoned contributory negligence in favor of a comparative negligence, and in 1986, the state statutorily adopted a modified comparative negligence.[6] In *Lorio v. Cartwright*,[7] the U.S. District Court in the Northern District of Illinois was tasked with deciding whether the rule in *Neff* was applicable after the change. The court reasoned that *Neff's* ruling made sense in a contributory negligence regime,[8] but "loses much of its force. . .under comparative negligence." The court explained that "the negligence of the [employer] is not the same as the negligence of the [employee]."[9] In a contributory negligence regime, the difference between the negligence of the employer and the employee-tortfeasor did not matter – if the employee was liable, then the employer was necessarily liable under *respondeat superior*.[10] Additional direct negligence claims against the employer would not add "the slightest to the amount of the judgment against the [employer]."[11]

In contrast, under a comparative negligence regime, "the trier of fact must determine percentages of fault for a plaintiff's injuries attributable to the negligence of plaintiff, the negligence of each defendant, and the negligence of other non-parties."[12] The difference between the employer's negligence and the employee-tortfeasor's negligence

matter a great deal to the difference in the amount of the judgment. Under comparative negligence, if the plaintiff prevails on both the negligence claims against the employee and the direct negligence claims against the employer, the employer "would be liable for the percentage of plaintiff's damages caused by the [truck driver's] negligence and for the percentage of plaintiff's damages caused by the [trucking company's] separate" direct negligence claims.[13] The court held that *Neff* was not viable after the adoption of comparative negligence, and held that "the Illinois Supreme Court would so hold were it to decide the issue."[14] *Lorio* echoes the law in several other states that allows direct negligence claims against employers who admit to vicarious liability of their employee-tortfeasors.[15]

Lorio was a federal decision, so *Neff's* viability under Illinois' comparative negligence regime remained unsettled in Illinois appellate courts until 2002, when the issue again appeared before the Illinois Court of Appeals in *Gant v. L.U. Transport*.[16] In *Gant*, the court held that "[notwithstanding the fact that Illinois is a comparative negligence jurisdiction, a plaintiff who is injured in a motor vehicle accident cannot maintain a claim for negligent hiring, negligent retention or negligent entrustment against an employer where the employer admits responsibility for the employee conduct under a *respondeat superior* theory.[17] The court reasoned that "allowing the simultaneous submission of these two separate theories would create the possibility that an employer's negligent entrustment of a vehicle to an employee would result in a greater percentage of fault to the employer than is attributable to the employee."[18] The court opined that "although [direct negligence claims against an employer] may establish independent fault on the part of the employer, it should not impose additional liability on the employer. Employer's liability. . .cannot exceed the liability of the employee."[19]

Gant controls in Illinois; the Illinois Supreme Court has not ruled on the issue. With *Gant*, Illinois joined a minority of other states that bar negligent hiring, retention, and entrustment claims against an employer when the employer admits to vicarious liability.[20] Despite the rule in *Neff* and *Gant*, the strategies discussed below may be useful in admitting evidence of prior bad conduct of truck drivers and trucking companies.

III. Theories of Liability

Despite *Gant's* bar on claims of negligent hiring, retention and entrustment against an employer if the employer admits vicarious liability, other claims should be made regarding trucking companies' negligence. These claims will be dependent on the facts of the case, but some of the claims made in *Reagan* may be applicable. In order to adequately explain these claims, a short synopsis of *Reagan* is set forth below.[21]

Reagan vs. Dunaway Timber

While exceeding federal limits on driving hours, a Dunaway Timber Company truck driver, Morgan Quisenberry, lost control of his semi-truck, crossed the centerline on a highway, and struck an oncoming semi-truck driven by Roger Reagan. Mr. Reagan died shortly thereafter. This tragedy is a prime example of what happens when a trucking company cuts corners and hires a driver that no reasonable company would trust to drive an 80,000 pound truck on the highway. Prior to being hired by Dunaway Timber, Quisenberry had pled guilty to two DWI's and had two license revocations. Under federal law, he had a lifetime ban on driving commercial trucks on interstate highways. In addition, just three months before Dunaway hired him, Quisenberry crashed a truck into a bridge while hauling hazardous materials. Finally, Quisenberry had not driven trucks "over the road" for more than fifteen years before Dunaway hired him and had not had any training driving trucks over the road in nearly twenty years.

Quisenberry admitted he had lied on his driver's application to Dunaway by not disclosing the two revocations and for failing to disclose the prior accident, but claimed he told his supervisor the truth shortly after he was hired. Dunaway admitted the following:

- It hired only experienced drivers because the company provided no training or supervision of drivers;
- It should have found out as much as possible about Quisenberry before hiring him;
- It did the minimum required under federal law regarding the driving history of Quisenberry (which did not show the two prior revocations or the prior accident); and,
- It did not monitor or supervise drivers when they were on the road.

The court entered a pretrial order[22] that prohibited us from presenting any evidence of negligent hiring, retention or entrustment due to an Arkansas decision similar to *Gant*.[23] However, the order specifically held that ruling did not preclude "any independent negligence claims [plaintiffs] assert against defendants regarding negligence in failing to have adequate policies, practices or procedures in place." The court indicated it would take up any objections to this evidence as it came up at trial.

During direct exam of the trucking expert,[24] we carefully steered clear of references to the prohibited areas mentioned above, but instead focused on the trucking company's poor policies, practices and procedures it had in place regarding the training, supervision and monitoring of

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Quisenberry. Uncontroverted expert testimony was presented that Dunaway could have discovered Quisenberry's revocations with an internet search for $15. The search would have taken less than fifteen minutes. Dunaway also could have discovered the revocations and the prior accident by doing a records search at the local county courthouse. As is often the case, the defense could not resist questioning the firm's expert on each of the actions Dunaway took in the hiring process to comply with the minimum requirements of federal law. The court agreed with us that Dunaway "opened the door" to evidence of Dunaway's policies and procedures during the hiring process, thus allowing us to get the negligent practices and procedures in the hiring process outlined above. In addition Quisenberry's lies on his application were used to impeach him, and thus his license revocations were referenced as well as prior accidents during the trial testimony of Quisenberry, Dunaway's president, and the trucking expert (although any mentioning of Quisenberry's DWIs were precluded under Federal Rule 403).[25] [26]

IV. Lessons Learned

While *Reagan* was an Arkansas federal court case, the facts and law regarding exclusion of negligent hiring claims are similar to those found in Illinois cases. Some practical ideas to help in such a case include the following:

1. In addition to pleading negligent hiring, retention and entrustment, also plead other theories such as negligent policies, practices and procedures for training, supervising, monitoring, etc., if applicable to the case;
2. Do comprehensive discovery on each of these areas;
3. Have expert testimony that is directed not only to negligent hiring, but also specifically addresses the policies, practices and procedures mentioned above;
4. Be prepared to respond to the inevitable Motion to Dismiss on the claim of negligent hiring, retention and entrustment;
5. Carefully go over the driver qualification file, any statements of the driver, any documents signed or authored by the driver that may contain lies or misrepresentations that could be used to contest the credibility of the bad driver. This is a separate and distinct grounds for admission of such evidence regardless of the claims made;
6. Wait for the defense to make a statement at trial glorifying the defendant company that will serve to "open the door" to this evidence.

V. Conclusion

Case law banning direct negligence claims against employers when they admit to responsibility for their truck drivers' negligence loses its logic in a comparative negligence regime. It prevents juries from assessing fault to all culpable defendants, for all of the culpable conduct that led to the lawsuit. In the context of trucking cases, the negligence of trucking companies in putting incompetent and dangerous drivers on the roads is distinct from the individual negligence of the truck drivers. Even so, under *Gant*, plaintiffs in Illinois are presently stuck with the law. Hopefully the strategies outlined in this article will offer some ideas to put clients in the best possible position to obtain a favorable verdict.

Endnotes

[1] *Gant v. L.U. Transport*, 770 N.E.2d 1155 (1st Dist. 2002).

[2] *Teri Reagan and Maverick Transportation, LLC v. Dunaway Timber Company, et al*; Case No. 3:10-CV-03016. United States District Court, W.D. Arkansas, Harrison Division. The jury awarded $7,000,000 to plaintiffs.

[3] *Neff v. Davenport Packing Co.*, 268 N.E.2d 574 (3rd Dist. 1971).

[4] *Id.* at 575.

[5] *Lockett v. Bi-State Transit v. Bi-State Transit Authority*, 445 N.E.2d 310, 313-314 (Ill. 1983).

[6] *Alvis v. Ribar*, 85 Ill.2d 1 (Ill. 1981); 735 ILCS 5/2-1116.

[7] *Lorio v. Cartwright*, 768 F.Supp. 658 (N.D. Ill. 1991).

[8] The court's rationale:

> In…a [contributory negligence] jurisdiction, the entrustee-agent will be either totally liable for plaintiff's damages or not at all liable for plaintiff's damages. If the entrustee is not at all liable for plaintiff's damages, whether it is because the entrustee was not negligent or the plaintiff was contributorily negligent, the entrustor-principal cannot be liable for any part of the plaintiff's injuries under either the respondeat superior theory or the negligent entrustment theory. If on the other hand the entrustee was liable and the entrustor's responsibility for the acts of the agent admitted, the entrustor-principal would be liable under the respondeat superior theory. Under the latter circumstances, it is unnecessary to determine whether the entrustor-principal was also liable under the negligent entrustment theory as the amount of the plaintiff's recovery under that theory would be identical to the amount of plaintiff's recovery under the respondeat superior theory. Because it is unnecessary, and because the evidence of negligent entrustment tends to be highly prejudicial, the rule set forth in Neff makes eminent sense in a contributory negligence jurisdiction. *Id.* at 660.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 660-661.

[14] *Id.*

[15] Alabama, Kansas, Michigan, Ohio, South Carolina, Delaware, North Carolina, and Virginia allow such claims. Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 Wyo. L. Rev. 229, fn 20 (2010) (citing *Poplin v. Bestway Express*, 286 F. Supp. 2d 1316 (M.D. Ala. 2003); *Marquis v. State Farm Fire & Gas Co.*, 961 P.2d 1213, 1225 (Kan. 1998); *Perin v. Peuler*, 130 N.W.2d 4, 8 (Mich. 1964); *Cark v. Stewart*, 185 N.E. 71, 73 (Ohio 1933); *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 332 (S.C. 2008); *Smith v. Williams*, C.A. No. 05C-10-307 PLA, 2007 Del. Super. LEXIS 266 (Sel. Super. Ct. Sept. 11, 2007); *Plummer v. Henry*, 171 S.E.2d 330, 334 (N.C. App. 1969); *Fairshter v. Am. Nat'l Red Cross*, 322 F.Supp.2d 646, 654 (E.D. Va. 2004).

[16] *Gant v. L.U. Transport*, 770 N.E.2d 1155 (1st Dist. 2002).

[17] *Id.* at 1159.

[18] *Id.*

[19] *Id.*

[20] Jurisdictions in which the state's highest court preclude these claims when an employer admits to vicarious liability include California, Connecticut, Idaho, Maryland, Mississippi, and Missouri. Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 Wyo. L. Rev. 229, fn 20 (2010) (citing *Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954); *Prosser v. Richman*, 50 A.2d 85 (Conn. 1946); *Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178, 1181 (Idaho 1986); *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. 1951); *Nehi Bottling Co. v. Jefferson*, 84 So. 2d 684 (Miss. 1956); *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995). Other states that also appear to hold this view include are Illinois, Florida, Georgia, New Mexico, Texas, and Wyoming. *Id.* (citing *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. App. 1977); *Bartja v. Nat'l Union Fire Ins. Co.*, 463 S.E.2d 358, 361 (Ga. App. 1995); *Ortiz v. N.M. State Police*, 814 P.2d 17 (N.M. App. 1991); *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. App. 1966); *Beavis v. Campbell Cty. Hosp.*, 20 P.3d 508 (Wy. 2001).

[21] This discussion is limited to the negligent hiring practices of Dunaway and at trial additional claims of fatigued driving and numerous violations of FSMCA were made and can be obtained by contacting our office.

[22] Pretrial Order on Motions in Limine is attached as Exhibit B.

[23] *Elrod v. G&R Const. Co.*, 275 Ark. 151, 628 S.W.2d 17 (1982).

[24] Philip J. Smith, Analysis, Inc., 2207 Lyn Street, Grand Junction, CO 81505.

[25] In support, we relied on *Simmons, Inc. v. Pinkerton's Inc.*, 762 F.2d 591 (7th Cir. 1985). In *Simmons*, a civil case, a witness took a polygraph test but the results were inconclusive. *Id.* at 603. The witness agreed to take a second polygraph test but never actually took the test. *Id.* Despite this, the witness untruthfully told an investigator that he passed his second polygraph test. *Id.* The district court did not admit the polygraph results as substantive evidence, but allowed evidence of the witness's lie to the investigator to be elicited on cross-examination under FRE 608(b). *Id.* at 604. The 7th Circuit affirmed that the lie was admissible under 608(b) to impeach the witness even though the polygraph evidence was inadmissible, and also rejected the appellant's arguments that the district court erred by allowing references that the witness took the test and references whether the witness passed the test. *Id.* We argued that even if Quisenberry's revocations and prior accidents were inadmissible, his lies on his applications about them were admissible as impeachment evidence. The court agreed.

[26] We cannot set forth all of the testimony and evidence because of space limitations, but contact our office if you would like additional information.

J. Kent Emison *is a partner at Langdon & Emison, where he devotes 100% of his practice to personal injury litigation on behalf of people who have been hurt by defective products, trucks, and a wide variety of other claims. He is a Fellow in the International Academy of Trial Lawyers, and a member of the AAJ's National Finance Committee.*

Mark Emison *is an associate at Langdon & Emison. He graduated from the University of Chicago Law School in 2010. After law school, he completed a one-year clerkship with Chief Justice William Ray Price, Jr., at the Missouri Supreme Court before starting with the firm.*