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CAC Advisor

Missouri and Illinois Updates

Negligent Entrustment: Was My Driver "Habitually Reckless"?


Ryan G. Dickherber

When faced with low insurance limits on a negligent driver, injured parties look to find additional parties to sue. Often, parties look to the owner who loaned a vehicle to the driver claiming "negligent entrustment."

Negligent entrustment claims arise when a driver is unlicensed, incompetent, or reckless and causes damages while driving a non-owned motor vehicle. A party injured by such a driver must prove four elements of this tort: (1) the driver is incompetent by reason of "habitual recklessness;" (2) the owner knew or should have known of the driver's incompetence; (3) there was an entrustment of the vehicle; and (4) the negligence of the owner concurred with the conduct of the driver as a proximate cause of the harm to the injured party. *Evans v. Allen Auto Rental & Truck Leasing, Inc.,* 555 S.W.2d 325 (Mo. 1977). If an injured party proves these elements, an owner may be liable for the full amount of damages caused by the driver.

When analyzing these cases, the focus is almost exclusively on the prior conduct of the driver. Before liability can be established, the injured party must show that the prior reckless conduct of the borrower was so constantly committed as to constitute a habit of negligence. *Bell v. Green,* 423 S.W.2d 724 (Mo. banc 1968). Absent such a showing, it cannot be said that the owner should have anticipated the likelihood of injury or dangers to others by lending his motor vehicle to the driver. *Lix v. Gastian,* 261 S.W.2d 497 (Mo. App. 1953). *(Continued on page 2)*

Seeking to Sidestep Co-Employee Immunity under the Workers' Compensation Act: Injured Employees Seek "Something More"


Joseph V. Lesinski

In recent months, we have observed a growing number of claimants injured in workplace accidents seeking to evade the exclusivity of the workers' compensation remedy by asserting the "something more" exception against co-employees, supervisors, foremen, or safety directors.

The Missouri Workers' Compensation Act adopts what is known as the "exclusive remedy doctrine" for the breach of an employer's general duty to provide a safe work place. RSMo. §287.120.2. Accordingly, workers compensation is the exclusive remedy against employers and co-employees for work place injuries. *State ex rel. Taylor v. Wallace,* 73 S.W.3d 620 (Mo. banc 2002). However, in limited circumstances, Missouri permits an injured employee to seek a remedy against a co-employee or supervisor outside the exclusive purview of the Workers' Compensation Law. *Taylor, 73 S.W.3d at 622.*

To succeed, a plaintiff must establish "something more" - an affirmative negligent act committed by the co-employee outside of the employer's duty to provide a reasonably safe environment. *State ex rel. Badami v. Gaertner,* 603 S.W.2d 175 (Mo.App. 1982). What qualifies as "something more" is routinely determined on a case-by-case basis.

Cases Finding "Something More"

Cases recognizing "something more" frequently involve a supervisor directing a subordinate to take on an unusually hazardous task beyond those normally faced. The directed activity often appears outrageous and extreme under the

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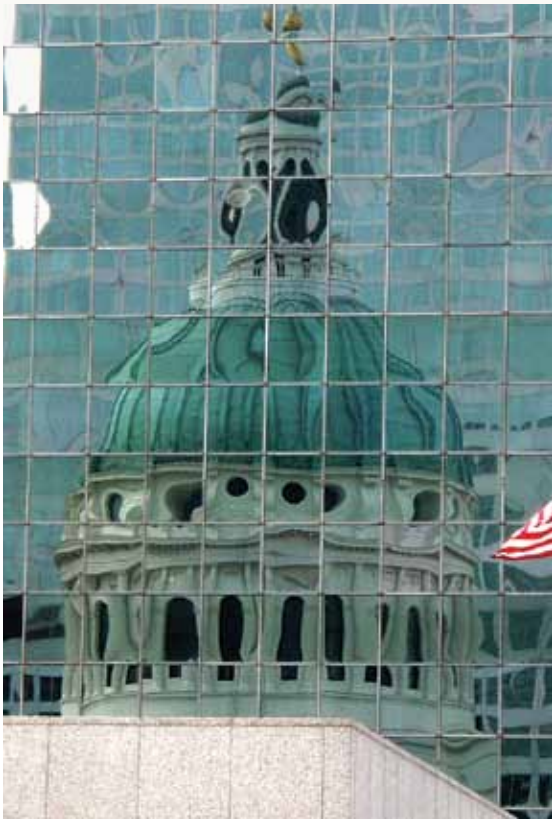

Negligent Entrustment

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Often, an injured party puts forth evidence of traffic violations to exhibit prior reckless conduct on behalf of the driver. However, Missouri courts have held that a history of traffic violations alone is insufficient to establish that a driver is incompetent. *Peters v. Henshaw,* 640 S.W.2d 197, 200 (Mo. App. W.D. 1982). Before concluding that such a driver is incompetent, a court must look to the timing of the alleged offenses in relation to the accident at issue. If the traffic violations occurred over a number of years with considerable time between each offense then the driver will not be considered habitually reckless for purposes of negligent entrustment. On the other hand, if the traffic violations were within a relatively short time and closely connected to the accident, then the driver could be habitually reckless. Proof of a single accident, even though accompanied by negligence, is not sufficient to establish habitual recklessness.

In *Portmann v. Stanley,* 674 S.W.2d 678, the court held that the past conduct of a driver did not rise to the level of such "habitual reckless conduct" that a reasonable person would foresee plaintiff's injuries as a result of letting him use a vehicle. The driver in *Portmann* had previously rolled his car into a ditch, ran into a parked car, pleaded guilty to leaving the scene, ran into a fire hydrant, and had a conviction for driving while intoxicated. Each of the offenses occurred more than two years prior to the accident. *Id.* at 679. Conversely, where the driver was convicted of ten separate traffic violations in a period of four years, temporarily had his driver's license suspended, had two violations in the six months prior to the accident, and had one violation just two weeks before the accident, there was sufficient evidence to establish the driver was incompetent. *LeCave v. Hardy,* 73 S.W.3d 637 (Mo. App. E.D. 2002).

In the end, using a reasonable person standard, an injured party has to show the owner should have known or anticipated the likelihood of injury or danger to others when lending his motor vehicle to the driver. This can be a difficult threshold to reach as shown in *Portmann* where a driver had a history of reckless conduct but it was not deemed to be so "constantly committed" as to constitute a habit of negligence. Therefore, when evaluating a negligent entrustment claim, one needs to take into consideration the timing of the alleged offenses in relation to the accident. One may think it is a case of liability at first glance, but it is a high threshold for an injured party to meet in order to prevail on his or her claim in Missouri.

Illinois And Missouri Supreme Courts Weigh in on Medical Malpractice Caps *By David T. Ahlheim and Rebecca A. Cary*

In the past two months, both the Illinois and Missouri Supreme Courts have weighed in on legislative attempts to cap "non-economic" or "pain and suffering" damages in medical malpractice cases.

In Illinois, the law previously capped "non-economic" jury awards against doctors at $500,000.00 and against hospitals at $1 million. The Illinois Supreme Court overturned the medical malpractice cap, saying it is unconstitutional to cap damages on jury awards. Going further, the Court stated the legislative branch was infringing on the judiciary and was a direct violation of the separation of powers doctrine. *Lebron v. Gottlieb Memorial Hospital,* 2010 Ill. LEXIS 26.

In Missouri, the Supreme Court sidestepped the constitutionality of the newly lowered $350,000.00 "hard cap" for all defendants on "non-economic" damages. The Court did not directly rule on whether the law was valid but simply ruled the cap could not be retroactively applied to injuries that took place before the enactment date of the 2005 tort reform. *Klotz v. Shapiro*, 2010 Mo. LEXIS 83.

With these rulings, no medical malpractice caps likely exist in Illinois while Missouri postponed a substantive challenge for a later date.

Missouri Supreme Court:

A driver of a non-owned vehicle had operator's liability policy. The Supreme Court found household exclusion and anti-stacking language were immaterial up to the Missouri's Motor Vehicle Financial Responsibility Law minimums and allowed recovery of minimum liability coverage from both owner of vehicle and driver's insurance carriers. *Karscig v. McConville*, 2010 Mo. LEXIS 2.

Overview of Federal Motor Carrier Safety Administration's Shift from SafeStat System to CSA 2010


Thomas J. Lewis

Since the 1970s Federal and State enforcement agencies have monitored commercial motor carrier's compliance with Department of Transportation standards for operation of commercial trucking equipment on our Nations highways and interstates. Since the 1980s motor carriers have been evaluated by the FMCSA through a CR – Compliance Review system known as SafeStat. The Federal Motor Carrier Safety Administration uses SafeStat for measuring the safety performance of the more than 700,000 interstate motor carriers. As of right now, under the SafeStat safety rating system, trucking companies are checked for compliance in four areas: Driver, Vehicle, Safety Management, and Accidents.

In 2010, the FMCSA is implementing a change in compliance and enforcement of motor carriers under the Comprehensive Safety Analysis 2010 (CSA 2010). Essentially, the CSA 2010 replaces SafeStat with a new Safety Measurement System (SMS) that measures the previous two years of roadside violations and crash data. With SMS, every inspection will count, not just out of service violations. SMS will use a "risk-based" violation weighting while SafeStat did not. SMS will assess each carrier's safety performance in each of the Behavior Analysis and Safety Improvement Categories (BASICs): Unsafe Driving, Fatigued Driving, Driver Fitness, Controlled Substance and Alcohol, Vehicle Maintenance, Improper Loading/Cargo Securement, and Crash Indicator. Furthermore, two new safety measurement systems will come into play with CSA 2010, one for carriers (CSMS) and one for drivers (DSMS).

SMS calculates a measure for each BASIC by combining the time and severity weighted violations/crashes *(regardless of fault)* normalized by exposure. These safety measurement systems will be "risk based" violation weighting systems. Essentially, the CSA 2010 will measure safety performance by using inspection and crash results to identify carriers whose behaviors ***could*** reasonably lead to crashes.

The new system gives rise to the creation of potential "false positive" poor safety ratings. For instance, at present, there does not appear to be any clear indication how FMCSA plans to handle the issue of non-preventable crashes as it affects the motor carrier's SMS ratings. Additionally, the rating system raises some other potential concerns. For example, drivers and carriers ratings will be directly affected by Loading/Cargo securement. This essentially is shifting loads, spilled or dropped cargo, and unsafe handling of hazardous materials. The problems that may arise are that many trailers are loaded by a shipper while the driver is not allowed on the dock or to supervise the loading. In these instances, the driver may be held responsible for an unsecured load that he or she does not have the opportunity to inspect.

What does all this mean in the defense of trucking cases? There have long been tensions over whether SafeStat or the new CSA 2010 and other motor carrier and driver safety ratings come into evidence at trial. The implementation of this system may give rise to potential complications because it will assess motor carriers adverse safety rating based on factors out of their control and on what ***could*** happen rather than what has happened. Depending on how these ratings are compiled, it could provide skewed data making a motor carrier or driver seem more unsafe before a jury. As such, we believe increased emphasis will be placed upon these ratings by Plaintiff's counsel. Therefore, it will be important to properly prepare the carrier and its drivers to handle these issues during the discovery process.

FMCSA is set to fully implement CSA 2010 in July 2010. We are continuing to monitor the unveiling of the CSA 2010 program and will update the effect of the new system on motor carrier industry.

Medicare Scare: Can Liability Files be Closed When Plaintiff is a Medicare Beneficiary?


Rebecca A. Cary

Everybody is talking about Medicare liens, reporting and set aside payments in the personal injury world. Not only are plaintiffs and their attorneys bound to reimburse and protect Medicare liens, so are insurance carriers, third-party administrators, defense attorneys and other entities falling under the same umbrella of a Responsible Reporting Entity (RRE).

Contrary to popular belief, lien protection and set aside payments were all required dating back to the enactment of the Medicare Secondary Payer Statute in the early 1980s. This statute was an attempt to curb rising costs and provided protection for Medicare in cases in which Medicare beneficiaries suffered personal injuries and a third party was responsible for the accident or injuries.

Settle?

When a settlement agreement is reached, how can the proceeds be distributed if the amount of the Medicare lien is not known? The Centers for Medicare Services ("CMS") process and issue reimbursement demand letters on behalf of Medicare. If the demand letter is not issued, there is obvious reluctance to distribute settlement money by any RRE. Basically the Medicare lien is not satisfied during settlement and the RRE could still be responsible until that lien is paid. I have attended numerous roundtable discussions and the responses are varied on dealing with these concerns.

• Some individuals are proposing the RRE issue a two party check payable to the CMS and the claimant. However, a problem arises regarding the time it takes to obtain a certain pay off letter which may result in an expired check. (CMS has no obligation to respond within a particular time period when issuing pay off letters.) If this occurs, the RRE would simply need to re-issue the check.

• Another method would be for the RRE to demand indemnity from the claimant in the release agreement. It is important to remember that if the CMS is not able to secure the funds, an RRE will likely not be protected and can still be responsible for the outstanding lien. Our firm typically requests that not only the plaintiff, but also the plaintiff's attorney agree to indemnify the RRE. This is done in cases where the plaintiff's law firm is solvent and well known.

• A RRE could also hold the funds until the CMS has properly responded with its demand, which offers the most security. However, this last proposal will likely prevent settlement agreements due to the length of time CMS takes to respond and the desire of the claimant wanting money in his/her hands.

> Overall, the black and white solution to handling liability settlements and Medicare payments is still evolving.

Set Aside?

Another issue is whether the parties need to set aside settlement monies in liability cases in order to account for future medical costs. The American Association of Justice concluded early this year that Section 111 of the MMSEA does not require set asides in liability cases in order to account for future medical costs. This doesn't make sense and appears contrary to the statute.

The above approach requires only repayment of the Medicare "conditional" payments made prior to settlement. The thought is if a settlement or judgment or other payment specifically takes into account future medical expenses then that settlement, judgment, award or other payment should be exhausted or appropriated before Medicare is billed for the associated services. This is simple and spelled out in cases involving workers compensation. It is difficult, however, in liability cases because there is no formal process for set asides.

Plaintiff's attorneys believe if a set aside is "considered" in liability cases, that is enough. Plaintiff's attorneys also believe it is their responsibility, not the defense attorney or their carriers to require set asides. This along with the other issues discussed above is a gray area. We will have to wait and see how the statute is ultimately construed. Overall, the black and white solution to handling liability settlements and Medicare payments is still evolving. To be continued as concrete remedies are formulated …***For more guidelines, see http://www.cms.hhs.gov/.***

Seeking to Sidestep Immunity (*continued from page 1*)

• An injured employee filed a personal injury action against his supervisor after he was injured in a water tank explosion. Prior to the explosion, the supervisor unsuccessfully attempted to weld the tank. Upon completion of the weld, the supervisor directed the employee to run the tank "until it blows." ***Burns v. Smith***, 214 S.W.3d 335, 338 (Mo. 2007).

• A supervisor ordered a maintenance employee to lift a 5,000 pound safe under threat of being fired. The court concluded that the supervisor's order increased the employee's risk of injury and went outside the scope of the employer's duty to provide a safe work place. ***Murry v. Mercantile Bank, N.A.,*** 34 S.W.3d 193 (Mo.App. E.D. 2000).

• An employee was directed by his supervisor to be suspended over a vat of scalding water from an improvised forklift rig to remove a grate. The employee died from falling in the vat. ***Hedglin v. Stahl Specialty Co.,*** 903 S.W.2d 922 (Mo.App. 1995).

Cases Failing to Find "Something More"

Courts, in a number of other cases, have found that the allegedly negligent actions of a co-employee did not represent "something more," by way of affirmative conduct by a supervisor extending beyond a general failure to fulfill the general duty of supervision and safety. Here are a couple cases declining to find "something more:"

• An apprentice lineman was electrocuted while installing fiber optic cable while within close proximity to a power line. In declining to find "something more," the court emphasized that the lineman occasionally worked near energized power lines. ***Logan v. Sho-Me Power Electric Cooperative,*** 122 S.W.3d 670 (Mo. App. S.D. 2003).

• A bindery operator was injured when he stuck his hand into the debris chute of a book trimming machine while it was still operating. The employee alleged his supervisor failed to provide proper instruction regarding clearing the debris chute of the machine. The court determined that the supervisor's actions do not rise to the level of an affirmative negligent act resulting in the employee's injury. ***State ex rel. Patton v. Grate,*** 241 S.W.3d 826 (Mo.App. W.D. 2007).

Additionally, a supervisor's knowledge regarding inadequate employee training does not alone constitute "something more." In ***JMF v. Emerson,*** an employee cut her finger with an instrument used to withdraw blood from a patient afflicted with AIDS. 768 S.W.2d 579 (Mo.App. E.D. 1989). The employee brought an action against her supervisor alleging she was not trained to handle infected blood samples. The ***JMF*** court concluded the employee failed to plead actionable negligence because the supervisors' alleged actions fell within the non-delegable duty of safe and proper supervision owed to the employee.

Defense Posture

A motion to dismiss for lack of subject matter jurisdiction based on the exclusivity of the Workers' Compensation Act may appear to be the most efficient defense strategy. However, a recent Missouri Supreme Court case established that circuit courts have authority to determine whether a personal injury claim is precluded by the Workers' Compensation Act. ***McCracken v. Wal-Mart Stores East, LP.,*** 298 S.W.3d 473 (Mo. 2009) In the wake of ***McCracken***, it appears the proper course of action is to raise the exclusive remedy doctrine as an affirmative defense and later move for summary judgment. This was recently affirmed in March 2010 by the Court of Appeals in ***Fortenberry v. Buck,*** 2010 Mo. App. LEXIS 331.

Conclusion

Although Missouri Courts allow injured employee to bring a civil action against a co-employee or supervisor for affirmative negligent acts, to survive a well-drafted summary judgment, those acts must constitute "something more" beyond the employer's general responsibility to provide a safe workplace. More often than not, the likelihood of defeating a motion will depend on the severity of the conduct alleged.

Firm Updates

We are pleased to welcome *Peter M. Maginot* to our firm as "Of Counsel." Peter has over 20 years of experience in defending mass tort litigation, with an emphasis in asbestos and benzene. We would be happy to answer any questions you may have regarding asbestos or benzene claims.

Rebecca Cary began a trial in St. Louis County. Plaintiff allegedly slipped and fell on black ice resulting in a fracture to his right fibula and right ankle requiring open reduction and internal fixation surgery. Following voir dire, Plaintiff accepted the last settlement offer of half the special damages.

David Ahlheim obtained a summary judgment on behalf of a landowner in St. Louis County. Plaintiff rode his bicycle into a properly painted and maintained post on Grant's Trail, a park and bike path. The post was designed to prevent vehicular traffic. The Court agreed the post is an "open and obvious condition" as a matter of law.

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Attorneys at Law

At Childress Ahlheim Cary LLC we have not forgotten that the practice of law is a service profession. Our firm is committed to providing an unsurpassed level of representation and personal service to our clients. We believe maintaining close ties and providing open lines of communication with our clients ensure the quickest and most efficient handling of cases. Our lawyers provide thorough and prompt services in all aspects of our defense practice.

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