

**Effective Use of Federal Motor Carrier Safety Regulations**

**Bryan L. Capps  
Gilreath & Associates**

At this point in the discussion you should be generally familiar the Federal Motor Carrier Safety Regulations. Anyone who is handling or screening a trucking case will usually immediately seize upon one or two FMCSR's which they strongly believe were violated by the truck driver or trucking company. In fact, a thorough investigation of most trucking cases will reveal one or more violations. Once violations are identified, the question becomes: how can I best use the violation in the case?

Like so many legal questions, the answer is - it depends. You may use the violation(s) to establish a general pattern of negligent conduct or you may attempt to prove negligence per se based on the violation. In either case, you can develop a strategy for determining when such violations are advantageous to your case by considering the following:

- 1) Does the applicable FMCSR apply to the subject vehicle?
- 2) Is the FMCSR violation the result of an act or omission by the driver, by the company/employer or does it relate to the condition of the tractor/trailer?
- 3) Did the defendants also violate more stringent internal operating rules?
- 4) What are my potential theories of negligence based on the violations?
- 5) Were the violations likely a proximate cause of the collision and/or injuries?
- 6) If so, what are the relevant authorities governing the use of FMCSRs for proof of negligence and/or negligence per se in the Sixth Circuit or other relevant jurisdictions?
- 7) Will I need, or can I use, an expert, to establish the applicability of the FMCSRs, the violation and/or proximate causation?

### **Determine Whether the FMCSR's Apply**

The FMCSRs apply to all commercial motor vehicles defined as:

any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle—

- (1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater; or
- (2) Is designed or used to transport more than 8 passengers (including the driver) for compensation; or
- (3) Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or
- (4) Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 CFR, subtitle B, chapter I, subchapter C. (49 C.F.R. § 390.5)

**Interstate commerce means** trade, traffic, or transportation in the United States—

- (1) Between a place in a State and a place outside of such State (including a place outside of the United States);
- (2) Between two places in a State through another State or a place outside of the United States; or
- (3) Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.

Intrastate commerce means any trade, traffic, or transportation in any State which is not described in the term "interstate commerce."<sup>1</sup>

If you fail to prove that the FMCSRs apply to the vehicle in your case, the court will likely refuse to consider charging the jury on the regulations or negligence. Consider Pleimann v. Coots, 2003 WL 164815 (Dist. 2 App. Ohio 2003) - CMV allegedly violated 49 C.F.R. § 392.22(b) requiring near immediate placement of warning devices on road near disabled truck. Court refused to charge or consider FMCSR because plaintiff failed

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<sup>1</sup>For exceptions see <http://www.fmcsa.dot.gov/rules-regulations/rules-regulations.htm>. This site divides the FMCSRs by general applicability to Driver, Company and Vehicle. It is a great resource for updated regulations for use in pleadings and briefs.

to prove that subject CMV was operating in interstate or intrastate commerce at time of alleged violation and collision. See also Howard v. Ramirez, 2003 WL 21214139 (Cal.App. 2 Dist. 2003) and Frohardt v. Bassett, 788 N.E. 2d 462 (Ind.App.2003) both refusing to consider FMCSR for lack of evidence showing CMV engaged in interstate or intrastate commerce.

**Is the Violation the Result of an Act or Omission by the Driver, by the Company/Employer or Does it Relate to the Condition of the Tractor/Trailer?**

In determining which regulations were violated, and by whom, it is important to remember that the FMCSRs set a **minimum standard of care** for the entire commercial trucking industry.

**§390.5**

**d) Additional requirements.** Nothing in Subchapter B of this chapter shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health.

**§390.9**

**State and local laws, effect on.**

Except as otherwise specifically indicated, Subchapter B of this chapter is not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto.

**Did the Defendant Have More Stringent Internal Operating Rules?**

Since the FMCSRs are the minimum requirements, do not succumb to a defendant's ability to show that it simply complied with the regulations. Discovery and expert development should focus on whether the company: 1) actually complied with all relevant FMCSRs, 2) whether the relevant state laws require a higher degree of care, and 3) whether, like similar companies within the industry, the defendant developed more stringent internal criteria for drivers, record retention, inspection, maintenance etc.

While your investigation and discovery, using techniques outlined later in this seminar, will search out evidence of violations, you will need an expert to prove the applicability of the FMCSRs, the standard of care which they create or require, and how they were violated in a particular case. It is important to retain an expert early; investigate together; and carefully develop potential theories of regulation-based negligence early in the case.

### **What are my potential theories of negligence-based on the violations?**

#### **Negligent Operation**

Failure to place (or provide) warnings near disable vehicle; placard placement; fatigued driver; improper securing of loads; improper driving during hazardous conditions.

#### **Negligent Inspection and Maintenance**

Improper brake calibration; tire tread; light and reflector placement; cracked windshield.

#### **Negligent Hiring, Retention and Entrustment**

Failure to do background check; failure to properly train; allowing to drive after repeated violations; young driver without co-driver; log book violations; fatigue.

This potential theory should never be overlooked. The FMCSRs have detailed and stringent requirements for the hiring and training of all drivers. The regulations require an employer to maintain all employee records at the carrier's principal place of business for as long as the driver is employed by that carrier and for three years after. The employer must administer, and the driver applicant must pass, tests covering FMCSRs and pass road tests demonstrating driver competence. The employer must also check the applicant's driving record for the past three years in every state where the applicant has held a license. The employer must do an extensive background check on the driver including contacting prior employers for the past three years. The employer must conduct an annual driver review and take actions based on the driver's performance.

Failure to comply with these regulations can lay the foundation for a theory that the company was negligent in allowing the driver to be on the road at the time of a collision. Consider the following case in which driving with falsified log books was considered unreasonable risk of harm and evidence of negligent hiring and entrustment

Osborne v. Pinsonneault, 2008 U.S. Dist. LEXIS 29695 (W.D. Ky. 2008).

Refusal to grant partial summary judgment on negligent hiring and entrustment claims where logbooks were falsified. Court found that such falsification showed trucking company created an unreasonable risk of harm to the Plaintiffs in its entrustment, hiring, training, and supervision of driver.

### **Spoliation**

Never underestimate the value of a well written and exhaustive spoliation letter.

Generally "[s]poliation is defined as the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for the destruction." United States v. Copeland, 321 F.3d 582, 597 (6th Cir. 2003)(citing Black's Law Dictionary 1401 (6th ed. 1990)). An adverse inference sanction is always rebuttable -- the effect of the sanction is to shift the burden to the spoliator to disprove the negative inference. See Welsh v. United States, 844 F.2d 1239, 1248 (6th Cir. 1988).

C & M asserts the lack of any impropriety, as "the law only requires that logs be retained for six months." (Docket Entry No. 61, C & M's Response to Motion for Sanctions, at 4). Under federal regulations, motor carriers are required to retain such "records of duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt." 49 C.F.R. § 395.8(k)(1)(2006).

As of the date of Plaintiff's counsel's (spoliation) letter, this regulation required C & M to maintain these records for the prior six months. Counsel's letter about a deadly accident involving a C & M driver would reasonably be expected to command C & M's attention. Plaintiff's counsel's letter commanded sufficient attention to be referred to C&M's company counsel. Plaintiff's counsel's request for those documents is clearly relevant. **Tennessee law has deemed failure to comply with federal safety rules as negligence, as discussed infra.** The six months record of Kusnierz's log books and accompanying documents may establish any misconduct by Kusnierz, as well as C & M's awareness of such misconduct. **The log book and accompanying documents could also have been relevant to establish direct misconduct by C & M. These documents could be relevant to Plaintiff's claims for**

**punitive damages. 2 The lease agreement between C & M and JBE clearly could clarify the employment relationship between Kusnierz and his co-defendants.** This issue is raised in JBE's motion for summary judgment.

Given Plaintiff's counsel letter to C & M, the subject of that letter involving a death and a C & M employee and a federal law requiring maintenance of these records, the totality of the circumstance here gives rise to an inference that the documents were intentionally destroyed.

**Under these circumstances, the Plaintiff is be entitled to a rebuttable, adverse inference jury instruction on her claims of negligence against Defendant C & M. The Court concludes that the jury should be instructed that C & M bears the burden of disproving the negative inferences drawn from the fact of missing evidence of Kusnierz's log book and attendant documents. Specifically, the jury will be instructed to infer: (1) that C & M failed to monitor properly Kusnierz's safety performance; (2) that C & M was aware of safety violations, including hours-of-service violations; and (3) that C & M knew Kusnierz was operating on a time schedule known to produce fatigue and failed to monitor this situation.**

This instruction will be limited to C & M because there is not any evidence that Kusnierz and JBE were responsible for this. Darling v. J.B. Expedited Servs., 2006 U.S. Dist. LEXIS 54000 (M.D. Tenn. 2006).

**Were the violations likely a proximate cause of the collision and/or injuries? If so, what are the relevant authorities governing the use of FMCSRs for proof of negligence and/or negligence per se in the Sixth Circuit or other relevant jurisdictions?**

### **Negligence Per Se**

Darling v. J.B. Expedited Servs., 2006 U.S. Dist. LEXIS 54000 (M.D. Tenn. 2006).

Under Tennessee law, all persons have a duty to exercise reasonable care by "refrain[ing] from conduct that will foreseeably cause injury to another." Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993). See also Pittman v. Upjohn Co., 890 S.W.2d 425, 428 (Tenn. 1994). Failure to exercise reasonable care, under the circumstances, constitutes a breach of this duty. Kellner, 359 F.3d at 404; Linder Constr., 845 S.W.2d at 178. Some minimum duties are established by statute, such that the "failure to perform a statutory duty is negligence per se." Tennessee Trailways, Inc. v. Ervin, 222 Tenn. 523, 438 S.W.2d 733, 735 (Tenn. 1969). See Hickman v. Jordan, 87 S.W.3d 496,

499 (Tenn. Ct. App. 2001)(noting that "statutory requirements help to determine the minimum standard of care").

Tennessee statutory law provides that "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." Tenn. Code Ann. § 55-8-136 (2006). Commercial carriers are also subject to the Federal Motor Carriers Safety Regulations (FMCSR), 49 C.F.R. § 390 et seq. See also Tenn. Code. Ann. § 65-15-101 et seq. (2006). **Where a driver is found to have violated a statute, ordinance, or regulation intended to protect a class of persons that includes the victim, this is often taken to be evidence of a defendant's per se negligence. "Generally, a claim of negligence per se may be supported only by statutes and regulations relating to public safety, such as health regulations and rules of the road."** Scarborough v. Brown Group, Inc., 935 F.Supp. 954, 964-65 (W.D. Tenn. 1995). **The FMCSR certainly relates to issues of public safety. The requirement to maintain a proper log book is directly related to the effort to enforce hours-of-service regulations. Accordingly, the Court concludes that Kusnierz's citation for maintaining a false log book -- a violation of 49 C.F.R. § 395.8(e) -- constitutes negligence per se.**

The Plaintiff alleges that Kusnierz violated other provisions of Tennessee statute and the FMCSR -- reckless driving, Tenn. Code Ann. § 55-10-205; hours-of-service violation, 49 C.F.R. § 395.3; fatigued driver, 49 C.F.R. § 392.3; schedules that do not conform to speed limits, 49 C.F.R. § 392.6. (Docket Entry No. 1, Joint Notice of Removal, Complaint). Absent a conviction for violation, whether a party's actions constitute a violation of a statute is a jury question. See Womble v. Walker, 216 Tenn. 27, 390 S.W.2d 208, 212 (Tenn. 1965)(holding that whether a defendant's actions constitute a violation of the reckless driving statute is a jury question); Thomas v. Harper, 53 Tenn. App. 549, 385 S.W.2d 130, 138 (Tenn. Ct. App. 1964)(same); Arnett v. Fuston, 53 Tenn. App. 24, 378 S.W.2d 425, 428 (Tenn. Ct. App. 1963). Based on the affidavits of Plaintiff's experts, there is a sufficient issue of genuine material facts as to the allegations that Kusnierz violated these other provisions.

## Causation

The Tennessee Supreme Court articulated "a three-pronged test for proximate causation": (1) the conduct of the tortfeasor must have been a substantial factor in bringing about the injury; (2) there can be no legal rule or policy that relieves the tortfeasor from liability for the injury; and (3) the injury must "have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence." McClenahan, 806 S.W.2d at 775. See also Lowery v. Franks, No. 02A01-9612-CV-00304, 1997 Tenn. App. LEXIS 617, \*11-12 (Tenn.Ct.App. Sept. 10, 1997); Restatement (Second) of Torts, § 431

(1965)(suggesting the substantial factor test and absence of exculpatory rule of law).

The Tennessee Supreme Court continued:

The foreseeability requirement is not so strict as to require the tortfeasor to foresee the exact manner in which the injury takes place, provided it is determined that the tortfeasor could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury or loss occurred. \* \* \* 'The fact that an accident may be freakish does not per se make it unpredictable or unforeseen.' Elizabethton v. Sluder, 534 S.W.2d 115, 117 (Tenn. 1976). It is sufficient that harm in the abstract could reasonably be foreseen. \* \* \* Finally, proximate causation is a jury question unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons agree on the proper outcome. McClenahan, 806 S.W.2d at 775. See Ervin, 438 S.W.2d at 736 ("Ordinarily, the question of proximate cause falls within the province of the jury."); Prosser and Keeton on Torts, 5th ed., § 45 ("[I]t may properly be said that 'proximate cause is ordinarily a question of fact for the [\*68] jury, to be solved by the exercise of good common sense in the consideration of the evidence in each particular case.'" (quoting Healy v. Hoy, 115 Minn. 321, 132 N.W. 208 (Minn. 1911))).

A defendant's breach of duty may not necessarily be a proximate cause of a complainant's injury. Although violation of a statute may constitute per se negligence, "this rule in no way dilutes the requirement that for the plaintiff to recover in a negligence action, the defendant's per se negligent act must be shown to have been a proximate cause of the injury." Ervin, 438 S.W.2d at 735. See Biggert v. Memphis Power & Light Co., 168 Tenn. 638, 80 S.W.2d 90 (Tenn. 1935). Intervening or superseding causes may arise to break the causal link between a defendant's act or omission and the injury suffered by the complainant. Whereas Tennessee's "test for liability under the law of intervening cause requires a person to anticipate or foresee what would normally happen[,] one is not required to anticipate and provide against what is unusual or unlikely to happen." Underwood v. Waterslides of Mid-America, Inc., 823 S.W.2d 171, 180 (Tenn. Ct. App. 1991)(citing Ward v. Univ. of the South, 209 Tenn. 412, 354 S.W.2d 246 (Tenn. 1962)). Nevertheless, "[a]n intervening act will not exculpate the original wrongdoer unless it appears that the negligent intervening act could not have been reasonably anticipated." Evridge v. American Honda Motor Co., 685 S.W.2d 632, 635 (Tenn. 1985).

Although there is authority allowing Tennessee Court's to recognize FMCSR violations as negligence per se, be aware that other jurisdictions have taken the opposite view. In Omega Contracting, Inc. v. Tores, 191 S.W.3d 828 (Tex. 2006), court considered FMCSR violations in an accident involving a tractor trailer whose tire separated and caused a collision between several tractor trailers. Plaintiffs alleged violation of numerous regulations including 49 CFR § 393.205, § 396.3(a) and 396.13.

The court refused to consider 49 CFR § 393.205, which requires that "nuts or bolts shall not be missing or loose" as evidence of negligence per se. The court held that:

The requirement that lug nuts shall not be 'loose' does not put the public on notice by clearly defining the required conduct because the regulations do not define the word 'loose' nor specify any particular amount of torque.

In this context, the word 'loose' is vague and not susceptible to precise meaning. It does not put the public/or in this case the owners, operators, and drivers of commercial vehicles on notice of what conduct is prohibited or required. Claimant is correct in observing that we must give 'loose' its ordinary definition of 'not rigidly fastened or securely fastened,' but that definition does not make the regulation any more precise. We hold that section 393.205(c)'s requirement that nuts shall not be loose is not an appropriate standard for applying negligence per se. Id. at 840.

As for §§ 393.3(a), and 396.13 regarding the general requirements to "systematically inspect, repair, and maintain. . ." the court held that these sections:

simply require a motor carrier to maintain motor vehicles 'in safe and proper operating conditions' and a driver to '[b]e satisfied that a motor vehicle is in safe operating condition.' Determining what is or is not safe in these circumstances bears practically no difference from what is or what is not reasonable. We hold that §§ 393.3 and 396.13 are not appropriate basis for a negligence per se instruction. The trial court erred by submitting these instructions to a jury.

### **Class of Persons Protected**

See State of Tennessee Strategic Highway Safety Plan located at:

[http://www.ite.org/safety/stateprograms/Tennessee\\_SHSP.pdf](http://www.ite.org/safety/stateprograms/Tennessee_SHSP.pdf)

Excerpts:

## **State of Tennessee Strategic Highway Safety Plan**

**MISSION:** Through coordination of education, enforcement, engineering, and emergency response initiatives reduce the number of crashes that result in fatalities, injuries, and related economic losses on Tennessee's roadways.

**VISION:** All roadway users arrive safely at their destination.

**GOAL:** Reduce the fatality rate by 10 percent by the end of CY 2008, based on CY 2002 data. It is projected this will result in saving 127 lives in CY 2008.

### **Safety Partners:**

For the State of Tennessee, the Tennessee Strategic Highway Safety Committee has taken on the responsibility of developing and implementing this safety plan to reduce fatalities in Tennessee. The team is comprised of the state transportation agencies and other partners: Tennessee Department of Transportation (TDOT), Tennessee Department of Safety (TDOS), the Tennessee Department of Health (TDH), Governor's Highway Safety Office (GHSO), Federal Highway Administration (FHWA), Federal Motor Carrier Safety Administration (FMCSA), Tennessee Trucking Association, representatives of the Metropolitan Planning Organizations (MPO's) and Rural Planning Organizations (RPO's), and the District Attorney General's Office. The American Association of Retired People (AARP), the Tennessee Sheriffs' Association (TSA), and the Association of Chiefs of Police will be invited to provide a representative to this committee. The committee reports directly to the Commissioners of Transportation and Safety on their activities and progress.

### **Enhanced Tennessee Emphasis Areas and Lead Agencies:**

- I. Improve Decision Making Process and Information Systems (TDOT, TDOS, GHSO)
- II. Keep Vehicles in the Proper Lane and Minimize the Effects of Leaving the Travel Lane (TDOT)
- III. Improve Intersection Safety (TDOT)
- IV. Improve Work Zone Safety (TDOT, TDOS)
- V. Improve Motor Carrier Safety (TDOS, FMCSA)
- VI. Improve Driver Behavior (GHSO, TDOS)
- VII. Legislation (GHSO)

**Will I Need, or Can I Use, an Expert, to Establish the Applicability of the FMCSRs, the Violations and/or Proximate Causation?**

**Wheeler v. Carlton, 2007 U.S. Dist. LEXIS 371 (E.D. Ark. 2007)**

**Highly Qualified Expert Not Allowed to Testify Regarding FMCSR or Prior Acts**

Defendants move this Court for an Order prohibiting the Plaintiff from calling Mr. William E. Hampton as an expert witness in the field of hiring and retention of truck drivers. Defendants argue that Mr. Hampton does not have the qualifications, by knowledge, skill, experience, training or education, to testify as an expert in this area and his opinions are not based upon sufficient facts or data, nor is his anticipated testimony the product of reliable principles and methods. Defendants further argue that scientific, technical, or other specialized [\*9] knowledge will not be of assistance to the trier of fact in understanding the evidence or in determining facts in issue. Plaintiff argues that Mr. Hampton's practical knowledge, skill, experience, and training qualifies him as an expert in the field of hiring practices of a motor carrier. Furthermore, Plaintiffs argue that Mr. Hampton's opinions are founded upon specialized knowledge and firm principles, not within the knowledge of a lay person. Plaintiffs contend that Mr. Hampton is qualified as an expert and will assist the trier of fact in determining a fact in issue.

Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 was [\*10] amended in 2000 in response the holdings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). See Fed. R. Evid. 702 advisory committee's note. The 2000 Advisory Committee's note states that trial judges have the responsibility of acting as gatekeepers to exclude unreliable expert testimony. See Fed. R. Evid. 702 advisory committee's note. A trial court is to consider factors such as:

(1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

(2) whether the technique or theory has been subject to peer review and publication;

(3) the known or potential rate of error of the technique or theory when applied;

(4) the existence and maintenance of standards and controls;

(5) whether the technique or theory has been generally accepted in the scientific community;

(6) whether [\*11] experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;"

(7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

(8) whether the expert has adequately accounted for obvious alternative explanations;

(9) whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting;"  
and

(10) whether the field of expertise claimed by the expert is known to reach reliable result for the type of opinion the expert would give.

See Fed. R. Evid. 702 advisory committee's note. "The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded." See Fed. R. Evid. 702 [\*12] advisory committee's note (citing American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.")).

The Advisory Committee's Note explains that the terms "principles" and "methods" when applied to technical or other specialized knowledge may encompass the application of extensive experience to analyze the facts presented. See Fed. R. Evid. 702 advisory committee's note. If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. See Fed. R. Evid. 702 advisory committee's note.

"[D]oubts regarding whether an expert's testimony will be useful should generally be resolved in [\*13] favor of admissibility." *Miles v. GMC*, 262 F.3d 720, 724 (8th Cir. 2001) (internal quotations omitted). However, this Court "must ensure that the testimony admitted under Rule 702 is both relevant and reliable." *Id.* "Although expert opinion embracing an ultimate issue is permissible under Federal Rules of Evidence 704(a), 'courts must guard against invading the province of the jury on a question which the jury was entirely capable of answering without the benefit of expert opinion.'" *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 732 (8th Cir. 2006). "[E]xpert testimony not only is

unnecessary but indeed may properly be excluded in the discretion of the trial judge 'if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation. *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 1122, 8 L. Ed. 2d 313 (1962). [\*14] "It is important also to note that Rule 702 'does not rank academic training over demonstrated practical experience.' That is, an individual can qualify as an expert where he possesses sufficient knowledge gained from practical experience, even though he may lack academic qualifications in the particular field of expertise." *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990) (internal citation omitted).

Here, Mr. Hampton states in his deposition that through the Recruit School in 1978, United States Department of Transportation's ("USDOT") Hazardous Materials Compliance & Enforcement training in 1984, and USDOT Hazardous Material - Cargo Tanker School in 1988, he received a "large block of information . . . on the qualifications of a commercial driver and their operating procedures upon the roadway." 1 However, Mr. Hampton admits that these courses approached the issues of qualifications of drivers from a law enforcement standpoint. 2 Mr. Hampton attended a one-week National Committee for Motor Fleet Supervisors, UCMO, course in 1991 that addressed managing safety operations in a commercial motor vehicle fleet. 3 He also attended a four to five day American [\*15] Trucking Association conference on accident litigation and reconstruction in 1995, and another in 1998, and states that such conferences discuss the qualifications of drivers and the operations of a company, in addition to reconstruction of accidents. 4 Mr. Hampton attended a JJ Keller & Associates Commercial Driver Qualification & Audits two-day seminar in 2002, which dealt with driver qualifications pursuant to the Federal Motor Carrier Safety Regulations. 5 He attended a Missouri Motor Carriers Association conference regarding the new hours of service requirements pursuant to the Federal Motor Carrier Safety Regulations in 2003. 6

As the Director of Safety for Champion Distribution Services from 1991 until 1995, Mr. Hampton was responsible for hiring drivers, developing company policies, ensuring compliance with all federal and state regulations. 7. Also during that time, he was a member of the Missouri Motor Carriers Association's safety council. 8 He attended monthly meetings where the members discussed issues on all topics relating to the safe operation of a motor carrier fleet. 9 W.E. Hampton & Associates performs risk analysis on motor carriers and performs consulting work for motor carriers, which includes ensuring compliance with Federal regulations and development of company policies, i.e. drug and alcohol policies and hiring standards. 10 Although Mr. Hampton has also given deposition testimony in the past, Mr. Hampton testified in court in May of 2006 regarding driver qualifications and the appropriateness of hiring a driver, in October of 2003 during a trial involving busing safety, in September of 2002 regarding a carrier's compliance with the Federal Motor Carrier Safety Regulations during the hiring process, and in July of 2001 regarding driving hiring standards and qualifications. 11 Mr. Hampton references research documents from the American Trucking Association in providing his opinion in this case. 12 Plaintiff also argues that a person must have specialized knowledge to read and interpret some documents containing information relating to this case, specifically the ECM reports, which are reports generated by downloading a tractor's on-board computer.

Mr. Hampton has prepared a letter stating that Marten Transport violated their own hiring guidelines by hiring Mr. Carlton despite Mr. Carlton's statement on his application that he had four speeding violations within the last three years. Marten Transport's Hiring Criteria lists "No patterns of irresponsible driving habits or more than three moving violations, including one serious moving violation if less than twenty-four months old" as a "Safety Requirement." See Exhibit A, Plaintiff's Response. Mr. Hampton also notes that Mr. Carlton's employment history "should indicate to a prospective employer, a disregard for safety compliance, and failing to adjust to the operations of an employer." Mr. Hampton notes that in the three year period before Marten Transport hired Mr. Carlton, he was a driver for six different motor carriers, and in

the last ten years, Mr. Carlton has been employed by fourteen different motor carriers.

Mr. Hampton states that "[a] driver's falsification of a driver's daily log is defined by the Federal Motor Carrier Safety Administration as being a Critical Violation, for safety fitness standards," noting that in Mr. Carlton's first month with Marten Transport, an audit of his drivers daily logs illustrate that he falsified these documents on at least three different occasions. Mr. Hampton notes continuing issues with Mr. Carlton's performance, including another safety and company policy violation by picking up a passenger in his Marten Transport unit, in the months prior to and following the accident. Mr. Hampton concludes by stating, "It was clear from Joshua Carlton's driving history, his continued unsafe performance, and his absence of control as a driver, there was a real probability of him being involved in an unsafe driving act, which was a threat to the general public operating on the highways."

While Mr. Hampton's training and experience might in some cases permit him to testify as an expert concerning an employer's hiring and retention policies and procedures, **the Court concludes that in this case his testimony as a purported expert would invade the province of the jury and his recital of the specific prior and subsequent acts of the Defendant Joshua Carlton would be prejudicial to the Defendants since that information would be irrelevant and would not assist the jury in determining the cause of this accident.** No one disputes the fact that the Defendant Carlton stopped his tractor-trailer in anticipation of turning left on State Highway 118/North Airport Road on to West Service Road, signaling same. **The central factual issue to be resolved is whether Ms. Wheeler's car approached the accident scene by driving south on the State Highway 118/North Airport Road or by driving south and east on the West Service Road. Mr. Hampton's testimony would not assist the jury in resolving this factual dispute.** Nor would his opinion aid the jury in deciding the speed of the two vehicles involved. The jury, as men and women of common understanding are certainly capable of comprehending the facts of this case, drawing correct conclusions from them, as are witnesses who claim to possess special or peculiar training or experience, in this case in the area of hiring and retention. See the

Court's further discussion of the bases of Mr. Hampton's opinions and their lack of relevance in its analysis of the Motion for Summary Judgment below. The Court concludes that Mr. Hampton's testimony does not meet the standard set forth in Rule 702 of the Federal Rules of Evidence nor the standard established under Daubert and Kumho Tire.

Therefore the Court grants the Defendant's Motion in Limine to exclude the opinion testimony of Mr. William E. Hampton.

**Garrett v. Albright, 2008 U.S. Dist. LEXIS 18615 (W.D. Mo. 2008).**

**Expert Qualified Based on Experience - Allowed to Testify as to Reckless Conduct**

Although Defendants describe Guntharp's educational background as "suspect," it is Guntharp's knowledge and experience which qualify him as an expert in trucking industry practices. See Fox v. Dannenberg, 906 F.2d 1253, 1256 (8th Cir. 1990) (finding practical experience sufficient to qualify an expert). Guntharp started as an over-the-road truck driver between 1976 and 1979. Between 1981 and 1987, Guntharp served as safety director for three trucking companies as well as teaching defensive driving classes to commercial motor vehicle drivers for the Indiana [\*7] Bureau of Motor Vehicles. (Guntharp CV, 3). From 1987 until 2000, Guntharp served as a safety engineer for John Deere Transportation Insurance evaluating trucking companies for underwriting purposes and assisting "insureds to come into compliance with federal regulations and industry standards." Id. 4 From 2000, Guntharp has been a consultant with Thorn Valley Enterprises which provides safety consulting and driver safety training to trucking companies. (Guntharp CV, 2). Guntharp has consulted and testified about truck drivers' general safety practices. See Estate of Schmidt v. Derenia, 158 Ohio App. 3d 738, 2004 Ohio 5431, 822 N.E.2d 401, 407 (Ohio Ct. App. 2004). According to Guntharp's curriculum vitae, he "evaluates transportation companies' hiring and safety practices . . . ." Id. The Court therefore finds that Guntharp is qualified as an expert by experience, knowledge and training.

The Court will preclude Guntharp's testimony as to the structure of CenTra and its subsidiaries unless Guntharp can establish that he has first-hand knowledge such as corporate formation or merger documents or experience with these specific entities. The Court further agrees that the word "intentional" is a legal term-of-art, the interpretation of which is beyond Guntharp's expertise. However, the use of the word "reckless" is relevant to whether Albright exhibited disregard for the standard of care in the industry. To the extent Guntharp is testifying as to where on a continuum of fault Albright's conduct falls, he may describe that conduct as "reckless" but may not ultimately conclude that Albright's conduct as "intentional" because Guntharp is not qualified to give an opinion on Albright's state of mind. The word "duty," while having an obvious legal implication, also has a meaning that [\*13] is familiar to lay people and will therefore help the jury to understand Guntharp's opinions about industry standards. The Court will not grant Defendants' motion to exclude Guntharp's use of the word "duty" or "obligation" or "reckless". The Court will permit Guntharp to refer to these terms in relationship to general industry practices the Defendants may not have adopted or observed.

**Ricker v. Southwind Trucking, Inc., 2006 U.S. Dist. LEXIS 97161 (N.D. Ga. 2006)**

**Highly Qualified Expert May Testify On Industry Standard of Care - Not On Meaning of or Violation of FMCSRs**

Mr. Morgan's Expert Report

Mr. Morgan is a 1975 graduate of the University of Tennessee, and holds a Bachelor of Science degree in Business Administration, with a major in Transportation. (Expert Report of Whitney G. Morgan at 1 (Docket Entry No. 80-3).) [\*12] From 1975 to 1982, Mr. Morgan served as a Special Agent (Highway Safety Management Specialist) for the United States Department of Transportation, Federal Highway Administration, Bureau of Motor Carrier Safety, in the Birmingham, Alabama, field office. (Id.) During that time, Mr. Morgan worked with and received training from a former Interstate Commerce Commission Safety Investigator. (Id. at 2.) Mr. Morgan also received hundreds of hours of training at the Department of Transportation's

Transportation Safety Unit located in Oklahoma City, Oklahoma, including training concerning fundamentals of and advanced accident investigation and reconstruction training, fundamentals of and advanced hazardous materials compliance training, safety enforcement training, and safety program standardization training. (Id.) Mr. Morgan has experience and training in the areas of commercial motor vehicle safety, motor carrier safety, motor vehicle and motor carrier regulatory enforcement, accident investigation and reconstruction, commercial motor vehicle operations, inspection, and maintenance, cargo loading and securement, and hazardous materials shipping and transportation.

Mr. Morgan has performed over 500 audits of commercial motor carriers and shippers. (Morgan Expert Report at 2.) Mr. Morgan has conducted over 10,000 inspections of commercial motor vehicles and carriers, and has made over 100 enforcement cases. (Id.) Mr. Morgan has investigated or reconstructed over fifty commercial motor vehicle accidents and hazardous material incidents. (Id.) Mr. Morgan has performed several joint accident investigations or reconstructions with the National Transportation Safety Board. (Id.)

Since 1983, Mr. Morgan has served as the president of Motor Carrier Safety Consulting, Inc., located in Birmingham. (Morgan Expert Report at 2.) Motor Carrier Safety Consulting provides safety consulting services to the commercial motor carrier industry and assists in litigation matters. (Id.) Alabama hired Mr. Morgan to train state troopers after Alabama adopted safety regulations. (Id.) Mr. Morgan is a certified driver trainer and safety supervisor, and has provided expert witness services in a number of cases. (Id. & list of testimony.)

Mr. Morgan's expert report states, in relevant part:

The circumstances of this accident demonstrate a classic example of a 'driver fatigue' type of commercial motor vehicle accident. A night-time rear-end collision is characteristically associated with several potential causes, including: following too closely; aggressive or reckless driving; inattention or drowsiness; and illness or fatigue. This accident occurred at a time of day (3:00 AM) which is consistent with the probability of truck driver

fatigue. The largest and most comprehensive over-the-road study of commercial motor vehicle driver fatigue ever conducted in North America comes from a seven year study titled the Commercial Motor Vehicle Driver Fatigue and Alertness Study which was completed in November of 1996. The study was conducted by the U.S. Department of Transportation, Transport Canada, and the Trucking Research Institute and was performed by the Essex Corporation. The study found that the strongest and most consistent factor influencing truck driver fatigue and alertness was time-of-day, and that the number of hours of driving and cumulative number of days were not strong or consistent predictors of observed fatigue. Peak drowsiness occurred during the eight (8) hours from late evening until dawn.

The truck driver involved in this rear-end collision, Mr. Detky, admitted in his deposition that he had lied to the State Trooper following the accident, had falsified his records of duty status (drivers logs), and had grossly exceeded his maximum hours of service prior to the collision, by as much as 10 hours over the 10 hour maximum. The Federal Motor Carrier Safety Regulations (FMCSR's), in Part 395, set forth the maximum hours of service requirements for commercial motor vehicle drivers. At the time of this accident in 2003, the maximum number of hours that a truck driver could drive before he was required to take an 8 hour break was 10 hours, and the driver could accumulate a total of 70 hours in an 8 day period of on-duty not driving time and driving time. Mr. Detky admitted during sworn testimony that he had destroyed logs reflecting prior trips he had made on August 29th and September 3-4, 2003, that he failed to show on his logs the prior trips he had made, and that he compressed time on the logs that he did produce. All of this was done intentionally by Mr. Detky in an effort to manage his driving time to accommodate additional trips he was dispatched on by Southwind Trucking, which otherwise would have shown him over his maximum hours of service, and put him out-of-service. As a result of this intentional log falsification, Mr. Detky admitted that he had been awake and/or driving for approximately 20 hours at the time of the collision with the Ricker family vehicle. Falsification of records of duty status (logs) is a violation of §395.8(e) of the FMCSR's and is a critical violation.

Section 390.3 of the FMCSR's requires that all employers be knowledgeable and comply with the applicable safety regulations, that they instruct their drivers and employees in the applicable safety regulations, and that they comply with the safety regulations.

The motor carrier, Southwind Trucking, dispatched Mr. Dekty on the trips that he made and the evidence is that the owners, Mr. Scott Adair and/or Mr. Ric Barringer made all of the decisions about which drivers were to go where and when they were to go. According to Southwind employee Kathy Caldwell, the dispatch board was a legal pad that moved between herself, Mr. Adair and Mr. Barringer. Knowingly dispatching drivers on trips that either cannot be made legally and/or in direct breach of the FMCSR's is a violation of §390.13, Aiding or Abetting, which requires that no person shall aid, abet, encourage, or require a motor [\*17] carrier or its employees to violate the regulations. Requiring or permitting a driver to drive over the maximum allowed hours of service is a critical violation of the FMCSR's.

Mr. Detky made several critical mistakes in his driving which are below the standard of care for professional truck drivers, and, in doing so, fell below the standards established for CDL drivers as set forth in the Federal Motor Carrier Safety Regulations (FMCSR's) commercial drivers standards and found in Part 383, as well as the CDL Manual, including:

Safe vehicle control - Mr. Detky[] was not driving at a speed at which he could safely control his vehicle. According to his testimony (pages 50-53) he was driving most of the time with his cruise control on and set at 68-69 miles per hour.

Proper visual search - Mr. Detky failed to perform a proper visual search and identify the Ricker Vehicle on the highway. All drivers look ahead, but many don't look far enough ahead, and not looking properly is a major cause of accidents. At highway speeds drivers need to look 12 to 15 seconds ahead, or about a quarter of a mile. Good drivers shift their attention back and forth, near and far, looking [\*18] for traffic and for road conditions that may affect

them. Mr. Detky failed to maintain a proper lookout. He told Trooper Smith that he had his cruise control on just a hair below 70, looked in the side mirror for a second or two, then looked forward and the impact occurred. Detky said that he did not even have time to hit his brakes. Even a second or two at 70 miles per hour is 102-205 feet, and a lot can change on the roadway ahead when you take your eyes off the road for a couple of seconds.

Space Management - Mr. Detky failed to properly manage the space between his vehicle and the Ricker vehicle in front of him. Mr. Detky made no adjustment in his driving to manage his space and accommodate the other vehicle by slowing and or changing lanes. The rule of thumb for drivers of commercial motor vehicles as instructed by the CDL manual, when managing space ahead, is at least one second for each ten feet of vehicle length with an additional second for speeds greater than 40 miles per hour. A speed of just under 70 miles per hour, and based on the approximately 65 feet of length for a tractor semi-trailer combination unit, translates to 7-8 seconds of space in front which computes [\*19] to 718-821 feet of following distance.

Speed Management - Mr. Detky failed to properly manage his speed for the conditions, and was in effect over-driving his headlights, at a speed of just under 70 miles per hour. CMV drivers need to have their vehicles under control at all times, especially when approaching a point of potential hazard, so they can change lanes, maneuver or stop in the assured clear distance. Professional truck drivers are instructed in the CDL manual that driving too fast is a major cause of fatal crashes, and that they must adjust their speed depending on the conditions, which include: curves, hills, traction, traffic, and visibility. Truck drivers are also instructed, in the CDL manual, that total stopping distance is made up of four components: perception distance; reaction distance; brake lag distance; and braking distance; and that the total stopping distance at 55 miles per hour is over 300 feet. Professional drivers must always be able to stop their vehicle within the distance that they can see ahead.

Hazard perception - Mr. Detky failed to recognize the Rickers['] vehicle ahead in the roadway that was clearly there to be seen. It is

[\*20] important for drivers to recognize potential hazards and hazardous situations in order to be prepared early enough to respond properly. Seeing hazards early lets drivers be prepared and allows more time to act before a hazard can become an emergency. Being prepared reduces the danger of a potential hazard. In this situation, a vehicle ahead only becomes a hazard for a driver that is not keeping a proper lookout and is not in control of his vehicle.

Night Driving - Mr. Detky was driving below the standard of care for night driving in a commercial motor vehicle. People can't see as sharply at night or in dim light and must adjust their driving accordingly. Less light means not being able to see hazards as well as in the daytime. Even when there are lights, the roadway can still be confusing. Drivers must adjust their driving for the conditions and be prepared to stop in the assured clear distance ahead, which is the area ahead illuminated by the vehicle[']s headlights. The CDL manual instructs truck drivers that headlights on low beams will illuminate an area approximately 250 feet ahead and with high beams approximately 350-500 feet. A speed of just under 70 miles per hour [\*21] is too fast for conditions, especially when not maintaining a proper lookout ahead.

This accident was preventable because:

1. Mr. Detky failed to maintain a safe following distance.
2. Mr. Detky failed to keep his vehicle under control.
3. Mr. Detky failed to ascertain the vehicles in front of him.
4. Mr. Detky misjudged the rate of overtaking.
5. Mr. Detky was not operating at a speed consistent with the existing conditions of road[,] weather and traffic.
6. Mr. Detky failed to control speed so that he could stop within the assured clear distance.
7. Mr. Detky failed to accurately observe existing conditions.
8. Mr. Detky was in violation of applicable safety regulations.

Conclusion(s):

It is my opinion, within a reasonable degree of probability in the field of commercial vehicle compliance, enforcement and safety that Southwind Trucking and Mr. Detky demonstrated a conscious disregard for the applicable safety regulations and for the safety of

other motorists and highway users, including the Rickers. It is also my opinion that Mr. Detky and Southwind caused and/or contributed to the cause of the accident involving the Rickers. The conduct of both Mr. Detky and Southwind fell well below the [\*22] safety standards established by the FMCSR's and CDL Manual for the protection of others. Compliance with the applicable safety requirements, which are established for safe operation and protection of the public, are a clear duty of all commercial motor vehicle operators, and the facts of this case demonstrate both knowledge and willfulness on the part of Mr. Detky and Southwind Trucking.  
(Id. at 3-6.)

### 3. Evaluation

For the following reasons, the Court cannot find that Mr. Morgan's expert report, as a whole, simply seeks to offer expert testimony on ultimate issues for the jury. **The Court acknowledges that it is inappropriate to allow Mr. Morgan to testify as to what the Federal Motor Carrier Safety Regulations provide and mean, or to allow him to opine expressly that the conduct of Defendants violated certain Federal Motor Carrier Safety Regulations.** Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 900 (7th Cir. 1994) ("The meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law, to be resolved by the court."); Police Ret. Sys. of St. Louis v. Midwest Inv. Advisory Serv., Inc., 940 F.2d 351, 357 (8th Cir. 1991) [\*23] (noting it was error for court to allow expert witness to lecture jury about what statute meant). **The Court therefore will not permit Mr. Morgan to testify as to what the regulations at issue mean, or to testify that Defendants violated those regulations.**

Additionally, because Mr. Morgan's testimony does not meet Federal Rule of Evidence 1006's requirements for a summary witness, his view as to the regulations or rules are not admissible under that Rule. The Court therefore denies Plaintiffs' request to use Mr. Morgan as a summary witness.

**Further, the Court will not permit Mr. Morgan to testify that Defendants' conduct amounted to "conscious disregard" for risks. Mr. Morgan, however, may state that, in his opinion, Defendants' conduct fell below the general standard of care.**

### **Other Authorities to Consider**

### **Verdict Form Should Seek Finding on Negligence vs. Negligence Per Se**

Once there is proof of negligence per se, make sure the verdict form requires finding as to general negligence versus negligence per se. In Longton v. Burgart, 1990 U.S. App. LEXIS 16478 (6th Cir. 1990) Sixth Circuit could not discern from verdict form whether jury made its decision based on negligence or negligence per se:

The plaintiff contends that defendants violated portions of the Federal Motor Carrier Safety Regulations dealing with the utilization of vehicular hazard warning signal flashers and the placement of other warning devices, 49 C.F.R. § 392.22 (1990). **Under Michigan law, HN3a violation of a duty imposed by an administrative rule or regulation is evidence of negligence, but not negligence per se.** Douglas v. Edgewater Park Company, 369 Mich. 320, 119 N.W.2d 567 (1963). Thus, any failure of Darbyson to utilize his emergency four-way flashers or place other warning devices behind the rig was evidence of negligence, but not negligence per se. In addition, the plaintiff does not dispute the district court's charge to the jury that there is no law which prevents a motorist from pulling off onto the shoulder of an interstate highway to perform such activities as looking at a map. **Because there was no negligence per se and because of the nature of the verdict form, it is impossible to discern under which one(s) of plaintiff's theories the jury found negligence on the part of the defendants.**

**Refusal to Use Lack of FMCSR to Avoid State Law Failure to Warn Claim**

The Defendant next argues that there is no requirement to warn about dry ice under transportation laws. In particular, ConAgra contends that because Kentucky abides by the Federal Motor Carrier Safety Regulations, and because those regulations do not require a warning about dry ice, no such duty to warn should exist in this matter. However, the Defendant's reasoning that a lack of warning requirement within federal regulations suggests that there is not a duty to warn in state law negligence matter is without basis. Though courts may look to statutes in order to determine a standard of care under a negligence per se action, a lack of a warning in a statute does not imply that no duty to warn exists. Knous v. ConAgra Foods, Inc., 2006 U.S. Dist. LEXIS 7