

The Transportation Brief®



The Transportation Brief

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light & Hanson.

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Indiana Decisions Trend Positive For Motor Carriers In Personal Injury Accidents

Although truck accident litigation presents many challenges for motor carriers, two recent Indiana Supreme Court rulings prosecuted by the Scopelitis firm gravitate towards more fair treatment for motor carriers involved in an accident while traveling Indiana's roads.

The court limits "bystander" claims for witnessing an accident or its aftermath

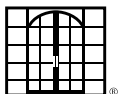
In *Smith v. Toney*, the court was asked whether a plaintiff who came upon the scene of a car-truck fatality could recover damages for witnessing the aftermath of the accident despite the fact that the accident victim – the plaintiff's fiancé – had already been removed from the scene when the plaintiff arrived. The court first recognized that such recovery is only permitted for witnesses who have a spousal-type relationship with the victim, and it held that a fiancé is not analogous to a spouse. The court further ruled that the scene viewed by the plaintiff must be essentially as it was at the time of the accident, the victim must be in essentially the same condition as immediately following the accident, and the plaintiff must not have been informed of the accident before coming upon the scene.

Suits may be transferred from the plaintiff's backyard

In *R&D Transport v. A.H.*, the court ensured that a motor carrier defending a personal injury claim will not be forced to defend a lawsuit in the injured party's home county unless the motor carrier also resides in that county or unless the accident occurs there. In that case, the passenger in a car involved in an accident with a tractor-trailer outside her home county sued the motor carrier in her home county because she regularly kept personal property damaged in the accident at her home. The court, however, moved the case to either the county of the accident or the county in which the motor carrier resided.

These new cases generally relate to accidents occurring in Indiana, but may influence rulings in other states. Motor carriers, however, should be aware that both developments require action by the defense in the very first response to a lawsuit.

*Lynne D. Lidke
Michael B. Langford
A. Jack Finklea,
Indianapolis*



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Briefly...

Seventh Circuit Affirms Heightened Safety Standards

On March 21, 2007, the U.S. Court of Appeals for the Seventh Circuit added to the list of court decisions affirming the rights of motor carriers to implement safety standards that are higher than the law requires. In *EEOC v. Schneider National, Inc.*, the court considered Schneider's policy of not employing drivers with neurocardiogenic syncope – a nervous system disorder that causes fainting – even though drivers with this condition, which can be treated with medication, are not prohibited from driving under the Federal Motor Carrier Safety Regulations. The EEOC argued that Schneider regarded a driver as disabled when it terminated his employment based on the mistaken belief that neurocardiogenic syncope is a disabling condition under the Americans with Disabilities Act. Rejecting the EEOC's position, the court upheld Schneider's right to determine "how much risk is too great for it to be willing to take."

The court cited as support for its decision the Second Circuit's decision in *EEOC v. J.B. Hunt Transport, Inc.*, a case in which the Scopelitis firm successfully defended J.B. Hunt in an EEOC class action. The *Schneider* and *J.B. Hunt* decisions are useful to any motor carrier seeking to justify heightened safety and qualification standards.

*James H. Hanson
David D. Robinson,
Indianapolis*

Ruling Issued in OOIDA v. Landstar Case

On March 29, 2007, a U.S. District Court in Florida issued its final judgment in the *OOIDA v. Landstar* case following a January trial.

In entering judgment in favor of Landstar and rejecting OOIDA's claims for damages and injunctive relief, the court ruled that under the federal leasing regulations:

- A carrier may charge owner-operators more for products and services provided through its voluntary programs offered to owner-operators than the carrier paid a third party vendor for the product or service.
- Carriers are not required to disclose information about the prices paid to vendors for these products and services where the carrier's lease with the owner-operator discloses a specific price to the owner-operator.
- Carriers and owner-operators are free to use any mutually-agreeable formula for computing an owner-operator's compensation as long as the lease discloses the formula.
- An owner-operator may only recover damages sustained as a result of a violation. For the court, the mere fact of a difference between a carrier's third party costs and the amount charged an owner-operator did not establish damages recoverable by an owner-operator. Consequently, the *Landstar* case could not proceed to trial as a class

action, as individualized trials on damages would be required for each owner-operator.

OOIDA has indicated it will appeal the Court's rulings.

*Daniel R. Barney
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Washington-Based Interstate Drivers Must Be Paid Overtime Under State Law

Despite federal law exempting interstate motor carrier drivers from overtime pay requirements, the Washington Supreme Court recently required overtime pay to such drivers under state law. The court held that Washington-based drivers who log more than 40 hours per week are entitled to overtime pay, even if most of their hours are logged in other states. According to the court, the Washington statute requiring employers to pay overtime to interstate drivers did not expressly require that drivers log 40 hours in Washington to trigger the overtime requirement.

Carriers that employ Washington-based interstate drivers should be aware of this ruling and ensure the state's overtime pay requirements are met. Failing to meet the requirements may lead to significant penalties.

*A. Jack Finklea,
Indianapolis*

Negotiation Counsel Offers Alternative Response to Catastrophic Accidents

A negotiation model that challenges conventional wisdom about accident defense litigation has been deployed at the Scopelitis firm with the addition of Jim Golden in the firm's newly established office in Chattanooga, Tennessee.

Golden developed and implemented the model, which he calls "negotiation counsel," in his role as general counsel at Covenant Transport, Inc., one of the nation's top ten truckload carriers and a client of the firm. He studied the approach at the Program on Negotiation at Harvard Law School and subsequently adapted it to the unique needs of motor carriers involved in catastrophic highway accidents.

The negotiation counsel's approach supplements traditional methods of accident defense by committing the defendant from the outset to immediate contact with the injured individual's family and legal team to establish a collaborative, problem-solving relationship. The goal is to "front load" negotiations in an attempt to secure an early and reasonable, mutually-beneficial settlement.

Negotiation counsel has gained interest beyond Covenant Transport, where Golden continues to serve as general counsel, and the Scopelitis firm, where he has served as of counsel since January 16, 2007. Since then, Golden has addressed the topic before the International Institute of Conflict Prevention and Resolution and the American Bar Association's Transportation Megaconference.

Golden joins the firm's accident litigation team that includes Tom Farrell, Mike Langford and Angela Cash in Indianapolis and Don Devitt and Jim Ellman in Chicago.

Golden is a member of the Board of Directors of the ATA Litigation Center, the ATA Insurance Task Force, the Litigation Executive Committee of the Association of Corporate Counsel, and the Litigation Section of the American Bar Association.

For the Record

We are pleased to announce that Chicago partner **Don Vogel** began his one-year term as president of the Transportation Lawyers Association on May 6, 2007. Don follows in the footsteps of fellow partners Kim Mann and Kathleen Jeffries as TLA president.

Renea V. Hill, formerly an associate in the Scopelitis firm's Chicago office, has relocated to the Indianapolis office where she will continue litigating highway accident claims in Indiana and Illinois courts.

On the Road

Jim Golden will speak on the role of negotiation counsel in achieving early favorable results in litigation at the Corporate Counsel Summit, June 10-12, in **Rancho Mirage, California**.

Kathleen Jeffries will attend the Conference of Freight Counsel, June 24-25, in **Seattle**.

Greg Feary and Dan Barney will participate in an owner-operator legal update panel, and Jim Golden will address the role of negotiation counsel in litigation, July 29-August 1, in **Dana Point, California**. Norm Garvin, Allison Smith and Kathleen Jeffries also will attend.

Don Vogel and Kathleen Jeffries will attend the Transportation Lawyers Association Summer Retreat, August 4, in **Chicago**.

Are Your Restructured Operations Protected?

Many transportation organizations are structured in a way to separate certain business activities (i.e. brokerage, trucking, equipment leasing, etc.) into distinct entities. One objective of this structure is to implement the legal doctrine of limited liability under which the assets of one entity are protected from being seized to satisfy the liability obligations of an associated entity. To maximize protection of those assets, a review of your operations under the structure should be conducted. A thorough review would assess how a court might view your business activities, including whether there has been complete implementation of the organizational structure (including appropriate inter-company transactions), whether there has been proper adherence to entity formalities, and whether operational shortcomings exist.

*Robert L. Browning
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Dispatches



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◆ Craig Helmreich reports that, with new rules governing production of electronic information in litigation now in effect, companies should re-examine **internal document retention and litigation hold procedures**. Appropriate procedures must recognize both where electronic data resides (PDA, e-mail, cell phone memory card, etc.) and when production of the electronic information is required.

◆ On January 1, 2007, at least ten state laws went into effect raising the minimum wage employers must pay to employees. Election ballot referenda and current legislation relating to **state minimum wage hikes** may ultimately result in over half of the states in the nation requiring a minimum wage higher than the federal minimum wage. Jack Finklea reminds motor carriers that they are subject to state minimum wage requirements for their company drivers and that the federal motor carrier exemption for overtime does not apply to federal or state minimum wage requirements.

◆ Chris McNatt notes that **bankruptcy courts are increasingly likely to uphold arbitration provisions** in parties' contracts that involve interstate commerce. Accordingly, in revising or preparing contracts, carriers and brokers should assess the potential benefits and burdens regarding arbitration clauses with the forethought of potential insolvency of one of the contracting parties.