APRIL 2005, VOL. 40, NO. 3

ILLINOIS STATE BAR ASSOCIATION

PUBLIC UTILITIES & TRANSPORTATION LAW

The newsletter of the ISBA's Section on Public Utilities & Transportation Law

District court finds actual carrier notice of cargo loss excuses late shipper claim

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In *Mitsui Sumitomo Insurance Co. Ltd., et al., v. Watkins Motor Lines, Inc.*, Case No. 03-2741 (10/8/04), U.S. District Court Judge Samuel Der-Yeghiayan granted the plaintiffs' summary judgment motion in Carmack Amendment 49 U.S.C. 14706 cargo loss and damage litigation and denied without prejudice defendant's partial motion for summary judgment to limit its damages. The case arose when Mitsui's insured, Sharp Electronics Corp., tendered motor carrier Watkins a shipment of 23 projectors worth $85,100 on April 30, 2001. Watkins, however, failed to deliver the goods to their intended consignee. In defense of Mitsui's claim, Watkins first contended that Sharp had failed to file a written notice of claim with Watkins within nine months of the loss and that even if Watkins was liable, its damages were properly limited by its bill of lading and tariff.

Mitsui argued that Watkins was the initial carrier and therefore was liable under Carmack. The Court cited several Seventh Circuit decisions holding that common carriers like Watson are liable for all losses on goods they transport unless they establish they were free from fault. Watkins acknowledged that principle, but asserted that Sharp did not file a claim on this April 2001 shipment until March 2002. As the claim was not filed within nine months of the loss, Watkins contended that the claim was barred under 49 U.S.C. §14706(e), 49 C.F.R. 730.3(c), and *Neely v. Mayflower Transit, LLC*, 2003 WL 23648655 (N.D. ILL. 2003).

The Court, however, focused instead on language from *Hopper Paper Co. v. Baltimore & O.R. Co.*, 178 F.2d 179, 192 (7th Cir. 1950), wherein that court held that a party's failure to provide timely written notice under a transportation contract was excused where the motor carrier knew about the claimed damage by means other than the written claim.

The Court found that Watkins had actual knowledge of the loss within nine months of its occurrence and that this actual knowledge trumped the nine-month written claim requirement. The Court found this case similar to *William Wrigley Jr., Co. v. Stanley Transport, Inc.*, 121 F.Supp. 670 (N.D. Ill. 2000), where the plaintiff's goods were stolen from the carrier's truck. As the *Wrigley* carrier was aware of the theft, that court found the carrier had the actual notice required to excuse the shipper's failure to file the written claim within the nine months. Application of *Wrigley* to this case emphasized both Watkins' admission that its employees documented the projectors' disappearance within the nine-month claim period and Watkins' report of the projector loss to the local police within the nine-month claim period. Given the Watkins' admissions, the Court concluded that no reasonable trier of fact could find that Watkins had no notice of the cargo loss within the nine-month claim period and therefore granted plaintiffs' summary judgment motion despite the shipper's failure to timely file a written claim.

Watkins also claimed that its damages related to this loss were limited to $25 per pound based on its shipping documents. But the Court denied this motion without prejudice due to Watkins' failure to comply with the specific requirements of the District Court's Local Rule 56.1 in its summary judgment presentation. The Court cited case law establishing Local Rule 56.1's requirements were not merely "technical" and required "strict compliance." Notwithstanding that precedent, the Court surprisingly gave Watkins another chance to fix its Motion to comply with the Local Rules, adding "the Court would enter final judgment for plaintiff and terminate the case if this future submission was not presented at all or not in compliance with the Rules."

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Route 30 via Division Street was less than five miles; and 2) Joliet's Answer admitted that Division Street was a locally designated highway. The Court further reviewed the two depositions of the Joliet employees and Joliet's Official Street Classification Map to provide additional support for its ruling. The Court rejected Joliet's argument by finding both that the Illinois Vehicle Code did not support Joliet's interpretation and the local designation of a "minor arterial" was the same designation which Joliet gave to a portion of Route 30, a Class II highway.

While this case was decided on a procedural point, the transportation significance of this decision extends beyond the issue of whether a party may amend its Answer after discovery closure. This decision constitutes Seventh Circuit authority for an interpretation of the Illinois Vehicle Code that bars a local municipality from prohibiting truck traffic when trucks are moving from a Class I or Class II highway on a locally designated highway for up to five miles for the purposes of loading, unloading, food, fuel, rest or repairs. As more and more municipalities try to limit local truck traffic, this decision will no doubt constitute a key asset to the business interests of both shippers and motor carriers who oppose bans on truck traffic as being harmful to the interests of commerce.

Court finds no FMCSR duty stated against motor carrier or shipper for loading issues

By William D. Brejcha; Scopelitis, Garvin, Light & Hanson, P.C.; Chicago, IL

In *Turner v. Goodyear Tire & Rubber Co.*, No. 02 C-5012 (12/1/04), Judge Samuel Der-Yeghiayan of the U.S. Court for the Northern District of Illinois held that the Federal Motor Carrier Safety Regulations ("FMCSA") in 49 C.F.R. Part 390 *et seq.* created no duty for either motor carriers or shippers regarding the loading or unloading of interstate shipments on private property. This case arose from a shipment of tires moved by plaintiff truck driver Michael Turner from Goodyear's Danville, IL facility to Danville, VA. Goodyear had contracted with an entity named Bowevil Express ("Bowevil") to perform this transportation. Bowevil in turn subcontracted defendant Westover Contract Carriers to provide the transportation services called for in its Goodyear contract. Plaintiff Turner was employed by Bowevil. Turner alleged that the load of tires shifted in transit and fell on him when he opened the doors at the delivery point on private property in Danville, VA. Turner sued Goodyear and Westover for negligence and both he and his wife sued both defendants for loss of consortium. The negligence claims were based on both common law and Federal Motor Carrier Safety Administration regulations ("FMCSR's"). The District Court's decision addressed several motions.

First, Goodyear moved to bar the testimony of plaintiffs' expert under Federal Rule of Evidence 702. Goodyear also moved for summary judgment on all claims and Westover moved for partial summary judgment as to the FMCSR claims.

The Court granted Goodyear's motion to bar plaintiffs' expert testimony in part. Plaintiff's expert was to testify regarding the following issues:

(1) the shifting of freight in transit;
(2) the shifting in the load of tires in Turner's trailer on the day in question;
(3) trucking industry customs and practices;
(4) applicability of the FMCSRs; and
(5) methods used in the trucking industry to prevent load shifting.

The Court granted Goodyear's motion to bar expert testimony that the FMCSR's applied to Goodyear, that those regulations created any Goodyear duty to the plaintiffs, and that Goodyear violated those regulations. The Court found that all matters relating to the expert testimony concerning the FMCSR's were legal issues on which the expert could not provide opinion testimony. Judge Der-Yeghiayan found that only the Court could determine whether or not the FMCSR's applied to Goodyear, whether those regulations created any Goodyear duty, and whether Goodyear violated the FMCSR's in the first instance. However, the Court also denied Goodyear's expert motion in part.

Plaintiffs sought to use expert testimony to prove both how the accident occurred and industry customs and practices. Goodyear contended that the expert's opinions were unreliable because he lacked specialized knowledge, there was no scientific basis for his opinions and that he lacked sufficient knowledge of industry customs and practices. The Court found that the expert had extensive trucking industry experience and had acted as an Illinois Commerce Commission safety inspector. The Court found that plaintiffs had demonstrated that the expert testimony could assist the trier of fact and appeared to be sufficiently reliable and not speculative. The Court cautioned that it was not finding the expert's testimony to be admissible at trial, but only that the Court would revisit this issue at trial where plaintiffs would be required to lay a sufficient foundation and address other pertinent evidentiary hurdles before the expert could testify.

Goodyear's Second Motion for Summary Judgment was premised on three grounds. Goodyear argued that: (1) plaintiffs could not show that Goodyear owed any duty to plaintiffs; (2) that the FMCSRs did not apply to Goodyear; and (3) Goodyear was entitled to summary judgment on the issue of whether the plaintiff had been contributorily negligent.

The Court rejected Goodyear's assertion that it owed no duty to the plaintiff. The Court cited evidence showing that Goodyear's employees were involved in the loading of Turner's trailer and that the loading took place on Goodyear's premises. The Court cited a Goodyear employee's testimony that Goodyear employees not only participated in the load-

ing, but were also responsible to insure that the cargo was properly loaded and secured. An employee of motor carrier Westover also testified that Goodyear employees were involved in the loading process.

Goodyear further argued that the motor carriers involved in the handling and transport of the trailer had ample opportunity to inspect the load and that the motor carrier involvement trumped any duty that Goodyear owed to the plaintiff. The Court rejected this argument, finding that any motor carrier load inspection did not necessarily relieve Goodyear from liability resulting from its own negligent conduct.

The Court, however, did grant Goodyear's summary judgment as to plaintiffs' FMCSR-based claims for reasons explained below. But the Court denied Goodyear's claim that it was entitled to summary judgment on the issue of contributory negligence. Goodyear based this claim on Turner's deposition admission that he had disregarded his training when he opened the trailer doors on delivery immediately before the tires fell out and struck him. The Court found that any Bowevil training of Turner as to unloading was not dispositive of the contributory negligence issue. The Court found that on a summary judgment motion, the Court must consider the record as a whole in a light most favorable to the non-moving party. Based on this requirement, the Court concluded that it could not find that Turner was contributorily negligent as a matter of law based on one answer to one question at a deposition and instead would rely on the entire record to determine that issue. The Court found that Goodyear was free to raise Turner's deposition testimony at trial and that the trier of fact could give it appropriate weight and expressly concluded that the trier of fact should resolve the contributory negligence issue.

The Court next addressed the issue of Westover's motion for partial summary judgment as to plaintiffs' FMSCR claim. The Court first found that Illinois law allowed a plaintiff to recover for a defendant's violation of a statute or rule designed to protect human life or property if the plaintiff showed: (1) the violation proximately caused the injury; (2) plaintiff belonged to the class of persons whom the rule was intended to protect; and (3) plaintiffs' injuries were the kind of injuries which the rule sought to prevent, citing *Gouge v. Central Illinois Public Service Co.*, 582 N.E. 2d 108, 112 (Ill. 1991).

Westover had argued that the third requirement was not met in the instant action because the FMCSRs were only intended to protect the public from hauling accidents that took place on the highway, not those that occurred at a private loading dock. Westover relied on the FMCSR's definition of "accident" as "an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce." Westover emphasized that the terms "accident" in the regulation did not include "[a]n occurrence involving only the loading or unloading of cargo" per 49 C.F.R. §390.5. Westover also pointed out that the version of 49 C.F.R. Part 393.100 that was in effect when the accident happened referred only to the duty to insure that vehicles were properly loaded "when transporting cargo" and that the definition of "highway" in the FMCSRs was limited to public areas.

Plaintiffs responded that the Motor Carrier Safety Act of 1984 ("MCSA") at 49 App. U.S.C. §2501 *et seq.*, directed the U.S. Department of Transportation to issue regulations concerning the safety of commercial motor vehicle operations and the FMCSRs were amended in response. The plaintiffs noted that 49 U.S.C. §31131 provided that the MCSA purposes were "to promote the safe operation of commercial motor vehicles; ... to minimize dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety; and ... to insure increased compliance with traffic laws and with the commercial motor vehicle safety and health regulations and standards prescribed and orders issued under this chapter." Based on this statutory framework, plaintiffs argued that loading and unloading of cargo fell within the MCSA's general purpose.

The Court concluded that despite the MCSA's general language, the regulations clearly indicated that they were not intended to cover or create any duty regarding accidents which took place while cargo was being unloaded in a private loading area. The Court also noted that the current version of 49 C.F.R. §393.100 speci-

fied that a load must be properly secured "when transporting cargo on public roads" and that the load must be secured to "prevent shifting upon or within the vehicle to such an extent that the vehicle's stability or maneuverability is adversely affect. ..." The Court found the regulations' language was consistent with the FMCSR's limited scope. The Court also noted that plaintiffs cited *Reed v. Ace Doran Hauling & Rigging Co.*, 1997 WL 177840 (N.D. Ill. 1997), in their answer to Goodyear's motion for summary judgment to support their common law negligence claims, but avoided reference to that case in their answer to Westover's summary judgment motion which was directed only at the FMCSR-based claims. The Court found that *Reed* illustrated the true purpose behind the FMCSR because, in that case, the plaintiff lost control of his truck while driving the vehicle on Interstate 294 when its load was not properly secured. *Reed* therefore concerned injuries which occurred during the operation of the truck on a public highway, not on private property. Based on the foregoing, the Court granted Westover's motion for partial summary judgment on the plaintiffs' FMCSR claims. As noted above, the Court's rationale as to Westover's motion for summary judgment was the basis for the Court's grant of Goodyear's summary judgment motion on plaintiffs' claims that their injuries resulted from Goodyear's FMCSR's violation.

The Court's decision therefore held that if a plaintiff's injury occurs on private property either during the loading or unloading of a shipment to be moved on the public highways in intrastate or interstate commerce, the plaintiff has no claim based on any asserted shipper or carrier FMSCR violation. However, nothing in this decision changes the existing law that carriers and shippers still maintain a common law duty to those who forseeably could be harmed by any shipper or carrier failure to exercise due care in the loading or unloading process of an intrastate or interstate shipment, regardless of where that loading or unloading might occur. Moreover, the Court's private/public property distinction does not address or cite the numerous FMCSR provisions which clearly apply to motor carrier operations on private property.