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$100 Million Dollar Transportation Jury Verdicts: Lessons Learned

The following astronomical Plaintiff trial verdicts in 2018 emphasize that the Plaintiffs' use of the *Reptile Theory* is currently being utilized to put the trucking company on trial, rather than the facts of the case and the injury to the Plaintiff. The defense must first recognize the deposition and trial tactics used by Plaintiffs' attorneys. The defense must immediately investigate all catastrophic losses using the checklist of the 11 hot button transportation issues discussed in this paper. The defense must then spend the time to fully prepare all of the witnesses, including the driver, the Safety Director, all corporate witnesses including the 30(b)(6) witnesses to withstand a *Reptile Theory* attack. These 11 items can be used as a checklist by the defense as best practices to both investigate, defend and evaluate a catastrophic transportation loss.

May, 2018 - $90 Million – *Werner Enterprises*

A jury in Houston, Texas found Werner liable when, at first blush, all of the facts point to the other vehicle as the cause of this accident.

A pickup truck went out of control on black ice on Interstate 20, crossed the grassy median separating a divided interstate and spun into the path of the Werner truck, which was driving on the opposite side of the interstate in the left hand lane. The road conditions were poor with freezing rain causing limited visibility and black ice. The damages were horrific as Plaintiff, Jennifer Blake, suffered a traumatic brain injury, her 7 year old son was killed, her 12 year old daughter was paralyzed, and her 14 year old son was injured as well.

The facts developed during the 6 week trial were uncontroverted that the Werner driver, Shiraz Ali, was traveling 50 mph in the seconds before the crash, which was well below the speed limit. He did not lose control of his tractor trailer and brought it to a controlled stop after impact so no other motorists were involved in a secondary type of accident.

The Plaintiff's attorneys tried a *Reptile Theory* case and did not focus on the actions of the driver of the pickup truck. Instead, Werner was put on trial.

First, the weather conditions were at issue. The National Weather Service issued a winter storm warning saying there was going to be freezing rain, making conditions on the highway extremely dangerous in the area where the accident occurred. This warning occurred 12 hours before the crash and 5 hours before the Werner driver was dispatched. Plaintiff contended that Werner directed the driver to

travel on I-20 through these icy conditions rather than taking a safer alternate route. Second, during this ice storm, Ali passed 3 accidents and had been in the ice for 50 miles before the time of the accident.

The Plaintiff's attorneys also focused on the training of Ali, who was a student driver and developed a theory that Ali was on an expedited delivery route to California requiring arrival by the next day. (This could be based on §392.6 of the Federal Regulations prohibiting a "run" which would necessitate the commercial motor vehicle being operated at an excessive speed). There were no punitive damages awarded in this case and Werner is appealing.

This is a case where the Werner driver was driving in a controlled manner in his lane of travel under the speed limit. The Plaintiff's attorney took what appears to be a case of 100% liability on the driver of the pickup truck and turned the tables on Werner. The focus and theme of the trial was Werner's lack of compliance with Federal Regulations and its policies and procedures.

Post-trial motions have been filed and overruled. The case is on appeal. Appellate counsel are hopeful for a reversal for a new trial. Appellants' brief was originally due by the end of this month, but an extension was necessary due to the Court Reporter needing more time to prepare the transcript.

Plaintiffs' Counsel are not interested in settlement.

July, 2018 - $101 Million – *Frac Tech Services ("FTS")*

Another Texas jury awarded Plaintiff a record amount for a trucking accident in the United States in the amount of $101 million. Again, the Plaintiff presented a *Reptile Theory a*s they put FTS on trial. This was a case of liability against FTS, as its driver Acker (a former employee), drove the FTS semi-truck and rear ended Plaintiff's pickup truck. However, the damages were not significant and clearly were not catastrophic. Plaintiff, who was returning home from church, advised the responding police officer that he was not injured and he continued on driving that day. He had chiropractic treatment and other medical procedures and ultimately had back surgery on disks in his neck. Plaintiff alleged that he could no longer work as a crane operator.

Plaintiff's attorney mounted a significant and damaging *Reptile Theory* against FTS and argued that FTS violated Federal law, and its own policies and procedures. Plaintiff argued that Acker should not have been hired in the first place, and was reckless in doing so, since he was convicted of 3 moving violations in the 2-1/2 years prior to applying with FTS. FTS' own policy and procedures deemed 3 moving violations as "risky behavior". Apparently, Acker lied about his driving record by omitting 2 of the 3 moving violations and, according to FTS policy, lying on an application is grounds for termination. Plaintiff's counsel, however, argued that had FTS spent the $20 to get the DOT driving record for this driver, they would have discovered the 3 violations. Had they done so, they would have determined he was not eligible to be hired in the first place. Plaintiff's theory is that had he not been hired, he would not have been driving on the date of the accident and, therefore, the injury to the Plaintiff would not have occurred.

Plaintiff's attorney also pointed out that Acker's post-accident drug test was positive for marijuana and methamphetamines in his system. He also was on probation with FTS at the time of the crash for past driving performance with the company. In fact, his driving privileges had been suspended at least twice before the crash. Despite all of these "red flags", the lawsuit claimed that FTS wanted to promote him to be a trainer.

Plaintiff also focused on FTS' conduct separately. It was argued that the Federal Motor Carrier Safety Administration had downgraded FTS' carrier status to "conditional". They discovered critical violations of the Controlled Substance and Alcohol Use and Testing regulation. Further, a request to upgrade its status was denied due to insufficient corrective action.

The depositions of FTS' witnesses were also an issue in this case. According to court records of the deposition of FTS' head of Human Resources, they defended its action to hire Acker by arguing that his CDL was valid. However, in cross-examination, this witness stated that, in her opinion, Acker was not a safe driver. Further, in the deposition this witness noted that Acker should have been fired based upon the 3 convictions in a 36 month period of time.

In this case, the jury awarded $75 million dollars for punitive damages of the $101 million assessed against FTS. In fact, all of the award was levied against FTS except for $50,000 against Acker. A further aggravating fact in this case was that Acker testified in a deposition that he had been using marijuana and methamphetamines consistently about 3 times a week and during the 3 days prior to the accident when he had been off work and had smoked marijuana during that time. Acker also signed documents that he attested to having gone through various safety training that was not truthful. There were also some notations that FTS fabricated some of Acker's prior drug test results and credited him with training that he never completed. There was also some testimony that FTS told Acker to initial documents falsely indicating that he underwent new driver, defensive driver, and drug and alcohol training.

Plaintiff's attorney argued that FTS recklessly disregarded their own internal policies and procedures and had so many chances to take him off of the road, but they never did. The company did not enforce their own policies and procedures.

As of February 11, 2019, no appeal has been filed.

November, 2018 - $260 Million – Jefferson Trucking

In a third astronomical verdict, an Upshur County, Texas jury returned a new record verdict of $260 million in favor of the parents of Riley McThurson, who died when the vehicle he was driving struck a Jefferson Trucking flatbed that was carrying steel pipe and was blocking lanes in both directions as it backed into a private driveway. The driver, 24 year old Eric Wayne Jefferson, was charged with criminal negligent homicide.

This verdict again had *Reptile Theory* allegations. The investigation noted that the truck driver had been returning home from Ohio on an 17-hour drive in excess of the hours of service limitation under both Federal and State law. In this wrongful death suit, the Plaintiffs alleged that Jefferson Trucking was negligent in terms of their hiring, training, and supervising of their drivers as well as entrusting him to drive the vehicle when they knew, or should have known, that he was a reckless and incompetent driver.

As of February 11, 2019, no appeal has been filed.

October, 2017 - $54 Million – Universal Am-Can, Ltd.

This Cook County, Illinois case involves a tractor trailer which rear ended the Plaintiff who was driving southbound on Interstate 65 near Rensselaer, Indiana. Traffic was abruptly braking because a wrong way driver was traveling north in the southbound lanes. The Plaintiff who was rear-ended sustained neck and back injuries, including epidural steroid injections and then 3 cervical spine surgeries, including an anterior discectomy/fusion at C4-5 and an L5-S1 laminectomy and fusion. He also suffered significant knee

injuries requiring 3 surgeries and a total knee replacement on his left knee. The Plaintiff alleged post-traumatic stress disorder, depression, and anxiety damages. Past medical was $678,900 and lost time was projected at approximately $3 million dollars as Vice President for Mohawk Industries. In addition to the negligence allegations against the driver, Plaintiff alleged that the company was grossly negligent, or willful and wanton, in its hiring and retention of the driver due to his checkered driving history and prior felony conviction stemming from a road rage incident. Apparently, he had multiple moving violations and at least 2 "at fault" accidents, terminations by previous employers, and 3 suspensions of his CDL in the prior 5 years. $35 million dollars of the verdict was for punitive damages against Universal Am-Can, Ltd.

FEDERAL LAW/REGULATIONS – WEATHER - §392.14

Since many of the most significant damage awards recovered by Plaintiffs in settlements and verdicts, like the *Werner* verdict, relate to driving in adverse weather conditions, it is crucial to note that Section 392.14 of the Federal Motor Carrier Safety Regulations is a provision that Plaintiffs' attorneys use to argue that the driver and trucking company were at fault for the weather-related accident. This section is entitled Hazardous Conditions: extreme caution. It states that "Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction."

Plaintiffs' attorneys use the term extreme caution to substantially increase the Standard of Care from ordinary negligence. A key issue in depositions is what is deemed to be "hazardous conditions" by the driver and trucking company.

§392.14 continues and states that "Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated."

Based upon the second part of this provision, the driver must reduce speed when these conditions exist. Therefore, a defense that the driver is driving at the speed limit most likely would not be successful in an adverse-weather case. Further, plaintiff's attorneys will argue that the truck shouldn't even be on the road at all if the weather conditions become "sufficiently dangerous".

Plaintiff's attorneys may also utilize State law as well as the CDL requirements to fashion an argument that the driver was not using extreme caution and that the truck should never have been driven in the first place, or it should at least have been discontinued and not resumed until the commercial motor vehicle could have been safely operated.

BEST PRACTICES CHECKLIST OF 11 HOT BUTTON TRANSPORTATON ISSUES

There are hot button motor carrier issues that Plaintiffs' attorneys will assess and target in order to drive up astronomical transportation verdicts at trial. The following 11 issues must be investigated by the defense as part of an "emergency response" from the moment a catastrophic accident occurs. These issues must then be evaluated and defended in order to prevent aggravated and astronomical verdicts from occurring:

1) Fatigue. Plaintiff's attorneys often argue that there is only one explanation for an accident, and that is fatigue. Of course, the driver and company must comply with the Federal hours of service requirements. A new focus has been on Obstructive Sleep Apnea (OSA). Sleep apnea is not a

condition in either FMCSR 391.41 – Physical qualifications for drivers or 391.43 – Medical Examination: Certificate of Physical Examination. However, in the physical examination section, it does mention that "abnormal findings on physical examination may require further testing such as pulmonary tests and/or x-ray of chest".

There is a relatively new addition (Question #25) on the long form medical report driver questionnaire which says "sleep disorders, pauses in breathing while asleep, daytime sleepiness or loud snoring". However, this is a driver self report. The form states that the driver is to fill it out, but the examiner is to make further inquiries where appropriate. Plaintiffs typically first raise the issue of the qualifications of the medical examiner and then also question the thoroughness of the medical examination.

It is in the "Respiratory Dysfunction" portion of 391.41(b)(5) that sleep apnea is first mentioned. The medical examiner is required to refer the driver to a specialist for further evaluation (sleep study) if anything appears out of ordinary. Given the relative lack of experience regarding OSA of most examiners, it is believed that very few referrals are made.

2) Cell phones and distracted driving. The regulations are found at §392.80 and §392.82. Texting in any form is absolutely prohibited, even if hands-free. The Regulation permits cell phone usage under certain circumstances (cell phones must be hands-free, within reach, and must be able to receive or make a call with the press of only one button).

   Many motor carriers absolutely prohibit the use of cell phones. If there is any evidence that the driver in an accident is using their cell phone in any form, even if it is allowed by company regulation, that can directly lead to an aggravated jury verdict.

3) Alcohol and controlled substances. Jurors absolutely recoil at the idea that a driver can be under the influence of drugs or alcohol at the time of an accident. This issue typically comes up when there is no compliance with post-accident testing, FMCSR 382.303. With regard to alcohol, the regulations require that it is conducted within 2 hours, which is almost impossible because most drivers are not released from the scene or the outside time of 8 hours because a testing facility is not open or cannot be found. There is less of an issue with controlled substances which has a 32 hour window. There must be post-accident testing with any fatality or anytime a driver is cited where there is either disabling damage to any vehicle or immediate medical treatment away from the scene.

4) Maintenance. The keeping of scheduled maintenance records and the issue of maintenance generally is typically pursued by plaintiffs' attorneys. It is crucial to keep the documents for the required period of time pursuant to the Federal Regulations.

5) Training. It is crucial that the motor carriers properly train the drivers upon their hiring and to counsel drivers when they are found to be deficient in any particular area.

6) Preventability – Should we or shouldn't we? There is no Federal requirement that a trucking company perform a preventability analysis after an accident. However, Plaintiffs' attorneys use this analysis against motor carriers as evidence of negligence. There are 3 definitions of preventability and some of the trucking companies and motor carriers who use the terms "preventability" do not define it. A disclaimer should be considered to the preventability section of the motor carrier's manual which explains that it is not meant to set a civil or tort standard.

7) Beware of the *Reptile.* It is crucial that all drivers, Safety Directors, and 30(b)(6) company witnesses be prepared to withstand a *Reptilian* deposition by not admitting to the umbrella rule that the plaintiff's attorney asks about safety issues. The witness(es) cannot simply agree and say "yes" to questions about whether the Defendant violated safety rules and standards and needlessly endangered the community/public. This *Reptile Theory* is not about the actual damage to the Plaintiff as the corporate defendant is put on trial. The case boils down to community safety.

8) Documents, documents, documents. Document retention is crucial. The key to this is to comply with the document preservation timeframes within the Federal regulations and also to be consistent in your approach with respect to the preservation of documents. If the plaintiff sends in a 50+ item preservation letter, it would be a good policy to preserve the documents even if it is consistent with your policies and procedures to discard them. This could lead to a spoliation of evidence claim.

9) Personnel files. Even though §391.51 permits a separate personnel file to be combined with the driver qualification file, there is no requirement for a separate personnel file to be kept. The motor carrier needs to be careful about what comments and information is put in the driver files. Assume anything in the files will be seen by plaintiff's counsel after an accident.

10) Hiring retention. It is crucial to obtain the driver's crash history from the FMCSA through the Pre-Employment Screening Program ("PSP") prior to retention of the driver. The fee is minimal to obtain these records.

11) CSA scores. Although CSA scores are no longer public, there are old scores and it can be a subject of discovery. Although the defense will argue that CSA scores should never come into evidence and the FMCSA has made it clear with a disclaimer on the CSA website that the findings are not meant to be used in litigation, plaintiffs' lawyers will still attempt to use the CSA scores as crucial evidence in their case in chief that the motor carrier was deficient in certain of the 7 Basics, and scored lower than other similarly situated motor carriers.

The recent trend of $100 million-plus verdicts in trucking and transportation cases emphasize that Plaintiffs' attorneys utilize the *Reptile Theory* to put the trucking company and its policies and procedures on trial. They want the jury to change the behavior of the corporate defendant by rendering an astronomical jury verdict. In this attack, the trucking company is the focus of Plaintiffs' trial theme and closing argument. Plaintiffs' attorneys' trial themes have now shifted from analyzing the facts of the accident and injuries to the Plaintiff to the conduct of the Defendant. This is clearly evident in the *Werner Enterprises, FTS, Jefferson Trucking,* and *Universal Am-Can, Ltd.* verdicts from 2017 and 2018.

Recognition of the *Reptile Theory* is the key as the defense must first understand the trial tactics of the Plaintiffs' bar. The defense must be prepared to defend this type of attack well in advance of the moment the telephone rings advising that there has been a catastrophic accident and an emergency response is required. The Best Practices checklist of the 11 hot button transportation issues can be used as a framework for the investigation of the facts of the loss and then utilized in evaluating the liability exposure of the case. These recent astronomical verdicts underscore Plaintiffs' trial tactics of centering their attack on the violation of Federal and State law, as well as the trucking company's own policies and procedures. The argument made by the Plaintiffs' bar is that the truck driver should never have been hired in the first place, should never have been retained, and should not have been on the highway at the time of the accident. Plaintiffs' closing argument and position is that had the driver and truck not been on the highway at the time of the loss, this accident would never have occurred.

The defense must proactively diffuse this *Reptile Theory* argument by investigating and evaluating the items in the Best Practices Checklist as well as extensively preparing the driver and other corporate witnesses for this type of *Reptile Theory* attack. Based upon the information regarding these 2018 astronomical verdicts, it appears that the deposition testimony of the corporate defendants was extremely damaging to the defense and aggravated the jury verdict award. Under the *Reptile Theory*, the case is not lost at the trial, as it is lost in the deposition testimony phase of the case. Reptilian deposition preparation is the key as the witnesses should be prepared for deposition over a course of a number of preparation sessions to respond to community safety, and needlessly endangering the public/community questions. This will also help prevent punitive damages from being assessed by a jury.

As of the time of the submission of this paper, Keenan and Ball's website on the *Reptile* (reptilekeenanball.com) reflects $7.7 billion in *Reptile* verdicts and settlements. The utilization of the Best Practices Checklist of 11 items will go a long way to counter this *Reptile Theory* attack.

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