

Who Let This Guy Behind the Wheel of a Truck?

Understanding Negligent Hiring, Entrustment and Retention Claims against Trucking Companies

By: Michael L. Goldberg

A commercial truck driver runs through a red light and collides with a vehicle lawfully entering the intersection. This accident is the third time in six months that the truck driver has failed to obey a traffic signal while driving a commercial vehicle. Why did the trucking company allow this driver to get behind the wheel of a truck given his prior driving history? This question embodies the concept behind the claims of negligent hiring, entrustment, and retention.

I.

Definitions of Negligent Hiring, Entrustment and Retention

Negligent hiring involves the claim that the trucking company should not have hired the driver because the company should have known that the driver was incompetent at the time of his application for employment. Negligent entrustment is a slight variation on this theme and encompasses the allegation that the trucking company should not have entrusted a truck to the driver because of his inexperience or his inability to safely operate a commercial vehicle. Negligent retention occurs when a trucking company learns during the course of a driver's employment that the driver is incompetent but continues to retain the driver and allow him to operate a commercial vehicle. For the purposes of this discussion, all three claims will be referred to simply as negligent hiring and retention.

II. Federal Regulations Governing Background Checks on Drivers

Before a trucking company hires a driver, it has a duty to the public to ascertain the competence of the driver and make sure that he is qualified to operate a commercial vehicle.¹ The purpose of this duty is to promote highway safety and prevent motor vehicle accidents.² Federal regulations require an interstate motor carrier to obtain certain background information on a driver before hiring him.³ Most jurisdictions, through rules issued by a state Public Service Commission or a similar entity, have adopted the federal regulations as guidelines for intrastate carriers and require intrastate carriers to meet these federal minimum standards.⁴

Under the federal regulatory scheme, a driver applying for employment with a trucking company must complete a comprehensive application listing any moving violations or accidents for the three-year period prior to the date of the application and identifying each motor carrier for whom the driver has worked for the past ten years.

Within thirty days of hiring a driver, the trucking company must make inquiries with the driver's prior employers for the three-year period prior to the date of his employment and must obtain a moving violations report ("MVR") from any state issuing a license to the driver for the preceding three-year period. The company must verify that the driver is physically able to operate a commercial vehicle by obtaining a medical examiner's certificate to this effect. The company must either give the driver a road test to determine his ability to operate a commercial vehicle or confirm that he has a commercial driver's license issued from a jurisdiction that requires the driver to pass a road test as part of its licensing procedure. A company is also required to make sure that the driver is knowledgeable of the proper manner of securing cargo.

III. Annual Review of Driving Record

During the course of a driver's employment, the trucking company must perform an annual review of the driver at least every twelve months to determine if the driver is still qualified to operate a commercial vehicle. In conjunction with this review, the driver must provide a certified list of all moving violations and accidents for the preceding twelve-month

period. The company is required to run an MVR on the driver to verify this information. The company must then consider the driver's accident record and driving history in deciding if the driver is still qualified to operate a commercial vehicle. The trucking company must give great weight to violations that indicate that the driver has exhibited a disregard for the safety of the public, such as speeding, reckless driving, or operating a vehicle while under the influence of alcohol or drugs.

IV. Driver's Qualification File

The trucking company is required to maintain a driver's qualification file on each driver. The driver's qualification file must contain: (1) the driver's application for employment; (2) a written record of inquiries to prior employers and any responses received from them; (3) the pre-employment MVR on the driver; (4) the results of any road test or a copy of the driver's CDL; (5) the driver's annual review; (6) the MVR on the driver related to the annual review; (7) the driver's certified list of moving violations and accidents provided in conjunction with the annual review; and (8) the medical examiner's certificate of physical qualification. The documents in the driver's qualification file must be kept by the company for as long as the driver is employed by the company and for an additional three-year period, except that documents related to the annual review may be discarded following a subsequent annual review and the medical examiner's certificate may be discarded every two years following the replacement with a new certificate.

V Minimum Standards for Driver Qualifications

The federal regulations provide a minimum standard for determining the qualifications of a driver. According to these regulations, a driver is qualified to operate a commercial vehicle if he (1) is at least 21 years old; (2) can read and understand the English language sufficient to complete necessary reports, converse with the public and understand traffic signs; (3) can by reason of experience and/or training operate safely a commercial vehicle; (4) is physically qualified to operate a commercial vehicle; (5) has a valid CDL; (6) has completed the driver's application for employment and has provided the company with the required list of prior moving violations and accidents; (7) is not disqualified under any federal regulation; and (8) has successfully completed a road test or has a CDL from a jurisdiction that requires the driver to pass a road test as part of its licensing procedure. The only disqualifying offenses contained in the federal regulations are certain crimes committed while driving a commercial vehicle and violations of out-of-service orders. A driver is disqualified for at least a year if he drives a commercial vehicle while under the influence of alcohol or drugs, transports controlled substances in a commercial vehicle, leaves the scene of an accident while operating a commercial vehicle or commits a felony involving the use of a commercial vehicle. A driver is also disqualified for at least 90 days if he violates an out-of-service order.

VI. Claims for Negligent Hiring and Retention

If the driver fails to meet the minimum standards required by the federal regulations, then the trucking company can clearly be held liable for injuries resulting from the driver's operation of a commercial vehicle under a theory of negligent hiring or retention. The real issue in most cases concerns the trucking company's liability for hiring a driver who has been involved in several prior accidents or has prior moving violations but has not committed a disqualifying offense under the federal standards. Because the federal guidelines are silent, with the exception of the previously mentioned disqualifying offenses, as to the number or type of moving violations or accidents which would render a driver incompetent or unfit to drive a commercial vehicle, the trucking company must decide based on its own policies and procedures if a driver is capable of operating a commercial vehicle based on the driver's history, experience and training.

The company is liable for negligent hiring or retention if the hiring of the driver creates an unreasonable risk of harm to others given the driver's prior record, or if the company hires a driver in violation of its own policies and procedures, and this negligence proximately causes plaintiff's injuries. If the trucking company fails to investigate the driver's qualifications as required by the regulations, the company is deemed to have knowledge not only of the violations and accidents disclosed to it, but also of any facts about the driver's history which would have been revealed had the company performed the appropriate background checks. This doctrine of imputed knowledge prohibits the company from being rewarded for its failure to discover a driver's record when it has a duty to obtain this information.

VII. The Effect of the Trucking Company's Admission of Agency

Negligent hiring and retention claims are simple negligence causes of action based on a trucking company's direct negligence in hiring or retaining an incompetent driver rather than on vicarious liability for the driver's actions. As such,

the company's liability is not dependent upon a finding that the driver was acting within the scope of his employment when the tortious act occurred. However, most jurisdictions will not allow a plaintiff to bring claims for negligent hiring and retention when the trucking company admits an agency relationship with the driver. The basis for this rule is that a company's admission of agency establishes the liability link from the negligence of the driver to the carrier rendering proof of negligent hiring and retention unnecessary and irrelevant. An exception to this general rule exists when the plaintiff asserts a separate claim for punitive damages based on the issues of negligent hiring and retention. In this situation, evidence of negligent hiring and retention will be presented to the jury as a basis for an award of punitive damages.

VIII. Non-vehicular Criminal Background Checks

While a trucking company clearly has a duty to investigate the driving experience and qualifications of a driver, most jurisdictions have held that the company does not have a duty to investigate the driver's non-vehicular criminal background. Because drivers are hired to transport freight and not to interact with the public as the company's representative, a trucking company does not have to perform an independent investigation into a driver's criminal past to determine if he is a violent individual who may attack or sexually assault a person. It would also be cost-prohibitive for a trucking company to conduct a criminal search on each driver since the company would have to review court records from every jurisdiction with which the driver had any significant contacts to complete the search. Accordingly, a trucking company cannot usually be held responsible under a negligent hiring or retention theory for an intentional assault inflicted by a driver.

IX. Conducting Discovery on Negligent Hiring and Retention Claims

The process of supporting a claim for negligent hiring or retention begins with requesting the production of the driver's qualification file from the trucking company during the course of discovery. Plaintiff's counsel should examine these documents to make sure that all of the required federal forms were completed and retained by the trucking company and should review the file for any "red flags" about the driver's qualifications. Red flags warranting further investigation include providing information in the driver's application which is inconsistent with the MVR or responses from prior employers, working for several different trucking companies over a short period of time, possessing more than one CDL, or having time gaps in a driver's employment history.

Along with the driver's qualification file, counsel should request a copy of any employee manual, driver's guide or other policy or procedure manual concerning the trucking company's procedures for hiring and retaining drivers. After obtaining this documentation, counsel should proceed with scheduling the deposition of the company's safety director. Most trucking companies designate an individual as a safety director, and this person is charged with the responsibility of supervising the company's compliance with all safety requirements including regulations pertaining to driver qualifications. The focus of the safety director's deposition should be general inquiries about the company's safety program as well as specific questions about problems with the driver. The final step in building a claim for negligent hiring or retention is retaining a trucking expert who can testify about the trucking industry standards and the applicable federal regulations. A trucking expert should be knowledgeable about industry requirements for hiring drivers and the minimum standards required by the federal guidelines. Although it is usually not necessary to have a trucking expert until after initial discovery and depositions are completed, counsel may want to hire a trucking expert early in the litigation for consultation purposes even prior to engaging in discovery or taking the safety director's deposition if counsel is unfamiliar with issues concerning driver qualifications.

X. Conclusion

A plaintiff who is involved in a tractor-trailer accident always has a potential claim for negligent hiring, entrustment or retention against the trucking company depending on the qualifications of the truck driver. Because a trucking company is required by federal regulations to investigate its driver's prior driving history and has a duty to hire competent drivers to protect the public on the highways, the company can be held directly liable for hiring an incompetent driver who causes an accident. Counsel should always obtain a driver's qualification file to make sure the driver is qualified to operate a tractor-trailer and conduct any necessary discovery on this issue. You never know who the trucking company has let behind the wheel of the truck. A good attorney always finds out for himself. .

1. *Morris v. JTM Materials, Inc.*, 2002 WL 535349(Tx. 2002). 2. *Guidry v. National Freight, Inc.*, 944 S.w.2d 807, 810 (Tx. 1997). 3.49 C.ER. § 391 *et. seq.* 4. For expmple, *See Transportaion*

1-391 *et. seq.* 5.49 c.ER. § 391.21. 6.49 C.ER. §391.23. 7.49 C.ER. § 391.41. & 49391.43. 8.49 C.ER. § 391.31. & 391.33. 9.49 c.ER. § 391.13. 10.49 c.ER. § 391.25. 11. 49 C.ER. § 391.27. 12. 49 C.ER. § 391.25. 13. 49 c.ER. § 391.25(b)(2). 14. 49 C.ER. § 391.25(b)(2). 15. 49 C.ER. § 391.51(a). 16. C.ER. § 391.51(b). 17. C.ER. § 391.51(c). 18. C.ER. § 391.1 (a). 19. C.ER. § 391.11(a). 20. C.ER. § 391.15(c). 21. C.ER. § 391.15(d). 22. *Lakes v. Minor*, 620 N.E.2d 1015 (Ohio 1993). 23. *Morris v. JTM Materials, Inc.*, 2002 WL 535349 (Tx.). 24. *Smith v. Tommy roberts Trucking Co.*, 435 S.E.2d 54, 57 (1993). 25. *Id.* at 57. 26. *Boyd v. L. G. Dewitt Trucking Co., Inc.*, 405 S.E.2d 914 (N.C. 1991). 27. *Morris* at 14. 28. *Cole v. Alton*, 567 ESupp. 1084 (N.D. Miss. 1983); *Bartja v. National Union Fire Ins. Co. of Pittsburgh, PA*, 463 S.E.2s 358 (Ga. 1996). 29. *Bartja* at 361. 30. *Smith* at 57. 31. *Id.* at 57. 32. *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316 (Col. 1992); c.c. v. *Roadrunner Trucking, Inc.*, 823 ESupp. 913 (D.Utah 1993); *Guidry v. National Freight, Inc.*, 944 S.w.2d 807 (Tx. 1997). 33. *Connes* at 1321-1322. *but compare, malorney v. B&L Motor Freight, Inc.*, 496 N.E.ed 1086 (Ill. 1986) (Because trucking company did not present any evidence that it would be unduly burdensome to conduct criminal background checks on iths drivers, company can be held responsible for failing to discover that driver who raped hitchhiker had long history of sexual crimes). 34. c.c. at 924. 35. *Id.*

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