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Entrustment claim is OK in $2.5M death case

Driver's record let into evidence

By: Douglas Levy in News Stories September 26, 2014

When an 83-year-old man attempted to cross an intersection in Shelby Township on his bicycle, he was struck and killed by a truck that was turning right.

His estate sued the truck driver for negligence and the parent trucking company for vicarious liability, under Michigan's owner's liability statute, because of the driver's negligence. The trucking company admitted liability.

But plaintiff's attorney Steven M. Gursten later amended the complaint to include another claim: negligent entrustment.

He argued that the trucking company was negligent for allowing the driver, whose bad driving record was not checked by the company upon his hiring, to use one of its trucks. In addition, the truck driver's personnel record indicated he had been cited for speeding and improper use of equipment.

A Macomb County jury in November 2012 returned a $2.55 million verdict. The defense appealed, arguing that plaintiff only added the negligent entrustment claim to introduce evidence of the driver's record, which was otherwise inadmissible, and use that evidence to further sway the jury.

But Gursten, of Michigan Auto Law in Farmington Hills, said that he had no choice but to amend the claim to include negligent entrustment. He said that MCL 600.6304(1)(b), the statute that abolished joint and several liability, requires a jury to allocate a "percentage of the total fault of all persons that contributed to the death or injury …"

"It would be completely unfair to the plaintiff and, actually, to the defendant driver if a jury has to allocate 100 percent fault, but you're leaving out a responsible party," Gursten said. "There can't be comparative fault if you're not allowed to have the jury also assess the direct negligence of the trucking company, which is really where they were coming from in the appeal."

He added that the Legislature has "forced us to do this" with MCL 600.6304.

"Defendants love this in medical malpractice cases because they abolished joint and several liability," Gursten said. "And this is the other side of it, and this is what the Court of Appeals grasped: evidence of direct negligence against a company must always be admitted in states that have abolished joint and several liability and that have comparative fault statutes."

The Michigan Court of Appeals upheld the verdict and ruled that under case law, the plaintiff could allege both the vicarious liability and negligent entrustment claims. The unpublished case is *Modzelewski-Shekoski v. Bindig, et al.* (MiLW No. 08-86472, 3 pages). Judges Donald S. Owens, Kathleen Jansen and Peter D. O'Connell were on the panel.

Gursten, who is involved with the Association of Plaintiff Interstate Trucking Lawyers of America and the Truck Accident Attorneys Roundtable, said that filing a negligent entrustment claim in trucking accidents is "a critical necessity" because some trucking companies can be considered "chameleon carriers." (Gursten did not characterize Allied Excavation, the parent trucking company in *Modzelewski-Shekoski,* as one of those carriers.)

"What's happening is, they rack up this really bad safety record and they close shop as Company A on a Friday and then they reopen as Company B on Monday with a new name but the exact same drivers and the exact same trucks and the exact same managers, and they do it almost like a mutual fund to wipe away the bad record and start fresh," he said.

"So what happens if you get a big verdict and the trucking company decides to stop doing business? You have to have that allocation of fault as to the driver and the company so you have at least some responsible party that you can pursue."

The Macomb County jury apportioned fault at 50 percent for truck driver Michael Bindig, 20 percent for Allied Excavation and 30 percent for plaintiff.

In addition, Gursten said that plaintiff's attorneys who primarily handle no-fault cases involving car-to-car or car-to-pedestrian accidents should know that truck-related cases require extra work and know-how.

"You have to learn to speak the language. Most lawyers don't know there's a statute in Michigan that requires trucking companies to run their own drivers' records once a year," he said.

"You have to be able to look at the driver's personnel file as a basis for whether or not you have a negligent entrustment claim, and that's the same whether it's a negligent supervision claim or a negligent maintenance claim. … Truck accident cases are not car accident cases with bigger policy limits."

He added that plaintiff's lawyers should also be on guard if a defense attorney does try to frame the complaint as "a big car accident case, because they *don't* want lawyers looking at what the companies did wrong.

"So all they do is focus on those three to five seconds in which the wreck took place and they want the jury's focus to be on those three to five seconds," Gursten said. "They don't want to focus on things like who's looking at the driver, who's making sure the brakes are working on this truck, all these things that could contribute to the crash itself that are part of that direct chain of events."

James G. Gross, the Detroit-based attorney who represented the defendants on appeal, said he anticipates appealing the decision at the Michigan Supreme Court.

He said he is hoping that the high court overrules *Perin v Peuler (On Rehearing)*, the 1964 decision that serves as the parent case for the alleging both a claim based on the owner's liability statute and a claim of negligent entrustment.

"The majority rule in this country is, if the employer admits vicarious liability, and if adding the cause of action cannot expand or change the employer's liability, then you may not pursue a negligent entrustment hiring claim because all you're doing is injecting otherwise irrelevant and prejudicial evidence, in particular the driver's record," Gross said.

A Verdicts & Settlements report on *Modzelewski-Shekoski v. Bindig* can be found here..

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Full-text Court Opinions

- Modzelewski-Shekoski v. Bindig, et al. MiLW No. 08-86472

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- Negligence – $2.5M verdict affirmed in fatal truck-bicycle collision case