

**FEDERAL MOTOR CARRIER SAFETY ACT [FMCSA]:
PROOF OF NEGLIGENCE PER SE**

GTLA seminar - July 25, 2005

The FMCSA sets the national standard for all tractor-trailers traveling interstate. 49 CFR § 390.3(a) et al. See www.fmcsa.dot.gov [examples attached hereto as Exhibit 1]. Georgia has also adopted the FMCSA. A certified copy of the state rules and regulations may be submitted into evidence. See Transportation Rules of Georgia Public Service Commission, Subchapter 4-1: Motor Carrier Safety. The Court is required to take judicial notice of state regulations upon motion. Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600 (1999). See Motion attached as Exhibit 2. Violations of the state rules are a criminal misdemeanor. Id. at 4-1-1.3; O.C.G.A. § 40-5-147. The federal rules are the primary rules for consideration when the tractor-trailer is traveling interstate.

The Georgia Courts have recognized the applicability of the FMCSA. Mabbett & Sons, Inc. v. Ripley, 185 Ga. App. 601, 365 S.E.2d 155 (1988); Stanley v. Fiber Transp., Inc. 221 Ga. App. 171, 470 S.E.2d 767 (1996). Violation of an applicable statute is negligence per se. Mabbett, supra at 603. When the FMCSA is admitted into evidence, the court may read the rules to the jury. Osburne Truck Lines, Inc. v. Langston, 454 So.2d 1317, 1324 (Ala. 1984).

The FMCSA must be relevant to the charges of negligence involved in the case and must be adjusted to the facts. Parker v. R & L Carriers, 253 Ga. App. 628, 560 S.E.2d 114 (2002). For instance, the FMCSA violations may involve driving over hours, failure to maintain records of driver competency in the file, or failure to maintain drivers' logs and supporting documentation. These rules are set forth in 49 CFR § 390.1 et al. Evidence should demonstrate how these violations are

relevant to the cause of the injury alleged in a case. See Plaintiff's Response to Defendant's Motion In Limine, attached hereto as Exhibit 3.

The motor carrier is responsible for requiring its drivers to comply with the FMCSA. 49 CFR § 390.11. The FMCSA's driver qualification requirements are minimum standards in addition to any state regulations pertaining to truck driving safety. 49 CFR § 390.9.

Only qualified drivers can be hired for driving an interstate truck. 49 CFR § 391.11 et seq. The rules require background checks, road testing, physical examinations, and collection of certain records. Id. These are minimum rules for qualification as a driver. 49 CFR § 391.1(a). Both the motor carrier and the driver must comply with these rules. 49 CFR § 391.1(b). The motor carrier must maintain the required information in its file on the driver.

The FMCSA also governs the driving of tractor-trailers. 49 CFR § 392.1 et seq. These rules apply both to motor carriers and to the drivers. 49 CFR § 392.1. The FMCSA establishes the minimum standard for operating a tractor-trailer and it preempts any lower standards. 49 CFR § 392.2.

Fatigued or ill drivers are not allowed to operate a tractor-trailer. 49 CFR § 392.3. A driver's schedules between certain locations must conform with the speed limits. 49 CFR § 392.6. The rules established the amount of time that a driver may drive. 49 CFR § 395.3. The rules also require that the driver maintain a daily driving log and that he provide this log with supporting documentation to the motor carrier for their review. The rules describe the form that is to be utilized and state in detail how the logs are to be completed. 49 CFR § 395.8.

Until recent revisions, the driving time limitations included a 10 hour driving limitation, a 15 hour on-duty limitation, and a 70 hour limitation of on-duty time for companies that operate 7

days a week. The 10 and 15 hour limitation required that drivers were limited to driving for 10 hours or being on-duty for 15 hours after eight hours of off-duty time. The CFR defines the difference between “driving” and “on-duty” time and furthermore, describes what activities are included in each status. 49 CFR §395.3; see also Gaibis v. Werner Continental, Inc., 565 F. Supp. 1538 (W.D.Pa. 1983). The 2003 revisions have changed the maximum driving time requirements. Maximum number of hours is 11 hours after 10 hours off duty. 39 CFR §395.3.

Practice Points

1. When investigating action, send certified letter to motor carrier requesting that all documentation and records required under the FMCSA for the driver, the truck and the trailer be preserved.
2. Send Request for Documents with the Complaint that itemizes the records required by the FMCSA for the driver, the truck and the trailer.

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

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|-----------------------------|---------------------------------|
| JOSEPH HANCOCK, |) |
| |) |
| Plaintiff, |) |
| |) CIVIL ACTION NO. CV01-0976-FR |
| vs. |) |
| |) |
| BOWMAN GIN COMPANY, INC. |) |
| LOMAN ABRAHAM, SR. |) |
| AND GULF INSURANCE COMPANY, |) |
| |) |
| Defendants. |) |

PLAINTIFFS' MOTION FOR JUDICIAL NOTICE
OF THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS

COME NOW Plaintiffs and move the Court take judicial notice of the application of Federal Motor Carrier Safety Regulations.

1. As a governmental regulation, this Court must take judicial notice of the Federal Motor Carrier Safety Regulations. 49 C.F.R. §382, et seq.; Dayoub v. Yates-Astro Termite Pest Control Company, 239 Ga. App. 578, 521 S.E.2d 600 (1999) cert. denied.

2. The Defendants' tractor-trailer rig was involved in interstate commerce. Defendant Abraham had begun his work on the day of the accident by picking up a tanker of chemicals in Orangeburg, South Carolina. He carried the tanker through Georgia to the port of Jacksonville, Florida. The incident injuring Hancock occurred in Georgia on Defendant Abraham's return trip.

Wherefore, Plaintiffs request that this motion be granted.

This _____ day of _____, 2002.

EUGENE C. BROOKS, IV
Georgia Bar No. 08-4750
Attorney for Plaintiff

Brooks Law Firm
313 West York Street
P.O. Box 9545
Savannah, GA 31412
912/233-9696

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**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION IN LIMINE**

COMES NOW Plaintiff and responds to the Defendant's motion according to the specific paragraphs set forth in the motion as follows:

1. Plaintiff consents to the exclusion of any reference to liability insurance.
2. Plaintiff consents to the exclusion of the issuance of the traffic citation, but states that he does intend to offer testimony of the investigating officer, the investigating officer's opinion, a copy of a redacted incident report and the facts surrounding the investigation of the officer which form the basis of his opinion. Furlong v Dyal, 246 Ga. App. 122, 124-25, 539 S.E.2d 836 (2000).
3. Plaintiff opposes the motion which seeks to exclude the Federal Motor Carrier Safety Regulations [FMCS]. The Plaintiff has alleged violation of the FMCS in its allegations of negligence per se. The FMCS regulations are safety regulations and violation of these regulations are a basis for liability and punitive damages. Wang v Marziani, 885 F Supp. 74 (S.D.N.Y. 1995) [Punitive damages have been imposed when a truck driver logged more time than the allowed 70 hours during an 8 hour day].

The opinion cited by Defendant does not refer to the admission of evidence, but to a jury charge. Parker v R&L Carriers, 253 Ga. App. 628, 560 S.E.2d 114(2002). The admission of

evidence is a discretionary decision made by the trial court. OCGA § 24-2-1. All relevant evidence should be admitted. It is error to exclude relevant evidence. Any evidence is relevant which logically tends to prove or disprove any material fact which is at issue in the case, and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant. P. Milich, Ga. Rules of Evidence § 6.1 (1995 and Supp. 2001) citing e.g. Kelly v Floor Bazaar, Inc., 153 Ga App. 163, 165, 264 S.E.2d 697, 699 (1980). The Georgia courts have followed a very liberal view and do not exclude evidence are irrelevant merely because it is logically weak or of little probative force. Milich, supra at 48 citing e.g. Ely v State, 192 Ga. App. 203, 384 S.E.2d 268 (1989). Evidence is admissible even if it falls short of proving the fact sought to be established if the evidence, either itself or in connection with other evidence, tends to prove the matter at issue. Id. at n. 2. The benefit of the doubt is cast in favor of admissibility. Id. at 48 citing Norman v State, 197 Ga.App. 333, 398 S.E.2d 395 (1990).

The FMCS applies to all trucks engaged in interstate commerce. 49 C.F.R. §390.3(a). The Defendant Bowman Gin's truck was engaged in interstate commerce. The Defendant Loman Abraham was driving the truck from South Carolina to Florida. This was a regular route of his. He maintained a log book in accordance with FMCS. Bowman Gin was legally obligated to inspect this log book and to be aware of the driving time of Loman Abraham.

The FMCS regulate how much time a driver may drive over a set period of time. The purpose of this regulation is to protect the public from fatigued truck drivers. Fatigued drivers are a danger to the public and fatigued has been implicated in many truck accidents.

In the instant case, the driver Loman Abraham was driving in excess of the hours allowed by the FMCS. Abraham lost control of his truck, which jack knifed into the median where Plaintiff Joe Hancock was working. Abraham contends that he was confronted with a sudden emergency and

that a yellow car suddenly swerved in front of him and required him to suddenly hit the brakes, which caused the jackknife. An eye witness co-worker will testify that the yellow car was always in the left traffic lane and that Abraham almost drove over the yellow car, before he suddenly hit his brakes and then left the roadway.

A sleep expert, Dr. Lankford, has reviewed evidence obtained in this case See Lankford affidavit attached to Plaintiff's Fourth Supplement In Response to Defendant's Motion for Partial Summary Judgment. The evidence includes a review of Abraham's log books. Also, a review of the testimony of Abraham and of the affidavits submitted by the witnesses to the incident. The evidence shows that Abraham had driven of many hours in excess of those allowed by the FMCS and that he had begun his day at 1 a.m. on the morning when Joseph Hancock was injured at 2:30 p.m. on the afternoon of the same day. Also, the sleep expert noted the discrepancy in the versions of the incident of the witness and of Abraham. In his opinion, Abraham would have been fatigued at the time of this collision and this fatigue would explain why he is confused about the appearance of the yellow car, which others saw in the left lane, but which he did not notice. Also, this fatigue would explain why Abraham was unable to make corrections to his speed and thus avoid the resulting loss of control of his truck.

Plaintiff Joe Hancock has alleged that Bowman Gin and Loman Abraham were negligent and negligent per se. Additionally, Hancock seeks punitive damages in addition to special and general damages. The punitive damage allegations contend that Abraham and Bowman Gin knew of Abraham's excessive driving hours which were in violation of federal standards and that this is evidence of conscience indifference to the consequences which would support punitive damages. Dr. Lankford's opinion testimony demonstrates the relevance of the excessive driving hour violations.

The evidentiary issue is whether the FMCS regulation violations are relevant to the allegations of Plaintiff. OCGA § 24-2-1. The FMCS regulations are relevant to the allegations and would tend to prove negligence, negligence per se and punitive damage allegations when connected to other evidence. P. Milich, Ga. Rules of Evidence § 6.1 (1995 and Supp. 2001). Standards and regulations are commonly admitted into evidence to establish the applicable standard of care. Dayoub v Yates Astro, 239 Ga. app. 578, 580-82, 521 S.E.2d 600 (1999). [Error to exclude national standards on termite control] In the instant case, FMCS is evidence of the standard of care for interstate trucking.

The federal government imposes mandatory commercial vehicle safety requirements. 49 U.S.C. §§ 31301-31504. The federal Department of Transportation has promulgated the FMCS. 49 C.F.R. Chapter II. The Georgia Public Service Commission (PSC) is authorized to regulate motor carriers. OCGA §46-7-1 et seq. The PSC is a quasi legislative body and its rules and regulations have the force and effect of law. OCGA §§ 46-7-26 and 46-7-27; Georgia Public Service v Smith Transfer Company, 207 Ga. 658 (1951); Georgia Public Service Commission v Jones Transportation, Inc., 213 Ga. 514 (1957). The PSC has generally adopted the FMCS's rules governing the safe operation of motor carriers. See Transportation Rules of the Georgia Public Service Commission, subchapter 4-1 adopting the FMCS sections 391-395 at sections 4-1-391, -392, -393, -394, -395 attached hereto at Exhibit A. Section 4-1-395 is entitled "Motor Carrier Safety Regulations- Hours of Service" and adopts the excessive hour regulations of the FMCS. The trial may take judicial notice of regulations in the Code of Federal Regulations which establish a standard of care. Donaldson v Dept. of Transportation, 236 Ga. App. 411, 413, 511 S.E.2d 210, 213 (1999).

Violation of the FMCS and the parallel state regulations is a misdemeanor and is evidence of negligence per se. JR Mabbett & Son, Inc. v Ripley, 185 Ga. App. 601, 603, 365 S.E.2d 155, 157

(1988); Southern Railway Co. v Martin, 125 Ga. App. 653, 188 S.E.2d 819 (1972)[Error not to instruct the jury on PSC regulations]. Regulations which have been adopted by a state regulatory agency have the force of law. Walter v Orkin Exterminating Co., 192 Ga. App. 621, 622-23, 385 S.E.2d 725, 726-27 (1989). This court must take judicial notice of these rules and regulations which have been adopted by the pertinent state agency charge promulgating these regulations. Dayoub, supra. 239 Ga. App. at 581-82.

The remaining issue is one of proximate cause. Proximate cause is peculiarly a jury question except in plain and indisputable cases Rowlette v Paul, 219 Ga. App. 597, 599-600, 466 S.E.2d 37 (1995) citing Bussey v Dawson, 224 Ga. 191, 193, 160 S.E.2d 834 (1968)[alleged violation of city ordinance]; Beringause v Fogleman Truck Lines, Inc., 200 Ga. App. 822, 409 S.E.2d 52 (1991). A contributing cause can be a proximate cause without being the primary or sole cause of the injury. Brown v Macheers, 249 Ga. App. 418, 547 S.E.2d 759, 764 (2001); Humphreys v Kipfmiller, 232 Ga. App. 572, 573, 515 S.E.2d 87 (1999); Kimberlin v PM Transport, Inc., 264 Va. 261, 267-68, 563 S.E.2d 665 (2002)[Personal injury claim with alleged FMCS violation by truck driver]. The jury can be charged with the applicable C.F.R. and the need to find proximate cause as a basis for liability. Wallace v Ener, 521 F.2d 215, 221 (5th Cir. 1975)[Ga. law]; Lott v Smith, 156 Ga. App. 826, 827-28, 275 S.E.2d 720 (1980). The proximate cause issue does not concern the admissibility of the FMCS. The issue of the appropriateness of any submitted jury charges containing excerpts from the FMCS is an issue which the court would have to consider at the time of the charge conference.

In order for the regulatory violation to be a basis for a jury charge, then the violation of the statute must be a proximate cause of the injury. Southeast Transport Corp. v Hogan Livestock Co., Inc., 133 Ga. App. 825, 212 S.E.2d 638 (1975)[Inoperative speedometer was not relevant to improper passing that caused the injury]. In the instant case, the issue of proximate cause is a jury issue

because Dr. Lankford has explained how excessive driving was a likely contributing cause to the injury suffered by Joe Hancock. This explanation was not present in the testimony in Parker or Southeast Transport.

Defendants also attack the opinion evidence of Dr. Lankford, however, they have not moved to exclude this testimony. Opinion evidence is admissible on facts which would be helpful to a jury. Dayoub, supra, 239 Ga. App. at 580-82; OCGA §24-9-67. It is error to exclude such testimony when a witness has the qualifications of an expert. Id.; see also Milich, supra, §15.3. The court has discretion to determine whether a witness has expert qualifications. Once admitted, the weight to be given to an expert witness's testimony is normally for a jury to decide. Milich, supra, §15.4.

In the instant case, Dr. Lankford is qualified to render an expert opinion. He has earned a Ph.D. with a doctorate in psychology. He is a diplomat on the American Board of Sleep Medicine. He is also director of the Sleep Disorders Center of Georgia in Atlanta. His testimony on matters within his expertise, would be admissible. Dayoub, supra; Sinkfield v Oh, 229 Ga. App. 883, 495 S.E.2d 94 (1997). Sleep deprivation and its effects would be within his expertise. His testimony presents a jury issue. Milich, supra, §15.4.

While it is true that Plaintiffs have alleged that Defendants were driving too fast for conditions, failed to keep a proper lookout and failed to keep his vehicle under control, the failure to comply with federal/state safety regulations also contributed to these actions and to the injury of Joe Hancock. Defendants try to create an artificial barrier between the probability of the truck driver's slow reactions and inattentiveness caused by his sleep deprivation, the safety regulation violations and the state uniform of the road statutory violations. All of these violations operate together as contributing causes to Joe Hancock's injury.

Finally, Defendant argues that there is no connection between the negligent performance review and the incident. However, this argument is better suited for a motion for summary judgement or directed verdict. The federal regulations require the employer, in this case, Bowman Gin, to review the driving record and the log of its drivers, including Loman Abraham. In this case, Bowman Gin retained Loman Abraham although he was a chronic speeder and although he was driving excessive hours. Bowman Gin knew about this driving history of Loman Abraham and apparently condoned this behavior the risk that others were placed due his recklessness and behavior.

This _____ day of _____, 2002.

EUGENE C. BROOKS, IV
Georgia Bar No. 084750
Attorney for Plaintiff

Eugene C. Brooks, IV, P.C.
P.O. Box 9545
Savannah, GA 31412
912/233-9696

