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VOLUME 15 : JULY 2015

A NEWSLETTER FROM THE PERSONAL INJURY ATTORNEYS AT PARR RICHEY OBREMSKEY FRANDSEN & PATTERSON

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PROVING LIABILITY USING THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS

by John McLaughlin

Building a case against a trucking company and its driver can be a daunting task when liability is contested by the company and its insurance carrier. Indiana law mandates the simple rules we all should know: obey the speed limit, stop at lights and signs, make safe turns and change lanes safely. When these basic "Rules of the Road" are violated and result in a collision, liability should be clear. However, things are not always that easy. Major collisions and pileups on our interstates and highways often involve large commercial vehicles and tractor-trailers that are subject to the Federal Motor Carrier Safety Regulations ("FMCSRs"). These crashes can be complex with multiple proximate causes that result in damages and personal injuries. Establishing the trucking company's violations under the FMCSRs can win or lose an injury victim's case. It is important to identify the FMCSRs that may be involved and include them in your final instructions to the jury.

Our legislature incorporated the FMCSRs into law in Indiana pursuant to I.C. § 8-2.1-24-18. This statute states FMCSRs "must be complied with by an interstate and intrastate motor carrier of persons or property throughout Indiana." *See* I.C. § 8-2.1-24-18(a). Specifically, the statute incorporates 49 CFR Parts 40, 375, 380, 382 through 387, 390 through 393, and 395 through 398. These regulations are vast and complicated to say the least, but are intended to reduce the large number of commercial motor vehicle crashes that occur every year in Indiana and across the United States.

Violations of the FMCSRs can be used at trial to prove negligence. The legal doctrine of negligence *per se* provides that an unexcused or unjustified violation of a duty dictated by statute is negligence *per se*. *Indiana Trucking v. Harber*, 752 N.E.2d 168, 172 (Ind. Ct. App.

(Continued on page 2)

John McLaughlin

PROVING LIABILITY USING THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS (Continued from cover)

2001). When a statutory duty exists, the trier-of-fact must consider whether the breach of such duty was a proximate cause of the injury. *Id.*

In order for an injury to be the proximate result of a statutory violation, the injury must have been a foreseeable consequence of the violation and would not have occurred if the requirements of the statute had been observed. *Town of Montezuma v. Downs,* 685 N.E.2d 108, 112 (Ind. Ct. App.1997). A trucking expert will probably be needed to explain the rule, why it was violated, and why the violation resulted in harm. If the allegations and evidence warrant, the jury will be instructed by the Court at the conclusion of trial regarding negligence per se. *See* Ind. Model Jury Instruction No. 397.

The FMCSRs are voluminous, but there are a few regulations that are repeatedly invoked when a tractor trailer is involved in a motor vehicle crash. FMCSR § 396.13 relates to the inspection of commercial motor vehicles and states: Before driving a motor vehicle, the driver shall:

(a) Be satisfied that the motor vehicle is in safe operating condition;
(b) Review the last driver vehicle inspection report; and
(c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed.

Other FMCSRs concern the safe operation of commercial motor vehicles:

- FMCSR § 395.3 – A driver may not drive without first taking 10 consecutive hours off duty;
- FMCSR § 392.3 – No driver shall drive or be permitted to drive when the driver's ability or alertness is impaired or likely to become impaired (fatigue, illness or any other cause);
- FMCSR § 362.6 – No motor carrier shall schedule a run between locations that would necessitate the driver to exceed the speed limit;
- FMCSR § 392.9 – A driver may not drive a commercial motor vehicle and a motor carrier may not permit a driver to operate a commercial motor vehicle unless the cargo is properly distributed and adequately secured.

Review the FMCSRs when you are hired in a truck accident incident and let them guide your investigation throughout discovery. Your case against the trucking company will likely be strengthened as a result. •

INDIANA NEWS

STATE MAY HAVE TO INDEMNIFY STAGE OWNER IN STATE FAIR STAGE COLLAPSE

Tony Patterson

On behalf of the victims of the Indiana State Fair stage collapse tragedy, including the Polet family represented by Parr Richey partner, Tony Patterson, our firm monitored closely as the Indiana Court of Appeals handed down its opinion in *Polet, et al. v. Mid-America Sound,* 28 N.E.3d 333 (Ind. Ct. App. 2015). The decision arises out of the August 13, 2011 stage collapse at the Sugarland concert. As discussed by the court, the stage owner, Mid-America Sound, ("MAS") pursued a claim against the Indiana State Fair Commission ("ISFC"), contending that the ISCF was obligated to indemnify MAS for any damages MAS incurred as a result of the ISFC's use of the stage, including any liability of MAS to those who suffered damages as a result of the collapse. The indemnity claim was based upon language contained on the back of the rental agreement/invoice sent by MAS to the ISFC after the collapse, which the ISFC accepted and paid. MAS contended that the ISFC agreed to all terms contained in the invoice, including the language obligating the ISFC to indemnify MAS for all damages it sustained as a result of the collapse.

The trial court entered Summary Judgment in favor of the ISFC. However, the Court of Appeals reversed, finding the indemnification provision was not unconscionable and that "there are genuine issues of fact regarding the validity and enforceability of the indemnification provisions" contained within agreement/invoice. The ISFC has appealed the decision to the Indiana Supreme Court. •

RECENT COURT DECISIONS – HOW IT IMPACTS YOUR PRACTICE, YOUR CLIENT

RODRIGUEZ V. UNITED STATES STEEL CORP.,

24 N.E.3d 474 (Ind. App. 2014)

Employers do not owe a duty to third parties who are injured by fatigued employees falling asleep while driving home from work. In *Rodriguez*, the court discussed the relationship between employers and third parties after an employee works extensive hours and then falls asleep at the wheel. While the court agreed that such injuries are surely foreseeable, third parties do not have a special relationship with those employers and public policy strongly disfavors enacting such a duty. The court reasoned that it would require all employers to closely monitor employee fatigue leading to ad hoc decisions by courts setting bright line caps on employee work hours. •

CITY OF FORT WAYNE V. PARRISH,

2015 Ind. App. LEXIS 406

A personal injury victim's failure to use a seat belt cannot be used to prove their fault or negligence for their own injuries whether they were caused by a private citizen or governmental entity. Until now, we knew that a private party defendant could not claim such defense but whether a governmental entity could claim the defense was not settled. In this case, the city attempted to introduce evidence that the plaintiff was not wearing her seatbelt to prove contributory negligence on her part. The Indiana Court of Appeals affirmed the trail court's decision to bar the admission of that evidence. •

GOODWIN V. YEAKLE'S SPORTS BAR & GRILL, INC.,

28 N.E.3d 310 (Ind. App. 2015).

Businesses have a well established duty to protect their patrons from harm that is inflicted by the business' other patrons. In *Goodwin*, a bar patron sued the bar after the patron was shot by another patron. The bar claimed it had no duty to protect the plaintiff, alleging the shooting was not reasonably foreseeable, and therefore the injury could not have been prevented. The court stated that for well-established duties, such as a business' duty to prevent harm to its patrons, foreseeability is used to determine whether the defendant breached their duty, not to establish the existence of a duty. •

DID YOU KNOW?

Typically a person who engages an independent contractor is not liable for damages caused by the negligence of that independent contractor. Ill. *Bulk Carrier, Inc. v. Jackson,* 908 N.E.2d 248 (Ind. App. 2009). However, the Federal Motor Carrier Safety Regulations eliminate the distinction between independent contractors and employees and impose liability on the trucking company for FMCSR violations by each.

LIEN ISSUES

A Medicaid lien against a personal injury claim is not perfected unless written notice of the same is filed in the Marion County circuit court and notice is sent to the person, firm, limited liability company, or corporation alleged to be liable BEFORE a final settlement has occurred. The written notice must state the Medicaid eligibility of the injured person; the name and address of the injured person; and the name and address of the party alleged to be liable. Finally, the notice must be delivered by registered or certified mail to the party alleged to be liable. I.C. § 12-15-8-3.

Indiana hospital liens are junior and inferior to all claims for attorney's fees, court costs, and litigation expenses incurred in the recovery of claims for personal injuries. I.C. § 32-33-4-2. The personal injury victim is entitled to 20% of the total settlement without regard to the amount of the lien. If the remaining proceeds are not enough to satisfy the hospital lien(s), they are reduced on a pro rata basis and the health care providers receive the remaining amounts. Yet, any remaining underlying debt is not automatically released. *Clarian Health Partners v. Evans,* 848 N.E.2d 763 (Ind. App. 2006). ●

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FIRM NEWS

Parr Richey partner **Tony Patterson** has been appointed by Supreme Court Chief Justice Loretta Rush to serve on the Indiana Supreme Court Committee on Rules of Practice and Procedure.

Paul Kruse was recently elected as Secretary for the Indiana University Alumni Association for the IU McKinney School of Law Board of Directors.

We are proud to announce that **John McLaughlin** was named Partner at the beginning of 2015 with Parr Richey Obremskey Frandsen & Patterson LLP.