CHAPTER 20: TRUCKING AND TRANSPORTATION

FEDERAL MOTOR CARRIER REGULATIONS

Historical Overview

The dangers associated with large trucks traveling on public thoroughfares were recognized as early as 1935. That year, Congress enacted the Motor Carrier Act, which created the Bureau of Motor Carriers of the Interstate Commerce Commission (ICC). *See* 40 U.S.C. §§ 1-27, 301-327 (1994). The commission was charged with developing and enforcing safety regulations in the trucking industry. In response, the commission developed the Federal Motor Carrier Safety Regulations (FMCSRs). *See* 49 C.F.R. §§ 301-399. Although the trucking industry was extensively deregulated in the 1980s, and the licensing and monitoring of professional truck drivers have been transferred to the states, the FMCSRs remain the sole safety standard that drivers and motor carriers must follow in operating commercial motor vehicles. These regulations apply to everyone who operates a commercial motor vehicle in interstate, foreign, or intrastate commerce, and to all their employers, and each professional truck driver and motor carrier is required to comply with FMCSRs §§ 383, 390-397, and 399 at all times. *See Id.* §§ 390.1, 390.3.

Incorporation of the FMCSRs into State Law

Almost every state has incorporated all or substantially all of the FMCSRs, often simply by reference. Arizona is no exception. Specifically, under Arizona Administrative Code R17-5-202, Arizona has incorporated the following sections of the FMCSRs:

Section 379: Preservation of Records
This section details which records a motor carrier is required to retain, how the records are to be retained and how long they are to be retained. This preservation rule still applies even if a trucking company dissolves, depending on when the accident occurred that leads to litigation, and when the company was on notice of potential litigation.

Section 382: Controlled Substances and Alcohol Use and Testing
Drivers are prohibited from reporting for duty or remaining on duty if they have a blood alcohol concentration (BAC) of .04 or greater. Drivers are also prohibited from performing safety-sensitive functions if they have consumed any controlled substances. Drivers may not refuse a drug or alcohol test if it is part of the program set up and run in accordance with the regulations.

Section 383: Commercial Driver's License Standards; Requirements and Penalties
This section requires anyone who operates a commercial motor vehicle to possess a commercial driver's license and forbids a commercial driver from having more than one commercial driver's license at a time.

Section 385: Safety Fitness Procedures
This section establishes the FMCSA's procedures to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial action when required, and to prohibit motor carriers receiving a safety rating of unsatisfactory from operating a commercial motor vehicle. This section also establishes the safety assurance program for a new entrant motor carrier initially seeking to register with FMCSA to conduct interstate operations and the consequences that will occur if the new entrant fails to maintain adequate basic safety management controls.

Last, this section establishes the safety permit program for a motor carrier to transport the types and quantities of hazardous materials listed in §385.403.

Section 390: General Applicability and Definitions Section
Under this section, carriers are subject to federal on-site reviews of vehicle inspection and maintenance procedures and records, driver qualifications and hours of service compliance, accident histories, and related subjects. Following a review, carriers receive a "safety fitness" rating of satisfactory, conditional, or unsatisfactory. Certain aspects of the company's operating authority can be terminated for carriers that are judged unsatisfactory.

This section also requires that all commercial vehicles must be marked so as to identify the name or trademark of the trucking company, the location of the company's principal place of business, and the vehicle identification number (USDOT #). The side of the vehicle must display the "ICC M.C." number for the company under whose authority the vehicle is being operated.

Section 391: Qualification of Drivers
This section provides criteria that drivers must meet in order to be hired by a trucking company. According to these requirements, a driver must be at least 21 years old; able to read and speak the English language sufficient to understand traffic control signs and police officers, and to complete entries on reports and records; able to safely operate the vehicle; able to determine whether cargo is securely loaded; physically qualified to operate a commercial motor vehicle (CMV) and possess a valid medical certificate; hold only one valid commercial driver's license; complete an application form for employment; provide the employer with a list of prior traffic violations; pass a road test or equivalent under § 391.33; and not be disqualified under the federal regulations.

A carrier is required to maintain a driver's qualification file on each driver it employs. The driver's qualification file must be retained as long as the driver is employed and for three years thereafter with some limited exceptions. A carrier does not have to maintain a driver's qualification file on any driver who is not regularly employed by the carrier if the driver is employed regularly by another carrier and the other carrier certifies in writing that the driver is fully qualified to operate a commercial vehicle.

The FMCSRs also require a motor carrier to maintain a "paper trail" and to do the following: (1) verify the driving history within 30 days after the initial hire, including submission of an inquiry to every state agency that has issued a CDL to the driver during the last three years; (2) investigate driver's employment record for previous three years and maintain all materials obtained in the investigation in the driver's qualification file; (3) maintain a post-hire employment file on each driver; (4) have the driver submit to

a pre-employment drug screen; (5) enforce a random drug screen procedure in place to occur over the time of the employment; (6) continue to supervise drivers, including a review of each driver's driving record and traffic violations at least once every 12 months after the initial hire and investigation; (7) audit driver logs and closely monitor the hours drivers work to ensure they file correct logs and do not drive for more than the maximum hours allowed; (8) refrain from encouraging drivers to speed or otherwise violate the FMCSRs (the FMCSRs state that a carrier shall not mandate deliveries in such a short amount of time as to require a driver to exceed speed limits to timely complete the trip);(9) inspect, repair, and maintain vehicles under their control and maintain repair records; and (10) retain a driver's log book for six months.

Section 392: Driving of Commercial Vehicles

Commercial vehicles operate in compliance with all state and local laws. If the federal regulations impose a stricter standard than do state or local laws, the federal regulations control. A driver cannot drive and an employer cannot require or allow the driver to drive if his/her ability or alertness is so impaired or likely to become impaired through illness, fatigue or other cause to make operation of a commercial vehicle unsafe. Moreover, a driver is not permitted to speed in excess of the local, posted speed limit, nor may a carrier permit or require that the driver speed.

Section 393: Parts and Accessories Necessary for Safe Operation

This section deals with the details of equipment and cargo safety.

Section 395: Hour of Service for Drivers

In 2004, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) changed the hours of service rules to provide drivers with better opportunities to sleep in hopes of reducing accidents attributed to fatigued drivers. Drivers are allowed to drive up to 11 hours, but only after a break of at least 10 consecutive hours off-duty. A driver cannot drive after being on duty for more than 14 consecutive hours, including break times. Basically, once a driver is on duty, he has 14 hours in which he may drive, regardless of break time, and after the 14 hours, he must go off-duty for ten hours before he can drive again. This means a driver must have 10 hours of off-duty time after his 11 hours of on-duty driving time. These 10 hours may be split into two segments. If a motor carrier operates seven days a week, its drivers may be on duty for up to 70 hours in an eight-day period. Drivers for motor carriers that operate fewer than seven days a week may not be on duty more than 60 hours in any seven consecutive days. However, the on-duty seven- or eight-day cycle restarts if a driver remains off duty for at least 34 consecutive hours.

In 2011, FMCSA imposed a qualification to the 34-hour off duty restart rule, which allowed drivers to restart the calculation of their 60- or 70-hour limit by taking an off-duty period of at least 34 consecutive hours. Drivers are therefore authorized to resume use of the previous, unlimited restart provision; that is assuming that 168 or more, consecutive hours have passed since the beginning of the last off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours with a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in seven consecutive days or 70 hours in 8 consecutive days.

The carrier must closely monitor the hours its drivers work to ensure they do not operate a CMV for more than the maximum number of hours. Furthermore, carriers are prohibited from encouraging drivers to speed or otherwise violate the FMCSRs. To ensure compliance with these regulations, a driver must keep a "record of duty status" – more commonly referred to as the "log." In any case involving a tractor-trailer accident, the log is always an item the plaintiff requests and which the defendant and its insurance carrier should review, because it contains important and valuable information – not just the hours of service. Typically, only the last eight days of logs are relevant to a given accident that results in litigation, due to the 60/70 hour rules.

Section 396: Inspection, Repair, and Maintenance
This section deals with the inspection, repair and maintenance requirements for commercial vehicles. The FMCSRs require that every motor carrier shall inspect, repair and maintain, or cause to be systematically inspected, repaired, and maintained all motor vehicles subject to its control. The records shall be retained where the vehicle is either housed or maintained for a period of one year and for six months after the vehicle is no longer under the control of the motor carrier. These records will be made available to the federal DOT or state police for inspection during a compliance audit.

Section 397: Transportation of Hazardous Materials, Driving and Parking Rules
This section states that the previous sections apply to a motor carrier when he/she is transporting hazardous materials that require placarding under the FMCSRs. Vehicles containing hazardous materials must be driven and parked in compliance with the laws of the jurisdiction in which it is being operated.

Section 399: Employee Safety and Health Standards
This section provides requirements for truck and truck-tractor access – specifically, step, handhold, and deck requirements on commercial motor vehicles. These requirements are intended to enhance the safety of motor carrier employees.

LIABILITY CONSIDERATIONS UNIQUE TO THE MOTOR CARRIER

General Overview

The FMCSRs prescribe every standard of safety for motor carriers and drivers who operate commercial motor vehicles in interstate, foreign, or intrastate commerce. Any deviation exposes the motor carrier and driver to liability, including punitive damages. Drivers and carriers may be jointly and severally liable for violating the regulations. In addition, motor carriers may be liable for their violation of these regulations under the theories of respondeat superior, negligent hiring and retention, negligent entrustment, and negligent vehicle maintenance.

Standard of Care

Common carriers formerly were required to exercise the highest degree of care practicable under the circumstances. This was known as the Common Carrier Rule, and it imposed a higher standard of care

than the duty to exercise reasonable care with which a typical person must comply. Failing to adhere to the higher standard meant the common carrier was negligent and could be held liable for damages caused by its failure to meet the heightened standard. The rationale behind the heightened standard was that passengers are completely dependent on common carriers to take safety precautions. ***Lowrey v. Montgomery Kone, Inc.***, 202 Ariz. 190, 195 (App. 2002). This reasoning dates back to "the age of steam railroads," when common carriers were far more hazardous. *Id*.

Arizona has since rejected the heightened standard for common carriers. Now, the ordinary negligence standard of reasonable care under the circumstances applies to common carriers. ***Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.***, 229 Ariz. 117, 119 (2012); *Lowrey, supra*. In *Nunez*, the Supreme Court reiterated that even though a common carrier is now only held to the standard of a reasonable person under the circumstances, the common carrier's duty could extend beyond the mere obligation not to create a risk of harm. Instead, common carriers have a duty to avoid harm from risks created by others. ***Ft. Lowell–NSS Ltd. P'ship v. Kelly***, 166 Ariz. 96, 101 (1990).

Vicarious Liability for Motor Carriers

Vicarious liability is a doctrine that imposes liability on a motor carrier for the negligent acts of its employees. When determining whether vicarious liability applies, the first consideration must be whether state or federal law controls the analysis. If a motor carrier's employee negligently caused damages while operating an interstate carrier, federal law applies. ***Planet Ins. Co. v. Transp. Indem.***, 823 F.2d 285, 288 (9th Cir. 1987). If the employee operated a carrier on a purely intrastate route, state law will control.

Classifying a shipment as intrastate or interstate depends on the "essential character of the commerce" and is "ascertained from all of the facts and circumstances surrounding the transportation." ***S. Pac. Transp. Co. v. ICC***, 565 F.2d 615, 617 (9th Cir. 1977). Typically, if the final intended destination at the time the shipment begins is another state, all legs of the shipment are considered interstate, even portions that only occur within state lines. ***Project Hope v. M/V IBN SINA***, 250 F.3d 67, 74-75 (2d Cir. 2001). Transportation of goods in interstate commerce begins when the goods are delivered to a carrier and the goods retain their character as goods in interstate commerce until they are finally delivered to the customer. ***Walling v. Jacksonville Paper Co.***, 317 U.S. 564, 567-68 (1943), superseded by statute as stated in ***Wirtz v. Melos Const. Corp.***, 408 F.2d 626 (2d Cir. 1969); ***S. Pac. Terminal Co. v. ICC***, 219 U.S. 498 (1911). Additionally, some courts have held that if a carrier is registered for either interstate or intrastate commerce, federal vicarious liability laws apply, even if the underlying incident occurred during a purely intrastate trip. ***Cox v. Bond Transp., Inc.***, 249 A.2d 579, 587 (N.J. 1969). Arizona courts have yet to directly address this issue, but Arizona and Ninth Circuit cases have cited to ***Cox.*** *See* ***Zamalloa v. Hart***, 31 F.3d 911, 914 (9th Cir. 1994); ***Transp. Indem. Co. v. Carolina Cas. Ins. Co.***, 133 Ariz. 395, 397 (1982); ***Wilson v. Riley Whittle, Inc.***, 145 Ariz. 317, 321 (App. 1984).

Vicarious Liability Under Arizona Law

If an employee negligently causes damages during a purely intrastate trip, traditional Arizona common law will decide whether the employer is vicariously liable through the theory of respondeat superior. ***Bruce v. Chas Roberts Air Conditioning***, 166 Ariz. 221, 226 (App. 1990). Under respondeat superior, an employer is vicariously liable for an employee's negligent acts or omissions committed in the course and scope of their employment. *Id.* An employer is not responsible through respondeat superior for the acts of its independent contractor, unless the employer owes a non- delegable duty. ***Wiggs v. City of Phoenix***, 198 Ariz. 367, 369-70 (2000). An employee acts within the scope of employment when: (1) the conduct is of the type the defendant hired the employee to perform; (2) the conduct occurs within the authorized time and space limits; and (3) the employee acts in furtherance of the employer's purpose. ***Love v. Liberty Mut. Ins. Co.***, 158 Ariz. 36, 38 (App. 1988); ***Smithey v. Hansberger***, 189 Ariz. 103, 106 (App. 1996).

Commuting To and From Work

Arizona law typically focuses its respondeat superior inquiry on whether the employer had control over the employee when the employee acted negligently. ***Carnes v. Phoenix Newspapers, Inc.***, 227 Ariz. 32, 38 (App. 2011). Because an employer typically does not have control over an employee while commuting to and from work, Arizona cases generally find that an employee does not act within the scope of employment while commuting. ***Faul v. Jelco, Inc.***, 122 Ariz. 490, 492 (App. 1979). There are two exceptions.

The first exception, the "dual purpose" doctrine, may give rise to vicarious liability if the employee performs concurrent services for himself and his employer while commuting to or from work. *Faul*, 122 Ariz. at 492. Concurrent services are those that would have required a separate trip by a different employee, had the commuting employee not performed the task. *Id*. The second exception that may give rise to vicarious liability while an employee is commuting to and from work is the special hazard doctrine. ***Kerr v. Indus. Comm'n***, 23 Ariz. App. 106, 108 (1975). This exception provides that if an employee encounters risks while traveling to and from work, which can be distinguished from the risks that are shared with the general public, his or her commute may be considered within the scope of employment. In *Kerr*, the court expressly rejected the contention that the distance of the commute, standing alone, constituted a special hazard. *Id.*

Special Errands

The "special errand" principle can also create vicarious liability. *Love*, 158 Ariz. at 39. Under this principle, if an employee engages in a special errand at the employer's request, the employer remains vicariously liable, even if the errand involves work different from the type of work the employee usually performs. *Id*.

Vicarious Liability Under Federal Law and Placard Liability

Aside from the doctrine of respondeat superior, federal law will hold a motor carrier vicariously liable if it has control of the vehicle and is responsible for operating the vehicle in compliance with its ICC authorization. ***Zamalloa v. Hart***, 31 F.3d 911, 913-14 (9th Cir. 1994); ***C.C. v. Roadrunner Trucking, Inc.***, 823 F. Supp. 913, 918 (D. Utah 1993). This means that an independent contractor driving a truck leased to a trucking company is still an employee of the trucking company, and thus, the trucking company is subject to vicarious liability. *See* ***Wilson v. Riley Whittle, Inc.***, 145 Ariz. 317, 320-21 (App. 1984).

In Arizona, there can be more than one statutory employer. *See Zamalloa*, 31 F.3d at 914-15 (stating the common carrier whose placards are on a truck is irrefutably presumed to be a statutory employer). Even where the trucking company and independent driver failed to establish a written trip lease, an oral trip lease can establish an additional statutory employer relationship, even where the truck driver had not loaded the cargo or affixed the carrier's placard. *Id.* at 917*; Wilson*, 145 Ariz. at 321. The intent of this regulation is to prevent the operation of unregulated, uninsured or underinsured vehicles on interstate trips by making the lessee liable for operation of trip-leased vehicles. ***Transp. Indem. Co. v. Carolina Cas. Ins. Co***., 133 Ariz. 395, 397 (1982).

Negligent Hiring, Training and Retention

An employer may be held directly liable for negligent hiring and retention of an employee if: (1) the employer knew or should have known of the risk of hiring a particular employee; and (2) the employer's negligence proximately caused the plaintiff's injury. *See* RESTATEMENT (SECOND) OF THE LAW OF AGENCY, § 213. The FMCSRs require that an employer conduct a background investigation on applicant drivers and maintain records regarding each driver. Failure to comply with these regulations provides the basis for a claim of negligent hiring, supervision and retention. However, plaintiffs are precluded from recovering against an employer unless they first prevail on underlying negligence claims against an employee. If the employee is not negligent, even the most severe injury cannot give rise to employer liability for negligent hiring, supervision and retention. ***Mulhern v. City of Scottsdale***, 165 Ariz. 395, 398 (App. 1990).

A claim for negligent hiring and retention is separate and independent of a claim for respondeat superior because negligent hiring is a direct claim against the employer, whereas respondeat superior is a claim for vicarious liability. ***Quinonez ex rel. Quinonez v. Andersen***, 144 Ariz. 193, 197 (App. 1984). Liability under respondeat superior arises because of the relationship between the parties, while liability for negligent hiring, training or retention arises because the employer had reason to believe that the employment would cause an undue risk of harm. *Id.* This means that in some cases a claim for negligent hiring, training or retention can succeed even though a claim for respondeat superior would fail. For example, if an employee was not acting within the scope of employment, the plaintiff cannot recover under respondeat superior, but may still be able to recover from an employer under a theory of negligent hiring. ***Pruitt v. Pavelin***, 141 Ariz. 195, 202-03 (App. 1984). Distinguishing the different claims also becomes important for purposes of the admissibility of evidence. As *Quinonez* illustrated, an employee's driving record is inadmissible to prove whether he was negligent and ran a red light, but it

is admissible to determine whether the employer hired an incompetent driver. *Quinonez*, 144 Ariz. at 197.

With limited exceptions, Arizona courts generally hold that, where an employer admits its vicarious liability for the negligent conduct of an employee, "the failure of an employer to hire only competent and experienced employees does not of itself constitute an independent ground of actionable negligence." ***Lewis v. S. Pac. Co.***, 102 Ariz. 108, 109 (1967). Exceptions to this rule may exist where the plaintiff asserts a claim for damages arising separately from the employer's independent conduct or where punitive damages are at issue. *See, e.g.,* ***Quinonez for & on Behalf of Quinonez v. Andersen***, 144 Ariz. 193, 198 (App. 1984) (evidence of employer's conduct was only material on the issue of aggravating circumstances affecting punitive damages). But "where the plaintiff claims no separate or additional damage from the employer's conduct, the employer's separate liability adds nothing to the damages sought, and any related evidence is similarly irrelevant." ***Roaf v. Stephen S. Rebuck Consulting, LLC,*** 257 Ariz. 425, ¶ 19 (2024). Because a vicariously liable employer "is wholly responsible for the employee's fault," the apportionment of fault unnecessary because no fault remains for the factfinder to apportion. *Id.* ¶ 15***.***

Negligent Entrustment

Arizona recognizes the tort of negligent entrustment. ***Powell v. Langford***, 58 Ariz. 281, 285 (1941); ***Lutfy v. Lockhart***, 37 Ariz. 488, 491 (1931). Negligent entrustment arises when the owner of a dangerous instrumentality loans it to another person. ***Powell,*** 58 Ariz. at 285; ***Alosi v. Hewitt***, 229 Ariz. 449, 457 (App. 2012). Plaintiff must then prove that the entrusted instrumentality is inherently dangerous. An automobile or truck is such an instrumentality when entrusted to a person incompetent to drive it. *Id.*; ***Tellez v. Saban***, 188 Ariz. 165, 171 (App. 1996).

To succeed on a claim for negligent entrustment of a vehicle, plaintiff must show that the defendant owned or controlled the vehicle, the defendant gave the driver permission to operate the vehicle, the driver was incompetent to drive safely because of his or her physical or mental condition, and the defendant knew or should have known this, and the entrustment caused damages. ***Acuna v. Kroack***, 212 Ariz. 104, 110 (App. 2006). The owner of the vehicle must have known or had reason to know that the driver was incompetent to drive the vehicle. *Id.* at 109. A plaintiff can establish that the employer knew or should have known of the employee's incompetence by reason of age, inexperience, habitual recklessness, or otherwise. ***Estate of Hernandez v. Arizona Bd. of Regents***, 177 Ariz. 244, 254 (1994); *Powell*, 58 Ariz. 281. If the driver then negligently injures another, the owner might be liable for negligent entrustment. *Acuna*, 212 Ariz. at 110. Negligent entrustment involves concurrent acts of negligence by the person entrusting the vehicle and the person entrusted with the vehicle. ***Quintero v. Cont'l Rent-A-Car Sys., Inc.***, 9 Ariz. App. 488, 491 (1969). But if an employer can prove that the employee's use of the vehicle at the time of the accident was unauthorized, there is no liability for negligent entrustment. ***Davis v. Vumore Cable Co.***, 14 Ariz. App. 411, 414 (App. 1971); *see also* ***Neihaus v. Southwest Groceries, Inc.***, 127 Ariz. 287, 288 (App. 1980).

Negligent Maintenance

While a claim for respondeat superior, negligent employment, and negligent entrustment will fail if the employee is found to not have acted negligently, other direct negligence claims against an employer, such as negligent maintenance, can succeed even if the employee did not act negligently. ***Miracle Mile Bottling Distrib. Co. v. Drake***, 12 Ariz. App. 439, 440 (1970). The employee in *Miracle* crashed a truck owned by the employer into another vehicle after running a red light due to brake failure. The employer was found to be liable for failure to repair its truck, even though the jury determined the employee did not act negligently. In order to recover under negligent maintenance, a plaintiff must show a causal connection between an alleged defect in the vehicle and the injury sustained. ***McCollum v. UPS Ground Freight Inc***., 2012 WL 3758837 at *4 (D. Ariz. August 30, 2012) (citing ***Gipson v. Kasey***, 214 Ariz. 141, 143 (2007)).

Liability for Unauthorized Passengers

Generally, an employer will not be liable for injuries to an unauthorized passenger riding in the employer's truck if the passenger rides in knowing violation of the employer's policy forbidding passengers. *See e.g.,* ***Reisch v. M&D Terminals***, 180 Ariz. 356, 358 (App. 1994) (employer not liable for injuries sustained by the driver's spouse who was riding in truck in knowing violation of employer's rule against carrying passengers). This situation is distinguishable from the situation where the unauthorized passenger is an innocent or unknowing participant. *Id.* at 359. Arizona courts have yet to decide whether or under what circumstances a trucking company would be liable to innocent, unauthorized passengers.

A driver's violation of the employer's no passenger rule does not negate coverage for the driver under the employer's insurance policy. *Reisch*, 180 Ariz. at 365.

Negligence Per Se

Drivers and motor carriers may be jointly and severally liable for violating the regulations. Arizona has adopted FMCSR's §§ 391-397. *See* Arizona Administrative Code R17-5-202 through 2012. Thus, in Arizona, as in most jurisdictions, a violation of these regulations, which were adopted for the public's safety, may be negligence per se and may establish the violator's civil liability.

If a driver or carrier fails to comply with a law that protects public safety and the failure to comply is the proximate cause of another's injury, the failure to comply constitutes actionable negligence per se. ***Brand v. J. H. Rose Trucking Co.***, 102 Ariz. 201, 205 (1967). Before the negligence per se doctrine can apply, injured parties must show they are members of the class that the statute or ordinance was intended to protect. In addition, an injured party must show that the injuries suffered were of the kind that the statute was enacted to prevent. *See* ***Sullivan v. Pulte Home Corp.***, 237 Ariz. 547 (App. 2015). Furthermore, the party must show that the statute or ordinance prescribes or proscribes the conduct at issue and that this conduct proximately caused the alleged harm. ***Christy v. Baker***, 7 Ariz. App. 354, 356 (1968). Although not citable, in ***Cameron v. Westbrook***, 2012 WL 385633, at *8 (Ariz. Ct. App. Feb. 7,

2012), the court suggested in dicta that it might be appropriate to include the FMCSR in a negligence per se jury instruction if a party offered appropriate foundation describing the origin, context, and application of the FMCSR.

Punitive Damages in Trucking Cases

An award of punitive damages requires a showing that the defendants' conduct was much more than negligent; it must be outrageous and against all acceptable societal norms, similar to that found in criminal behavior. ***Swift Transp. Co of Ariz. L.L.C. v. Carman***, 235 Ariz. 499 (2022) (stating that punitive damages may not be awarded "based on mere negligence, gross negligence, or recklessness"); ***Rawlings v. Apodaca***, 151 Ariz. 149, 162 (1986). "To be entitled to punitive damages, once a plaintiff establishes that the defendant engaged in tortious conduct of any kind, intentional or negligent," a plaintiff must prove through "clear and convincing evidence that the defendant's actions either (1) intended to cause harm, (2) were motivated by spite, or (3) were outrageous, creating a 'substantial risk of tremendous harm to others.'" *Swift Transp.*, *supra* at 506.

The *Swift* court stated that the first method proof, intent to cause harm, does not apply in negligence cases since "by definition there is no intent to injure the plaintiff." *Id*. The court also observed that "a negligent defendant is unlikely to be motivated by spite or ill will," the second method of proof. *Id*. Therefore, a plaintiff in a negligence action typically must rely on the third method, outrageous conduct, to make out a claim for punitive damages. *Id*. In order to do so, "a plaintiff generally must show that the defendant's conduct was 'outrageous, oppressive or intolerable,' and 'create[d] [a] substantial risk of tremendous harm,' thereby evidencing a '*conscious* and *deliberate* disregard of the interest[s] and rights of others.'" *Id*. (emphasis in original) (citation omitted). This requires clear and convincing evidence that the defendant knew of and consciously disregarded "a risk substantially greater than that necessary to make his or her conduct negligent or even grossly negligent." *Id*. at 507.

When determining whether punitive damages can be awarded, the focus is not on how horrific the accident was, but on the defendant's attitude and conduct. ***Volz v. Coleman Co.***, 155 Ariz. 567, 570 (1987); *see also* ***Gurule v. Illinois Mut. Life & Cas. Co.***, 152 Ariz. 600, 601-02 (1987). The purpose of punitive damages is to punish the defendant and deter others from engaging in similar conduct, rather than to compensate the plaintiff.

Application in Arizona

A jury will be instructed on punitive damages and may award them only if the defendant intended to cause harm, was motivated by spite, or his/her conduct was outrageous, creating a substantial risk of tremendous harm to others. *Swift Transp.*, *supra* at ¶ 22. A driver operating a truck he or she knows is in dangerous condition and that continued operation will result in a substantial risk to pedestrians or other motorists meets the requirement of acting with an evil mind. ***White v. Mitchell***, 157 Ariz. 523, 529 (App. 1998). However, a driver acting unreasonably (for example by allegedly driving too fast in the rain) does not entitle a jury to hear about punitive damages. *Swift Transp.*, *supra* at 506. In *White*, however, the driver's employer did not act with an evil mind because the trucking company was not aware of and did not consciously disregard the risk of harm. *Id*.

Proof that a driver exceeded a speed limit is insufficient by itself to support punitive damages. ***Quintero v. Rogers***, 221 Ariz. 536, 542 (App. 2009). But if exceeding the speed limit is combined with swerving and weaving in and out of traffic, and the driver has admitted to being reckless, a jury may be instructed on punitive damages. *Id*. In an unreported, non-citable Arizona decision, a trucking company faced punitive damages on evidence that it allowed its drivers to exceed federal regulations regarding maximum allowable hours, and that driver fatigue caused a fatal accident. ***McAchran v. Knight Transp., Inc***., 2009 WL 888539 (Ariz. App. April 2, 2009). If the jury believed this evidence, then it could conclude that the company, by allowing and even encouraging a driver to violate regulations regarding maximum allowable hours, "acted to serve his or its own interests, having reason to know and consciously disregarding a substantial risk that the conduct might significantly injure the rights of others, thus engaging in reprehensible conduct and acting with an evil mind." *Id*.

Vicarious Liability for Punitive Damages

An employer may be required to pay punitive damages for the acts of an employee under the doctrine of *respondeat superior*. ***Hyatt Regency Phoenix Hotel v. Winston & Strawn***, 184 Ariz. 120, 140 (1995). This encourages employers to control the actions of its employees. *But see* ***White v. Mitchell***, 157 Ariz. 523, 529 (App. 1988) (upholding punitive damages against driver and vacating punitive damages against employer because trucking company was not aware of and did not consciously disregard a substantial and unjustifiable risk of significant harm).

Employers can be responsible for greater punitive damages than the employee. In ***Wilson v. Riley Whittle, Inc.***, 145 Ariz. 317, 319 (App. 1984), an intoxicated, independent driver collided with another truck and killed the other driver. The trucking company was held vicariously liable through *respondeat superior* under placard liability and the jury awarded $350,000 punitive damages against the employer and $10,000 against the employee. *Id.* at 322.

The United States Supreme Court has provided general guidelines to prevent punitive damages from becoming excessive and thus violating due process. ***BMW of N. Am., Inc. v. Gore****,* 517 U.S. 559, 575 (1996). Arizona law has followed suit. ***Sandpiper Resorts Dev. Corp. v. Global Realty Invs., LLC***, 904 F. Supp. 2d 971, 986-87 (D. Ariz. 2012). When awarding punitive damages, the most important consideration is the reprehensibility of the defendant's actions, but juries may also consider the wealth of the person or entity against whom the punitive damages are awarded. *Id*. This explains why a carrier may be required to pay more in punitive damages than the driver.

Punitive damages should also have an appropriate relationship to the compensatory damages awarded. A general rule of thumb is that punitive damages should not be more than four times the compensatory damages. ***Arellano v. Primerica Life Ins. Co.***, 235 Ariz. 371, 379 (App. 2014).

A deceased's employer can be vicariously liable for punitive damages as long as the deceased was acting in the course and scope and in furtherance of his or her employer's business when the tort was committed. *See* ***Haralson v. Fisher Surveying Inc.***, 201 Ariz. 1, 6-7 (2001).

INSURANCE COVERAGE ISSUES UNIQUE TO COMMERCIAL TRUCKING

Motor Carrier Financial Responsibility

A.R.S. §§ 28-4031 to 28-4039 address Vehicle Insurance and Financial Responsibility. A person or entity that commercially operates a vehicle in excess of twenty thousand pounds must comply with the provisions of this article and a person or entity that commercially operates a vehicle in excess of twenty-six thousand pounds must have a liability insurance policy in the minimum amount of $750,000. A.R.S. §§ 28-4032, -4033. The purpose of these requirements is to provide compensation for injured motorists. A person wishing to operate heavy commercial vehicles in Arizona must provide to the Arizona Department of Transportation proof of an insurance policy meeting the minimum requirements.

If the insurer certifies that a person has the requisite insurance and this certification results in permission from the Arizona Department of Transportation to operate, but the policy in actuality does not meet the requirements of these statutes, the policy may be deemed to be amended to meet the minimum requirements. *See* ***McCandless v. United S. Assur. Co.***, 191 Ariz. 167, 171 (App. 1997). In other words, in Arizona, the financial responsibility law can trump an insurer's scheduled vehicle limitation. For example, in *McCandless*, the insured defendant obtained an insurance policy from the insurer protecting three vehicles with a policy limit of $750,000 per accident for covered vehicles. But the defendant had approximately 100 additional vehicles that were not covered; and one of the uninsured vehicles was in an accident severely injuring the plaintiff. The court held that under Arizona's financial responsibility law, the insurer was required to cover the insured's use of any motor vehicle.

Loading and Unloading of a Vehicle

Loading and unloading a vehicle is considered "use" and is therefore covered by the liability insurance applicable to the vehicle as long as the person "using" the vehicle is covered by the policy. *See* ***Mission Ins. Co. v. Aid Ins. Servs.***, 120 Ariz. 220, 221 (1978); ***Chavez v. Arizona Sch. Risk Retention Trust, Inc.***, 227 Ariz. 327, 329 (App. 2011); ***Granite State Ins. Co. v. Transamerica Ins. Co.***, 148 Ariz. 111, 113 (App. 1985).

Because loading and unloading is considered "use" and is covered, policies often exclude anyone other than the carrier's employees from coverage "while moving property to or from a covered auto." There has been a growing trend for businesses whose employees or invitees are injured while loading and unloading a tractor-trailer to seek coverage for their independent negligence under the motor carrier's insurance policy despite the exclusions. These businesses argue that the exclusions violate Arizona's financial responsibility law. *See* ***Mission Ins. Co. v. Aid Ins. Servs.***, 120 Ariz. 220, 221-22 (1978) (stating the exclusion of non-employees of the named insured in the policy conflicted with the financial liability law and was therefore void and unenforceable).

Mission, however, was decided before the enactment of Arizona's financial responsibility statute applicable to commercial vehicles. Thus, its analysis focused on the statute applicable to personal

vehicles, which required coverage for all permissive users (which would include anyone who was injured while in "use" of the vehicle). The statute enacted for commercial vehicles does not require such coverage for permissive users and, therefore, *Mission* is arguably no longer applicable. *Compare* A.R.S. § 28-4009 *with* A.R.S. § 28-4033. ***Wilshire Ins. Co. v. Home Ins. Co.***, 179 Ariz. 602, 606 (App. 1994), held that Arizona's financial responsibility law does not require complete coverage for permissive users of a commercial vehicle. In that case, the court upheld the common carrier's insurance policy exclusion for anyone other than the trucking company's employees or a lessee or borrower or their employees while loading or unloading a covered vehicle. *Id*. at 605. The trucker's insurer was not liable for injuries caused when another company's employees unloaded a truck covered by the insurer.

McCandless v. United Southern Assurance Company, 191 Ariz. 167, 171 (App. 1997), though focused on different issue, criticized *Wilshire.* In *McCandless*, the insurer argued the policy was cancelled because the insured misrepresented the number of vehicles operating under its authority. The court held that fraud discovered after the accident does not cancel coverage. As authority for this proposition, the court cited former A.R.S. § 28-1170(F)(1),[1] which says that the policy may not be cancelled after the occurrence of the injury or damage. This is where *Wilshire* comes in. The insurer in *McCandless* argued that A.R.S. § 28-1170 does not apply to commercial vehicles because that section is in the part of the financial responsibility law that deals with private vehicles. Remember, this was the successful argument in *Wilshire* regarding permissive drivers. The court in *McCandless*, however, distinguished the two situations: unlike the private vehicle statute, A.R.S. § 28-1170 expressly makes the non- cancellation rule applicable to all policies "required by this chapter." A.R.S. § 28-1170(F)(1). The chapter includes the entire financial responsibility law pertaining to both private and commercial vehicles. In reaching this ruling, the *McCandless* court was critical of *Wilshire*'s broad reasoning, but did not reject (indeed, did not even address) *Wilshire*'s holding that the statute requiring coverage for permissive users does not apply to commercial vehicles.

The "Mechanical Device" Exclusion

The "Mechanical Device" exclusion should also be considered in cases involving the loading and unloading of vehicles. This exclusion typically says that damage caused while using a mechanical device to load or unload a vehicle is not covered, unless the device is attached to the covered auto.
The first issue is whether the exclusion applies. In part, resolution of this issue may depend on whether the facts ultimately show that something other than the use of the mechanical device caused the injury. Thus, whether this exclusion will apply ultimately will depend on the facts. The second issue is, assuming the exclusion applies, whether it violates the financial responsibility law. Arizona has yet to address this issue, but, ***Truck Ins. Exchange v. Home Ins. Co.***, 841 P.2d 354, 358 (Colo. Ct. App. 1992), held such an exclusion void because the injuries arose from a covered use of the truck and the exclusion narrows the circumstances under which compulsory

[1] A.R.S. § 28-1170 is now renumbered A.R.S. § 28-4009.
coverage applies.

In *Truck*, however, the court focused on a financial responsibility statute that requires coverage for all permissive users and held that exclusion was invalid because it would deny coverage to a permissive user. As discussed above, Arizona's statute applicable to commercial vehicles does not require coverage for all permissive users, so there is a strong argument this exclusion remains valid under Arizona law. *See* ***Travelers Indem. Co. v. General Star Indem. Co.***, 157 F. Supp. 2d 1273, 1288 (S.D. Ala. 2001) (enforcing the mechanical device exclusion).

THE MCS-90 ENDORSEMENT (THE ULTIMATE MONKEY WRENCH)

Any policy that insures a licensed interstate motor carrier must have what is known as an MCS-90 endorsement attached to it. The endorsement creates an obligation to the public to pay any judgment resulting from negligence in the operation, maintenance or use of motor vehicles, even if the specific vehicle is not identified or covered under the insurance policy to which the endorsement is attached. ***John Deere Ins. Co. v. Nueva***, 229 F.3d 853, 857 (9th Cir. 2000). This means that the MCS-90 endorsement obligates an insurer to pay judgments against the named insured that the policy does not otherwise cover, regardless of coverage defenses or allocation issues arising under the policy. Even if the endorsement is not physically attached to the policy, the court will impute the terms of the MCS-90 endorsement into the policy as a matter of law. *See* ***Transport Indem. Co. v. Carolina Cas. Ins. Co.***, 133 Ariz. 395, 406 (1982).

Who is an Insured Under the MCS-90

Cases involving an MCS-90 endorsement typically turn on promoting the overriding public policy considerations behind the MCS-90 endorsement. The endorsement originated in the idea that the public must be protected when a licensed carrier uses interchanged, leased or substitute vehicles to transport goods under federal operating authority. With this purpose in mind, courts have extended coverage through the MCS-90 endorsement for leased or non-owned vehicles, as well as for permissive users of non-covered vehicles. ***John Deere Ins. Co. v. Nueva***, 229 F.3d 853, 857 (9th Cir. 2000). To clarify, an MCS-90 endorsement creates a duty on the part of the insurer to indemnify its named insured for injuries negligently caused to the public, even if the underlying incident is not covered under policy.

In response to decisions expanding coverage, the Federal Motor Carrier Safety Administration (FMCSA) has issued regulatory guidance indicating that the term "insured" as used in both the MCS-90 and the MCS-82 is defined as the motor carrier named in the policy of insurance and surety bond. The FMCSA made it clear that these endorsements were not intended to satisfy judgments against any party other than the carrier named in the endorsement or surety bond, or its fiduciary. Other jurisdictions have followed this regulatory guidance, calling into question the validity of precedents like *Nueva*. Arizona and the Ninth Circuit have yet to reach such a decision and therefore, continue to uphold *Nueva* as good law.

Duty to Defend Under the MCS-90

The purpose of MCS-90 is not to "create a windfall for the insured." Thus, the MCS-90 does not create a duty to defend if no such duty exists under the policy. *See* ***Harco Nat'l Ins. Co. v. Bobac Trucking, Inc.***, 107 F.3d 733, 736 (9th Cir. 1997). However, the MCS-90 also does not negate a separate duty to defend that exists under the terms of the policy. The *Harco* court held that the MCS-90 endorsement did not affect the rights of the insurer and the insured as between each other.

Right to Reimbursement Under the MCS-90

The MCS-90 endorsement gives the insurer the right to seek reimbursement from the insured carrier for "any payment by the company on account of any accident, claim or suit involving a breach of the terms of the policy, and for any payment that [the insurer] would not have been obligated to make under the provisions of the policy except for the agreement contained in" the endorsement. Under both Arizona's financial responsibility laws and the MCS-90, if an insurer is required to pay a judgment only by reason of the endorsement (and the insurer would not otherwise be obligated to pay under the policy), the insurer has a right of reimbursement against the motor carrier. *See* A.R.S. § 28-4009; *see also Harco*, 107 F.3d at 736. The insurer may seek reimbursement for both judgments and settlements prior to the entry of a judgment. An insurer should reserve his/her right to seek reimbursement by giving written notice to the insured motor carrier that coverage may not exist under the policy and that the insurer will seek to recoup from the insured any amounts expended to resolve the case.

The Effect of the MCS-90 on the Priority of Coverages

Because authorized carriers commonly use leased vehicles to haul goods, most of the reported cases—not surprisingly—involve such leased vehicles and disputes concerning the applicability of "other insurance" clauses. There are numerous conflicting judicial decisions regarding the effect of the MCS-90 on the determination of primary coverage in accidents involving leased vehicles, which might be insured by multiple policies. Simply stated, the issue is whether the existence of the MCS-90 endorsement in a lessee's policy makes that policy primary as a matter of law. What if the other policy involved is a commercial automobile policy purchased by the leased driver which does not have an MCS-90 endorsement, yet states it is to be primary?

The Arizona Supreme Court addressed this issue in ***Transport Indem. Co. v. Carolina Cas. Ins. Co.***, 133 Ariz. 395, 406 (1982). The court held that an MCS-90 endorsement does nothing more than negate limiting provisions, such as excess clauses, in the policy to which it is attached, but it does not make the policy primary over other policies that by their own terms provide primary coverage. In *Transport Indemnity*, the driver of a leased tractor was involved in an accident. At the time, the driver was under dispatch of the lessee, an interstate carrier licensed by the Interstate Commerce Commission. The court held that because the truck driver was dispatched with an interstate load by a licensed ICC carrier, the insurer for the ICC motor carrier provided "primary coverage to the minimum limits required by law." Other Arizona cases are in accord. *See, e.g.*, ***Canal Ins. Co. v. United States Fidelity & Guar. Co.***, 149 Ariz. 578, 579 (App. 1986) (holding lessee's policy was primary because the MCS-90 endorsement nullified the limiting language in the policy); ***Transamerica Ins. Co. v. Maryland Cas. Co.***,

166 Ariz. 219, 220 (App. 1990) (holding lessee involved in an informal trip lease was required to carry primary liability insurance).

Transport Indemnity reasoned that the legal effect of the ICC/DOT regulations is to make the driver of the leased vehicle the statutory employee of the interstate carrier/lessee. The carrier/lessee then becomes vicariously liable to the public for the negligent operation of the leased vehicle. Having assumed by operation of law the exclusive possession, control, and use of the vehicle, and full responsibility for its operation, the interstate carrier/lessee must also have adequate insurance coverage. If this were not the case, the federal regulations would be meaningless, and the objective of providing financial protection to the public and shippers would not be accomplished. Accordingly, under Arizona law, the lessee's/carrier's policy that contains the MCS-90 endorsement must provide primary coverage for any loss its dispatched leased driver causes.

The analysis, however, does not end here. Indeed, the requirement that the ICC/DOT carrier assume full control and responsibility for the leased vehicle does not mean that the owner and/or operator of the leased vehicle are without insurance coverage. The confusion inherent in this situation is exacerbated by conflicting policy provisions and exclusions among the policies along with the tendency of each insurer to claim that its coverage is excess only and that the others are primary. While there has yet to be an Arizona decision that discusses the precise issue of whether a second policy issued to the owner and/or driver, such as a commercial automobile policy, may be considered co-primary with the interstate motor carrier's policy, the dicta in *Transport Indemnity* suggests that both parties will be considered co-primary:

We do not go so far as to hold that federal law imposes upon the lessee's insurer the status of sole primary insurer. There may be other primary insurers, depending upon the terms of the lessor's insurance contract. (Citations omitted). And there may be indemnification agreements between lessor, lessee and other respective insurers. (Citations omitted). Where they exist, these rights may be enforced by action for contribution or indemnity, but such actions will not ordinarily delay disposition of the tort claim by enforcement of the primary liability which the lessee and its insurer must bear.

Transport Indem., 133 Ariz. at 405-406. This language indicates that Arizona courts will look to the language of any other policies in effect, and will decide whether they are primary or excess based on the policy language. Assuming the owner and/or driver's policy clearly purports the be primary, it will likely be held co-primary with the carrier's policy under Arizona law. The loss, therefore, would then be prorated based on the respective liability limits of the respective policies as dictated by the policy provisions.

If you have questions regarding the information in this chapter, please contact the author or any JSH attorney.

CONTRIBUTING AUTHOR:

CLARICE SPICKER, PARTNER

Clarice focuses her practice on transportation defense, wrongful death and personal injury, premises liability, and products liability defense.

cspicker@jshfirm.com | 602.263.4544 | jshfirm.com/cspicker