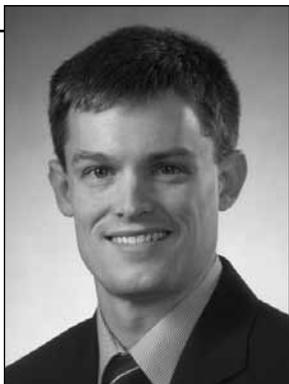


“Extreme Caution” and a Driver’s Standard of Care WHEN ENCOUNTERING INCLEMENT WEATHER



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Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.

Have you ever had a semi-tractor-trailer blow by you at top speeds in a rain storm? Inclement weather such as rain, snow, and fog is a regular and unavoidable feature of motor vehicle travel. Operators of passenger vehicles must act reasonably in such weather. Commercial truck drivers are now being held to a higher standard.

The Code of Federal Regulations specifically addresses adverse weather conditions during travel and requires commercial drivers to exercise “extreme caution.” 49 C.F.R. § 392.14. The interpretation of that phrase is subject to some debate. The regulation itself plainly states the driver shall reduce speed when adverse weather conditions are present and to cease operations when those conditions become “sufficiently dangerous.” However, some courts have interpreted the “extreme caution” phrase as placing a heightened standard of care on the driver, requiring a level of vigilance and attentiveness on the driver greater than the ordinary or reasonable person.

To properly examine whether Part 392.14 places a heightened standard of care on commercial truck drivers, it is important to understand the nuts and bolts of the regulation. This article first considers the circumstances that trigger Part 392.14. Next, it examines the plain meaning of the regulation to extrapolate what the regulation does – and does not – require. Finally, this article examines how courts have interpreted Part 392.14 in relation to the standard of care required of commercial truck drivers who encounter adverse weather conditions during travel.

A good case study is found in *Gruenbaum v. Werner Enterprises, Inc.*,¹ where a sudden and unexpected blast of wind struck and toppled a tractor-trailer as it traveled on a two-lane U.S. highway in rural Ohio.

Unfortunately, a pickup truck was travelling in the oncoming lane at the very moment the gust overturned the tractor-trailer. The pickup truck was crushed under the weight of the tractor-trailer, causing the immediate death of the pickup driver. In suit, plaintiff asserted that Part 392.14 applied to the commercial truck driver and that the regulation required the driver to exercise greater vigilance and care than the level of care owed by a driver during normal weather conditions.

A. When Is Part 392.14 Triggered?

When the “extreme caution” regulation arises in litigation, the very first issue that must be addressed is whether the regulation even applies. The first sentence of Part 392.14 addresses the circumstances that trigger the regulation: “Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction.”

1. Hazardous Conditions

An initial question that arose in the *Gruenbaum* case was whether the regulation applies when wind was the only adverse weather condition

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experienced by the driver. Although a storm had moved through central Ohio earlier in the day, the driver did not experience any precipitation, ice, fog, or other adverse weather condition during his travel that evening.

Look again. Wind is notably absent from the hazardous conditions listed in Part 392.14. Arguably, Part 392.14 does not apply to wind-only conditions due to the infrequency of wind-related accidents. FMCSA's report to Congress in 2005 showed that of 141,000 large truck crashes, only 13% were attributed to adverse weather with rain, fog and snow being the most frequent causes. Because wind represented only a tiny fraction of large truck crashes, it could be asserted that the FMCSA did not intend Part 392.14 to apply to wind-only conditions. However, the regulation's list of weather conditions is non-exhaustive, and at least one court has specifically held that the list is not exclusive and includes wind.² Thus, the first element in determining if Part 392.14 applies is the existence of adverse weather.

2. Visibility or Traction

While the list of weather conditions within the scope of Part 392.14 is meant to be very broad, the regulation is not triggered unless those conditions "affect visibility or traction." 49 C.F.R. § 392.14. Nevertheless, a simple police report note regarding the presence of some weather condition does not automatically mean that Part 392.14 applies. As in *Gruenbaum*, if the driver testifies that his visibility or traction was never compromised until the very moment a blast of wind topples his truck, then the defense can argue that Part 392.14 was never triggered. Likewise, if a driver encounters a wall of fog upon rounding a curve on a mountainous highway, then Part 392.14 would not be triggered until the moment the fog could first be reasonably observed.

Without a doubt, weather conditions usually affect visibility or

traction. Ice causes roads to become slippery. Fog reduces sight distance. A blizzard can create a virtual white-out and wet the roads, thus threatening both visibility and traction. The severity of the weather condition is key; it must limit the driver's visibility or reduce the vehicle's traction with the road.

B. Duties Owed Once Part 392.14 Is Triggered

Once triggered, the regulation provides that "extreme caution . . . shall be exercised." 49 C.F.R. § 392.14. So what must a driver do in order to exercise "extreme caution?"

The second two sentences of Part 392.14 set forth the two separate duties required under the regulation:

Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated.

Id. In other words, Part 392.14 requires the driver to slow down under some circumstances and to completely cease operations under other, more drastic circumstances.

The FMCSA purposefully inserted phrases such as "[s]peed shall be reduced" and "[i]f conditions become sufficiently dangerous." They are intentionally imprecise and open ended. This is because evaluating the severity of weather conditions and deciding upon the appropriate response are best left to the discretion of the commercial truck driver. The FMCSA acknowledges this view in its official Interpretation of Part 392.14, which provides:

Question 1: Who makes the determination, the driver or carrier, that conditions are sufficiently dangerous to warrant discontinuing the

operation of a Commercial Motor Vehicle (CMV)?

Guidance: Under this section, the driver is clearly responsible for the safe operation of the vehicle and the decision to cease operation because of hazardous conditions.³

This interpretation comports with the notion that the driver is the "captain of his ship" (or "her ship"), a view adopted by many motor carriers with respect to a driver's decision-making authority while on the road.

Certainly, the "[s]peed shall be reduced" mandate of Part 392.14 contemplates a reduced speed at which safe driving can be maintained. Further, "sufficiently dangerous" contemplates conditions in which safe driving cannot be maintained at any speed. While these are typically objective standards when applied by courts, the FMCSA ultimately places this decision in the capable hands of the commercial driver.⁴

A perhaps obvious but important, and sometimes overlooked, feature of the two-part duty imposed by Part 392.14 is that travel does not need to cease simply because adverse weather conditions are present. Part 392.14 requires the driver to stop not simply when visibility or traction affect travel, but when the impairment of visibility or traction is sufficiently dangerous. In *Gruenbaum*, the blast of wind would have toppled the semi-trailer regardless of the speed it was travelling at that moment. Thus, plaintiff had to argue that conditions were sufficiently dangerous to warrant the drastic measure of shutting down operations. This is a tall order. While an appropriate response to encountering weather conditions during travel is typically reduction of speed, only truly serious conditions warrant completely ceasing operations.

Another point worth noting is that the two-part duty encompasses the entirety of the "extreme caution"

required by Part 392.14. In *Gruenbaum*, the plaintiff attempted to shoehorn a variety of additional duties on the part of the driver and motor carrier under the “extreme caution” umbrella. For instance, plaintiff argued that “extreme caution” requires commercial drivers to always know the forecast, to research the weather prior to travel, to call ahead to his or her destination both before and during a journey, and to use four-lane highways instead of two-lane highways if hazardous conditions arise. However, these duties are not actually found in Part 392.14. Simply put, the regulation requires the reduction of speed when adverse weather conditions are present and cessation of operations when those conditions become sufficiently dangerous. The plain language of the regulation requires nothing more. Unfortunately, courts have not always applied it in such a straight forward way.

C. Is “Extreme Caution” A Heightened Standard of Care?

Under Part 392.14, the exercise of “extreme caution” appears to be a two-pronged duty requiring reduction of speed or cessation of travel, depending on the conditions experienced by the driver. However, some courts have interpreted the phrase “extreme caution” to impose a heightened standard of care, requiring greater diligence and alertness than required under the typical standard of reasonable or ordinary care.

1. Heightened Standard

For instance, in *Kimberlin v. PM Transport, Inc.*,⁵ a tanker truck driver encountered rainy and foggy conditions, hit a rock in the roadway, veered left and struck a rock wall. Soon after, plaintiff’s vehicle struck the tanker, which was blocking the roadway. The Virginia Supreme Court held that Part 392.14 “imposes a duty on the operator of a commercial motor vehicle to exercise [e]xtreme caution’ under such conditions.”⁶ The

court described the standard as “an expanded duty of care.”⁷

Two California state courts have also held that “extreme caution” imposes a higher standard of care on the CMV driver travelling in adverse weather conditions. In *Crooks v. Sammons Trucking, Inc.*,⁸ the California Court of Appeals held that the trial court erred in instructing the jury based on reasonableness instead of the higher standard of extreme caution. Likewise, in *Weaver v. Chavez*,⁹ the appellate court again held the trial court erred in instructing jury on reasonableness, because the standard of care is a heightened “extreme caution” as set by Part 392.14. The *Weaver* court explained that a “reasonable person standard is not consonant with a standard of extreme care,” referring to the Black’s Law Dictionary definition of “extreme” as the “[g]reatest, highest, strongest, or the like.”¹⁰

It should be noted that Part 392.14 itself does not state that “extreme caution” is a heightened standard. Further, the FMCSA has not taken that position. Thus, it is curious that the *Weaver* court explained that the Department of Transportation promulgated Part 392.14 to “prescrib[e] the appropriate standard of care when hazardous conditions exist.”¹¹ It is yet to be seen whether more courts will follow *Kimberlin*, *Crooks*, and *Weaver* by interpreting the “extreme caution” phrase to impose a higher standard of care on the commercial driver.

2. Reasonable Care

The good news is that many courts have declined to impose the heightened standard of care when applying the “extreme caution” regulation. For instance, in *Freudiger v. Keller*,¹² the court explained that there is “neither a legislative enactment nor a finding by a court in a civil case that the regulation creates a special standard of care.” In *Smithers v. C & G Custom Module Hauling*,¹³ the court acknowledged that there was evidence

of patchy fog in vicinity of roadway, but rejected application of a “higher standard of care . . . namely, extreme caution,” adopting reasonable care as the appropriate standard.¹⁴

The trial court in *Tavorn v. Cerelli* took a very sensible approach with respect to Part 392.14 and the standard of care.¹⁵ There, the trial court adopted the reasonable care standard but was careful in how it instructed the jury. Specifically, the jury instructions matched the three sentences of Part 392.14, but omitted the words “extreme caution.” This approach met the approval of the appellate court, which explained that the instruction “conveyed the requirements of the regulation, while avoiding the use of a term that might confuse the jury as to the standard of care applicable to the case.”

In *Gruenbaum*, the court rejected plaintiff’s assertion that “extreme caution” is a heightened standard of care.¹⁶ The court instead held that the appropriate standard “is that degree of care which an ordinarily reasonable and prudent person exercises, or is accustomed to exercising, under the same or similar circumstances.”¹⁷ As to the role of Part 392.14 under the reasonable standard of care, the *Gruenbaum* court held that evidence showing violation of Part 392.14 “may be considered by the trier of fact as evidence of negligence.”¹⁸ While the *Gruenbaum* case did not reach trial, the defense would have argued that additional tasks such as checking forecasts and calling ahead to his or her destination for weather information would not have been relevant to the jury’s consideration of whether the driver violated Part 392.14.

3. Why Does It Matter?

The difference between a heightened standard and a reasonable care standard establishes one of the most critical aspects of any jury trial – jury perception. Are members of the jury permitted to evaluate the conduct of the commercial truck driver based

on what a reasonable driver would do under similar circumstances, or are members of the jury required to hold the driver to a more exacting standard, requiring actions above and beyond those required of the normal, reasonable driver? The jury's viewpoint in this regard can greatly impact the outcome of a trial.

The *Weaver* case, discussed above, provides a good illustration. There, the primary issue was whether the commercial truck driver was driving at a proper speed for the wet and rainy conditions. The defense expert testified to what a "reasonable" speed would have been.¹⁹ A police officer testified, using the term "feasible" and explained the California Highway Patrol's grace period of an extra five miles per hour before ticketing a speeding offender. In closing argument, defense counsel emphasized the definition of negligence as something a reasonably careful person would do in the same situation, repeated the term "reasonable" in referring to the speed at which the driver was traveling and argued the accident was unavoidable "even at a super reasonable speed." However, because the trial court instructed the jury based on a reasonable standard of care, rather than the heightened standard, the appellate court held that "a result more favorable to [plaintiffs] would have been obtained had the jury been properly instructed" on the heightened standard. *Id.* In other words, under the heightened standard, reasonable conduct is not enough.

The *Crooks* court employed a similar reasoning. There, the defense argued that the commercial truck driver acted reasonably in the

face of unexpected and perilous circumstances. The appellate court reversed the jury defense verdict because "the jury could have found that [the driver] breached the applicable standard of care by violating Regulation 392.14."²⁰

Simply put, a jury who examines a driver's conduct through the lens of reasonableness may conclude that a driver acted reasonably when driving 40 mph in a 55 mph zone during a severe rain storm. However, when the same situation is examined through the lens of "extreme caution" as a heightened standard, the jury is more likely to conclude that the driver breached his or her duty.

Under a heightened standard, the jury is also more likely to place greater weight on evidence unrelated to the driver's real-time observation of conditions experienced during travel, such as weather forecasts, the driver's knowledge or lack of knowledge of such forecasts, and the driver's conversations with the dispatcher or other drivers regarding weather conditions. Because the duties imposed by Part 392.14 only contemplate the driver's examination of current conditions during travel, such other evidence is irrelevant for determining violation of the regulation. Yet a court who adopts a heightened standard is likely to admit such evidence. Faced with the decision of whether the driver went above and beyond the care that an ordinary person would exhibit under the same circumstances, a jury is likely to strongly consider this extraneous evidence despite the specific language and purpose of Part 392.14. In essence, the heightened standard of care permits the jury to

place the driver on a pedestal, and demand much more of him or her than the ordinary or reasonable person. As a consequence, the tipping point for a jury's determination of breach of duty is much lower than under the reasonable care standard.

D. Conclusion

Without doubt, when commercial truck drivers experience inclement weather during travel, they must respond appropriately by either reducing speed or stopping altogether. Yet, when accidents occur and litigation ensues, defense counsel must be wary of arguments from the plaintiffs' bar that misinterpret the federal regulation addressing operating in adverse weather conditions. Part 392.14 is a "real time" regulation, meaning it is triggered by conditions that the driver actually experiences during travel, and those conditions must affect visibility or traction. Once triggered, the regulation sets forth two specific duties, and nothing more. While many courts continue to adopt a reasonable person standard of care, some courts require the jury to hold the commercial truck driver to a higher standard, where reasonable conduct is insufficient. The jury's perception of the commercial truck driver, and the standard by which it judges him or her, can make or break the defense of a trucking accident. Therefore, preventing the court from interpreting Part 392.14 to impose a heightened standard on the driver will help keep the wind at your back in defending the driver and motor carrier. 

Endnotes

1. 2011 WL 563912 (S.D. Ohio Feb. 2, 2011).
2. See *Crooks v. Sammons Trucking, Inc.*, 2001 WL 1654986 at *12 (Cal. 3rd Dist. Dec. 21, 2001) (the words "such as" in the regulation "indicate plainly that the list was intended to be illustrative, not exclusive" and any argument to the contrary "cannot withstand scrutiny").
3. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, Interpretation for Part 392.14 (2008).
4. See *Jurek v. Hubbs*, 2004 WL 1487116 (Ky. App. Jul. 2, 2004) (court upheld jury defense verdict finding that the driver did not violate Part 392.14, relying on driver's statement that "just [be]cause it snowed for a mile [doesn't] mean you've got to stay slow for 500 [miles]").

5. 264 Va. 261 (Va. 2002).
6. *Id.* at 268.
7. *Id.*
8. 2001 WL 1654986 (Cal. App. 3 Dist. Dec. 21, 2001).
9. 133 Cal. App. 4th 1350 (Cal. App. 2 Dist. 2005).
10. *Weaver*, 133 Cal. App. 4th at 1355 (citing Black's Law Dictionary, Sixth Edition (1990), p. 1265).
11. 133 Cal. App. 4th at 1355.
12. 104 S.W.3d 294, 298 (Tex. App. 2003).
13. 172 F.Supp.2d 765, 775 (E.D. Va. 2000).
14. *See also Tavorn v. Cerelli*, 2007 WL 2189075 (Mich. App. Jul. 31, 2007) (rejecting a heightened standard in favor of reasonable care standard).
15. 2007 WL 2189075 at 5 (Mich. App. Jul. 31, 2007).
16. 2011 WL 563912 at 4.
17. *Id.* (citing *Mussivand v. David*, 45 Ohio St.3d 314, 318 (Ohio 1989)).
18. *Id.*
19. *Id.* at 1357.
20. *Crooks.* at 15.