Wake-Up Call for Carrier and Driver

Falling Asleep Can Result in Punitive Damages

By Marshal M. Pitchford and Christopher E. Cotter

Even when proven the legal cause of an accident, fatigued driving may not go beyond mere negligent conduct to the more egregious culpable conduct.

Driver fatigue continues to be a significant problem for motor carriers and their drivers. A 2007 study reported that 13 percent of commercial drivers were considered to have been fatigued at the time of their crash. U.S. Dep't of Transp. Fed. Motor Carrier Safety Admin., The Large Truck Crash Causation Study, http://www.fmcsa.dot.gov/facts-research/research-technology/analysis/FMCSA-RRA-07-017.htm (2007). Certainly, there are instances in which tired driving has led to accidents. However, whether such conduct rises to a level of culpability in which courts should levy punitive or exemplary damages against the driver and the carrier is another matter. Numerous courts have considered the issue and the results may surprise you.

This article provides an in-depth analysis of the cases that have tackled whether to permit punitive damages awards in accidents involving driver fatigue. Although the punitive damages standard varies from state to state, and the outcomes hinge on the particular facts of each case, the cases do provide guidance about whether a defense attorney can successfully convince a court to dismiss a punitive damages claim at the summary judgment stage or whether a jury will have the opportunity to consider such an award.

Standards for Awarding Punitive Damages

Although punitive damages have been awarded in this country since Colonial times, for most of this nation's history they were available only in the traditional, intentional tort context. That is, only if a jury found that a defendant acted with a specific intent to cause harm could it award punitive damages. Before the 1960s, punitive damage awards were rare. Visible punitive awards against manufacturers came with the 1960s product liability revolution. *See* Daniel W. Morton-Bentley, Law, Economics, and Politics: The Untold History of the Due Process Limitation on Punitive Damages 17, ExpressO (Mar. 2011) (unpublished manuscript), available at http://works.bepress.com/daniel_morton-bentley/1. At that time, American courts and legislatures began to expand rapidly the situations in which punitive damages were awarded. A number of states adopted a "reckless disregard" standard for puni-

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tive damages liability. Other states adopted a three-pronged "willful, wanton or gross misconduct" standard, giving plaintiffs three separate paths to obtain punitive damages. Both of these standards require a mental state that is something less than a specific intention to harm someone.

Today, most states use these two standards in some form or another. For instance, many states use the term "gross negligence," which is typically defined as a "wanton or reckless disregard for the safety of others." *Crouch v. Teledyne Continental Motors, Inc.*, 2011 WL 1539854 (S.D. Ala. Apr. 21, 2011); *see also Durham v. County of Maui*, 692 F. Supp. 2d 1256, 1262 (D. Haw. 2010) ("gross negligence… is the entire want of care [raising] the presumption of indifference to consequences"); *In re Fosamax Products Liability Litigation*, 647 F.Supp.2d 265, 283 (S.D.N.Y. 2009) ("'Gross negligence' means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct"). Another common standard today is a "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *See Preston v. Murty*, 32 Ohio St. 3d 334, 335 (Ohio 1987).

Yet, in other states, the bar remains high. For instance, under Arizona law, a plaintiff must prove that a tortfeasor's "evil hand was guided by an evil mind." *Bachrach v. Covenant Trans. Inc.*, 2011 WL 1211767, at *1 (D. Ariz. Mar. 31, 2011). In New York, punitive damages are permitted when a defendant's wrongdoing "is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." *Washington v. Kellwood Co.*, 2009 WL 855652, at *11 (S.D.N.Y. Mar. 24, 2009).

Although state courts and legislatures have adopted a variety of standards for awarding punitive damages, most if not all courts would agree with the Ohio Supreme Court that "something more than mere negligence is always required." *Leichtamer v. Am. Motors Corp.*, 67 Ohio St. 2d 456, 472, (Ohio 1981); *see also Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 983–84 (Pa. Super. Ct. 2005), *aff'd*, 922 A.2d 890 (Pa. 2007) ("Ordinary negligence, involving inadvertence, mistake or error of judgment will not support an award of punitive damages."). Yet, conduct associated with something less than a specific intent to drive a semi into another vehicle can fall within the punitive damages standard. A commercial driver who makes a conscious decision to forego sleep to spend more time on the road and subsequently causes an accident due to fatigue tests where courts will draw that line.

The Purpose of Punitive Damages

The same two objectives generally underlie the various standards for awarding punitive damages: punishment and deterrence. The United States Supreme Court has recently explained that "[r]egardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492–93 (2008). In most modern American jurisdictions, juries are customarily instructed on these twin goals of punitive damage awards.

Because of the deterrent goal of punitive damages, some level of mental awareness or knowledge on the part of a tortfeasor is an indispensable feature of any punitive damages standard. In the trucking context, what a driver knew before an accident and whether the driver made conscious decisions based on that knowledge are the key issues. For a motor carrier, its knowledge of previous unresolved problems affecting a driver's ability to drive safely, or a failure to properly monitor a driver for such problems, are often the key considerations.

Certainly, any situation in which money or profit takes precedence over safety quickly raises a red flag for courts considering whether to permit juries to consider awarding punitive damages. As aptly described by an Illinois federal court, "[m]oney [taking] precedent over safety is virtually the definition of the kind of corporate behavior warranting an award of punitive damages." *Trotter v. B & W Cartage Co., Inc.*, 2006 WL 1004882, at *7 (S.D. Ill. Apr. 13, 2006) (internal quotations omitted). Motor carriers often find themselves the target of these kinds of attacks, regardless of their plausibility. *See, e.g., McAchran v. Knight Trans., Inc.*, 2009 WL 888539, at *1–2 (Ariz. App. Apr. 2, 2009) (involving assertions by the plaintiffs that the carrier's policy of paying by the mile encouraged and in fact resulted in falsification of travel logs to the financial benefit of both the carrier and its drivers). Punishment and deterrence are not overtly discussed in many of the driver fatigue cases, but these two underlying goals surely play a role in determining their outcome.

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Higher Burden of Proof

Plaintiffs seeking punitive damages not only must establish a greater degree of culpability than mere negligence, they also carry a greater burden of proof. In a majority of jurisdictions, a plaintiff is required to establish conduct warranting punitive sanction by "clear and convincing evidence," which is typically defined as "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *See, e.g., Wood v. Neuman*, 979 A.2d 64, 73 (D.C. 2009); *Cross v. Ledford*, 161 Ohio St. 469, paragraph three of the syllabus (Ohio 1954); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979); Black's Law Dictionary 227 (5th ed. 1979).

This standard takes a middle ground between the burden of proof standard ordinarily used in civil cases, proof by a "preponderance of the evidence," and the criminal law standard, proof "beyond a reasonable doubt." The United States Supreme Court has specifically endorsed the "clear and convincing evidence" bur-

den of proof standard for punitive damages in civil cases. *Humana Inc. v. Forsyth*, 525 U.S. 299, 301 (1999).

Levying Punitive Damages Against a Motor Carrier

A plaintiff injured in a trucking accident often will sue both the commercial driver and the motor carrier. Under the doctrine of respondeat superior a trier of fact may hold an employer liable for compensatory damages resulting from the negligent acts of its employees committed within the scope of their employment. However, when a plaintiff seeks punitive damages from an employer based on the culpable conduct of its employees, a different analysis may apply.

A plaintiff must prove that a motor carrier's conduct with respect to its driver exceeded mere negligence and reached a gross level of culpable conduct.

The Restatements of Torts and Agency both support holding an employer liable for punitive damages only when the employer or one of its managerial agents authorizes, contributes to, or ratifies the employee's wrongful conduct. Restatement (Second) of Torts Section 909(d); Restatement (Second) of Agency Section 217(C)(d). For instance, if a trucking company actively permits or encourages its drivers to violate the hours of service regulations and to sleep inadequately between runs, a jury could find that the carrier authorized the driver's fatigued driving.

Several courts have adopted the Restatements' approach. *See*, *e.g.*, *Ducharme ex rel. Rogers v. Board of County Com'rs of Butler County, Kan.*, 2011 WL 2173684, at *10 (D. Kan. June 2, 2011); *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981); Cal. Civ. Code §3294(b); *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 592 (N.J. 1993).

Other courts take a firmer approach, holding an employer liable for punitive damages any time an employee's wrongful acts occurred within the scope of employment. *See*, *e.g.*, *Laidlaw Transit, Inc. v. Crouse ex rel. Crouse*, 53 P.3d 1093, 1097–98 (Ala. 2002); *Stroud v. Denny's Restaurant, Inc.*, 271 Or. 430, 532 P.2d 790 (Ore. 1975). This is no different from the respondeat superior doctrine for negligence claims.

Pennsylvania has adopted its own standard. There, a jury may award punitive damages when an employee's conduct was clearly outrageous, committed within the scope of employment, and carried out with the intent to further the employer's interests. *Achey v. Crete Carrier Corp.*, 2009 U.S. Dist. Lexis 44353, at *7–8 (E.D. Penn. Mar. 30, 2009).

Yet even in jurisdictions that require employer authorization or ratification, this additional hurdle for a plaintiff does not exist when the plaintiff asserts a direct claim against a trucking company. For claims such as negligent hiring, negligent supervision, negligent retention, or negligent entrustment of a vehicle, a plaintiff must prove that a motor carrier's conduct with respect to its driver exceeded mere negligence and reached a gross level of culpable conduct. *See*, *e.g.*, *Dalworth v. Bulen*, 924 S.W.2d 728, 732 (Tex. App. Apr. 24, 1996) (finding that for the jury to award punitive damages against the carrier requires finding that "someone employed by [the motor carrier] and who was acting in the scope of that managerial capacity was grossly negligent"). Because a motor carrier's own conduct is at issue, whether it ratified or approved the driver's conduct that led to the specific accident is not germane.

Methods of Proving Driver Fatigue

Although the central question of this article is whether a commercial driver's fatigue rises to the level of culpable conduct, the question involves an antecedent question. A plaintiff must first establish that fatigue, in fact, played a role in causing the accident. Unless a driver readily admits that he or she slept at the wheel, a plaintiff must present evidence, often circumstantial, that the driver slept or that fatigue otherwise contributed to an accident. Plaintiffs have attempted to present evidence of fatigued driving in a variety of ways.

Hours-of Service-Violations

By far the most commonly presented evidence of driver fatigue is violation of the federal hours of service (HOS) regulations. Although the HOS regulations do not explicitly declare their purpose, the tie between restrictive driving hours and fatigue is clear. Preventing driver fatigue is undoubtedly one of the key purposes of the limitations on hours of service in part 395 of the FMCSR. *See* 49 C.F.R. §§395.3, 395.8.

Courts disagree about whether punitive damages are warranted when a driver violates the HOS regulations. For example, one court has explained that HOS violations "are merely evidence that [the driver] drove beyond the ten-hour limit earlier in the week and, therefore, may have been tired when he hit [plaintiff's] car." *Purnick v. C.R. England, Inc.*, 269 F.3d 851, 853 (7th Cir. 2001). They "do not show [the driver's] knowledge that an accident would probably occur, however." *Id.*

Another court acknowledged that "a reasonable man in [the truck driver's] position, after reading the ten hour rule, may have realized the risk the regulation was designed to avoid." *Burke v. Maassen*, 904 F.2d 178, 183 (3rd Cir. 1990). However, the court was quick to add that the plaintiffs didn't present evidence that the defendant driver "himself appreciated this risk." *Id.*; *see also Osborne Truck Lines, Inc. v. Langston*, 454 So. 2d 1317, 1326 (Ala. 1984) ("the mere violation of these [HOS] regulations would not support a claim of wantonness"). These cases recognize that a driver does not automatically become tired the minute he or she exceeds the time limits imposed by the HOS regulations. A driver in violation of the HOS regulations is not necessarily a fatigued driver.

Yet other courts have found a connection between a driver's HOS violations and culpability at least potentially reaching the punitive damages level. For instance, in *Smith v. Printup*, the driver testified during his deposition that he knew what the law required regarding accurate logs and limited work hours, but nevertheless he drove 17 or 18 consecutive hours leading up to the collision. 866 P.2d 985, 1013 (Kan. 1993).

The court concluded that "[t]o the extent that such disregard may be interpreted as related to the cause of the accident, it supports the claim that he acted wantonly." *Id.*

Also, in *Torres v. North Am. Van Lines, Inc.*, the driver failed to log any of his time on Line 4 (On Duty Not Driving) of his log in the three months preceding the accident. 658 P.2d 835, 838 (Ariz. App. 1983). The court, interpreting this oversight as the driver's attempt to avoid the 70-hour rule, concluded that a jury "could logically conclude that this manifested a wanton disregard for the safety of others, that is, gross negligence." *Id.* at 839.

A carrier's best response to evidence of a driver's HOS violations is direct evidence that the driver was not in fact fatigued at the time of an accident. For instance, in *Purnick*, there was evidence that the commercial driver had driven beyond the 10-hour limit several times during the week preceding the crash and had falsified his logs. 269 F.3d at 853. However, the driver's Qualcomm showed that he did not drive for the 17 hours before the trip that ended in the crash, which "tend[ed] to show that [the driver] likely thought he was rested." *Id.* As such, the court granted a summary judgment in favor of the defense on the punitive damages claim. *Id.* at 854; *Tew v. Jones*, 417 So. 2d 146, 147 (Ala. 1982) (affirming a directed verdict in favor of the defendants on the punitive damages claim and involving a driver who had driven all day but had taken breaks for breakfast and an afternoon soft drink). In general, direct evidence demonstrating the driver's alertness and rest will likely trump circumstantial evidence of fatigue.

Other Circumstantial Evidence

Another common method for proving driver fatigue is offering evidence of the driver's activity in the days or hours leading up to an accident. For instance, in *Cummings v. Conglobal Indus., Inc.*, the driver had slept only five and a half hours in the three days before the accident. 2008 WL 4613817, at *1 (N.D. Okla. Oct. 14, 2008). The court determined that the driver was "sleep deprived" at the time of the accident and denied the trucking company's motion for a summary judgment on that basis. *Id.* at *2. When a driver had not had sleep for more than 40 hours at the time of an accident and habitually used amphetamines, a court permitted the jury to consider punitive damages against the driver and motor carrier. *Sakamoto v. N.A.B. Trucking Co., Inc.*, 717 F.2d 1000, 1002–1003 (6th Cir. 1983); *see also DeMatteo v. Simon*, 812 P.2d 361, 364 (N.M. App. 1991) (upholding a punitive damages award when a driver only had five hours of sleep and then drove for 20 hours immediately preceding the accident); *Osborne*, 454 So. 2d at 1326 (finding a jury properly awarded punitive damages when the driver had been on the road over 16 hours and "with knowledge of that fact continued to drive").

Certainly, when a plaintiff's attorney has evidence that a driver took amphetamines or caffeine pills, achieving a summary judgment for the defense can become difficult. *See Briner v. Hyslop*, 337 N.W.2d 858, 867 (Iowa 1983) (remanding the case for a jury to consider punitive damages when the driver had not slept for 30 hours and had in his possession amphetamine and caffeine pills that he admitted taking at various times during his trip).

Plaintiffs' attorneys have also supported a driver fatigue theory with evidence of unusual activity of a semi immediately preceding an accident as reported by eyewitnesses. Although evidence that a truck was weaving in and out of its lane, or drifted into an adjacent or oncoming lane might suggest that the driver was fatigued, such circumstantial evidence alone would not likely support a punitive damages claim in most courts. *See*, *e.g.*, *Batts v. Crete Carrier Corp.*, 2009 WL 6842545, at *3 (N.D. Ga. Dec. 14, 2009) (finding insufficient evidence to support a punitive damages claim when the driver never slowed down, never braked, and rear-ended the plaintiff's vehicle); *but see Briner*, 337 N.W.2d at 867 (finding a jury entitled to decide whether the conduct warranted a punitive damages award when the driver had recently consumed several double scotches and drifted over the center line and collided with the oncoming vehicle).

When a commercial driver has a medical history that includes sleep apnea, plaintiffs' attorneys have cited the sleep disorder as circumstantial evidence of driver fatigue. However, as with HOS violations, plaintiffs must make the connection between the disorder and the cause of the accident. For instance, in *Achey*, the plaintiff contended that the driver knew that he had sleep apnea but continued to drive his tractor-trailer. *Achey*, 2009 U.S. Dist. Lexis 44353, at *8. The defense effectively overcame this assertion, as the court concluded that "there does not appear to be a link between [the driver's] alleged sleep apnea condition and the fatigue [he] experienced prior to the accident, as [his] primary sleep apnea symptom was snoring, not drowsiness." *Id.* at 16 of 25. Whether a driver was actually in a tired state at the time of an accident is the key inquiry and not all circumstantial evidence can adequately establish fatigue, despite the hunches of plaintiffs and their counsel.

In general, direct evidence demonstrating the driver's alertness and rest will likely trump circumstantial evidence of fatigue.

Direct Evidence

The most common direct evidence of fatigue is the driver's own admission that he or she was tired at the time of an accident, or shortly beforehand. In one case, the commercial driver testified that she knew that she was having problems staying awake while operating her automobile and, in fact, had stopped her vehicle twice before the accident and attempted to wake herself up. *Claypoole v. Miller*, 43 Pa. D. & C.4th 526, 528 (Penn. Comm. Pleas 1999). The court permitted the plaintiffs to amend their complaint to add a claim for punitive damages. *Id.*

In another case, the driver told the responding police officer after the crash that "I was tired and thought as soon as I got into New Jersey I would stop and nap. I dozed for a second, when I looked traffic was at a dead stop. I hit the brakes and turned the wheels, but couldn't stop; the [decedents'] car got jammed underneath." *Achey*, 2009 U.S. Dist. Lexis 44353, at *4.

The court concluded that a jury could reasonably conclude that the driver "acted outrageously in continuing to drive while knowing the risks of doing so in a state of fatigue." *Id.* at *34; *see also Gunnells v. Dethrage*, 366 So. 2d 1104, 1106 (Ala. 1979) (finding a jury had properly considered punitive damages when the driver testified that he "might have had a little bit of drowsiness" and that the car had drifted over the center line and back just before the accident).

Whether a driver was actually in a tired state at the time of an accident is the key inquiry and not all circumstantial evidence can adequately establish fatigue, despite the hunches of plaintiffs and their counsel.

However, direct evidence of driver fatigue does not automatically mean that a defense attorney cannot achieve a summary judgment. In one case, the driver testified that he was sleepy but not asleep at the time of the accident. *Turner v. Werner Enterprises, Inc.*, 442 F.Supp.2d 384, 385 (E.D. Ky. 2006). Specifically, he testified that "obviously when you're tired, you're kind of like in an… in and out state." *Id.* Yet even in light of this testimony, the court granted a summary judgment in favor of the trucking company and its driver on the punitive damages claim. *Id.* at 387. Because the driver was "within the speed limit, apparently within the proper lane, and without any suggestion of intoxication," mere fatigued driving did not rise to the level of culpable conduct warranting punitive damages. *Id.* at 386.

Common Threads

After reviewing the numerous cases that have tackled whether a punitive damages award is appropriate when an accident is caused by driver fatigue, it can be a challenge to synthesize the holdings to extract a distinct bright line that, once crossed, would completely foreclose a summary judgment in favor of a defendant and making punitive damages a real possibility. Because the punitive damage standard varies from state to state, and because the outcomes hinge largely on the specific facts of each case, unsurprisingly we have found inconsistencies and contradictions among the courts that have examined this issue. Yet some common threads have emerged.

Punitive Damages Against the Commercial Driver

Simply put, if a driver was *aware* of his or her fatigue before an accident and made a conscious *decision* to continue driving, a defendant's attorney will not likely achieve a summary judgment on the punitive damages claim. Such knowledge and subsequent conduct appears to make the difference with driver fatigue between negligent and culpable conduct warranting punitive damages.

Several courts have stated that "just falling asleep at the wheel does not support an award of punitive damages." *Batts*, 2009 WL 6842545, at *2; *see also Briner*, 337 N.W.2d at 868 ("The act of falling asleep generally would not constitute conduct that would allow punitive damages."); *George*, 708 S.E.2d at 207 ("inadvertent driver error caused by falling asleep behind the wheel *by itself* does not support an award of punitive damages").

Yet, in many of those same cases, the courts permitted the juries to consider punitive damages because the drivers had some awareness of their fatigue and continued to drive. For instance, in *Briner*, the commercial driver "*knew* of his [fatigued] condition and *persisted in driving* despite the danger." *Briner*, 337 N.W.2d at 868 (emphasis added). In *Claypoole*, the driver "*knew* she was physically exhausted," since she had stopped her vehicle twice before the accident and attempted to wake herself up. *Claypoole*, 43 Pa. D. & C.4th at 528 (emphasis added). In *McAchran*, the driver "was aware of the substantial risks involved in continuing to operate his truck while fatigued but acted to serve his own interests *having reason to know* and *consciously disregarding* the substantial risk of harm to others." 2009 WL 888539, at *1 (emphasis added). In *Osborne*, the driver had been driving over 16 hours at the time of the accident and "with knowledge of that fact continued to drive." *Osborne*, 454 So. 2d at 1326. In all of these cases the courts permitted the juries to consider whether punitive damages were warranted.

Conversely, a court granted a summary judgment in favor of the driver and carrier because the court found "no evidence [that the driver] *consciously ignored* the risk of fatigue." *Batts*, 2009 WL 6842545, at *2 (emphasis added). The *Burke* court, discussing the punitive damages claim, did not find evidence that the driver "*consciously appreciated* the risk of prolonged driving" beyond the 10-hour rule. *Burke*, 904 F.2d at 183 (emphasis added).

Given the twin goals of punitive damages—punishment and deterrence—it makes sense that courts home in on a driver's awareness of fatigue and whether he or she made a decision to continue driving. It is difficult to deter accidental conduct. For the same reason, it would not make sense to punish that behavior. The case law reflects these underlying principles.

Levying Punitive Damages Against a Motor Carrier

When juries consider whether to levy punitive damages against a motor carrier, the focus shifts from the driver's conduct to the knowledge and acts or omissions of the carrier management. On examining the cases in which courts permitted juries to consider levying punitive damages against motor carriers, several patterns emerged.

Regardless of whether a plaintiff seeks punitive damages based on respondeat superior or direct claims against a carrier, the most common reason courts permit juries to award punitive damages is that a carrier failed to monitor a driver's compliance with the HOS regulations.

For instance, in *Torres*, the court found that the carrier had received notice several times that its drivers were not complying with the HOS regulations. *Torres*, 658 P.2d at 839. The problem had existed for a number of years, and the carrier did not attempt to take corrective measures. *Id.* The court explained that the carrier "should have known that its failure to

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enforce the 70-hour rule could result in sloppy logging of on-duty time with the concomitant risk of exceeding the time limitation, thus causing fatigue." *Id.* This was enough for the court to send the punitive damages decision to the jury. *Id.*; *see also Came v. Micou*, 2005 WL 1500978, at *5 (M.D. Penn. Jun. 23, 2005) ("failure to conduct any investigation into [the driver's] hours of service… constitutes reckless indifference to the rights of others"); *McAchran*, 2009 WL 888539, at *6 (reversing a summary judgment on the punitive damages claim in favor of the defendant and remanding the case for trial on punitive damages in part because the carrier "failed to take any actions to ensure specifically that [the driver] did not violate the federal regulations regarding maximum allowable hours of service"); *Innovative Container Company, LLC v. Son Light Trucking, Inc.*, 2006 WL 895021, at *8 (D.S.C. Apr. 3, 2006) (finding the motor carrier "exhibited a conscious indifference to the consequences of exceeding the hours-of-service requirements by putting a tired driver on the road and destroy[ing] the logbooks to prevent uncovering this information").

Courts view a motor carrier's failure to monitor HOS compliance as "send[ing] a message to drivers that hours of service violations were acceptable conduct." *Trotter*, 2006 WL 1004882, at *7. Clearly, the goals of deterrence and punishment underpin these decisions.

A related but separate reason courts permit juries to consider levying punitive damages against a motor carrier is that the carrier provided incentives to its drivers to work long hours or forego adequate rest. For instance, in *Briner*, the court criticized the livestock carrier's payment system, which paid its drivers a percentage of the gross truck revenue. *Briner*, 337 N.W.2d at 868. The greater the number of truckloads, the more the drivers earned. *Id.* If a driver could not make it to a loading site early in the morning, then loading the livestock would be put off until another day. *Id.* Thus, a driver had "great incentive to arrive by early morning." *Id.* Because the court found that the carrier was "fully aware of the habits of [its] drivers," it overturned the motion for a summary judgment in favor of the defense and remanded the case for a jury trial on punitive damages. *Id.*

As mentioned briefly above, if the case facts suggest that profits may trump safety for a carrier, a court will likely permit a jury to consider awarding punitive damages. *Trotter* offers one striking example: the carrier's director of safety explained during his deposition that "my own gut reaction, if you will, was that money took precedent over safety" for the carrier. 2006 WL 1004882, at *7. The court explained that "'[m]oney [taking] precedent over safety' is virtually the definition of the kind of corporate behavior warranting an award of punitive damages." *Id.*

A less common reason courts will permit juries to consider awarding punitive damages is that a carrier had knowledge of a driver's history of a fatigue problem and failed to address it adequately. For instance, in *Matthews*, the bus driver was involved in a previous, fatigue-related accident while employed by the company, and the company didn't complete the background check on the driver, failing to get a report concerning the driver's previous employment that it had requested but didn't receive, which would have revealed that the driver had two other fatigue-related accidents. 882 F. Supp. at 149. This was sufficient to defeat a summary judgment motion on the punitive damages claim. *Id.* In *Came*, the fact that the carrier knew about one of the driver's previous accidents involving fatigue, and should have known about two other previous accidents involving fatigue, contributed to the court's decision to deny a summary judgment request on the punitive damages claim. *Came*, 2005 WL 1500978, at *5.

Attorneys defending motor carriers in lawsuits will want to note that if a court finds that a driver's conduct did not rise to the level of culpable conduct warranting punitive damages, it will likely find the same for the carrier as well, even if a plaintiff asserts direct claims against the carrier. *See, e.g.*, *George*, 708 S.E.2d at 208 ("because we conclude that [plaintiff] offered an insufficient forecast of evidence that [the driver] engaged in willful or wanton conduct, we likewise conclude that there was an insufficient forecast of evidence that Greyhound participated in or condoned [the driver's conduct]"); *Burke*, 904 F.2d at 184 ("Since the evidence is insufficient to allow an award of punitive damage against [the driver], it follows that no punitive damages can be awarded vicariously against [the carrier].").

Conclusion

As driver fatigue continues to play a role in trucking accidents, it is important to assess the risks associated with that conduct. For a driver, evidence that he or she was aware of his or her own fatigue and continued driving typically forecloses a summary judgment in favor of the defense. For a motor carrier, when a plaintiff has evidence that a company failed to monitor its driver's fatigue issues or hours of service adequately, achieving a summary judgment can be difficult on the respondeat superior and direct claims.

Yet there is good news for motor carriers and their drivers. In many jurisdictions, fatigued driving alone will not support a punitive damages claim. Further, plaintiffs can find proving fatigue warrants punitive damages challenging because they must meet a higher standard than the standard for negligence claims; they have the burden to prove that fatigue warranting punitive damages caused an accident with clear and convincing evidence. When a plaintiff's attorney offers only circumstantial evidence of fatigue, the attorney must demonstrate a connection between such evidence and a driver's actual condition at the time of an accident. A defense attorney must draw to the court's attention the weaknesses of a circumstantial case. Although statistics show that fatigue continues to accompany a number of semi accidents, a plaintiff's attorney must still prove that fatigue was the legal cause of an accident. But even then, what may be considered negligent conduct does not necessarily reach the more egregious level of culpable conduct warranting punitive damages. FD