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As anyone who has served on a law school editorial board can attest, a publication like the Georgia Defense Lawyers Association’s Law Journal is not an effortless undertaking. Rather, it takes considerable time and energy on the part of many.

At the head of that extraordinary group effort is the Editor-in-Chief, who must identify the timeliest topics that will have the broadest appeal to our readership – GDLA members and judges at all levels of the bench. The Editor-in-Chief must recruit authors, ensure articles are submitted by the deadlines, review and edit, and otherwise ensure the entire publication is worthy of the name it bears. And, all the while, continuing to practice law.

This year, GDLA Vice President Dave Nelson of Chambless, Higdon, Richardson, Katz & Griggs in Macon, has done a terrific job as Editor-in-Chief, and I know you join me in thanking him for his considerable efforts.

Without the authors, though, there would be nothing for Dave to edit. This year, 12 talented attorneys have taken time away from their busy practices to prepare 8 insightful and practical articles to benefit us all. We all owe them a debt of gratitude for their hard work in making the Law Journal a great reflection of the civil defense bar in Georgia.

And perhaps most importantly, our organization has one great executive director who pulls it all together and makes it all happen. Every day of every year, for every president and every board, Jennifer Davis shows us why she is simply the best at what she does – period! We are so incredibly fortunate to have her as a member of the team.

As my tenure draws to a close, I want to thank you for the privilege of serving as your President. With the support of the Board, and so many of you, it has truly been an honor.

I hope you enjoy this year’s Law Journal.

For the defense,

Matthew G. Moffett
GDLA President
Gray, Rust, St. Amand, Moffett & Brieske
Atlanta
I. INTRODUCTION

On December 16, 2015, the Federal Motor Carrier Safety Administration ("FMCSA") adopted long-anticipated regulations mandating the use of electronic logging devices ("ELDs") to track hours-of-service. The ELD mandate applies to any commercial motor vehicle ("CMV") drivers who are currently required to keep paper records of duty status. Motor carriers and interstate drivers operating CMVs have until December 18, 2017, to install and use qualified ELDs to record compliance with hours-of-service regulations.

Although expected, the ELD mandate is a significant change for trucking and the industry is divided regarding its support of the new regulations for recording hours-of-service. As fleets adopt ELD technology across the country, motor carriers will accumulate massive amounts of information on their drivers, CMVs, and trucking operations. The proliferation of ELDs and similar technology – known as “Telematics” – will pose predictable and unique challenges to defense attorneys in future trucking litigation.

In some cases, ELDs will establish compliance with the hours-of-service regulations and other relevant laws. The functionality of certain ELDs and Telematics devices may also yield information critical to rebutting liability and damage claims. However, the impact of the ELD mandate will cut both ways. Many trucking companies lack the resources to properly manage and retain information received from ELDs or are simply
unaware of its relevance to future claims which will give rise to the potential for spoliation of evidence. ELDs will also yield large amounts of data on the driving behavior of employees. In turn, this will raise question regarding the motor carrier’s duty to proactively investigate the ELD information in its possession and control in order to avoid claims for negligent hiring, retention, supervision, and entrustment even before a trucking accident ever occurs.

The identification of those critical liability and evidentiary issues today might avoid the pitfalls and complications in litigating trucking claims tomorrow. This article addresses the primary changes to the Federal Motor Carrier Safety Regulations (“FMCSR”) related to hours-of-service and electronic logging as well as the relevance of those changes to future trucking litigation. A brief introduction to the purpose and functionality of ELDs and Telematics is also included to frame the challenges each poses to future litigation.

II. COMPLYING WITH THE NEW REGULATIONS AND ELD MANDATE

A. Legislative History

ELDs, in their simplest form, automatically record a driver’s driving time and other aspects of the hours-of-service records. An ELD monitors a CMV’s engine to collect data on whether the engine is running, whether the CMV is moving, miles driven, and the duration of engine operation (engine hours). Simply stated, ELDs record a driver’s record of duty status electronically, eliminating the need for paper logbooks. This makes recording hours-of-service easier and more accurate, and reduces both human error and deliberate violations of the recordkeeping requirements. The FMCSA believes ELDs will foster greater compliance with the hours-of-service and, in turn, overall CMV safety.

FMCSA estimates the new regulations mandating the use of ELDs will avoid 1,844 accidents every year. The FMCSA further estimates the regulations will save at least 26 lives and prevent 562 injuries resulting from collisions with large CMVs on an annual basis. In addition to enhancing roadway safety, the more accurate and consistent recordation of hours-of-service is also expected to support trucking operations such as effective dispatching by motor carriers. In fact, the amount of time and money that motor carriers and drivers save using ELDs instead of current paperwork requirements is estimated to produce an annual net economic benefit in the range of $1.2 billion.

Based on the foregoing reasons, the FMCSA adopted the new regulations mandating installation and use of ELDs. The trucking industry should experience increased efficiency, if ELDs are used properly, and operational savings through fleet optimization and
performance tracking. There is also a potential for insurance premium adjustment based on risk assessment profiles that insurers create using the information generated by ELDs and Telematics devices. Despite the potential benefits, the ELD mandate was and remains a controversial issue in trucking.

The FMCSA’s path to adopting new ELD regulations was not without controversy and involved years of debate, legal wrangling, and technical challenges. The Owner-Operator Independent Drivers Association (“OOIDA”) vigorously opposed any FMCSA legislation relating to or requiring ELDs at every turn. Conversely, the American Trucking Association (“ATA”) and many large, national motor carriers supported an ELD mandate throughout the FMCSA’s rulemaking process. The ATA even issued a press release calling the FMCSA’s new regulations and ELD mandate “a historic step forward” for the trucking industry that “will change the trucking industry for the better – forever.”

The path to the FMCSA’s new regulations regarding ELDs started back in 2010 when the FMCSR were amended to establish new performance standards and technical specifications for electronic on-board recorders (“EOBRs”) installed on any CMVs manufactured after June 4, 2012 (the “2010 Regulation”). The FMCSA later published a notice of proposed rulemaking to expand the electronic logging requirements of the 2010 Regulation to a broader population of motor carriers. In response to the 2010 Regulation, OOIDA filed a petition in the U.S. Court of Appeals for the Seventh Circuit seeking a review of the regulations regarding EOBRs. The court held that the FMCSA failed to address driver harassment issues despite a statutory requirement to the contrary. As a result, the Seventh Circuit agreed with OOIDA and vacated the 2010 Regulation.

Similarly, once the FMCSA announced the newest set of regulations, OOIDA immediately filed another petition for review with the U.S. Court of Appeals for the Seventh Circuit seeking to vacate any regulations mandating the installation and use of ELDs. The petition is currently pending before the Seventh Circuit (Case No. 15-3756). If the FMCSA’s new regulations stand, ELDs will continue to serve as a flashpoint for debate as motor carriers implement the technology into fleet operations over the next two years. The debate might also intensify over the next six months if the FMCSA further mandates installation and use of speed-limiters (otherwise known as “governors”) on CMVs as many anticipate.

B. New Regulations v. Old Regulations

The new FMCSR governing CMV drivers’ hours-of-service do not change or alter any of the restrictions applying to the hours-of-
service or duty status of CMV drivers. The changes apply, instead, to the methods for recording hours-of-service. Restated, the FMCSA changed the regulations to replace handwritten, paper logs with ELDs to track driver compliance with hours-of-service requirements.

The old regulations and new regulations each prohibit drivers from operating CMVs for more than 14 consecutive hours following 10 consecutive hours of off-duty or sleeper-berth time. A driver is considered on-duty “from the time [he] begins to work or is required to work until the time the driver is relieved from work and all responsibility for performing work.” Both the old and new regulations regarding driver’s hours-of-service limit CMV drivers to 11 hours of driving time during the 14-hour on-duty period.

To ensure compliance with hours-of-service requirements, drivers must record their duty status for each 24-hour period that they work. Under the old regulations, drivers could record their duty status in one of two ways. First, the driver could use the specific graph-grid format provided in § 395.8. The “graph-grid” method often involved keeping paper logbooks to record the driver’s hours-of-service and duty status. The second method tracked hours-of-service using an automatic on-board recording device (“AOBRD”). This required the installation and use of an AOBRD satisfying the standard set forth under § 395.15. AOBRDs are similar, but not identical, to ELDs contemplated under the new regulations. Specifically, an ELD must satisfy technical specifications that clearly delineate it from an AOBRD, even though each device tracks a driver’s hours-of-service using a similar technology platform.

The new provisions of the FMCSR regarding ELD usage became effective on February 16, 2016, and, with limited exceptions, apply to all interstate CMV drivers who are currently required to maintain records of duty status. The new regulations also apply to intrastate drivers in states that have adopted the FMCSR for intrastate operations. Since Georgia has adopted the FMCSRs set forth in 49 CFR §§ 390-397, the recent changes mandating use of ELDs, found under § 390, will apply to intrastate drivers in Georgia.

The deadline to comply with the new regulations depends on the motor carrier and driver’s current method for maintaining records of duty status. Those preparing and retaining records of duty status in accordance with the graph-grid format, as set forth under § 395.8(f),
must comply with the new regulations no later than December 18, 2017. For motor carriers and drivers currently using AOBRDs, the compliance deadline is December 19, 2019. However, any motor carriers or drivers subject to the new regulations will eventually need to install a “certified” ELD, which must be capable of printing recorded information in the same graph-grid format required for paper logbooks.

C. The Functionality, System Architecture, and Recordkeeping Requirements Relating to ELD Information and Data

The FMCSA defines an electronic logging device as “a device or technology that automatically records a driver’s driving time and facilitates the accurate recording of the driver’s hours of service, and that meets the requirements of subpart B of this part.” In short, ELDs sync with a CMV’s engine to capture power status, motion status, miles driven, and engine hours.

The technology used in ELDs essentially monitors CMV engines to capture data about whether the engine is running, whether the CMV is moving, miles driven, and the duration of engine operation. The following data elements comprise the ELD dataset required under the FMCSA new regulations and mandate: (1) date, (2) time, (3) CMV location, (4) engine hours, (5) vehicle miles, (6) driver or authenticated user identification data, (7) vehicle identification data, and (8) motor carrier identification data. The foregoing dataset is automatically recorded by ELDs pursuant to the new regulations.

Qualified ELDs must also provide for the driver’s manual entry of certain data during the process of recording hours-of-service. The drivers are specifically required to use the ELD interface to manually input duty status subject to the following categories: (1) off duty, (2) sleeper berth, (3) driving, and (4) on duty not driving. The driver must also be capable of producing the ELD data to authorized safety officials during roadside inspections, onsite reviews, and other qualified inspections.

Currently, drivers of CMVs are required to submit their records of duty status to the motor carrier within 13 days of the 24-hour period to which the record pertains. The same holds true with the recent mandate for ELDs. However, “a driver must review the driver’s ELD records, edit and correct inaccurate records, enter any missing information, and certify the accuracy of the information.” The driver must then certify the data entries and record of duty status for the particular 24 hour period are true and accurate.

At that point, the motor carrier is provided the opportunity to review the ELD records submitted by the driver. The new regulations provide that the “motor carrier may request edits to a driver’s records of duty status
to ensure accuracy. A driver must confirm or reject any proposed change, implement the appropriate edits on the driver’s record of duty status, and recertify and resubmit the records in order for any motor carrier-proposed changes to take effect.”

The process of jointly reviewing ELD data is, in fact, reflected in the new regulations. Specifically, the new regulations provide that drivers and motor carriers “must ensure that the driver’s ELD records are accurate.”

Upon completing the joint review of ELD records, the motor carrier must retain the record of duty status and supporting documentation “for a period of not less than 6 months from the date of receipt.” The new regulations also require motor carriers to retain a “backup” copy of any information and data recorded by ELDs operating in their fleet. The motor carrier must then store the backup copy separately from the original recording. Additionally, “when requested by an authorized safety official, a motor carrier must produce ELD records in an electronic format either at the time of the request” or pursuant to certain deadlines specified in the new regulations.

III. EVIDENTIARY IMPLICATIONS: SPOLIATION OF EVIDENCE IN GEORGIA

Often times, after a collision involving a CMV occurs, claimants will send pre-suit “spoliation letters” to motor carriers, requesting that they preserve a variety of documents and information regarding the driver and CMV or potentially face spoliation sanctions for the failure to preserve the same. Although these letters normally include requests for relevant documents and information, they also seek to burden motor carriers by requiring them to gather and preserve a large amount of irrelevant and untimely information. With the ELD mandate, motor carriers will be required to accumulate and retain an increased amount of information about their drivers and CMVs. Motor carriers should, therefore, anticipate ever more expansive document preservation requests from plaintiffs, with the goal being to set motor carriers up for potential spoliation sanctions if they do not comply with the requests.

Spoliation generally refers to a party’s destruction or alteration of evidence. The precise definition of spoliation varies across jurisdictions, but it normally involves the destruction or alteration of evidence that is relevant to pending or anticipated litigation.

In Georgia, spoliation is defined as “the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.” Before a party can pursue a remedy for spoliation, they must establish that the spoliating party had a duty to preserve the evidence at issue. A duty to preserve exists under Georgia law when the following two
elements are satisfied: (1) the evidence at issue is “necessary” to the litigation; and (2) there is “contemplated or pending litigation” at the time of the alleged spoliation.\textsuperscript{54}

What evidence is “necessary to the litigation” depends on the specific facts of each case. In regards to ELDs, even though the new FMCSAs do not require motor carriers to record a driver’s speed, braking information, and acceleration, this data is normally captured in ELDs currently marketed to the trucking industry. As was noted by the plaintiff’s accident reconstruction expert in \textit{Howard v. Alegria}, such data is almost uniformly relevant and necessary to lawsuits involving CMV accidents, as it provides “the highest and best evidence of what actually occurred at the time of the collision.”\textsuperscript{55} The safe assumption, therefore, is that the loss or destruction of ELD information will provide plaintiffs with legitimate grounds for requesting the imposition of sanctions from the trial court.

As for the second element, the question of whether there is contemplated or pending litigation has been significantly complicated by the Georgia Supreme Court’s ruling in \textit{Phillips v. Harmon}. Prior to that decision, it had been clear for some time that the duty to preserve evidence was triggered by actual notice of contemplated or pending litigation. For motor carriers, the duty was normally triggered after receipt of a preservation letter or letter of representation. As a result of \textit{Phillips}, it is now the law in Georgia that a motor carrier’s duty to preserve evidence can also be triggered through constructive notice, that is, when the “the [motor carrier] … reasonably should have anticipated litigation, even without notice of a claim.”\textsuperscript{56}

To determine whether a party reasonably should have expected litigation, the Court in \textit{Phillips} explained that the duty to preserve “must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party.”\textsuperscript{57} The Court then described other circumstances from which it might be reasonably inferred that the defendant is contemplating litigation. Those “other circumstances” include (1) the type and extent of injury; (2) the extent to which fault for the injury is clear; (3) the potential financial exposure if faced with a finding of liability; (4) the relationship and course of conduct between the parties; and (5) the frequency with which litigation occurs in similar circumstances.\textsuperscript{58} Finally, the Court held that in determining whether the defendant did or should have foreseen litigation by the plaintiff, courts should consider the “initiation and extent of any internal investigation, the reasons for any notification of counsel and insurers, and any
expression by the defendant that it was acting in anticipation of litigation."59

*Phillips* raises particular concerns for motor carriers. Collisions involving CMVs and passenger vehicles often result in severe bodily injury, are frequently litigated potentially leading to high financial exposure for motor carriers, their insurers, and their drivers. Additionally, many motor carriers have standard procedures that they follow after an accident occurs including interviewing drivers, preparing incident reports, and notifying the insurance carrier. Under the reasoning of *Phillips*, a court could conclude that these fairly routine circumstances put a motor carrier on notice of potential or contemplated litigation, triggering a duty to preserve all relevant evidence.60

To combat potential spoliation charges, motor carriers need to ensure that they develop an effective policy for preserving relevant documents and information. With the move to ELDs and the significant amount of relevant data they yield, this means confirming the reliability of the motor carrier’s electronic storage units and ensuring the retention of these records pursuant to company policy and federal regulations. The *Phillips* opinion also underscores how important it is for motor carriers and defense counsel to conduct prompt and thorough investigations after a collision to determine the extent of the injuries and the potential for liability.

Therefore, in all but the most minor collisions, motor carriers would be wise in implementing their document retention policies, inclusive of ELD data, immediately after a collision involving a CMV. Although this may seem onerous, the failure to preserve evidence can adversely impact an otherwise defensible claim. Since the determination of whether to impose spoliation sanctions is so fact-intensive and difficult to predict, it is safer for a motor carrier to preserve evidence upfront, rather than wait and potentially face sanctions later.

**IV. LIABILITY IMPLICATIONS: INDEPENDENT NEGLIGENCE CLAIMS AGAINST MOTOR CARRIERS IN GEORGIA IN THE AFTERMATH OF THE ELD MANDATE**

The ELD mandate will result in motor carriers possessing large amounts of information regarding their driver’s driving behavior, tendencies, timeliness, and various other factors that give insight into safety and compliance with the FMCSRs. The duty of motor carriers to proactively review this information and, if necessary, take remedial action is unclear. The duty to review ELD records as part of the annual inquiry and review of process is similarly unclear.61

With increasing amounts of available information from ELDs and vague statutory responsibilities for reviewing it, defense
attorneys can expect an uptick in claims against motor carriers under theories of liability for negligent retention, supervision, and entrustment. Georgia generally favors summary judgment on those theories of liability absent unique circumstances warranting punitive damages. However, as ELDs gather information about driver behavior in larger quantities, the opposition to summary judgment is expected to rely on stronger factual and substantive grounds going forward.

Georgia trucking cases follow a general rule: if the motor carrier admits respondeat superior applies with respect to the driver, it is entitled to summary judgment on claims for negligent hiring, retention, supervision, and entrustment. The rationale is that since respondeat superior establishes liability for the driver’s negligence, the claims against the motor carrier are “merely duplicative” of the respondeat superior claim. The only exception exists where the plaintiff has a valid claim for punitive damages.

Punitive damages are only recoverable in Georgia if the plaintiff meets the increased burden provided by O.C.G.A. §51-12-5.1. In trucking cases, punitive damages may be awarded for negligent hiring, supervision, and retention when “an employer had actual knowledge of numerous and serious violations on its driver’s record, or at the very least, when the employer has flouted a legal duty to check a record showing such violations.” Georgia courts will grant summary judgment on punitive damages if the employer complied with applicable regulations and investigated the background of its drivers. As a practical matter, this typically leads to a review of the motor carrier records during litigation. The chances of satisfying the burden for punitive damages on claims for negligent hiring, retention, supervision, and entrustment are, in most cases, slim.

Summary judgment is, therefore, appropriate for negligent entrustment, hiring, retention, and supervision claims when (1) the motor carrier complied with the FMCSA safety regulations when hiring the driver, (2) the driver was qualified to drive under the FMCSRs at the time of the accident, and (3) the motor carrier did not know nor should it have known that a driver had a tendency to act in a manner that plaintiff alleges caused the accident at issue. The simplified version of the foregoing analysis entitles a motor carrier to summary judgment on independent theories of liability if a plaintiff fails to show “actual knowledge” that a driver committed “numerous and serious violations” prior to the accident.

It is here that ELD and Telematics devices may present issues in the future. The question becomes: because motor carriers will receive large amounts of information from ELDs potentially showing “numerous and serious violations” of employee drivers, what
impact will it have on the motor carrier’s ability to defend claims for negligent hiring, retention, supervision, and entrustment? Furthermore, what duty does a motor carrier have going forward to proactively review ELD or Telematics data during annual reviews or when, say, it receives notice (formally or informally, e.g., motorist calls to 1-800 safety numbers posted on the rear of a motor carrier’s trailer) of an employee-driver’s potentially unsafe driving or violations?

The potential implications to Georgia’s “actual knowledge” requirement for sustaining negligent entrustment, hiring, retention, and supervision claims are even more troubling. Motor carriers will now possess ELD information that potentially reveals disqualifications or other violations at the time of the accident, e.g., operating a CMV in violation of the hours-of-service. Defense counsel can expect increased opposition summary judgment briefs based on a motor carrier’s mere possession of information that was recorded by ELD and Telematics devices. If actual knowledge is required, there is a valid argument for motor carriers to remain “willfully blind” of the ELD information recorded. This willful blindness would, in turn, support a motor carrier’s argument for summary judgment on grounds that it lacked “actual knowledge” as required under Georgia law.

The authors do not expect Georgia courts to tolerate a willful blindness defense. The FMCSR provide that motor carriers “must consider any evidence that the driver has violated any applicable [federal safety regulations]” during the mandatory annual inquiry and review of a driver’s record. The “any evidence” standard could extend, arguably, to the consideration of large quantities of ELD information that are now in possession of motor carriers by virtue of the ELD mandate. If the duty to consider any evidence extends to ELD information within the motor carrier’s possession or control, plaintiffs will argue the motor carrier flouted its legal duty to review that information for violations in lieu of establishing actual knowledge.

Further complications may arise from ELDs and Telematics devices allowing motor carriers to easily review driver conduct and, thus, propensity for certain unsafe driving practices. The availability of that information could put more emphasis on the analysis of summary judgment as to whether a motor carrier “knew or should have known” about those propensities. The additional layer of analysis could, in turn, provide plaintiffs with easier methods to establish constructive knowledge and defeat motions for summary judgment on claims for negligent entrustment and related theories of independent tort liability.
Currently, Georgia allows plaintiffs to establish constructive knowledge with evidence showing that a motor carrier flouted a legal duty to review information for violations, as described above. The threshold for establishing constructive knowledge in connection with negligent entrustment claims varies, somewhat, from one jurisdiction to the next. Although complications will inevitably arise as to what constitutes knowledge, it is worth noting Georgia’s high tolerance for prior driver violations upon review of negligent hiring, supervision, and retention. In *Ballard v. Keen Transp., Inc.*, the plaintiff claimed punitive damages for negligent entrustment. In granting summary judgment, the District Court stated:

Plaintiff “has presented evidence that [the driver] may have had five speeding tickets in the eight years preceding the collision. Ballard has shown that [the motor carrier] was aware of two of them; one possibly being only a log book violation. The myriad of other stop sign, stop light, log book, and seatbelt violations that [plaintiff] cites are irrelevant because he has not put forward any evidence showing that similar conduct contributed to this collision. . . Even considering [the driver’s] three other alleged speeding tickets over eight years, as the Court must in examining [plaintiff’s] claim against [the driver, the plaintiff’s] proof falls short.”

Therefore, the District Court held: “[The driver's] speeding tickets, however, are not such ‘numerous and serious violations’ . . . as to suggest that this collision ‘resulted from a pattern or policy of dangerous driving. . . ’” Furthermore, Georgia requires a causative relationship between the allegations of negligent entrustment and the driver’s negligent conduct as it relates to the proximate cause of the accident at issue. For example, if a driver was previously convicted of disobeying traffic signals on multiple occasions, what relevance do those convictions have regarding the driver who causes an accident because he failed to stop because he was following the vehicle in front too closely?

For negligent entrustment claims, Georgia requires plaintiffs to satisfy a “higher standard requiring actual knowledge of the employee’s incompetence.” This theory of liability undergoes the same analysis applied in *Ballard* to claims for negligent hiring, retention, supervision, and training. Without “actual knowledge” of a driver’s prior violations bearing a causative relationship to the accident at issue, or evidence showing the motor carrier flouted a legal duty to check for driver violations, a negligent entrustment claim must fail. Once again, the chances of establishing a valid claim for punitive damages based on allegations of negligent entrustment are, in most cases, slim under Georgia law.

In *Danforth v. Bulman*, the Georgia Court of Appeals affirmed summary judgment on the
plaintiff’s claim of negligent entrustment. The opinion sets forth the applicable standard, stating: “Under the doctrine of negligent entrustment, a party is liable if he entrusts someone with an instrumentality, with actual knowledge that the person to whom he has entrusted the instrumentality is incompetent by reason of his age or inexperience, or his physical or mental condition, or his known habit of recklessness.”78 Thus, a motor carrier can prevail on summary judgment in the absence of “numerous and serious violations.”

Nevertheless, the plaintiffs’ bar will rely on ELD information to argue that numerous and serious violations of state law, federal law, or internal policies of the motor carrier existed at the time of the accident. That will, at the very least, complicate the analysis of the motions for summary judgment filed in future cases.79 As more plaintiffs argue for a constructive knowledge standard, i.e., a motor carrier “knew or should have known” based on the “any evidence’ standard applied during the annual review of CMV drivers, the FMCSA’s new regulations mandating use of ELDs will complicate the defense of motor carriers going forward.

On the opposite side of the coin, however, the ELD information could potentially firmly establish a driver’s lack of prior violations or unsafe driving, strengthening the grounds for dispositive motions. Thus, ELDs are equally capable of providing defense counsel with an excellent opportunity to show certain allegations about the accident are unsubstantiated and, if desired, pursue an early resolution through motion practice or settlement. Indeed, ELD and Telematics information can and will cut both ways going forward, and will lead plaintiffs and defendants to closely scrutinize the evidence in future trucking litigation.

V. CONCLUSION

The information that ELDs record – both good and bad – will be critical to effectively defending transportation claims in the future. Georgia law still favors summary judgment for defendant motor carriers on independent negligent claims, so defense counsel can potentially overcome any harm from ELD-related evidence. However, the future of the “actual knowledge” standard appears uncertain based on a motor carrier’s statutory duty to possess and, possibly, review ELD information on an annual basis. The new statutory requirement for motor carriers to possess large amounts of relevant and easily accessible ELD and Telematics information, which could certainly reveal driver behavior, does not bode well for the longevity of summary judgments relying on “willful blindness.”
Spoliation of evidence is also particularly concerning in light of the decision in Phillips v. Harmon. Since almost every CMV accident gives rise to a reasonable anticipation of litigation, the spoliation of ELD information (which is almost potentially relevant to a future litigation in almost every claim) could ultimately erase its potential strategic benefits (i.e., confirming driver compliance), undermine summary judgment arguments, and even lead trial courts to impose sanctions against motor carriers. If at all possible, defense counsel should attempt to overcome the destruction or loss of ELD information with the “supporting documents” required under the FMCSRs. Otherwise, the loss or destruction of ELD information could undermine a dispositive motion notwithstanding Georgia’s current case law favoring summary judgment for motor carriers.

Ultimately, the potential implications of the ELD mandate make it abundantly clear proactive steps are necessary to avoid future headaches. Defense attorneys should work with trucking clients to implement effective procedures for preserving information that ELDs record on employee-drivers, which should go well beyond the FMCSA’s 6 month document retention requirements. Defense attorneys should also encourage trucking clients to take appropriate steps to properly investigate ELD information, possibly even proactively during annual reviews, and pursue corrective action if and when necessary. Otherwise, motor carriers could face exposure to future claims for negligent hiring, retention, supervision, and entrustment as Georgia law adapts to current trucking technologies.

1 https://www.fmcsa.dot.gov/faq/what-is-an-eld
2 Id.
3 https://www.fmcsa.dot.gov/faq/benefits-of-elds
7 https://www.fmcsa.dot.gov/faq/benefits-of-elds
10 See supra note 9.
11 For a complete regulatory history and background relating to the FMCSA’s legislative efforts relating to ELD regulations, see 75 Fed. Reg. 17208 (April 5, 2010), 76 Fed. Reg. 17208 (February 1, 2011), and 79 Fed. Reg. 17656 (March 28, 2014).
12 To view OOIDA objections, see the Comments filed on June 26, 2014 in response to the FMCSA’s supplemental notice of proposed rulemaking and request for public comments (Docket No. FMCSA-
Defense of Trucking Claims After the Federal Motor Carrier Safety Administration’s Mandate for Electronic Logs

See supra notes 4-6, at 78297, citing Electronic On-Board Recorders for Hours-of-Service Compliance, 75 Fed. Reg. 17208 (April 5, 2010). According to the new regulations mandating ELDs, the 2010 regulations regarding EOBRs “would have required that motor carriers with demonstrated serious noncompliance with the HOS rules be subject to mandatory installation of EOBRs meeting the new performance standards included in the 2010 rule. If FMCSA determined, based on HOS records reviewed during a compliance review, that a motor carrier had a 10 percent or greater violation rate . . . or any HOS regulation listed in a new Appendix C to part 385, FMCSA would have issued the carrier an EOBR remedial directive.”

See supra note 11, at 78297, which cites Electronic On-Board Recorders for Hours-of-Service Supporting Documents, 76 Fed. Reg. 17208 (February 1, 2011).

Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin., 656 F.3d 580 (7th Cir. 2011); also see supra note 11, at 78297.

See supra note 11, at 78297, citing 656 F.3d at 589 (7th Cir. 2011) / 656 F.3d 580 (7th Cir. 2011).


See generally, 49 C.F.R. § 395, Subpt. B., App. A, at ¶ 1.4 (System Design); the FMCSR has given Appendix A to Subpart B of the new regulations the title of “Functional Specifications of Electronic Logging Devices.”


See generally, 49 C.F.R. § 395, Subpt. B., App. A, at ¶ 1.4, and (System Design); the FMCSR has given Appendix A to Subpart B of the new regulations the title of “Functional Specifications of Electronic Logging Devices.” In the Appendix to the new regulations, titled “Functional Specifications for All Electronic Logging Devices,” the FMCSA provides a detailed overview on ELD functionality and the minimum performance standards for “certified” ELDs. See generally, 49 C.F.R. § 395, Subpt. B., App. A, at ¶ 1.4 (System Design); the FMCSR has given Appendix A to Subpart B of the new regulations the title of “Functional Specifications of Electronic Logging Devices.”
±0.5 mile of absolute position of the CMV when an ELD measures a valid latitude/longitude coordinate value, (4) the position information must be obtained in or converted to standard signed latitude and longitude values and must be expressed as decimal degrees to hundreds of a degree precision, i.e., a decimal point and two decimal places, (5) the measurement accuracy combined with the reporting precision requirement implies that position reporting accuracy will be on the order of ±1 mile of absolute position of the CMV during the course of a CMV’s commercial operation, (6) during periods of a driver’s indication of personal use of the CMV, the measurement reporting precision requirement is reduced to tenths of a degree, i.e., a decimal point and single decimal place as further specified in ¶ 4.5.1 of Appendix A, supra, and (7) an ELD must be able to acquire a valid position measurement at least once every 5 miles of driving; however, the ELD records CMV location information only during ELD events as specified in ¶ 4.5.1 of Appendix A, supra. The FMCSA does not require the use of a satellite based global positioning system (“GPS”) based on the foregoing, however, even the communication of ELD data and hours of service is transmitted over a mobile network.

36 49 C.F.R. § 395.26(b), which the FMCSR has given the title of “ELD data automatically recorded.”

37 49 C.F.R. § 395.26(b) (2016).

38 49 C.F.R. § 395.24(b) (2016).

39 49 C.F.R. § 395.22(j) (2016), which the FMCSR has given the title of “Motor Carrier Responsibilities – In General.”

40 49 C.F.R. § 395.8 (2016).

41 49 C.F.R. § 395.30(b)(1) (2016)

42 49 C.F.R. § 395.30(b)(2) (2016)

43 49 C.F.R. § 395.30(d) (2016)

44 49 C.F.R. § 395.30(d)(1) (2016)

45 49 C.F.R. § 395.30(a) (2016).


47 49 C.F.R. § 395.22(j) (2016), which the FMCSR has given the title of “Motor Carrier Responsibilities – In General.”


a trucking company preserve 46 different categories of documents or potentially face spoliation sanctions.

51 See, e.g., West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779, 42 Fed. R. Serv. 3d 1161 (2d Cir. 1999) (defining spoliation as the “destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”); Aaron v. Kroger Ltd., P’ship I, No. 2:10CV606, 2012 WL 78392, at *3 (E.D. Va. Jan. 6, 2012) (explaining that spoliation occurs when a party destroys evidence relevant to pending litigation); Vesta Fire Ins. Corp. v. Milan & Co. Coast., Inc., 901 So. 2d 84 (Ala. 2004) (“Spoliation of evidence is an attempt by a party to suppress or destroy material evidence favorable to the party’s adversary.”).


57 Id. 297 Ga. at 396, 774 S.E. 2d at 604 (citing Graff v. Baja Marine Corp., 310 Fed. Appx. 298, 301 (11th Cir. 2009)).

58 See id. 297 Ga. at 397, 774 S.E. 2d at 605.

59 Id.

60 Other jurisdictions have also held that a duty to preserve evidence is triggered in cases where litigation is reasonably foreseeable. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”) (citing West, 167 F.3d at 779, 42 R. Serve. 3d); Yelton v. PHI, Inc., 297 F.R.D. 377 (E.D. La. 2011); Marceau v. Int’l Bhd. of Elec. Workers, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009).

61 49 C.F.R. § 391.25(b).

62 Like Georgia, most jurisdictions follow the general rule that an employer’s admission of vicarious liability obviates the need for negligent hiring, retention, or supervision claims. See e.g., Durben v. Am. Materials, Inc.,


65 Pursuant to the requirements of O.C.G.A. §51-12-5.1, punitive damages are to be awarded only in tort actions where it is proven by “clear and convincing evidence” that the defendant’s actions showed “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.”


68 See, e.g., Bartja v. Nat. Union Fire Ins. Co., 218 Ga. App. 815, 818-19, 463 S.E.2d 358 (1995) (no punitive damages where employer complied with federal regulations and driver was qualified to drive under regulations despite fact that driver’s record showed two moving violations, a citation for driving his truck into a car parked on an emergency lane, and clipping the side mirror of an oncoming van on a two-lane highway”).


71 49 C.F.R. § 391.25(b).

72 See, e.g., Mastec N. Am., Inc. v. Wilson, 325 Ga. App. 863, 866, 755 S.E.2d 257 (2014); Smith v. Tommy Roberts Trucking Co., 209 Ga App. 826, 829-30, 435 S.E.2d 54 (1993) (reversing the entry of summary judgment on claims for negligent entrustment and punitive damages where the defendant/motor carrier ignored regulations requiring license record check, where such a check would have unearthed numerous violations, including DUI, and where the evidence otherwise supported an inference that the defendant/motor carrier had actual knowledge that its driver was incompetent or had a propensity to drive dangerously).

73 In Alabama, an employer is “held responsible for his [employee’s] incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof of such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. Coleman v. Flagstar Enters., Inc., 1999 U.S. Dist. LEXIS 8500 (S.D. Ala. May 19, 1999) (quoting Big B. v. Cottingham, 634 So. 2d 999, 1003 (Ala. 1993). Therefore, constructive knowledge is established by showing that the employer knew or should have known about the employee’s incompetency. Alabama’s appellate courts have not addressed whether an employer’s admission of agency precludes recovery on claims for negligent entrustment, hiring, supervision, training, and retention. Federal courts, on the other hand, determined that Alabama would follow the minority view and allow the plaintiff to maintain independent claims against the employer. Poplin v. Bestway Express, 286 F. Supp. 2d 1316, 1318-1320 (D. Ala. 2003).

In Texas, to establish a claim for negligent entrustment, plaintiffs must prove (1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless; (4) that the driver was negligent on the occasion in question and (5) that the driver’s negligence proximately caused the accident. Schneider v. Esperanza Transmission Co., 744 S.W.2d 595, 596 (Tex. 1987). However, Texas law precludes a plaintiff from pursuing causes of action for negligent entrustment or negligent hiring if the employer has admitted liability under the theory of respondeat superior. See, e.g., Arrington’s Estate v. Fields, 578 S.W.2d 173, 178-79 (Tex. Civ. App. – Tyler 1979, writ ref’d n.r.e.).

According to Tennessee law, claims for negligent entrustment require (1) an entrustment of a chattel, (2) to a person incompetent to use it, (3) with knowledge that the person is incompetent, and (4) that is the proximate cause of injury or damage to another. Nichols v. Atkin, 844 S.W.2d 655, 559 (Tn. Ct. App. 1992). The admission of an agency relationship does not defeat claims for negligent entrustment, however, which is considered a “distinct and separate issue from the [driver’s negligence].” See, e.g., Darnell v. Flour Daniel Corp., No. 94-5757, 70 F.3d 115, at *2 (M.D. Tenn. 1995).

Arkansas law sets for the following elements for negligent entrustment claims: (1) the entrustee was incompetent, inexperienced, or reckless, (2) the
entrustor knew or had reason to know of the entrustee’s condition or proclivities, (3) there was an entrustment of the chattel, (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant, and (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant. Arkansas Bank & Trust Co. v. Ervin, 300 Ark. 599, 603, 781 S.W.2d 21, 23 (1989). If the defendant generally denies liability, it is subject to both negligent entrustment and respondeat superior claims. See LaClair v. Commercial Siding and Maint., Co., 308 Ark. 580, 582, 826 S.W.2d 247, 248 (1992). However, if liability is admitted under either theory, the plaintiff may only pursue liability under the admitted theory of recovery. See Elrod v. G. & R. Constr. Co., 275 Ark. 151, 154, 628 S.W.2d 17, 19 (1982).

In Mississippi, several federal district court determined that Mississippi would adopt the majority view that once an employer has admitted the agency relationship between it and the employee, it is improper to allow a plaintiff to proceed against the employer on any other theory of derivative or dependent liability. Hood v. Dealers Transport, 459 F.Supp. 684 (N.D.Miss. 1978). The appellate courts have not address the interplay of admitting vicarious liability and direct negligence claims against employers though.

74 2011 U.S. Dist. LEXIS 5487, at *10-12(citing Hutcherson v. Progressive Corp., 984 F.2d 1152, 1155-56 (11th Cir. 1993) (dismissing punitive damages because employer obeyed regulations, despite evidence that the truck driver was on amphetamines at the time of the collision, received four speeding tickets in the previous three years, had his license suspended for refusing an alcohol test, and had a history of DUI)).


77 Under Georgia law, “an employer may be liable for hiring or retaining an employee the employer knows or in the course of ordinary care should have known was not suited for the particular employment.” Musgrove v. Universal Health Services, Inc., 277 Ga. 861, 862; 596 S.E.2d 604, 605 (2004). “An employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.” Id. However, a claim for negligent entrustment has a higher standard requiring actual knowledge of the employee’s incompetence. See Danforth v. Bulman, 276 Ga. App. 531, 623 S.E.2d 732 (2005).


79 Traditional summary judgment arguments will also face mounting opposition to motions for summary judgment on claims for negligent hiring, retention, supervision and entrustment based on a novel argument which relies on Georgia’s apportionment statute, O.C.G.A. § 51-12-33. The argument was based on the District Court’s rejection of the defense of trucking claims after the Motor Carrier Safety Administration’s mandate for electronic logs.

80 See, 49 C.F.R. § 395.2 (2016) (“Supporting document means a document, in any medium, generated or received by a motor carrier in the normal course of business as described in § 395.11 that can be used, as produced or with additional identifying information, by the motor carrier and enforcement officials to verify the accuracy of a driver’s record of duty status.”).