



MARCELLO & KIVISTO

LLC

## TRANSPORT CENTER UPDATE

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### For More Helpful Articles and Information Check Out M&K's Blog

Another resource for helpful information and articles is Marcello & Kivisto's Blog; [Transportation Legal News](#). Recent posts include; PA Police Accident Reports Not Admissible and Police Accident Report Overlays. Upcoming posts include "Lessons of CSA 2010." Feel free to leave a comment or question and we will follow-up.

You can also keep up with industry events and news as well as what M&K is up to by following us on [Twitter](#), and [Facebook](#).

### Sleep Apnea Claim For Punitives Against Carrier Dismissed On Summary Judgment

A trucking company cannot be held liable for punitive damages because it knew of a driver's history of sleep apnea. The Court granted our motion for summary judgment in Achey v. Crete Carrier Corporation, No. 07-cv-3592 (E.D.Pa., Decision of March 30, 2009).

In Achey, Plaintiff sought punitive damages against the carrier based upon alleged negligent/reckless entrustment. Plaintiff based

#### M&K Upcoming Events

- M&K's Annual Seminar - Keep a lookout for information regarding M&K's upcoming seminar.

#### Upcoming Events in the Industry:

Oct. 16th-19th -

the claim upon the continued employment of a driver who was diagnosed with sleep apnea.

The driver testified that he had been diagnosed with sleep apnea in 1992, but denied any noticeable effect on his driving ability. He further testified that he underwent surgery for the condition in 1992, but felt no difference in his level of fatigue.

It was "hotly disputed" whether the driver had sleep apnea as of the time of the accident. The Court held, however, that even if he did and if fatigue and drowsiness was a symptom of sleep apnea (which the Court found it was not according to The Merck Manual), the Court could not find any evidence that the driver ever suffered from the symptoms of fatigue or drowsiness as a result of the alleged sleep apnea condition.

The Court stated that merely because the driver suffered some snoring as a result of sleep apnea, and at some point experienced drowsiness does not mean the drowsiness was because of the sleep apnea condition.

The Court noted that Plaintiff had not presented an expert who linked the sleep apnea to the drowsiness. Absent expert testimony, the Court would not make the leap to connect the two.

Plaintiff had attempted to use its transportation safety expert to make the connection. That expert opined that cumulative fatigue and sleep apnea of the driver were contributing causes of the accident. We filed a motion in limine challenging the transportation expert's qualification for such opinions.

In response to our motion in limine, Plaintiff agreed to withdraw his opinions on sleep apnea and/or cumulative fatigue and whether either factor contributed to the accident. Absent any qualified expert opinion on this issue, Plaintiff's claim failed and summary judgment was granted.

Plaintiff further asserted a claim for punitive damages based upon the carrier's alleged awareness of the driver's risk for falling asleep at the wheel based upon his record. The Court granted our motion for summary judgment based upon the lack of any evidence that carrier had a conscious appreciation of the risk.

The Court noted that the driver had been deemed medically qualified by his successive DOT physicals. While there was a reported of

ATA's Management Conference and Exhibition, Phoenix, AZ for more info click [here](#).

Oct. 17th-23rd - CVSA's Operation Safe Driver 2010, for more info click [here](#).

Oct. 25th 9am - 11am - PMTA Seminar - CSA2010 Update presented by Tim Cotter of FMCSA. For more info click [here](#).

Documents and Resources Available From M&K

If you are interested in obtaining copies of the following, please call or email.

- Hours-of-Service Rules Safety Impact 2010 Analysis compiled by ARTI in May 2010

- Accident preparedness DVD and/or forms

- Powerpoint presentation regarding CSA 2010 presented by ATA

- Powerpoint presentation by Dr. Hickman regarding Distracted Driving Study presented at M&K Seminar

To see M&K's recent case results and articles click [here](#).

history of sleep apnea that was treated, there was no evidence that the carrier knew or should have known that the driver might fall asleep at the wheel.

Plaintiff next tried to make the nexus by arguing that violations on the drivers operating record should have alerted the carrier. The Court again rejected the violations as evidence of the carrier's conscious appreciation of the risk of the driver experiencing fatigue behind the wheel.

We also argued, and the Court noted, that there was no evidence of any violation of the hours-of-service regulations by the driver with regard to this accident. Accordingly the Court granted our motion for summary judgment.

Please let us know if you would like a copy of this decision To check out more of our case results click [here](#).

## ATA Safety Meeting Notes

Doug Marcello was privileged to present at the ATA Safety Conference on the topic of legal pitfalls facing trucking companies. His presentation addressed plaintiff strategies and do's and don'ts for companies to consider in response.

At the conference, speakers and panelists shared numerous facts of interest to the trucking community. These included the following:

-On December 5, 2010, Safestat is turned off and the public will have access to your CSA 2010 scores;

-Expect new EOBR regulations to extend their required use beyond those carriers covered by the most recent regulations;

-Expect new HOS regulations by the end of the year;

-More than 1,000 changes to the CSA 2010 procedures were made by the August revisions;

-Expect regulations limiting DOT physicals to approved physicians;

-Older drivers do not present a higher risk of accidents according to recent studies;

-For your cell phone limitation/ban

### Other Resources

To get construction and accident updates for Pennsylvania roadways click [here](#).

FMCSA Distracted Driving Instructional Videos click [here](#).

[PA Motor Trucking Association](#)

[American Trucking Association](#)

[Trucking Industry Defense Association \(TIDA\)](#)

[Federal Motor Carrier Safety Administration](#)

[PA Travel InformationTo-Go](#)

For more resources click [here](#)

### LET US KNOW WHAT YOU THINK

We want to focus our articles on the issues and concerns of our subscribers. If you have suggestions for our newsletter please do not hesitate to contact us.

### QUOTE OF THE MONTH

"I don't know any other way to lead but by example."

~Don Shula

Free  
Presentations for  
Your Driver  
Meetings

program, educate the driver's wife and family of the safety aspects of the program and the importance of their not calling a working driver;

These are just headlines from an information-filled three days of speakers, roundtables, and presentations of the industries safety professionals.

## Have You Checked Your CSA2010 BASICS Assesment?

FMCSA's [Data Preview Website](#) is now available. As of August 2010, motor carriers are able to preview their assesment under the BASICS.

Beginning in December of 2010 motor carriers will be able to access full SMS results and BASIC assesments. In December of 2010, this information will also be available to the public, with the exception of the Crash Indicator.

Be proactive as the government implements CSA2010 and preview your assesment. The CSA2010 [Timeline](#) indicates that in the fall/winter of 2010 FMCSA will begin to issue warning letters to carriers with deficient BASICS as well as roadside inspectors will begin to use the CSMS results to identify carriers for inspections.

## About Our Firm

Founded in 2005, **M&K, LLC** is dedicated to and focused upon transportation law and the needs of their transportation clients. Since opening in 2005, **M&K, LLC** has expanded its office to provide clients with the attention and availability they deserve.

DISCLAIMER: The Information Contained in this Newsletter is NOT Legal Advice.



We provide FREE presentations at driver's meetings geared toward our client's topics of interests. Recently, we finished filming a mock trial cross-examination of a driver as part of a new presentation.

Please let us know if you are interested.

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[Transportation Legal News Blog](#)

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