



# TRANSPORTATION LAW UPDATE



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Nigel A. Greene

The events leading up to this moment took place over three years ago. On August 5, 2008, at 11:17 a.m., a paratransit van was driving south on Roosevelt Boulevard in Philadelphia, Pennsylvania. Roosevelt Boulevard, a major traffic artery in the city, has multiple lanes, including express and local lanes. Our client operated the paratransit van. The van was in the right lane of the three-lane set of local lanes. Traffic was heavy, but moving. As the driver proceeded southbound at approximately 40 miles per hour, the vehicles ahead of him in his lane came to a sudden stop mid-block. The driver performed a hard brake, but it was clear that he would strike the car ahead of him if he continued directly forward. After a quick glance to the left, he moved to the center lane. At about the same time, plaintiff moved from the left lane to the center lane. The passenger side rear corner of her pickup's bumper caught the driver side front corner of the bumper on the paratransit van. The impact pulled the pickup bumper down and away from the body of the vehicle. Plaintiff maintained control of her vehicle and pulled over.

## PENNSYLVANIA DEFENSE VERDICT

"The jury has reached a verdict." The message came by way of a phone call from the courtroom. Fifteen minutes later, we sat in the courtroom waiting for the jury to return and record the verdict.

We saw this accident as a sideswipe. Plaintiff saw this accident as a rear-end collision and argued that the driver solely caused the accident when he violated the assured clear distance rule by following too closely. During the trial, plaintiff's counsel argued that had the driver maintained a safe braking distance and not changed lanes, this accident never would have happened.

During trial, plaintiff alleged that her economic damages approached \$750,000. Plaintiff was working at the time of the accident. As a result, she had a workers' compensation lien in excess of \$150,000. In October of 2008, she was terminated from a light duty position and had not worked since that time. She claimed to be totally disabled. Her attorneys argued that her lost future earning capacity amounted to \$585,000. The court, moreover, had allowed plaintiff to argue that she should recover for future medical expenses, including possible surgery to perform a multiple level anterior cervical spinal discectomy and fusion. Her medical expert testified that the procedure would cost between \$100,000 and \$250,000.

Plaintiff also sought to recover a substantial sum for past, present, and future pain and suffering. She claimed that the accident caused or aggravated a four level cervical disc herniation, caused bilateral carpal tunnel syndrome and left arm numbness and weakness. The three years of treatment to date included multiple epidural cervical injections, cervical traction, right trigger thumb release surgery and various stints of physical therapy and

chiropractic care. She claimed to be in pain daily with limited use of her arms, the left arm being the most diminished.

We contested the damages. Through thorough discovery and diligent review of medical records, we discovered that the records from her primary care provider painted a different picture of her condition. The primary care provider's records contained several post-accident reports that her pain scale readings were 0/10 and her physical exam produced normal results. We also located pre-accident medical records going back to 1995. Those records included, among other things, a 1998 report of a cervical disc herniation with left arm numbness. We noted that plaintiff failed to provide these pre-accident records to her "accident doctors."

Plaintiff argued that she was an "eggshell" plaintiff and the fact that she may have had one herniated disc before the accident did not relieve defendants of responsibility for the other discs or the aggravation of her condition.

We contested liability. The driver, however, no longer worked for our client, the paratransit van company, and failed to appear for deposition or trial. The trial judge, understandably irate that the driver ignored a notice to appear at trial, gave the jury an adverse inference charge, telling them that since he failed to appear, they could assume that his testimony would have been unfavorable to his position. The only person to testify from the date of the accident was the plaintiff. In closing, her attorney argued that since our client, the paratransit van company, did not have a witness to contradict her account, the defense version of what had occurred had no merit.

But we did have a witness. Our client company's vehicles are equipped with DriveCam. DriveCam is a windshield mounted camera system that simultaneously films the forward view and interior view from its position. When an event such as a hard brake or collision causes the camera to experience a change in acceleration that exceeds the triggering level, the camera saves the 10 seconds before and 10 seconds after the event. We had 20 seconds of the accident saved at four frames per second: 80 separate images surrounding one impact. The video was our witness to at least part of the accident.

The DriveCam has some limitations. As plaintiff pointed out, it does not have the same peripheral vision a driver would have.

On the recording, we do not see plaintiff's vehicle until a quarter second before impact. The video does not show how or why her vehicle came to the location where the accident occurred. The DriveCam also does not readily show a vehicle's position within a travel lane; that information has to be inferred.

A DriveCam can be used to show that a driver is following too closely. In fact, the plaintiff used it to establish that the driver was following the car ahead of him at a one-second interval. DriveCam recommends a two-second interval at minimum. The driver was half that distance. The DriveCam seemed to prove plaintiff's theory of the driver's negligence.

The DriveCam alone would not be enough to establish plaintiff's comparative negligence. The rest would come from cross-examination, at deposition and trial, and from a thorough review of her medical records. Combining the evidence from the transcripts, the medical records, and a detailed review of the wealth of information available from the DriveCam, we built a case that contradicted plaintiff's trial testimony. We argued that not only was plaintiff negligent, her negligence exceeded that of the driver.

The jury foreman stood to read the verdict, finding that the driver was negligent and that his negligence was a factual cause of the accident. However, the jury also found that plaintiff was negligent and that her negligence was a factual cause of the accident. They apportioned the negligence: the driver 40%, plaintiff 60%. This was a verdict for the defense.

**Nigel A. Greene** focuses his practice on the defense of commercial motor vehicles and complex commercial litigation matters. In addition, he serves as an arbitrator in Philadelphia County. He is admitted to practice in the state courts of Pennsylvania, the United States District Court for the Eastern and Middle Districts of Pennsylvania and the U.S. Courts of Appeals for the Third Circuit. He earned his B.A. from Virginia Polytechnic and State University in 1989. He received a Juris Doctorate from Georgetown University Law Center in 1994, where he was active in Moot Court competition. Prior to joining Rawle & Henderson, Nigel served as an Assistant District Attorney in Philadelphia as a prosecutor in the Major Trials Unit where he successfully tried numerous cases, including jury trials involving major felonies.

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