

# LAW REPORTER

VOLUME 51, NUMBER 1 FEBRUARY 2008

## SPOTLIGHT

**Babysitter's neglect leads parents, counsel to show danger of leaving children in cars, 29**

## RECENT CASES

Admiralty, 4  
Attorneys, 4  
Automobile Accidents, 6  
Aviation, 8  
Civil Rights, 9  
Commercial Litigation, 9  
Consumer Protection, 10  
Damages, 12  
Employment Law, 12  
Evidence, 14  
Family Law, 15  
Government Liability, 16  
Insurance, 16  
Intentional Torts, 18  
Medical Negligence, 18  
Negligence, 20  
Practice & Procedure, 21  
Premises, 21  
Products Liability, 22  
Professional Negligence, 24  
Railroads, 25  
Schools, 26  
Utilities, 27  
Workplace Safety, 27



AMERICAN  
ASSOCIATION *for*  
**JUSTICE**

~ ENDOWED BY SIDNEY GILREATH ~

## RECENT CASES

applies when all of four elements are met. A communication is privileged if (1) it was made by an attorney acting in the capacity of counsel, (2) it was related to the subject matter of the proposed litigation, (3) the proposed proceeding is under serious consideration by the attorney acting in good faith, and (4) the attorney has a client or identifiable prospective client at the time the communication is published. The court said there must be a reasonable nexus between the publication and the litigation under consideration, and the proceeding must be contemplated in good faith.

The court noted that remedies such as malpractice actions, malicious prosecution actions by those defamed, or court sanctions exist to prevent exploitation of the privilege, and unnecessary defamatory publications to recipients unconnected with the proposed proceeding would not be privileged.

### *Law Firm's Counsel*

Robert J. Walker, Nashville, Tenn.  
Charles I. Malone, Nashville, Tenn.

## AUTOMOBILE ACCIDENTS

### **Tractor-trailer hits car trying to avoid collision with another truck: Negligent hiring: Failure to keep proper lookout: Brain damage: Settlement.**

*Kellum v. Allied Van Lines, Inc.*, U.S. Dist. Ct., E.D. Tex., No. 4:06-cv-00449, Aug. 1, 2007.

Kellum, 22, was driving on a highway when a tractor-trailer driven by Akauola unexpectedly swerved into her lane. Kellum took evasive action to avoid a collision with Akauola but was struck by another tractor-trailer driven by Popejoy. As a result of the accident, Kellum now suffers permanent brain injury. A recent college graduate, Kellum's lost earning capacity is estimated at about \$1.25 million. Her past medical expenses were about \$318,400. She will require life-long assistance due to her injuries, and her unspecified life-care plan is expected to be substantial.

Kellum's parents, individually and on her behalf, sued the two drivers and their respective employers, alleging, among other claims, that the employers failed to perform appropriate background checks of the drivers—which in Popejoy's case would have revealed numerous citations for driving under the influence, reckless driving, and speeding—failed to have appropriate policies, procedures, and screening for the hiring and retention of truck drivers; and allowed unfit drivers to operate commercial trucks. Plaintiffs alleged

that the drivers, among other claims, failed to maintain a proper lookout and failed to obey local, state, and federal laws pertaining to the operation of a motor vehicle. Regarding Popejoy, plaintiffs also alleged he operated a commercial motor vehicle when he was not physically qualified to do so by virtue of a mental disorder.

Defendants Akauola and his employer contended that Popejoy was the proximate cause of the wreck and that Kellum was contributorily negligent in overreacting to Akauola's actions. Defendants Popejoy and his employer contended that Akauola was responsible because the accident would not have occurred but for his negligence in swerving into Kellum's lane.

The parties reached a confidential settlement.

Plaintiffs' experts were Dave Stopper, federal motor carrier safety regulations, Broad Run, Va.; Andy J. Priest, brakes, Rockwall, Tex.; and J. Herbert Burkman, economics, and Steven Irwin, accident reconstruction, both of Dallas, Tex.

### *Plaintiffs' Counsel*

**R. Dean Gresham**, Dallas, Tex.  
**Joel Fineberg**, Dallas, Tex.

### **Graves Amendment preempting rental car company vicarious liability is unconstitutional.**

*Vanguard Car Rental USA, Inc. v. Huchon*, U.S. Dist. Ct., S.D. Fla., No. 4:06-cv-10082, Sept. 14, 2007.

A U.S. district court held that the Graves Amendment, 49 U.S.C. § 30106, which abrogates rental car company vicarious liability, is an unconstitutional overreaching of Congress's power under the Commerce Clause.

Huchon sued a car rental agency in state court for injuries he sustained in an accident involving a rental car. The agency sought a declaratory injunction in federal district court that it was immune from liability under the Graves Amendment, which preempts state laws creating vicarious liability for car rental companies. The court removed the state law claim and consolidated the two causes of action.

The court rejected the car rental agency's motion for summary judgment, holding that, as required by the U.S. Supreme Court in *U.S. v. Lopez*, 514 U.S. 549 (1995), 38 ATLA L. Rep. 238 (Aug. 1995), the Graves Amendment does not regulate the (1) use of channels of, (2) instrumentalities of, or (3) activities substantially related to interstate commerce. Thus, Congress has no authority to regulate vicarious tort liability for rental car agencies.

Here, the Graves Amendment directly regulates tort liability between parties to a commercial transaction, not the channels or the use of channels of interstate com-