



Defense Tactics to Refute Emerging Attempts to Impose a Higher Standard of Care on Commercial Truck Drivers

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I. Introduction

Can a commercial truck driver commit professional malpractice? The answer should be a resounding “no,” right? Not so fast.

Some recent decisions have affirmed the imposition of a higher standard of care on commercial truck drivers through the use of questionable experts and arguably improper jury instructions.

Characterizing truck drivers as “professional drivers,” plaintiffs’ attorneys argue that the “superior knowledge” of these professional drivers establishes a standard of care of what a reasonable *semi-truck driver* would do under the circumstances, as opposed to the duty of any driver to exercise ordinary care.

To avoid this emerging trend—in part the result of reptilian tactics—this article provides an overview of the pertinent decisions from throughout the country and outlines a number of defense tactics to be utilized to combat these tactics throughout the course of the case. These tactics can, and should be, used when attacking a complaint, responding to discovery, challenging a plaintiffs’ expert witnesses, presenting and arguing motions in limine, and ensuring the jury is not improperly instructed.

II. *Dakter v. Cavallino*: The Higher Standard of Care

In *Dakter v. Cavallino*, the plaintiff successfully submitted a jury instruction reflecting a higher standard of care than ordinary care at trial, and the Supreme Court of Wisconsin found no error in doing so. *Dakter v. Cavallino*, 866 N.W.2d 656 (Wis. 2015). The jury in *Dakter* was, in fact, instructed in a variety of questionable ways, including an instruction that,

“At the time of the accident, the defendant, [Joe Smith], was a professional truck driver operating a semi tractor-trailer pursuant to a commercial driver’s license issued by the State of Wisconsin.”

Then, with that information in the back of the jurors’ minds, they were further instructed:

As the operator of a semi tractor-trailer it was [the defendant’s] duty to use the degree of care, skill, and judgment which a reasonable semi-truck driver would exercise in the same or similar circumstances having due regard for the state of learning, education, experience, and knowledge possessed by semi-truck drivers holding commercial driver’s licenses.

Finally, the jury was told that, *"A semi-truck driver who fails to conform to the standard is negligent."*

Essentially, the jurors were instructed that if the "professional truck driver" did not act as a "reasonable semi-truck driver," then he was negligent. And that was precisely what the jury in *Dakter* concluded, resulting in a net verdict of over \$1 million for the plaintiff.

The defendant appealed, arguing that an instruction referencing the defendant's special knowledge and skill as a truck driver should only be given in *professional* negligence cases, which this obviously was not. Therefore, as the defendant argued, the trial court imposed a "heightened standard of care" on the defendant rather than instructing the jury to use that degree of care a reasonable person would have used in the same or similar circumstances. The Supreme Court of Wisconsin rejected these arguments, concluding that "[t]he truck driver negligence instruction did not misstate the law and was not misleading."

The court held that "ordinary care" in this case is the care a "reasonable and prudent *truck driver* would use under the same or similar circumstances." As support for its conclusion, the court invoked one rule and one principle. It first looked to the "Superior Knowledge Rule," as embodied in Restatement (Second) of Torts § 289, which provides that a person with special knowledge or skill is required to exercise the care a reasonable person with such special knowledge or skill would exercise under the same or similar circumstances.

It then considered the "Profession or Trade Principle," as embodied in Restatement (Second) of Torts § 299A, which provides that a person who undertakes to render services in the practice of a profession or trade is required to exercise the care a reasonable member of the profession or trade would exercise under the same or similar circumstances.

Then, court combined the two to create the following rule:

"An actor engaged in a profession or trade who has knowledge or skill superior to that of a reasonable person within that profession or trade must employ such knowledge or skill in order to meet the standard of ordinary care."

The language of this combined "rule" recognized by the court in *Dakter* is concerning because it broadens the classic interpretation of the Profession or Trade Principle, which is generally confined to those individuals that render services to others, such as doctors, lawyers, pharmacists, etc.

In *Dakter*, the court expanded this principle so that it would govern any person "in the performance of his or her occupation so long as reasonably performing that occupation requires acquired learning and aptitude by special training and experience." The court reasoned, "professional drivers" have a specialized state of learning, education, experience, and knowledge by virtue of their holding of a commercial driver's licenses.

Just as a truck driver could be said to have "acquired learning" as a result of "special training and experience," so too could the employee at McDonald's have "acquired learning" as a result of "special training and experience" gained at Hamburger University.

So has this happened?

III. Life After *Dakter v. Cavallino*

The good news is that it has not. There are many reported decisions, both before and after *Dakter*, that reject these types of attempts to impose a higher standard of care through a truck-driver specific jury instruction.

1. *Cervelli v. Graves*, 661 P.2d 1032 (Wyo. 1983);
2. *Fredericks v. Castora*, 360 A.2d 696 (Pa. Super Ct. 1976);
3. *Cahalan v. Rohan*, 2004 WL 2065056 (D. Minn. Sept. 2, 2004);
4. *Tavorn v. Cerelli, et. al.*, 2007 WL 2189075 (Mich. Ct. App. July 31, 2007);
5. *Townsel v. Dadash, Inc.*, 2012 WL 1403246 (Tex. App. Apr. 24, 2012);
6. *Southard v. Belanger*, 966 F.Supp.2d 727 (W.D. Ky. 2013).¹

To ensure the result in *Dakter* does not become commonplace, it is imperative for defense counsel to vigilantly identify tactics attempting to impose such a higher standard and combat these attempts at every stage of the litigation. Some decisions are useful at each stage where the issue may present itself.

The Supreme Court of Wyoming's decision in *Cervelli v. Graves*, for example, is highly quotable. There, the court held that a jury should not be instructed that a professional truck driver is held to a higher standard of care, explaining:

"It is one thing to say that, if so found, a jury can take account of an individual's exceptional knowledge or skill in determining negligence; it is quite another to say that as a matter of law, because he is a truck driver, an individual is held to a higher standard of care than other drivers."

Also, in *Fredericks v. Castora*. a Pennsylvania court ruled that a higher standard of care would not be applied to a pair of experienced truck drivers. *Fredericks v. Castora*, 360 A.2d 696 (Pa. Super Ct. 1976). The court plainly stated that "[a] requirement that experienced truck drivers be subject to a higher standard of care does not impress us as being a useful concept to infuse into the law of vehicle negligence." The court also recognized the slippery slope that could be created by imposing a higher standard of care in these cases, noting that "[t]o begin to vary the standard according to the driver's experience would render the application of any reasonably uniform standard impossible." The difficulty would be compounded by the fact that "[a]n understanding of the ordinary standard of due care applicable to the average motorist under the multitude of changing circumstances likely to confront today's driver is already difficult to grasp and apply justly."

In *Townsel v. Dadash, Inc.*, the Court of Appeals of Texas held that the trial court correctly denied a jury instruction that "a professional tow truck driver is held to the same standard of care that would be exercised by a reasonably prudent professional tow truck driver acting under the same similar circumstances." *Townsel v. Dadash, Inc.*, 2012 WL 1403246 (Tex. App. Apr. 24, 2012). The court, therefore, upheld the use of "the traditional reasonable person-standard" in the jury instruction.

¹ For a great summary and resource compiling case law, see "*Dakter v. Cavallino: An Anomaly or the New Normal?*" by Matthew S. Hefflefinger in DRI, *For the Defense* (December 2015).

On the federal side, the Eighth Circuit affirmed the trial court's result in *Cahalan v. Rohan*, 423 F.3d 815, 816 (8th Cir. 2005). At the trial-court level, the court acknowledged that the substantive state law recognized and imposed only a single standard of care on all drivers: "ordinary negligence." In *Cahalan v. Rohan*, 2004 WL 2065056 (D. Minn. Sept. 2, 2004), involving a personal-injury action against a UPS driver, the court held that "[t]he law does not recognize a standard of care beyond a reasonable and prudent ordinary person standard—even for professional drivers," and attempts to impose a different standard of care were rejected.

Likewise, in *Southard v. Belanger*, the Western District of Kentucky noted that "in the Plaintiff's response, she continually highlights that Mr. Belanger was a 'professional driver,' indicating that this fact somehow heightens the egregiousness of his conduct." *Southard v. Belanger*, 966 F.Supp.2d 727 (W.D. Ky. 2013). The court derided these attempts, acknowledging that "Kentucky law is clear, however, that **all motor vehicle drivers**, with the exception of those who carry passengers for hire, **are held to the same standard of care, regardless of the type or size of their vehicle.**"

IV. Defense Tactics to Combat the Higher Standard of Care

a. *The Higher Standard of Care in the Complaint*

We often see attempts to impose a higher standard of care is in the allegations in the complaint. A plaintiff will allege, for example, that "Defendant, professional driver, was operating a tractor-trailer on Interstate 55 in Jefferson County, Missouri." Then, continuing on, the plaintiff will allege that "suddenly, negligently, and without any warning Defendant, a professional driver, caused his tractor-trailer to crash into Plaintiff's vehicle." Once the plaintiff has inserted the idea of the defendant-driver as a "professional driver" into nearly every pertinent allegation to his or her claim, the seed has already been planted.

These types of allegations provide an opportunity to educate the court on the nuances and particular issues that will arise trucking cases. Rather than simply answer these allegations, file a motion to strike or a motion to dismiss. A motion to strike is particularly appropriate if the complaint contains numerous allegations referencing a "professional driver," and incorporates those characterizations into the allegations supporting the asserted negligence claim. Even if the motion is not successful, you have the opportunity to raise the issue with the court and to continue have it addressed.

b. *The Higher Standard of Care in Discovery*

The next stage in the litigation will be exchanging of written discovery, and again, there will likely be signs of the intent to impose a higher standard of care. It could be explicit in the written discovery, with requests to admit stating:

- "Admit that on the date of the accident you were operating a commercial motor vehicle as a professional driver"
- "Admit that, as a professional driver, you were subject to Federal Motor Carrier Safety Regulations while you operated the commercial motor vehicle on the date of the accident"

It could be more subtle, with requests for production seeking training materials, driver manuals, a copy of the driver's CDL license, etc. These can all be used in depositions and at trial as substantive and demonstrative evidence to portray your client as a "professional driver."

Although most courts will find much of this information to be discoverable, an objection to “professional driver” characterizations as argumentative should be asserted, even if materials are produced or an answer is provided. Additionally, unless “professional driver” is defined elsewhere, a valid objection is to the term being vague and ambiguous.

c. The Higher Standard of Care in Depositions

The higher standard of care is most likely to be a major issue in the deposition of defendant-driver and company safety director. In these instances, it will be fairly easy to spot, as it almost always follows a reptile-theory line of questioning. For example:

“Q: All right. Do you believe that professional drivers must keep a safe distance from other cars to protect all of us on the road from injury or death? A: Yes.”

“Q: Do you believe that drivers must observe road conditions to protect all of us on the road from injury or death? A: Yes. Q: Do you believe that professional drivers must maintain awareness by consistently scanning to protect all of us from injury or death? A: Yes.”

“Q: All right. The – just getting back on track, Mr. ██████, the – the rules requiring you to look well ahead and overs the entire situation, do you believe these rules are important to professional drivers? A: Yes.”

The plaintiff’s counsel has not only established—multiple times—that the defendant-driver is a “professional driver,” but also laid the foundation necessary for the reptile theory to come into play. By establishing the necessary safety rules, and securing admissions of the defendant-driver being a “professional driver,” the plaintiff will now argue a higher standard of care along with reptile-theory arguments at trial. Safety directors and other company representatives are also susceptible to these lines of questioning in depositions.

The most important defense tactic during the deposition is to object early and object often to these lines of questioning. The real work, however, should take place well before the deposition, as objections are unlikely to sufficiently rebut these efforts during the depositions.

As part of the deposition preparation, create a deposition database of video tape and deposition transcription from a prior deposition involving the same plaintiff’s counsel. Once that is reviewed, mock question-and-answer sessions are instructional in preparing the witness. This is especially useful if another attorney is available to play the part of opposing counsel, and hopefully, can mimic the questioning tactics seen in the video transcriptions.

Finally, it is important to take the time to review all of the documents that were produced. Driver manuals and safety materials are often the most obvious grounds for these types of questions, but do not overlook seemingly innocuous materials, such as a possibly expired commercial driver’s license.

d. *The Higher Standard of Care with Plaintiff's Experts*

In many cases, the attempts to impose a higher standard of care will come to a head, once expert witnesses are disclosed and expert reports are exchanged. In expert reports, for example, it is common to see phrases like a truck driver's "higher performance standards," which the expert will state "are essential to highway safety." Sometimes it will go even further, suggesting that [t]he increased exposure of risk and danger to the environment and general public does not lessen the responsibility to the *standard of care required of a truck driver and motor carrier*, but rather *increases their performance duties to maintain that same standard of care proportionate to the risks involved.*" These statements are designed to establish a mythical "standard of care of truck drivers," and "performance standards" that drive up the standard of care beyond that or ordinary care.

There are a number of ways to combat and limit these types of opinions from reaching the jury at trial.

First, following the deposition, prepare and submit a motion to exclude the proposed testimony from the expert. By this point, you may have already presented these same issues to the court through a motion to dismiss or a motion to strike, a motion to compel, and possibly on other discovery issues, so hopefully this is not a novel point to be raised. The argument itself is straightforward: the expert is attempting to impose an incorrect standard of care. And, if the court were to permit the expert to testify that defendant-driver had a higher "performance standard" or that it was his "duty" to operate his truck in accordance with Federal Motor Carrier Safety regulations, the jury will undoubtedly conclude that *the law* imposes a higher standard of care for him, a commercial driver, than an average motorist, which the law does not impose. Any suggestion that the defendant-driver has a greater standard of care, or a higher performance standard, is a misstatement of law that will confuse the jury, and such testimony—as well as portions of the expert's report—should be excluded and stricken.

Second, offer a competing expert. If the plaintiff's expert mischaracterizes non-mandatory industry practices as "requirements," a competing expert can provide the proper context for Federal Motor Carrier Safety regulations and other industry practices, which can be used to temper the idea that a higher standard of care applies to commercial truck drivers.

Third, file a stand-alone motion in limine to prevent testimony that either states or infers that truck drivers have a higher standard of care than other motorists. These motions in limine should also seek to preclude any references to "professional driver," "performance standards," the "truck driver standard of care," etc. To support these motions, there are a few cases that can be referenced, in addition to the more general case law summarized previously:

1. *Botey v. Green*, 2017 WL 2485231, at *3 (M.D. Pa. June 8, 2017) (precluding plaintiff from referring to defendant driver as a "professional driver" to avoid suggestion of higher standard of care);
2. *Lay v. Haskins*, 549 Fed. Appx. 707, 710 (10th Cir. 2013) (finding no error in the district court's granting of defendant's motion *in limine* to exclude "references to a higher standard of care for commercial truck drivers");
3. *Dahlgreen v. Muldrow*, 2008 WL 186641, at *7 (N.D. Fla. Jan. 18, 2008) (precluding plaintiff from eliciting testimony "regarding commercial motor vehicle operators being held to a higher standard of care than other highway users").

e. *The Higher Standard of Care with Jury Instructions*

Remember: the end goal is to prevent jurors from hearing—and, especially, believing—that commercial truck drivers are held to a different standard of care from ordinary motorists. Hopefully, you were successful in eliminating such inferences or references from the complaint, avoiding answering written discovery on these issues, preparing for deposition questions to lay the foundation, and in preventing any expert witnesses from opining on a higher standard of care.

All of those efforts would be for naught if the instructions are submitted to the jurors like those in *Dakter v. Cavallino*. To prevent that from happening, it is imperative to carefully scrutinize the plaintiff's proposed instructions, and to offer alternative instructions if there is the slightest indication that a higher standard of care is being suggested.

Dakter is an obvious example of a type of instruction to challenge, but often the inference will be more subtle. So long as the jurisdictional law supports it, any attempt to treat the defendant-driver differently than other non-commercial drivers should be challenged, and there is case law to support those challenges. See, e.g., *Dahlgreen v. Muldrow*, 2008 WL 186641, at *7 (N.D. Fla. Jan. 18, 2008) (precluding plaintiff from seeking a jury instruction attempting to impose a higher standard of care).

V. Conclusion

While the decision in *Dakter v. Cavallino* suggests that a commercial truck driver may commit professional malpractice, the strategies outlined in the preceding pages should help to ensure that this does not become the case throughout the country. Using strategies that can be employed to combat attempts to impose a higher standard of care on commercial truck drivers than that of ordinary care, defense counsel must be vigilant throughout the course of litigation to prevent this emerging trend and secure favorable decisions rebutting that an ordinary traffic accident would ever become a commercial truck driver's professional malpractice.

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