Life is a Highway: Navigating Roadway-Derived Litigation

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The United States civil justice system operates with an expectation that taking reasonable safety measures regarding foreseeable behavior should guard against catastrophic or fatal injuries. When a roadway related accident results in significant trauma or death, therefore, a forensic evaluation should be conducted to identify the breakdown in the safety measures that could have prevented such an outcome.

This article addresses the interplay of that philosophy with roadway-related accidents. With properly designed modern vehicles, airbags, seatbelts, reinforced roofs, sturdy seats, guardrails, and maintained roadways, these safeguards, if reasonably implemented by the respective entities, should protect against catastrophic outcomes. . This article will focus on guardrail end-terminals, in addition to other roadway-related claims, and then address issues regarding the preservation and spoliation of such evidence.

Guardrail End-Terminals

Guardrails are installed along America's roadways for the protection of motorists. Guardrails, if properly designed, keep vehicles from straying off the roadway and, when impacted at the endpoints, should absorb or dissipate energy from the crash and give way, rather than remaining rigid and potentially penetrating the accident vehicle. But, unfortunately, there are tens of thousands of guardrails that will not achieve this purpose due to either poor design or improper installation.

On November 1, 2016, 17-year-old Hannah Eimers was driving her father's Volvo S80 on Interstate 75 near Niota, Tennessee, when the car went off the road, traveled into the median, and hit a Lindsay X-Lite guardrail end-terminal on the driver's side. Instead of the guardrail end-terminal telescoping back on impact or re-directing the vehicle, the guardrail end-terminal penetrated the car, impaling and killing Hannah.

Ironically and tragically, on October 26, 2016, just six days before Hannah was killed, the Tennessee Department of Transportation (TDOT) had removed the Lindsay X-Lite guardrail end terminal from its qualified products list, based upon concerns for potential performance issues of the system.

The decision to remove the Lindsay X-Lite guardrail end terminal from the state's qualified products list meant that TDOT would not replace or install new Lindsay X-Lite guardrail terminals. The same X-Lite guardrail system had already been involved in several other fatal crashes at the time of Hannah's death. Later in 2016, TDOT decided to remove these guardrail end terminals entirely from roads where the speed limit is greater than 45 mph.

Earlier that year, on July 2, 2016, 69-year-old Wilbert Byrd was killed on I-75 in Chattanooga, Tennessee, when, while riding as a passenger in a 2015 Ford Explorer driven by his nephew, the vehicle left the

roadway and collided with a Lindsay X-Lite guardrail end-terminal. Once again, the guardrail's W-beams penetrated the vehicle and traveled through the vehicle's cabin. It entered through the center dashboard and exited the rear windshield. Over 60 feet of guardrail passed through the vehicle in a matter of seconds.

To date, of all the uncovered highway speed frontal impacts involving an X-Lite, every one of them has resulted in an actual and/or potential penetration.

Hannah and Wilbert's deaths were alleged as being due to the catastrophic failure of the X-Lite system. Specifically, their lawsuits contended that when impacted at highway speeds, these end-terminals typically fail to properly contain the telescoping rails, resulting in violent and deadly penetration of the impacting vehicle.

Additionally, as the manufacturer of the X-Lite, Lindsay has the responsibility of ensuring the quality of its installation manuals, videos, and training. A series of audits conducted on approximately 600 randomly selected X-Lites throughout the country, however, exposed an installation defect rate potentially as high as 90 percent. It is a universally acknowledged tenet in the guardrail industry that installation defects contribute to an increased risk of penetration during impact.

According to the US Department of Transportation Federal Highway Administration (FHWA), 29 states in the country have the X-Lite installed on state-owned roadways. There are approximately 14,000 X-Lites nationwide; however, over 80 percent were concentrated in seven states: Maryland, Massachusetts, North Carolina, Tennessee, Texas, Virginia, and West Virginia.

Finally, in its annual report to investors, Lindsay disclosed that the Department of Justice, Civil Division, and US Attorney's Office for the Northern District of New York, with the assistance of the Department of Transportation, Office of Inspector General, are conducting an investigation of the Company relating to the Company's X-Lite end terminal and potential violations of the federal civil False Claims Act. At this point, there are no states in this country that permit the installation of X-Lites on their roadways, and many have spent millions of dollars removing and replacing this product. Despite this, Lindsay continues to maintain that their X-Lite was state of the art.

Lindsay is not the first industry leader to be involved in a guardrail controversy. During litigation against another guardrail industry giant, Trinity Industries, Inc., it was uncovered that Trinity had reduced the steel in their ET-Plus end rail terminal, allegedly resulting in violent deaths on the roadway due to their failing guardrail end terminals. Specifically, Trinity reduced the steel of its feeder channel system by one inch, resulting in reduced costs per system for the company. Following nationwide litigation against Trinity, the ET-Plus was completely removed from all federally associated Qualified Products Lists for roadway use. Trinity was later ordered to pay $663 million for its improper actions. This was recently reversed by an Appellate Court because it found that the US government refused to acknowledge that it was defrauded by Trinity. *See United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir. 2017).

Testing and Approval Process

All the defective and potentially dangerous guardrails raise the question: how did these products get approved for American roadways? The answer is fairly disturbing. The US government, through the Federal Highway Administration (FHWA) sets out minimum design guidelines for guardrail systems. If a company provides passing results to the government under these guidelines, then the FHWA will rely

upon the accuracy of that information and inform individual states that federal funding can be used for the installation of those particular systems.

However, the testing criteria are minimal standards that quickly become outdated due to the inherent inability of a publicly funded governmental program to keep up with state-of-the-art technology. Unfortunately, individual state departments of transportation are left with the impression that FWHA approval is the gold standard when in reality the guideline is a bare minimum criterion that does not take foreseeable real-life scenarios into account.

In the case of the X-Lite, the allegations are that it failed eight out of 14 of the governmental crash tests during a 10-week product development process and that Lindsay never reported those failed tests to the FHWA. It has been further alleged that, despite marketing their product specifically for highway usage, Lindsay admitted that it had not tested the X-Lite at any impact speeds above 62.5 mph and that it has no data to say beyond 62.5 mph how the X-Lite would perform.

In lawsuits involving the X-Lite or ET-Plus, the plaintiffs' position has been that the FHWA was never actively made aware of such product deficiencies, whereas the defense position is that the FHWA knew or could have learned or deduced such information on their own. However, as the FHWA is typically immune from a court's subpoena power to sit for civil depositions, a clear-cut answer to this looming question continues to remain absent in roadway related litigation.

Other Roadway Claims

In addition to claims stemming from defective guardrails, there are also actionable claims derived from the absence of any guardrail system. The design criteria used for American highways mandate that guardrails be installed to protect against certain hazards based upon a variety of factors, including roadway speed, hazard location, hazard type, etc. These hazards may include trees, poles, rivers, or even something as simple as a steep embankment. A thorough evaluation of a failure-to-install guardrail case must be conducted whenever a motorist's catastrophic or fatal injuries occur due to such a hazard next to the roadway.

There may also be a scenario where a guardrail is installed, but it does not properly protect against a hazard. For example, if a guardrail is seeking to protect a motorist from a light pole next to the roadway, the rail must extend a certain distance past the pole, rather than ending right next to it. This is known as the "length of need" or "length of advancement." A roadway expert can review and identify whether this standard was properly met.

Other roadway claims involve Maintenance of Traffic (MOT), where a construction company is altering the flow of traffic with the use of cones and other directional aids during a project. We have all been victims of a poorly executed system where three lanes suddenly and dangerously converge into one. In these cases, the contractors in charge of the roadway work have a responsibility to properly manage the flow of traffic and are liable if they fall below the reasonable standard of care.

Additional roadway claims can also involve pedestrian-vehicle accidents. An examination of the effectiveness of the crosswalk, or a lack of a reasonably accessible crosswalk, should be evaluated. If pedestrians are jaywalking, then steps to prevent that behavior should also have been addressed. This can include putting a fence or guardrail in the median to deter the crossing or increasing the size of the median to allow the crossers the ability to safely stop and assess the remaining lanes of the traffic. This

is known as a pedestrian safety or median refuge island; if it is too small, it incentivizes pedestrians to dangerously attempt to cross all lanes of traffic in one motion. These claims should also be investigated.

There are a variety of immunities that must be evaluated in the context of roadway related claims, particularly relating to governmental defendants. A diligent attorney must efficiently evaluate the potential claims against any sovereign entity and comply with the appropriate notice requirements, as the time limitations for those claims are often less than the underlying personal injury or wrongful death claim. That legal analysis, however, extends beyond the reach of this article.

The investigation of such claims, from both the plaintiff and defendant perspective, should begin before filing suit. Most states have well-developed Freedom of Information Act (FOIA) laws that allow for the procurement of many roadway related materials pre-suit. These can include development review committee notes, traffic engineering studies, accident analyses, topographic images, etc. Often, there will be private, non-sovereign, entities involved in the design, development, and maintenance of the roadway. The FOIA process should be used liberally by all parties to evaluate the merits of any potential claim.

Preservation and Spoliation Of Evidence

An important note is the significance of the physical evidence in evaluating these cases. A primary objective of a product liability attorney is to always preserve the product at issue. The absence of the product provides the opposition expanded opportunity to construct alternate failure mode theories to the detriment of your case and client. The following is a brief primer on the main issues that arise when an entity fails to preserve actual or potential evidence in a roadway or other product liability action.

The law is heavily jurisdictionally dependent, but the concepts apply generally. The most common issue is a first-party cause of action for spoliation. In this scenario, the acts or omissions of the potential plaintiff ordefendant caused the potential evidence to be destroyed. Some venues permit a separate cause of action sounding in spoliation, though others simply apply court sanctions ranging from adverse inference jury instructions to striking of the pleadings.

Florida, for example, does not permit a separate cause of action for first-party spoliation. Rather than providing a direct cause of the action, the Florida Supreme Court explained that sanctions, including striking of pleadings, under the rules of civil procedure provide enough protection against a first-party defendant who destroys, damages, or misplaces evidence. *Jimenez v. Cmty. Asphalt Corp.*, 968 So. 2d 668, 671 (Fla. 4th DCA 2007); *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015); *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005).

The elements needed to establish a claim for spoliation in Florida form the fundamentals that are common in many jurisdictions:

1. Existence of *a potential legal action*;
2. A legal or contractual *duty* to preserve relevant evidence;
3. *Destruction/spoliation* of that evidence;
4. Significant *impairment* in the ability to prove the lawsuit;
5. A causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. *Damages*.

Gayer v. Fine Line Const. & Elec., Inc., 970 So. 2d 424, 426 (Fla. 4th DCA 2007). Practically speaking, the ability to establish the actual destruction of evidence and its detrimental impact on your client's ability to prove her case is typically not where the spoliation battles are fought in first-party cases. Instead, the

majority of spoliation claims hinge on the establishment of whether a *duty* to preserve existed.

The duty analysis varies by jurisdiction and case law. Absent a contractual or statutory duty, courts may evaluate whether the spoliating party simply had notice of anticipated litigation related to the evidence at hand in evaluating whether such a duty arises. Other courts look at how imminent a potential lawsuit may be. These cases are often heavily fact-specific, as courts need to balance out the interests of preservation for a potential party in conjunction with a company's right to not become a permanent repository of all potential evidence.

The analysis under federal law is more direct. "[F]ederal law . . . makes clear that a litigant 'is under a duty to preserve what it knows, or reasonably should know, is relevant [to litigation or potential litigation].'" *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 127 (S.D.Fla.1987) (*quoting Wm. T. Thompson Co. v. General Nutrition Corp*., 593 F.Supp. 1443, 1455 (C.D.Calif.1984))." St. Cyr v. Flying J Inc., 3:06-CV-13-33TEM, 2007 WL 1716365, at *3 (M.D. Fla. June 12, 2007). However, "[t]here is no federal cause of action for spoliation." *See, e.g., Sterbenz v. Attina,* 205 F.Supp.2d 65, 74 (E.D.N.Y.2002); *In re Elec. Mach. Enterprises, Inc.*, 416 B.R. 801, 872 (Bankr. M.D. Fla. 2009), *aff'd in part*, 474 B.R. 778 (M.D. Fla. 2012).

Though a broader duty to preserve may exist under federal law, the execution of it is also couched in sanctions and inferences as opposed to an independent cause of action.

There is also potentially helpful, albeit distinguishable, authority under each state's workers' compensation statute and resultant case law regarding an implicit or explicit duty to preserve evidence by the employer in anticipation of litigation that may be triggered based on additional facts in a case.

A broader legal discussion of third-party spoliation will not be addressed here as the jurisdictions have wildly disparate approaches. Often the spoliating parties in roadway and vehicle cases are the insurance carriers and storage lots. The courts have struggled with imputing liability onto them, particularly when a theory of a defect is still just a nascent allegation. When a product is destroyed before any meaningful examination by a party's expert, the court will be faced with either applying a windfall of untested liability in favor of the plaintiff, or a windfall of simply exonerating the spoliating third-party; neither option is appealing to any court. The moral of this story is the significance of taking all efforts to preserve evidence and put repository entities on notice as soon as possible to avoid the uncertainty of such spoliation cases.

The rulings in the case law are more driven by the facts rather than black letter law. The closer in time to the filing of a lawsuit that a product was destroyed, the stronger the argument will be. The argument for spoliation is strengthened as greater notice or knowledge of impending litigation can be imputed onto the defendants. In the case of third-party spoliation, the ability to prevail on a case is even more challenging; therefore, such evidence should be promptly secured and maintained by the attorney rather than allowing it to remain in the possession of a third-party.

Whenever a roadway related accident appears in your office, it is important to always assess the potential for a defective roadway claim. Whether the claim pertains to defective guardrails, a failure to implement a guardrail system, or general roadway defects, it is important to quickly assess these potential claims. Guardrails are typically repaired or destroyed shortly after an accident, and totaled vehicles can often be quickly sold at auction. It is therefore imperative for both parties to send out preservation requests once a potential claim has been identified. It is also important to send out proper investigators to document the scene of the crash.

Additional Considerations

Roadway related accidents contain many facets to their thorough investigation. They also require a full examination of all potential defects associated with any motor vehicles involved in the accident. A tire defect may inaccurately incriminate the super-elevation of a roadway as being the reason the vehicle lost control in a storm. Crashworthiness defects associated with the safety features of a sedan may falsely point to an unguarded light pole as being the ultimate cause of a catastrophic injury. A tractor trailer's defective gasket oil leak may misleadingly implicate an improper paving or grading of the roadway for a vehicle's inability to stop in time to avoid a violent impact. A lack of visibility due to a sports car's aggressively angled A-pillar could erroneously mimic the same outcome as a line-of-sight roadway defect case. All these issues must be thoroughly evaluated when considering the cause of a victim's catastrophic or fatal injury in a roadway related accident.