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ALTERNATIVES TO LITIGATION: IS THERE A BETTER WAY?

Protective Insurance Company
Carmel, Indiana
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- ▶ Depending on the specific facts of a case, there are several alternatives to traditional litigation available that can help minimize exposure, risk, and ultimately the total amount paid to defend and resolve a claim.
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ALTERNATIVES AVAILABLE

- ▶ Mediation – Formal and Informal
 - ▶ Binding Arbitration/Private Judges
 - ▶ Mini-Trials
 - ▶ High-Low Agreements
 - ▶ Bifurcation of Liability and Damages
 - ▶ Contribution Actions
- 

Why not seek a jury trial?

Runaway Verdicts and the Application of the Reptile Theory



Overview of Recent Verdicts

What is the Reptile Theory?

Reptile Theory

Goals:

- ▶ Infuriate the Jury
- ▶ Increase Damages.

How:

- ▶ Focus on how “dangerous” the Company is.
- ▶ Show the Jury how violations of the Federal Regulations affect the jury members and not just their client.



The Focus is on the Trucking Company, not the Truck Driver

- ▶ Plaintiff's Counsel understands that truck drivers can often be more sympathetic than their own clients
 - ▶ Plaintiff's Counsel also knows that many people are in some way related to the trucking industry
- 

Plaintiff's Evidence



- Truck Drive
- Did the Company know that this Driver had several prior violations?
- Did the Company know of a pre-existing medical condition that should disqualify the truck driver from driving?

No Expert for Trucking Standards

- ▶ Plaintiff's Counsel will develop the trucking standard from the Company's Corporate Representative



- ▶ Win/Win Situation:

- ✓ If the Corporate Representative agrees with the regulations set forth in the FMCSA, that fact/standard is established.
- ✓ If they disagree, they are disagreeing with a Regulation in the FMCSA.

Beyond Formal Discovery

- ▶ Plaintiffs are utilizing:
 - ✓ FMCSA Safety Profile
 - ✓ FOIA requests to FMCSA
 - ✓ Company websites
 - ✓ News coverage
 - ✓ Corporate filings



The Wedge

- ▶ Plaintiff's Counsel wants to drive a wedge between the Company and its Driver to get better admissions.



One tactic:

- Plaintiff will inform the driver how much money the Company made on the load **versus** how much the Driver made for that load.

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Biography:

Dr. Kanasky is recognized as a national expert, author and speaker in the areas of witness preparation and jury psychology. He provides top-quality litigation research and consultation to defense counsel involved in civil lawsuits. Bill has expertise in all aspects of litigation research and consulting, including:

- **Witness Preparation:** Special proficiency in pre-deposition and pre-trial witness effectiveness training, particularly with corporate executives, healthcare professionals, foreign-born witnesses, and 30(b)(6) witnesses.
- **Trial Science:** Expertise in all aspects of jury research, including research design, sampling methods, multivariate statistical analysis, and juror profiling; also skilled in juror questionnaire and voir dire development, jury selection, opening statement construction, case strategy analysis, and persuasive visual aid creation.
- **Settlement and Mediation Science:** Expertise in early case assessment, empirical damages prediction, and witness effectiveness assessment.

Bill's success with training witnesses for deposition and trial testimony is remarkable. His systematic witness training methodology is efficient and effective, as it is designed to meet each witness's unique needs, while concurrently teaching core principles of persuasive communication. Clients benefit from Bill's ability to transform poor or average witnesses into extraordinary communicators.

Bill earned his B.A. in Psychology from the University of North Carolina at Chapel Hill, and his Ph.D. in Clinical Psychology from the University of Florida. He has been a faculty member at several trial academies where he has taught voir dire development, jury selection methodology, and witness preparation techniques. Bill is a published author in the areas of communication science and jury psychology, and has presented at numerous State Bar conventions, corporate counsel organizations, corporate legal departments, law schools, and major law firms.

General Safety Rule Attack

Answers



“Consumer/Patient/Employee safety is your top priority, correct?”

▶ “You have an obligation to ensure their safety, right?”

▶ Option 1: General Agreement (not absolute)

- Answer: Safety is certainly an important **goal**, yes.
- Answer: Safety is **ONE OF** our many concerns, of course.

▶ Option 2: Request Specificity

- Answer: Safety in what regard? Can you please be more **specific**?
- Answer: In what **circumstance** are you referring to?

SAFETY IS MY GOAL
1-888-550-7233 **L7822**

Specific Safety Rule Attack Answers



- ▶ “If you have factors A, B, and C, then the safest thing to do is conduct/choice X, correct?”
- ▶ Answers:
 - It depends on the **specific circumstances**.
 - It depends on **full picture**.
 - Not necessarily, as every **situation** is different.
 - That is **not always** true.
 - I would **not agree** with the way you stated that.
 - That is not how I was **trained**.
 - That is not how **it works**.

General Danger Rule Attack

Answers



- ▶ “It would be wrong to needlessly endanger someone, right?”
- ▶ “You would agree that exposing someone to an unnecessary risk is dangerous, correct?”
- ▶ “You always have a duty decrease risk, right?”
- ▶ Answers:
 - I don’t understand **what you mean** by “needlessly endanger.”
 - That is a **confusing** question; **can you define** “needlessly endanger?”
 - I don’t understand what you mean by “unnecessary risk,” can you please be **more specific**?
 - That is a very **broad** question, what **specific circumstance** are you referring to?

Specific Danger Rule Attack Answers



- ▶ To avoid risk/danger/harm, you should always never do conduct/choice X, right?

- ▶ Answers:
 - It depends on the **specific circumstances**.
 - It depends on **full picture**.
 - Not necessarily, as every **situation** is different.
 - That is **not always** true.
 - I would **not agree** with the way you stated that.
 - That is not how I was **trained**.
 - That is not how **it works**.

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9	departs 99:11	87:
	depends 16:20,24	13:
	17:17,19,23 18:2,6	14:
	49:13 53:13,17 54:3	16:
	54:5,14 60:5 65:19	19:
9	65:22,25 66:1,7,17	1:
	67:16 72:23 73:2	dif
	90:22,23 101:25	4:
	109:20 111:4	dif
7	112:15 115:6	2:
16	123:14 129:20,22	
4	136:8 138:1 139:7	
	140:2,16 141:13	
3	149:23 153:9	d
7	155:10 157:2	
	158:13 159:16	d
8	160:19 176:21,24	d
	203:13	d
	deposition 1:14 3:22	d
	4:10,11,12 10:21,22	

- ▶ The alternatives to traditional litigation allow us to avoid the reptilian trap.

MEDIATION

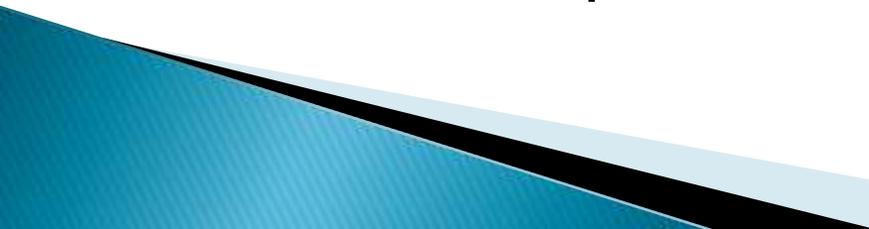
- ▶ Form of Alternative Dispute Resolution through use of neutral third party that facilitates rather than directs the process
 - ▶ Relatively inexpensive, swift and simple
 - ▶ Allows responsibility and authority for coming to agreement to remain with the people who are handling or have the conflict
 - ▶ Allows the parties to retain control of process rather than handing the decision making to a jury or judge
 - ▶ Process is confidential
- 

- ▶ Most commonly used Alternative Litigation Strategy
- ▶ Developing in popularity over the years and often times required early on in Federal Court Claims

ADVANTAGES

- ▶ Brings all interested parties together “in the same room” for the purposes of attempting resolution
 - ▶ Attendance alone shows willingness of both parties to achieve resolution
 - ▶ Mediator provides the parties with an opportunity to hear and learn about the strengths and weaknesses of their liability and damage positions from a neutral party
 - ▶ Allows for structured settlements to be utilized for long term benefits
- 

EXAMPLE

- ▶ Driver of insured tractor trailer becomes lost due to poor directions provided by employer company
 - ▶ Insured driver attempts to turn around at the intersection of U.S. Highway 6 and Main St. in order to head the opposite direction
 - ▶ Insured driver admits to police that is what he was doing
 - ▶ Alternative route available to driver that would not have required backing onto the highway
- 

- ▶ During the course of turning around, trailer is perpendicular to U.S. Highway 6, blocking both lanes of travel
 - ▶ Visibility conditions were dark with some street light illumination
 - ▶ Speed limit on U.S. Highway 6 in both directions is 55 mph
- 

- ▶ Because the trailer is blocking both directions of travel on U.S. Highway 6, 73 year old Plaintiff/decedent, driving a 2003 Chevy S-10 pickup, returning home after attending church, strikes insured driver's trailer
 - ▶ Plaintiff/decedent died at the scene
 - ▶ Survived by a daughter, with whom Plaintiff/decedent was close, pursues Wrongful Death and Survival Claim
- 

MEDIATION

- ▶ Allowed for the use of expert reports at mediation to shape the issues – through a third party neutral
 - ▶ Liability of truck driver clear; however, there were several contested issues as to Plaintiff/decedent's comparative negligence
- 

- ▶ Visibility and conspicuity of the tractor and trailer at issue
 - ▶ The level of Plaintiff/decedent's attentiveness and reaction at issue
 - ▶ Question as to whether Plaintiff/decedent was using headlights
 - ▶ Is there enough evidence at trial for an award of conscious pain and suffering?
 - ▶ Issues with future economic damages due to age and health of Plaintiff/decedent
- 

Defendant's expert provided that the trailer was properly fitted with retro-reflective tape - which should have allowed the trailer to be visible to Plaintiff/decedent



- ▶ Expert also was able to support insured driver's contention that the Plaintiff/decedent's headlights were not activated
 - ▶ Switch was damaged in crash and therefore inconclusive as to whether headlights were illuminated
 - ▶ Expert conducted inspection – no hot shock deformation indicative of headlights not being activated
- 



- ▶ Expert's scene inspection also found no evidence of skid or gouge marks, allowing expert to opine that Plaintiff/decedent never made any evasive maneuvers to avoid the trailer. Therefore, Plaintiff/decedent was not operating the vehicle attentively.



- ▶ Also able to raise issues concerning Plaintiff/decedent's expert economic report and methodology. Specifically, the failure to take into consideration deductions for personal maintenance
 - ▶ Raised issues concerning conscious pain and suffering based on coroner's report
 - ▶ Raised issues concerning Plaintiff/decedent's medical conditions due to lifetime of heavy smoking and prior medical conditions
- 

- ▶ Introduction of these issues through third party neutral allows parties to discuss sensitive topics with less risk of parties becoming “entrenched” in their positions or becoming overly emotional and less rational

- ▶ Based on issues raised by Defendants through neutral third party – case resolved for significantly less than what was demanded

INFORMAL MEDIATION

- ▶ Informal meeting involving counsel, a representative from the trucking company and Plaintiff and/or Plaintiff's representatives
 - ▶ No formal neutral "mediator," but the parties understand that the individuals with full authority are present and willing to talk
 - ▶ Good strategy to employ early on in litigation
- 

- ▶ Nothing to lose – if case does not settle, allows for a dialogue to get started and for Defendant to assess Plaintiff and/or Plaintiff's representatives in person
 - ▶ Oftentimes will result in obtaining critical information from Plaintiff and/or Plaintiff's representatives early on a case
 - ▶ Shows willingness of trucking company to want to resolve claim amicably without potentially emotional, protracted litigation
- 

UNIQUE SITUATIONS

- ▶ It is important to recognize and understand cultural differences.

- ▶ The accident presented unique situations regarding:
 - Accident investigation
 - Contact with family representatives
 - The Amish culture and belief system
 - Valuation
- 

On the evening of Sunday, November 3, 2013, a rear-end collision occurred between a tractor-trailer and a buggy. A couple was traveling in the buggy. One occupant was killed in the accident.



- ▶ Contact was made through church elders and a meeting was held with all family members, church elders and neighbors.

 - ▶ The meeting was lengthy and emotional. We had full buy-in and support of our client. The meeting was attended by:
 - Company owner
 - Driver
 - Safety Director
 - Counsel

 - ▶ On the evening of December 24, 2013, the matter was fully resolved.
- 

BINDING ARBITRATION WITH HIGH/LOW AGREEMENT

BINDING ARBITRATION WITH HIGH/LOW AGREEMENT



The Accident

This accident took place on Interstate 81 southbound, just a few hundred feet south of where another major interstate, I-78 westbound, junctions and the two major roads combine to make it a four lane super highway. Plaintiff, who was traveling from NYC to NC overnight, decided to park on the right shoulder at the merge point and sleep for a couple hours. Our tractor trailer was traveling South on I-81 and just at that point, suffered a blowout of the steer tire causing him to veer right and strike Plaintiff's parked vehicle.

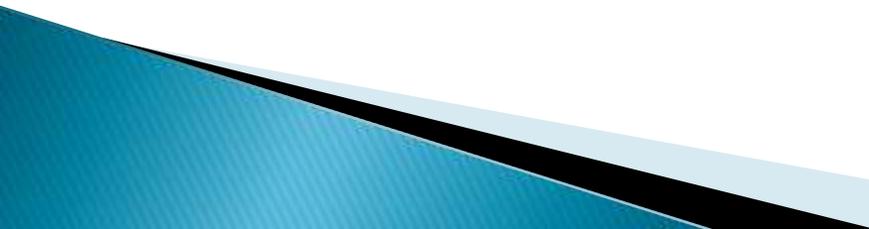


- ▶ Plaintiff has asserted a punitive damages claim
- ▶ Issue with spoliation due to the disappearance of the steer tire and rim on the tractor trailer that failed

PHILADELPHIA COUNTY VENUE

Despite Plaintiff residing in NY and/or NC, Defendant domiciled in Pittsburgh, and accident occurring in Lebanon County, Plaintiff chose Philadelphia as the Venue. Despite efforts to remove and change venue, case remained in this Plaintiff oriented County.

VENUE AND “LOGISTICS”

- ▶ Plaintiff-oriented venue
 - ▶ Plaintiff’s counsel from Philadelphia
 - ▶ Witnesses and parties from multiple locations
 - ▶ Multiple legal and factual issues; many experts
 - ▶ No date certain for trial (month long jury pool)
 - ▶ Mediation tried but failed—high demand and low offer
 - ▶ 3 day arbitration rather than a 2 week trial
 - ▶ All these factors pointed to an alternative way of litigating this case
- 

CHOOSING AN ARBITRATOR

- ▶ Highly reputable and familiar with complicated issues (former Philadelphia County judge)
 - ▶ Agreeable to both sides
 - ▶ Willing to make liability and damage decisions and to make pre-arbitration decisions on motions and other evidentiary issues
- 

AGREEING TO PARAMETERS

- ▶ I wanted to confirm our understanding that we have agreed to pursue this case by private arbitration (Arbitrator Name) and further that we have agreed to a high/low agreement of \$175,000.00 and \$825,000.00.
 - ▶ We have further agreed that we will not advise the Arbitrator that a high-low agreement is in place, but will wait until after he has rendered his decision to mold the decision accordingly.
 - ▶ We have further agreed that the arbitration will include issues on both liability and damages.
 - ▶ By separate correspondence we will provide you with a list of those witnesses we intend to call and I understand that you will do likewise.
 - ▶ We will have some additional discussions as to whether some of the expert witnesses may be introduced by report only and others may either appear live or via videotape deposition.
- 

AGREEING TO PARAMETERS (cont.)

- ▶ Payment under the terms of the high/low agreement will be made once an award is entered. In the event of a defense verdict or a verdict of less than \$175,000.00, Defendant will pay \$175,000.00.
 - ▶ In the event of a verdict in excess of \$825,000.00, your client will accept the amount of \$825,000.00, inclusive of any costs, fees, expenses, interest or delay damages.
 - ▶ In the event that there is an award between \$175,000.00 and \$825,000.00, that amount will be paid, inclusive of fees, costs, expenses, interest or delay damages.
 - ▶ Defendant will make payment to you and your client within 30 days of the receipt of the award.
 - ▶ Both parties agree that the award of the arbitrator is binding and that any appeal rights have been waived.
- 

ARBITRATION AWARD AND DECISION

- ▶ In favor of Plaintiffs and against Defendant
 - ▶ Plaintiff husband \$175,000
 - ▶ Plaintiff wife (consortium) \$5,000
 - ▶ Client would have paid up to \$300,000
 - ▶ Tremendous savings in legal fees and expenses
 - ▶ Minimized and controlled risk in Plaintiff oriented venue
- 

MINI-TRIALS

- ▶ Mini-trials are a unique method of alternative dispute resolution
 - ▶ It is a settlement process in which the parties present highly summarized versions of their respective cases to a panel
 - ▶ Parties not bound to an outcome
- 

PLAINTIFF'S BACKGROUND

- ▶ Husband/father was a 51-year-old high school principal earning \$110,000 per year
 - ▶ Wife/mother was a 58-year-old legal secretary earning \$45,000 per year
 - ▶ Daughter is a 22-year-old college graduate who is an only child. She was employed as a schoolteacher and wanted to follow her father's career path. Wrongful death damages include the value of services such as guidance, tutelage and moral upbringing that her parents would have provided
- 

Multiple vehicle accident involving 25 vehicles that resulted from a snow squall that caused icy conditions







MULTIPLE CONTESTED LEGAL ISSUES

▶ Serious Liability dispute

- Both Plaintiff–husband and Defendant–driver were alleged to have been driving too fast for conditions and failed to control their vehicles
 - Witnesses say Plaintiff–driver was going 50–60 mph when he hit the back of a tanker truck
 - ECM from Defendant’s tractor shows Defendant’s speed prior to braking at 48 mph
 - Defendant had a forklift on the rear of a trailer that allegedly impacted braking capacity
 - Accident occurred during a white–out
 - Father was joined as an additional defendant on mother’s claim
- 

▶ Serious dispute over punitive damages claim

- Plaintiffs allege recklessness on the driver/company's failure to train regarding operation of the tractor trailer unit with a forklift on the back; no CB radio; company's failure to monitor the speed of its drivers; failure to train drivers for adverse weather conditions
- Defendant's position is that the claims are irrelevant or only rise to the level of negligence. Furthermore, actions of the defendant driver were the same as the Plaintiff-husband

▶ Serious dispute as to Plaintiffs' expert's projected future economic losses

- Plaintiffs' expert says husband's economic loss is \$2,900,000 and wife's economic is \$750,000
- Our economic expert did not provide a "floor" for either Plaintiff. Instead our expert said Plaintiffs' expert used the wrong percentage for personal maintenance, overinflated the Plaintiffs' household services and used the wrong work life expectancy.

▶ Serious dispute over conscious pain and suffering

- Plaintiffs' biomechanical expert says the Duffys survived the initial impact and that their death was caused by our over ride of the Plaintiffs' vehicle.
 - Our biomechanical said that there were sufficient forces from the frontal impact to cause death such that the Plaintiffs died before Defendant's impact.
 - There were no lay witnesses to support a claim for conscious pain and suffering.
 - At best, Plaintiffs had a few seconds of conscious pain and suffering.
- 

- ▶ Mediation had been attempted but failed partly due to the contested and disputed legal issues
 - ▶ Mini trial takes place after discovery is substantially completed
 - ▶ Mini trial provided an opportunity for the parties to file and argue Motions in Limine and have those pretrial legal issues resolved by a Judge
 - ▶ Helped to realistically frame parties' perspectives
 - ▶ Jury is not told that the verdict will only be advisable in nature
- 

- ▶ After rulings on Motions in Limine and before a verdict was rendered, the case resolved for much less than what was demanded
 - Plaintiffs needed to tell their story to a jury. After Plaintiffs presented their side, they were ready to settle.

BIFURCATION OF LIABILITY AND DAMAGES



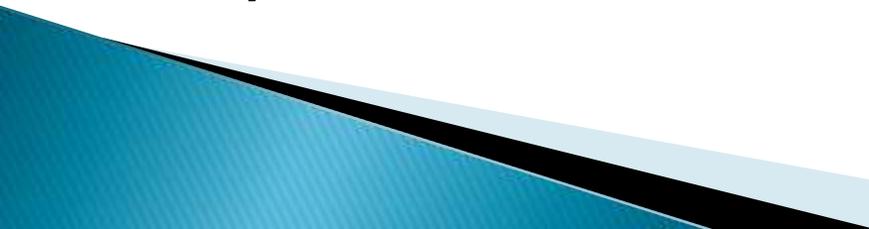
OFTEN USEFUL WHEN:

- ▶ Questionable liability, high exposure and/or complex damages
 - ▶ Allows parties to save on expenses by only having to litigate damages portion of case after a finding of negligence against Defendants by Jury
- 

Case can be bifurcated by agreement of the parties or by filing Motion to Bifurcate with the court

- ▶ Bifurcation is generally favorable to a defendant on the basis that by not introducing evidence of Plaintiff's damages, the Jury can focus on the liability questions presented without the potential for sympathy and prejudice

FACTS

- ▶ Plaintiff fails to stop at stop sign and drives directly into the side fuel tank of tractor trailer with the right of way. As a result of the incident, a fire ensues and Plaintiff dies.
 - ▶ Plaintiff's expert offers expert opinion that the case was an override accident despite overwhelming evidence to the contrary
 - ▶ Plaintiff's expert's report is deemed sufficient by the court to defeat summary judgment
- 



- ▶ At trial, Jury does not hear the gruesome details of Plaintiff's death or the testimony of her family concerning their loss
- ▶ Jury, focusing solely on liability, finds in favor of Defendant

CONTRIBUTION ACTIONS

- ▶ If favorable liability facts exist with respect to a co or additional defendants' liability, it can be advantageous from both a cost and recovery standpoint to resolve the underlying claim with the Plaintiff and pursue the co and/or additional defendants for contribution.
- 

EXAMPLE NO. 1









THE DILEMMA

- ▶ You are defending the bullet tractor-trailer in the above photographed four vehicle accident which occurred in a thick fog bank in the middle of the night:
 - ▶ Three people are dead and the State Police are criminally prosecuting your driver;
 - ▶ Tractor-trailer one significantly slowed or possibly may have even stopped in the right travel lane due to extremely impaired visibility resulting from the fog;
 - ▶ Tractor-trailer two impacts the rear of tractor-trailer one, pushing it across the left lane and comes to rest blocking the right lane—effectively closing the highway down in the middle of the fog bank;
 - ▶ Somehow a passenger car maneuvers into the right lane behind tractor-trailer two and ahead of tractor-trailer three—the bullet truck;
 - ▶ Tractor-trailer three impacts the passenger car and the rear of tractor-trailer two and erupts into flames.
- 

THE SOLUTION

- ▶ The Aggressive Empathetic approach:
 - 1. Aggressively and consistently reaching out to the families of the deceased ultimately scheduling mediations after procuring all relevant materials through informal discovery
 - Including providing mothers of two of the decedents' children rent money and money to buy the children Christmas presents as an advance towards settlement;
 - 2. Aggressively pushing trucking company one and trucking company two to meaningfully participate in discussions regarding resolution with the decedents' families;
 - 3. Document invitations and the theories of liability against trucking company one and two;
 - 4. Settle each of the three wrongful death claims with general releases;

5. Make demands on trucking company one and two to contribute their share;
 6. File a contribution action against trucking company one and two and their respective drivers;
 7. Recover almost half of the settlement payments made.
- 

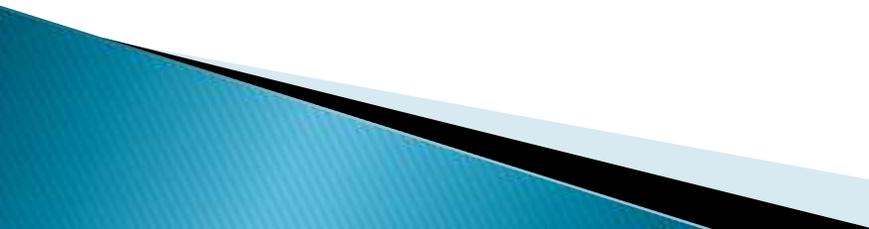
- ▶ Lawsuit arising from an accident involving an insured tractor-trailer left turn. Plaintiff claimed defendant turned in front of the van she was a passenger in. Defendant argued that the driver of the van, Plaintiff's son, did not do enough to avoid the accident.
- 

- ▶ Driver falsified 30 days of logs which were disclosed through discovery.

- ▶ Badly injured and disabled plaintiff that would have garnished significant emotional sympathy with a jury

Photo of van



- ▶ By resolving that underlying claim, Defendant/Insured can then pursue other negligent parties for the amount Defendant/Insured paid to the injured party
 - ▶ Can assert at trial that, Defendant/Insured admitted they were negligent and did the right thing by resolving the claim without the injured party having to endure an emotional trial
 - ▶ Now the jury's job is to apportion the amount that the other negligent party should contribute to the underlying settlement
- 

PRECURSORS TO RECOVERY

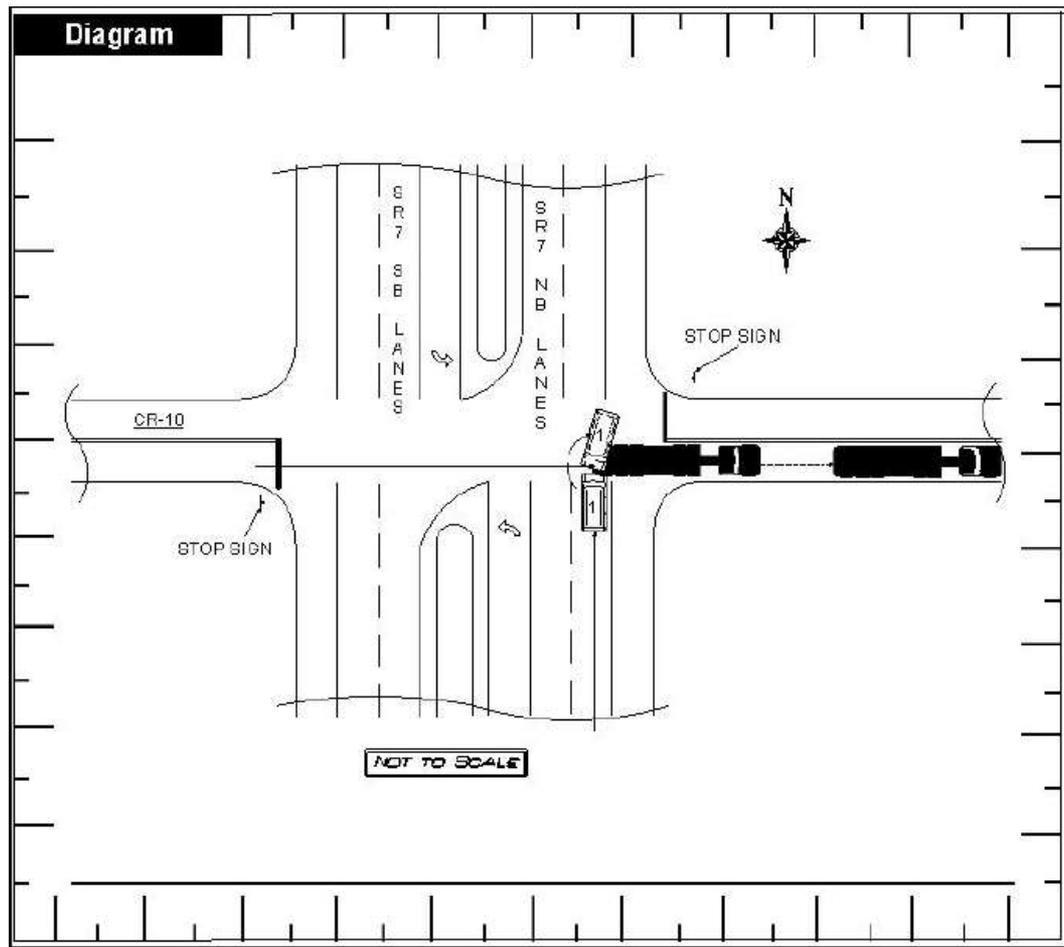
Settling party must admit it was at least 1% negligent

Settlement must be “fair and reasonable”

Often the non-settling parties will stipulate settlement was fair and reasonable

If not, may have to prove the value of the injured parties damages claim. If taken by non-settling party, this is a risky position, as it paints the non-settling party in an even more unfavorable light.

POLICE DIAGRAM



- ▶ Based on the forensic crash data available, an expert was retained that was able to provide an expert report that detailed the negligence of co-Defendant

- ▶ Van was traveling at 45 to 50 plus miles per hour pre-impact
 - ▶ Little to no significant braking by the van
 - ▶ Driver of van would have avoided the accident had the brakes been applied 1.0 second prior to when they were or if they had been applied more aggressively
 - ▶ Ample time and distance for the driver of the van to have avoided the collision
- 

- ▶ The below Jury Interrogatories assisted the Jury in the contribution action by simplifying the issues.

Interrogatories

1. Was negligent in causing the automobile collision?

CIRCLE YOUR ANSWER IN INK

Yes

or

No

Date: 10/3/2012

me &

2. What percentage of negligence is attributable to

? 65 %

What percentage of negligence is attributable to

? 35 %

TOTAL 100 %

- ▶ Non-Settling Defendant found 65% at fault.
- ▶ Settling Defendant is therefore entitled to recover 65% of the underlying settlement it paid from the Non-Settling Defendant

Are your company documents the SWORD or the SHIELD to an attack on company representatives and drivers?



What printed material is available on the Internet, through your Marketing Departments or in materials delivered to drivers or prospective customers that could impact a Safety Representative's deposition?



Your **HOMework** is to return home and scrutinize these materials and imagine being cross-examined on the contents.



Q & A

