Article of the week from *North Carolina Lawyers Weekly:*

Electronic-device manufacturers may avoid liability for injuries caused by distracted drivers

By PAUL THARP, Staff Writer

Motorists injured in a 2008 pileup on I-40 in Buncombe County should not be able to recover from the maker of a communications device a trucker was using at the time, a federal magistrate has recommended in a case that could indicate limits on manufacturers' liability for accidents involving distracted drivers.

In the first case of its kind in North Carolina, U.S. Magistrate Judge Dennis L. Howell recommended that Geologic Solutions, Inc.'s and Xata Corporation's 12(b)(6) motion to dismiss be allowed because the plaintiffs failed to state a recognized cause of action under N.C. law.

The recommended order was issued May 26 in the case of *Durkee v. C.H. Robinson Worldwide, Inc., et al.* (Lawyers Weekly No. 10-04-0520, 18 pp.).

"I see this as a significant case because it is the first in N.C. in which a third party has sued a products manufacturer based not on a defect with the product itself but [on] the way in which the product has been used," said Asheville attorney Brady J. Fulton of Northup McConnell and Sizemore. He represented Geologic and Xata.

While Judge Howell described the plaintiffs' proposed extension of products-liability law as "appealing," ultimately in light of N.C. precedent and case law from other jurisdictions, he concluded that "a cause of action does not lie for products liability negligence under G.S. Sect. 99B-6 against a product manufacturer for harm caused to third parties by an end user's misuse or poor judgment in the use of a product."

Fulton said that if the order is adopted by District Judge Martin Reidinger, it could be used as persuasive authority by attorneys representing manufacturers in all manner of distracted-driver injury cases.

Research Triangle Park attorney Mark McGrath said that federal court is a difficult forum to petition for an extension of state law. McGrath was not involved in the case.

He said he wondered if a cause of action arose under G.S. Sect. 99B-5 for inadequate warning or instruction. As "an inadequate-design claim at least as it was characterized by the court this was a real stretch."

An attorney for the plaintiffs did not comment on the record about the case other than to say that he would file written objections to the proposed order as early as today.

Background and analysis

The plaintiff was driving westbound on Interstate 40 in Buncombe County with a friend and two minor children. A driver operating a tractor trailer became distracted while using a communications system manufactured by Geologic "which required the driver to look away from the road to view the message." He ran into and over the plaintiff's vehicle.

According to the *Asheville Citizen-Times*, several of the plaintiffs were seriously injured, and a toddler later died from injuries sustained in the accident.

Fulton said the communications device enabled the truck driver to communicate with a dispatcher about travel location, changes in delivery sites and conditions on the roadway.

Greensboro attorney James W. Bryan of Nexsen Pruet said communications devices in motor-carrier cabs are fairly common.

"They are very useful. I would say they are necessary in terms of complying with federal motor-carrier safety regulations," Bryan told Lawyers Weekly. He was not involved in the *Durkee* case.

Bryan added that while some of the technology is new, the concept is not. "Twenty years ago it was a CB radio. Then it was GPS tracking systems."

He said the proposed order won't affect motor carriers as much as communications manufacturers. If the order is adopted, Bryan said, "It will help manufacturers who supply products for the trucking industry."

In the proposed order Judge Howell took judicial notice of "the growing problem of accidents caused by drivers who divert their attention from the road to send or retrieve text messages from their cell phones, who input data into GPS devices while driving, and some who even surf the net on their laptop while driving."

The court agreed with the plaintiffs that using any data-entry or retrieval device while driving is dangerous regardless of the size of the vehicle being operated.

The key, as Fulton saw it, was driver behavior. "This is about the driver, not the device," he said.

Crux of claim

A review of the plaintiffs' complaint revealed no allegations that any relationship existed between the plaintiffs and Geologic and Xata, according to the recommended order.

Additionally, there was no allegation that the communications device malfunctioned in any way. The only allegations, the court observed, concerned misuse of the device by the truck driver.

"It is clear that the duty owed by a manufacturer doesn't extend to cover situations in which a product is used in a negligent manner," Fulton said. "The facts of this case bore that out."

The court could find no case law that would impose a duty on manufacturers to anticipate misuse of a product and design it to prevent misuse.

If such a legal duty could be imposed, "no vehicle would be capable of traveling above the speed limit, car ignitions would all be equipped with ignition interlock devices, and guns would not be sold to persons with poor judgment," the court wrote.

Referencing an Indiana case, *Williams v. Cingular Wireless*, 809 N.E.2d 473 (Ind. Ct. App. 2004), the court noted that "simply because an action may have some degree of foreseeability does not make it sound public policy to impose a duty."

Part of the court's reasoning in the proposed order, Fulton said, was that just because an injury is possible doesn't make it probable.

"There are a million things people do while driving," Fulton said. "They put on makeup, eat food, they look at billboards. Distractions abound in cars and trucks."

That doesn't mean billboards, biscuits and lipstick are to blame for accidents.

The court agreed, writing that the risk of harm has to be both unreasonable and foreseeable in order to impose liability on a manufacturer.

"The real issue is not the product," Fulton said. "The issue is the way in which the product is used."

OPINION BRIEF

Case name: *Durkee v. C.H. Robinson Worldwide, Inc., et al.*

Court: *U.S. District Court for the Western District of N.C. - Asheville Division.*

Judges: *U.S. Magistrate Judge Dennis L. Howell.*

Date: *May 26, 2010*

Plaintiff's attorney: *Robert B. Long Jr. and Steven Ray Warren, both of Long, Parker & Warren (Asheville); and Ruth Campbell Smith (Asheville)*

Defendants' attorneys: *David Erik Albright, Casper Fredric Marcinak III and Robert D. Moseley Jr., all of Smith Moore & Leatherwood (Greensboro), for C.H. Robinson Worldwide, Inc.; Isaac Noyes Northup Jr. and Brady James Fulton, both of Northup, McConnell & Sizemore (Asheville), for Geologic Solutions, Inc.*

Issue: *Can a products-liability action proceed against the manufacturer of a communications device used by a truck driver who caused an accident that injured third parties?*

Holding: *No, the manufacturer owed no duty to the third parties, and the negligent misuse of the communications device by the trucker was not reasonably foreseeable.*