MAKING TRACKS

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A Transportation and Logistics Law Firm

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Moseley Marcinak Newsletter Contents

A Note from Blair Cash

Be where your feet are. I admittedly devote too much of my "free" time to UGA Football. Reading articles. Watching games. And although it has not happened much recently, agonizing over defeats.

But something Coach Kirby Smart said recently resonated with me, "Be where your feet are." In a world where technology can distract us, news can depress us, and life can derail us, what does it mean to be present in the moment? Lawyers can sometimes have trouble juggling Courts, clients, and opposing counsel. Working parents have the added responsibility of raising children while juggling the demands of work. All of these stressors can pull us away from the moment.

Perhaps the solution is to put on blinders and focus on the task at hand. Give whatever it is you are called to do at that moment your undivided attention. Your very best. We surprise ourselves with our ability, our tenacity, and our resiliency. I oftentimes find myself in awe of the resiliency of the industry we represent. The trucking industry – everyone in it – perhaps best embodies the "Be Where Your Feet Are" spirit.

I also think it calls on us to enjoy the ride. Life is short. Difficult seasons pass. Fun times fade. Kids grow up. Staying present can help us enjoy all that life has to offer. Be where your feet are and soak it in. You'll never be in this moment, at this time, alone or with others, ever again.

Welcome

In July, the Firm welcomed Anna K. Beaton as a partner in the Firm's Atlanta office. Anna comes to MoMar from another well-respected Southeast firm where she specialized in trucking. Anna brings a wealth of knowledge and experience litigating truck accident cases with significant exposure involving complex legal issues. Anna's cockapoo, Sophie, has already made numerous appearances at Firm Teams calls, client conference calls, and has enrolled in the Firm's daily exercise program.

In October, the Firm welcomed Ashton Scott as an associate in the Firm's Greenville office. She is a graduate of William & Mary Law School and obtained her undergraduate degree from the University of Georgia. Ashton comes to MoMar from the Thirteenth Judicial Circuit Solicitor's Office where she worked as a Victim's Advocate to ensure witness rights are protected and prepare victims to serve as witnesses in trial. Ashton is admitted to practice in Georgia and will be admitted to practice in South Carolina after sitting for the South Carolina Bar in February of 2024. When she is not at MoMar, she enjoys spending time with her 4-month-old son, Noah Grant, and hiking with her husband, Jeremy, and her dog, Oliver. We are thrilled to welcome Ashton to the Firm's illustrious UGA alumna group.

Also in October, Elizabeth "Ellie" Pappu joined the Firm as a paralegal in the Atlanta office. Ellie comes to MoMar from a well-respected firm in Greenville where she worked in the family law arena. Ellie has hit the ground running. Ellie is originally from the Caribbean. She enjoys spending time outside, going to the beach, and playing badminton and pickleball with friends. In addition to being the newest paralegal with MoMar, she is also a newlywed. Welcome, Ellie!

New Case Alert: The Supreme Court's Decision of *Mallory v. Norfolk Southern Railway Company* Could Have Far-Reaching Implications on All Businesses, Including Trucking Companies

BY BLAIR CASH

On June 27, 2023, the United States Supreme Court issued an opinion in the case of *Mallory v. Norfolk Southern Railway Co.*, 143 S.Ct. 2028 (2023). This decision could have a far-reaching impact across the country when it comes to the exercise of general personal jurisdiction over corporate entities. Although the decision claims to merely affirm preexisting case law that has been on the books for over 100 years, taken to its logical conclusion, the implication of the *Mallory* decision could open up corporate entities to lawsuits in numerous states and venues that were unanticipated previously.

In *Mallory*, a former freight car mechanic for Norfolk Southern sued the company for damages and alleged that his cancer diagnosis was attributed to his work with Norfolk Southern under the Federal Employers Liability Act. *Id.* at 1032. The application of FELA is not relevant to the trucking industry, however, the jurisdictional analysis in *Mallory* is the crucial part of this case.

Mallory worked as a freight car mechanic for Norfolk Southern for 20 years, first in Ohio and then in Virginia. After leaving the company, he moved to Pennsylvania for a brief time before returning to Virginia. Id. at 1032-33. During that time, he was diagnosed with cancer, which became the subject matter for his lawsuit against Norfolk Southern. *Mallory* filed his lawsuit in Pennsylvania state court against Norfolk Southern. However, at the time the lawsuit was filed, *Mallory* lived in Virginia. The Complaint alleged only that *Mallory* was exposed to carcinogens while working for Norfolk Southern in Ohio and Virginia, not Pennsylvania. Notably, Norfolk Southern is a Virginia corporation.

Norfolk Southern challenged the Pennsylvania state court's exercise of jurisdiction over it, alleging that this lawsuit would have been proper in Virginia, where Norfolk Southern was based, or in Ohio, where some of Mallory's alleged cancer exposure took place. In response, *Mallory* argued that Norfolk Southern was required by Pennsylvania state law to register to do business in the commonwealth in order to conduct within the state. Pennsylvania state law also required out-of-state companies such as Norfolk Southern to agree to appear in courts on "any cause of action" against them. 42 PA. Cons. Stat. Section 5301(a)(2)(i), (b). This, in addition to Norfolk Southern's significant business operations and contacts within Pennsylvania, served as the basis for Mallory's Complaint that Norfolk Southern subjected itself to the general jurisdiction of Pennsylvania courts. The Pennsylvania Supreme Court agreed with Norfolk Southern in granting its Motion to Dismiss in finding that the Pennsylvania state court's exercise of general jurisdiction over Norfolk Southern in this instance violated the due process clause of the United States Constitution. The United States Supreme Court disagreed and vacated the Pennsylvania Supreme Court's decision, concluding several key points along the way. 143 S.Ct. at 2044-45.

First, Justice Gorsuch, writing for the Court, highlighted Norfolk Southern's significant contacts with the State of Pennsylvania in finding that a court may be authorized to conclude that Norfolk Southern is subject to the general jurisdiction of Pennsylvania state courts and that such exercise of jurisdiction would not violate the due process clause. The Court pointed to Norfolk Southern's over 2,000 miles of track, 11 rail yards, 3 locomotive repair shops, and other business operations in Pennsylvania as

evidence that Norfolk Southern's contacts with the State of Pennsylvania were significant and pervasive enough to warrant the exercise of general personal jurisdiction. *Id.* at 2042-43.

Second, and also vital to the Court's decision, was a Pennsylvania state law that required Norfolk Southern to register to do business in Pennsylvania and to agree to appear in its courts on "any cause of action" against them. 42 PA. Cons. Stat. Section 5301(a)(2)(i), (b). In overturning the Pennsylvania Supreme Court and siding with Mr. Mallory, including several other state supreme courts and their decisions interpreting general jurisdictions, the Court likened this case to its 100-year-old precedent in the case of *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. and Mill. Co.*, 37 S. Ct. 344 (1917). I*n Pennsylvania Fire*, the Supreme Court held that laws like Pennsylvania's law requiring out-of-state corporations to designate an agent of service of process did not violate the due process clause. In those instances, a corporate entity such as Norfolk Southern in this case consents to the exercise of jurisdiction over it in those states in which it registers to do business. The Court declined Norfolk Southern's invitation to overrule Pennsylvania Fire and held that Pennsylvania Fire as well as the Court's other decisions on personal jurisdiction are not so incompatible that it required explicit overruling.

The Court found that Norfolk Southern's presence in the state was so significant and pervasive that, combined with its registration with the Pennsylvania Secretary of State, the exercise of general jurisdiction against Norfolk Southern in this case did not violate the due process clause or notions of fair play and substantial justice. 143 S.Ct. at 2043-44.

On its face, *Mallory* could have a significant impact on all businesses, not just motor carriers, in the coming years. First, *Mallory* reaffirms Pennsylvania Fire's decision that the registration of a foreign, out-of-state company with a state's secretary of state office amounts to consent to personal jurisdiction of that foreign entity. *Mallory* seems to suggest that the mere registration is enough to impose jurisdiction by consent against an out-of-state entity. Many trucking companies are registered to do business in numerous states, particularly those states in which they have terminals, and the effect of that registration could mean a company is open to suit in one venue for an accident or injury that occurs in another venue. However, as Justice Barrett noted in her dissent, she mentions that Pennsylvania's law is the outlier.

Second, in an era of acquisition and consolidation amongst motor carriers, the *Mallory* decision could increase exponentially the potential venues in which a motor carrier could be subject to suit. For instance, if *Mallory* is taken to its logical conclusion, an Alabama motor carrier involved in an accident in Tennessee with a North Carolina resident could be subject to suit in Georgia state courts if that Alabama motor carrier is registered to do business with the Georgia Secretary of State. The Mallory decision specifically references the Georgia Supreme Court case of *Cooper Tire & Rubber Co. v. McCall*, 312 GA. 422 (2021). In that case, the Georgia Supreme Court reached a similar decision as the Mallory Court when faced with a lawsuit filed by a Florida resident against a foreign company and *Cooper Tire* in the state court of Gwinnett County for an accident that occurred on a Florida roadway. The Georgia Supreme Court in that case concluded that the exercise of jurisdiction over *Cooper Tire* in that instance did not violate the due process clause and Cooper Tire's contacts in the State of Georgia were significant and pervasive enough to support the Georgia court's exercise of jurisdiction over it. Notably, *Cooper Tire* stressed that Georgia's business corporation code "does not expressly notify out-of-state corporations that obtaining authorization to transact business in the [Georgia] and maintain a registered office or registered agent [Georgia] subjects them to general jurisdiction." However, the Court in *Cooper Tire* did stress that its previous decision in the *Klein v. Allstate* case put out-of-state

corporations on notice that their corporate registration "will be treated as consent to general personal jurisdiction in Georgia." This is the key part that could bring Cooper Tire into the same playing field as Mallory and open trucking companies to out-of-state suits in Georgia, the newly-crowned number one judicial hellhole according to the American Tort Reform Association (ATRA).[1]

The *Mallory* and *Cooper Tire* decisions, read together, mean that a significant number of motor carriers and insurers may be subject to suit in Georgia state courts for actions having nothing to do with the state. This is especially so given that Georgia in one of four states in the country which allows a motor carrier's insurer to be named as a defendant in a case arising out of a truck accident. Trucking companies across the country, if they are insured with an insurance carrier who meets the test set forth in *Mallory, Cooper Tire*, and *Klein*, could be subject to suit in Georgia state courts simply by virtue of their insured status with a particular insurance carrier.

It remains to be seen what impact *Mallory* will have on motor carriers given that the case is very fresh. In concurrence, Justice Alito expressed doubts about the validity of *Mallory* and Pennsylvania's registration requirement withstanding a constitutional challenge under the Commerce Clause. *Mallory*, 143 S.Ct. at 2054-55. Justice Barrett's dissent highlighted the concerns with the Court's opinion, writing "Pennsylvania's power grab infringes on more than just the rights of defendants—it upsets the proper role of the States in our federal system." *Id.* at 2059. The Court would have litigants believe that Mallory merely affirms existing 100-year-old precedents set forth in Pennsylvania Fire and corresponding state precedent in cases like *Cooper Tire*. Given Georgia's descending status as a judicial hellhole as ranked by ATRA, it will be interesting to see if litigants attempt to avail themselves of *Mallory* and *Cooper Tire* in Georgia state courts for claims that arose in different states.

If you have a matter that is presently pending in Georgia state court for an accident that occurred outside the state and opposing counsel is telling you that the exercise of general personal jurisdiction in Georgia is warranted, please contact us so that we can be of additional help and challenge the exercise of jurisdiction in Georgia state courts. If you would like to attempt to avoid the exercise of general personal jurisdiction in Georgia courts altogether, we can help there as well. Decisions such as *Mallory* and *Cooper Tire* are becoming more commonplace and require motor carriers and their insurers to consistently evaluate and adapt to better understand their litigation risk in today's world.

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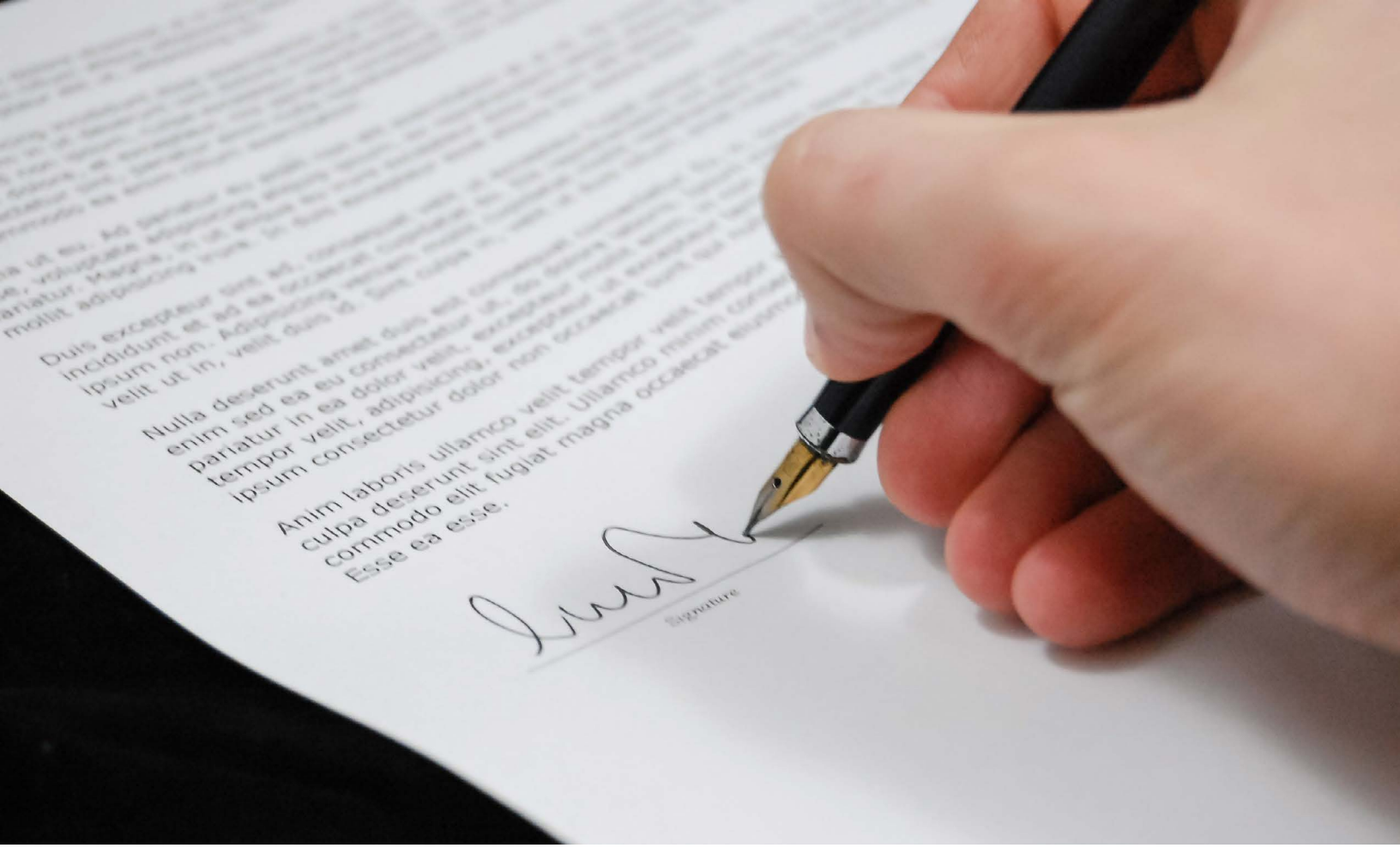
[1] Judicial Hellholes Report, 2022-23, American Tort Reform Association, available at https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf. October 2, 2023.



A Change in Admissibility of Police Testimony? Maybe.

BY ANNA K. BEATON

The Supreme Court and Federal Courts began using a heightened standard for expert testimony in 1993. The Supreme Court Case *Daubert v. Merrell Dow Pharmaceuticals* became the case model to show that just because someone holds the title of being an expert, does not necessarily mean that their testimony is credible or should be presented to a jury. Instead, experts had to verify whether the technique used could be tested, was subject to peer review, potential error rate, maintenance of standards controlling the operation, and whether there was widespread acceptance of the method within the scientific community.

The State of Georgia adopted the *Daubert* standard in 2005 for civil cases. Georgia Courts then spent the next 18 years using this *Daubert* standard for civil cases. In 2008, the Georgia Court of Appeals concluded that an investigating officer is presumptively qualified as an expert and his or her testimony may not be generally excluded in civil actions. The Court in *Fortner v. Town of Register*, tackled this issue head-on when it held, "It has long been recognized that a police officer with investigative training and experience on automobile collisions is an expert… such an officer is an expert even if he is not trained to reconstruct traffic accidents." The *Fortner* Court later stressed "for a trial court to exclude the investigating officers testimony about the cause of the accident has been found to constitute an abuse of discretion." *Id.*

This all seemed straightforward enough. Then in August 2023 things got a little confusing. Justice Carla Wong McMillian of the Georgia Supreme Court, wrote the unanimous opinion that the lower courts needed to apply the Daubert standard when considering the admissibility of an investigating police officer's testimony. *Miller v. Golden Peanut Company*, LLC, 2023 WL 5337865, *5 (Aug. 21, 2023). The opinion is a little confusing on two grounds. First, lower courts had been applying the *Daubert* standard to civil cases since 2005, when the Georgia General Assembly revised the Georgia civil evidence code.

Second, the Georgia Supreme Court was persuaded by the Plaintiff's argument that the Georgia Civil Code regarding expert testimony was actually altered in 2012 and that therefore cases prior to 2012 were irrelevant. The Georgia Supreme Court acknowledged that the text of the Georgia civil code regarding expert testimony had not changed since 2005. The argument was that the criminal code regarding evidence had changed, and therefore the intentions behind the Georgia Rules of Evidence had changed, making the pre-2012 cases interpreting the same text of the Georgia Code that exists today irrelevant.

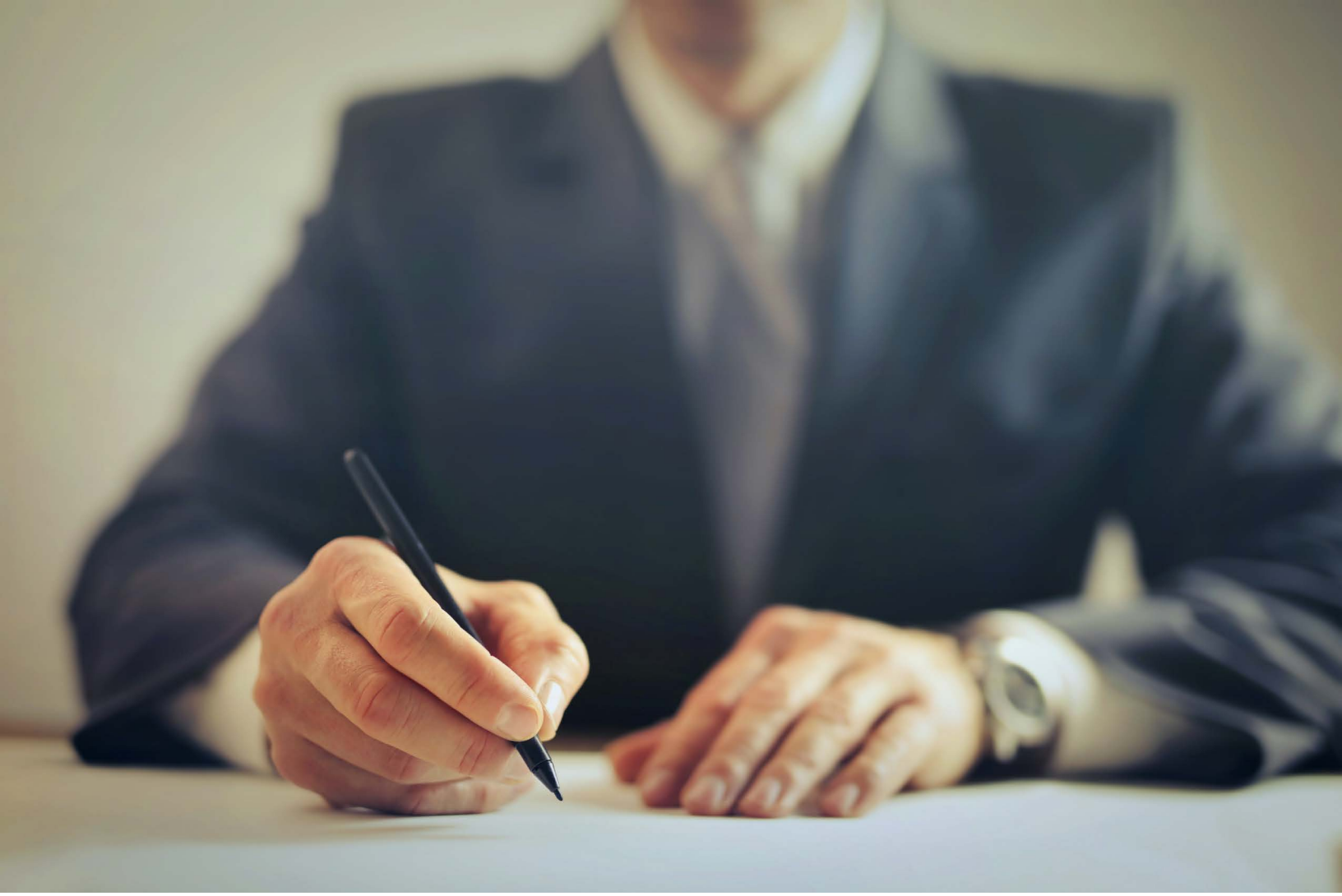
In 2012, the Georgia Assembly voted to adopt the federal evidentiary standard for criminal cases, as well as civil. To be clear: the civil expert evidence standard remained unchanged in 2012. But in its August 2023 decision, the Georgia Supreme Court held that the textual modification of the criminal code led to an alteration in the "intention" behind the civil code, saying specifically:

> "Georgia courts should not look to cases decided under the former Evidence Code because that precedent did not survive the adoption of the new Evidence Code. This principle is true even where, as White points out here, the new statutory language is materially identical to the former statute it replaced."

Miller, 2023 WL 5337865, *4 (emphasis added).
This returns us to the most confusing part of the Court's decision. Taking aside the argument that the "intentions" of the Georgia code had changed, the Georgia evidence rules on civil expert testimony had been using the Daubert standard since 2005 anyway, so why the emphasis that lower courts now needed to ignore pre-2012 cases?

The pre-2012 cases all stated that an investigating officer's testimony was admissible, and to exclude this testimony was an abuse of discretion. And practically, this led to defense friendly verdicts and barred Plaintiffs from recovery based on the investigating officer's testimony that they were at fault. The facts of this August 2023 case are a prime example of why Plaintiffs might want an investigating officers' testimony excluded. In *Miller*, plaintiff was traveling down a two lane road. Ahead of her, and in the opposite direction, a tractor-trailer was executing a wide turn with his lights clearly visible. The investigating officer noted, and was prepared to testify, that based on his reconstruction of the accident, the decedent plaintiff had 29 seconds to see the truck lights and slow down or stop her vehicle. She did not slow down or stop, and this ultimately caused her death when her vehicle collided with the truck's trailer.

The investigating officer assumed, and wrote in his report, that the woman must have been distracted. Plaintiff argued that the investigating officer could not have known that she was distracted and that the responding officer had performed accident reconstruction tests in daylight, and not during the nighttime when the accident happened.



Both portions of this testimony are testimony that the counsel would have opportunity to cross examine. Which is in part why the lower court, and Georgia Court of Appeals, was prepared to admit the investigating officer's testimony.

But the Georgia Supreme Court said "maybe not" and requested that the lower court re-analyze their decision in a more "federal court" manner. Or, said another way, in a manner more lenient to Plaintiff.

How does this affect trucking companies and defense counsel? Oftentimes, responding officers' testimony is so helpful is because it is a neutral third party providing information on the cause of the accident. The Supreme Court's ruling will make it harder and provide more hoops to get that neutral evidence to the jury. Defendants need to be prepared both with arguments highlighting an expert's expertise, and the knowledge that, based on this Supreme Court ruling, a trial court may end up still excluding this evidence. How this unfolds in practice will have ripple effects on accident investigation, rapid response, and claims evaluation.

In Camera Review: American Transportation Research Institute's (ATRI) Recent Survey Results on Cameras in Trucks Provide Useful Information

BY LESESNE PHILLIPS

Dash cameras are more prevalent than ever in commercial motor vehicles. This includes road-facing cameras ("RFCs") and driver-facing cameras ("DFCs"). Anecdotally, there are probably fewer accidents where dash camera footage is not available than accidents where the footage is available. For years, many opponents to dash cameras have lodged complaints about their usage, arguing that dash cameras are not the end-all-be-all for several reasons.

First, opponents to dash cameras argue that they engender a "Monday Morning Quarterback" effect that does not necessarily comport with the standard of care expected of a truck driver. The standard of care is determined by whether a truck driver acted reasonably in the moments leading up to an accident. Dash cameras can provide information to assess the driver's actions, but do not necessarily always depict an accident exactly how it was experienced by the drivers involved.

Second, and related to the first point, dash cameras are often positioned high on the windshield from a vantage point that a truck driver simply does not have. A truck driver often sits as many as three to four feet backwards and to the left of a dash camera. The dash camera necessarily shows more than a truck driver is able to see, often leading to disputes in litigation of what the truck driver could have done to avoid an accident.

Third, particularly in accidents at night or other scenarios where visibility is low, conspicuity and visibility is often disputed. Dash cameras, for all their benefits, are not an exact replica of the human eye. What a truck driver perceives in these conspicuity and visibility accidents is not the same as what the dash

camera shows.

Finally, dash camera footage can be interpreted different ways by different people. It is not always as simple as, "This vehicle ran a red light" or "This vehicle crossed the center line." Dash camera footage can be open to interpretation in cases where the liability answer is not clear-cut.

As attorneys to motor carriers, we generally like cameras and event recorders in commercial motor vehicles for several reasons. First, one of the primary jobs of a lawyer is that of factfinding. Once facts are learned from a case, lawyers can analyze the facts and determine strengths and weaknesses in a case applying the law to those facts. Footage from cameras provides evidence helpful to lawyers in defending a personal injury or property damage lawsuit, and footage from cameras can help defense lawyers determine potential exposure for a claim.

Second, dash cameras help attorneys, motor carriers, and their insurers better understand their exposure earlier in the process. If a driver other than the truck driver was actually at fault for an accident, footage from a camera can provide useful evidence to exculpate that truck driver from civil or even criminal liability. The most prevalent argument we hear against cameras is "well what if the camera shows that the truck driver was actually at fault." This information is also useful. If the truck driver is actually at fault, we want to know that as soon as possible in order to determine potential exposure and potentially engage in early settlement negotiations without subjecting the truck driver and the motor carrier to prolonged litigation, which can be expensive and time-consuming.

Third, dash cameras, even RFCs, allow motor carriers the opportunity to train, correct, and teach their drivers when dangerous behaviors are observed. Cameras provide trainers and safety department personnel with another tool in their arsenal to train drivers and encourage safe behavior.

Now, you know our position on cameras. How do truck drivers feel about cameras? In an American Transportation Research Institute ("ATRI") report published this year, ATRI gathered insight into driver perceptions of inward facing cameras. Unsurprisingly, while RFCs are widely popular in the industry, DFCs are not as popular. The ATRI study cites the following reasons for the lack of popularity:

(1) driver privacy issues/concerns;
(2) confusion over video use, personnel access and recording models; and
(3) concern that truck driver negligence, however subtle, will be highlighted.

The objectives of the ATRI study were to understand the driver issues and perceptions associated with DFCs and to understand DFCs' role in claims and litigation processes. DFCs are almost always integrated with RFCs, and ATRI determined solely DFCs have mostly been used with driver fatigue research. As part of its report to determine driver perception of DFCs, ATRI developed a questionnaire, which was answered by approximately 2,100 drivers. A survey was also presented to defense attorneys representing transportation companies, and another survey was sent to claims management and was distributed through the Motor Carrier Insurance Education Foundation ("MCIEF"). After reviewing the results of the surveys, ATRI determined driver approval of DFCs to be low (2.24 on a 0-10 scale) among the current users of DFCs. Drivers who never used DFCs had the lowest approval rating of DFCs. This

shows that education and use of DFCs will increase the rating among drivers. Drivers across the chart cited privacy as the biggest concern with DFCs.

When asked what suggested improvements drivers had for DFCs, the biggest suggestion was that the DFC footage should only be viewed by safety departments or attorneys in litigation as much as possible. This is an area where driver perception might need to be corrected. Drivers incorrectly often believe that DFC footage is used for reasons unrelated to safety and litigation, which is not the case. At the end of the study, ATRI provides recommendations for the use of DFCs or motor carriers contemplating the use of DFCs. Among these recommendations are:

(1) carriers using event-based DFCs unless they have strong specific reasons to use continuously recording DFCs;
(2) carriers implementing DFCs in all fleet vehicles to prevent the sense that certain drivers are being targeted;
(3) carriers implementing standardized DFC policies and procedures and provide these procedures to their drivers; and
(4) limit employee access to video footage on a need-to-know basis.

ATRI concluded that education and use of DFCs will help give drivers and motor carriers added safety measures and provide evidence in case of a crash. Through the implementation of guidelines and providing transparency to drivers, ATRI believes the transportation industry can benefit from the use of DFCs.

FMCSA Proposes to Broaden the Current Crash Preventability Determination Program

BY STEPHANIE BESSELIEVRE

The Federal Motor Carrier Safety Administration's ("FMCSA") request for comments and input on proposed changes to FMCSA's Crash Preventability Determination Program ("CPDP") is now closed. What remains to be seen is what the FMCSA will do with the comments and input it received. The Notice and requests for comments ("Notice") can be found at https://www.regulations.gov/document/FMCSA-2022-0233-0001. The CPDP is the FMCSA's program used to review certain eligible crash types, findings of which are incorporated into the FMCSA's Safety Measurement System ("SMS"). Ultimately, the CPDP findings impact motor carriers' Behavior Analysis and Safety Improvement Categories ("BASIC") scores because non-preventable crashes are excluded from a motor carriers' Crash Indicator BASIC. Motor carriers are grouped by performance in each BASIC, and assigned a percentile, with lower percentiles indicating better performance in each BASIC. The BASIC percentiles are ultimately intended to rank motor carrier safety performance. SMS utilizes BASICs to prioritize the investigation of high-risk motor carriers.

The FMCSA determines preventability through Requests for Data Review (RDRs) by motor carriers through its DataQ System. Preventability is based on the evaluation of certain eligible crash types. The proposed changes will serve as an expansion of the current crash types. The Notice indicates that the FMCSA expects the changes to double the size of the current program.

According to data published in the Notice, between May 1, 2020, and December 30, 2022, 39,133 RDRs were submitted and of those, 72.5 percent were eligible for review, i.e., they were one of the designated crash types eligible for review. Of those eligible crashes, the FMCSA found that 96 percent were non-preventable.

The proposed changes expand existing crash types as well as add four (4) new crash types involving commercial motor vehicles ("CMVs"). The FMCSA intends to analyze the proposed changes for 24 months, but notes that it may make changes prior to that. The preventability standard under the proposed changes remains the same, with the burden on the submitter to show by compelling evidence that a given crash is non-preventable. The proposed changes will not apply to crashes that occurred prior to the start date of the new crash types, which will provided at a later date.
The proposed revised crash types are as follows:

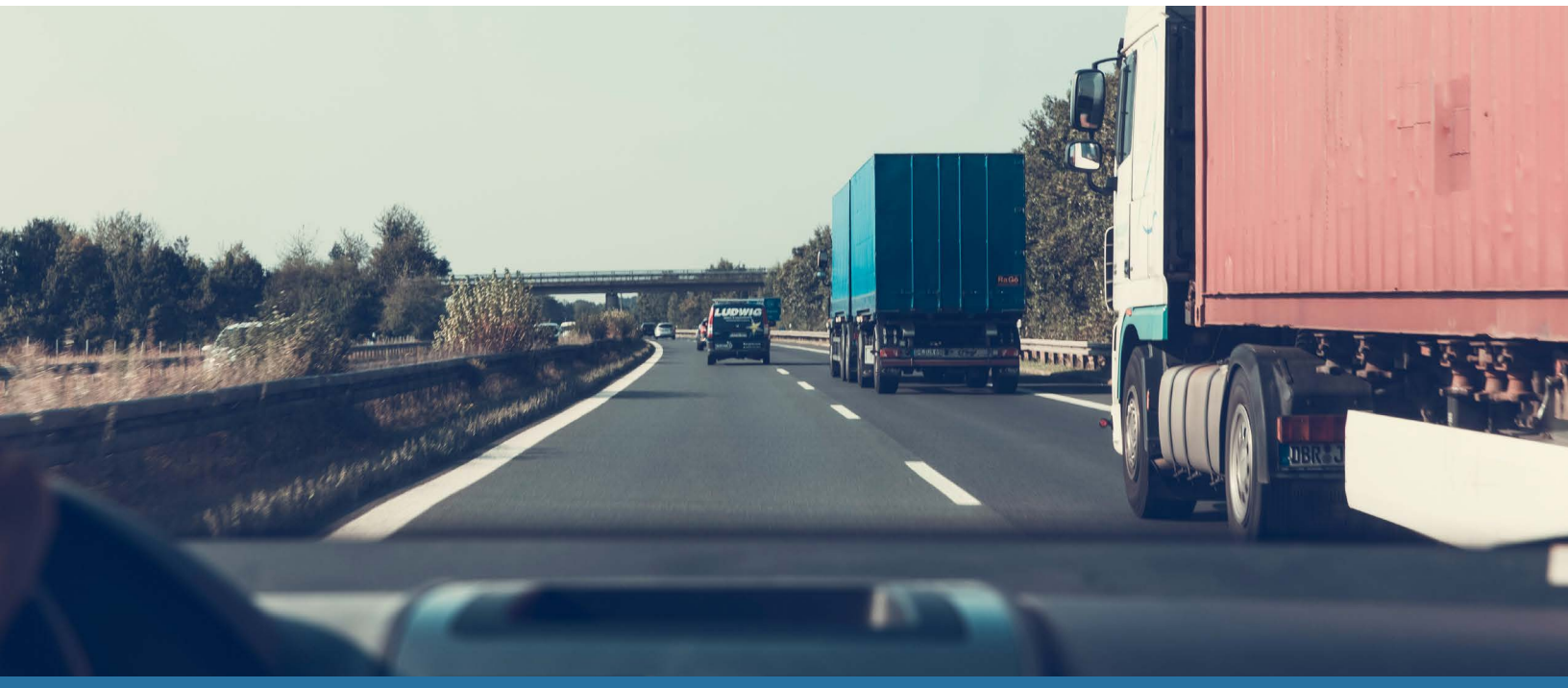
(1) CMV was struck because another motorist was driving in the wrong direction.
(2) CMV was struck because another motorist was making a U-turn or illegal turn.
(3) CMV was struck because another motorist did not stop or slow in traffic.
(4) CMV was struck because another motorist failed to stop at a traffic control device.
(5) CMV was struck because another individual was under the influence (or related violation, such as operating while intoxicated), according to the legal standard of the jurisdiction where the crash occurred.
(6) CMV was struck because another motorist experienced a medical issue which contributed to the crash.
(7) CMV was struck because another motorist fell asleep.
(8) CMV was struck because another motorist was distracted (e.g., cellphone, GPS, passengers, other).
(9) CMV was struck by cargo, equipment, or debris (e.g., fallen rock, fallen trees, unidentifiable items in the road);
(10) CMV crash was a result of an infrastructure failure.
(11) CMV was involved in a crash with a non-motorist.

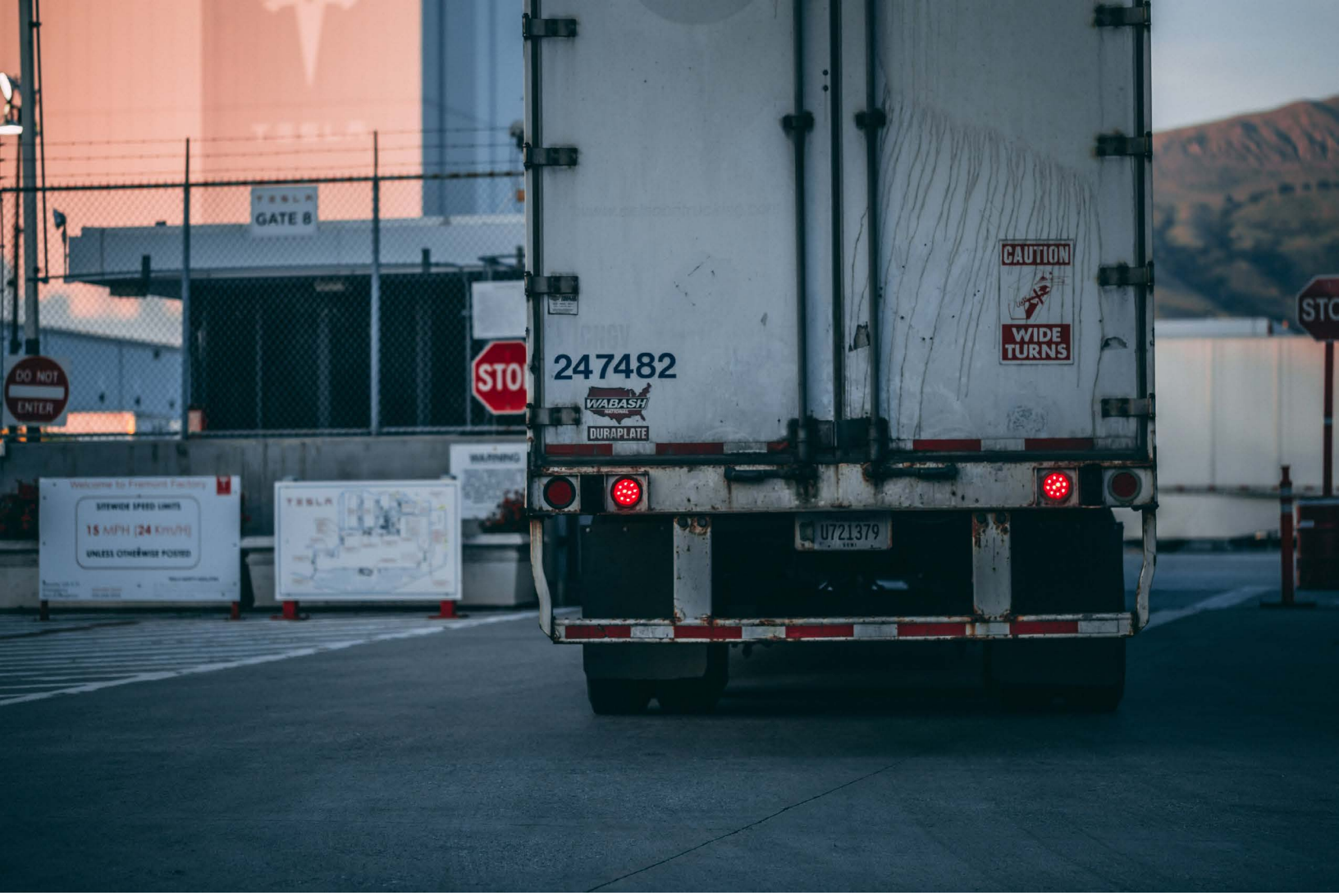
The proposed new crash types are as follows:

(1) CMV was struck on the side by a motorist operating in the same direction. Currently, the crash type is limited to side strikes at the very rear of the vehicle (e.g., 5:00 and 7:00 points of impact).
(2) CMV was struck because another motorist was entering the roadway from a private driveway or parking lot.
(3) CMV was struck because another motorist lost control of their vehicle. FMCSA reviewed many PARs that included this information but were ineligible for the program under the current crash types.
(4) Any other type of crash involving a CMV where a video demonstrates the sequence of events of the crash.*

*The FMCSA noted that the addition of number 4, crashes where video evidence demonstrates the sequence of events, could allow the FMCSA to review crashes that would otherwise be ineligible under the other crash types. Importantly, with the increased use of dash cameras in recent years, this new crash type is likely to significantly increase motor carriers' opportunity to submit crashes for review that otherwise did not and would not qualify under one of the current or proposed crash types.
The stated goal of the proposed changes is to refine prioritization of carriers and drivers with the riskiest behavior, and the FMCSA indicates that increased data will allow for an improved indication of a motor carrier's crash risk.

Ultimately, the proposed changes will hopefully have a positive impact on motor carriers and roadway safety. At a minimum, it gives motor carriers more options to challenge an adverse preventability determination that may not fit nice and neat into a certain category. By broadening some of the current crash types and adding new crash types, motor carriers are given more opportunities to submit crashes for determination of non-preventability, potentially having a positive impact on their BASIC and CSA scores. Further, the proposed changes serve to increase FMCSA access to crash data, thus providing more accuracy in prioritization of the appropriate motor carriers for intervention. The proposed changes are now closed for comment so it bears following what happens next.





Take It to (but not over) the Limit? FMCSA Speed Limiter Rule Proposal v. H.R. 3039 & S. 2671

BY MARTIN E. CAIN

Last year, the Federal Motor Carrier Safety Administration (FMCSA) submitted a Notice of Intent (NOI) to promulgate a rule which would "impose speed limitations on certain [commercial motor vehicles] (CMVs) that operate in interstate commerce." Fed. Motor Carrier Safety Admin., Speed Limiters Notice of Intent, Last Updated Apr. 27, 2022, https://www.fmcsa.dot.gov/regulations/speed-limiters. If adopted, the proposed rule could mandate that electronic engine control units (ECUs) be placed (or if already in place be adjusted) on CMVs to prevent the vehicles from exceeding a specific speed. Other details of the proposed rule, including what specific maximum allowable speed would be placed on the ECUs or whether there would be variations for different classes of CMVs, are unclear. The FMCSA sought input on the proposal and received over 15,000 comments (available for viewing at: https://www.regulations.gov/docket/FMCSA-2022-0004/document).

While some organizations and individuals support the FMCSA's proposed rule, others vehemently oppose it. *See* Jason Cannon, *House bill would clip FMCSA's ability to implement speed limiters*, Commercial Carrier Journal, Updated May 4, 2023, https://www.ccjdigital.com/regulations/safety-compliance/article/15446971/house-bill-clips-fmcsas-ability-to-implement-speed-limiters. Those in opposition to the proposed rule include a group of Congressional House Members who, on May 2,

2023, introduced and/or sponsored H.R. 3039. Entitled the "Deregulating Restrictions on Interstate Vehicles and Eighteen-wheelers Act" or "DRIVE Act," the proposed bill would prohibit the FMCSA Administrator from issuing "any rule or regulation to require vehicles with a gross vehicle weight of more than 26,000 pounds operating in interstate commerce to be equipped with a speed limiting device set to a maximum speed." H.R. 3039, 118th Cong. (2023). The proposed bill has been referred to the Subcommittee on Highways and Transit of the House Committee on Transportation and Infrastructure. An identical proposed bill, S. 2671, was introduced in the Senate on July 27, 2023.

Others in opposition to the FMCSA's proposed rule have argued that mandating the use of speed limiters on CMVs will impede the flow of traffic, cause increased encounters between CMVs and passenger vehicles, and ultimately lead to more collisions. *See* Cannon. Those in opposition to the rule base their argument on past experiences operating CMVs, the theory that the flow of traffic exceeds posted speed limits, and the concern that passenger vehicles would be frustrated by slower moving CMVs. *See* CCJ Staff, I*ndustry sounds off on speed limiter, voices concern over potential spike in road rage*, May 9, 2022, https://www.ccjdigital.com/regulations/article/15291716/industry-worries-speed-limiters-will-lead-to-road-rage. At least one survey supports the premise that the flow of traffic on highways exceeds posted speed limits, as it found that 48% of drivers reported exceeding speeds of 15 miles per hour over the speed limit on freeways. *See* Andrew Gross, *87 Percent of Drivers Engage in Unsafe Behaviors While Behind the Wheel, AAA Newsroom*, Feb. 25, 2016, https://newsroom.aaa.com/2016/02/87-percent-of-drivers-engage-in-unsafe-behaviors-while-behind-the-wheel/.

However, speed is oftentimes a double-edged sword, as the National Highway Traffic Safety Administration found that it was a contributing factor in 12,330 traffic fatalities in 2021. *See Speeding and Aggressive Driving Prevention*, National Highway Traffic Safety Administration, last accessed August 29, 2023, https://www.nhtsa.gov/risky-driving/speeding. Those in favor of the FMCSA's proposed rule cite to these and similar statistics, arguing that excessive speed kills more drivers and that the rule, if adopted, would lead to fewer serious collisions. See Cannon.

Ultimately, carriers, insurers, and others with a vested interest in travel on the Interstate Highway System will want to closely follow the status of the proposed rule and the proposed bills. Their potential adoption is particularly relevant for carriers, as additions of or modifications to ECUs could have an impact on CMVs which are currently part of existing fleets. Additionally, the proposed rule, if adopted, could have a drastic impact on arguments related to negligence per se violations for excessive speeding or reckless driving and arguments related to comparative or contributory negligence on the part of passenger vehicles. In short, the proposed rule will be something to watch in the coming months.

THE ROAD AHEAD- Past and Future Events

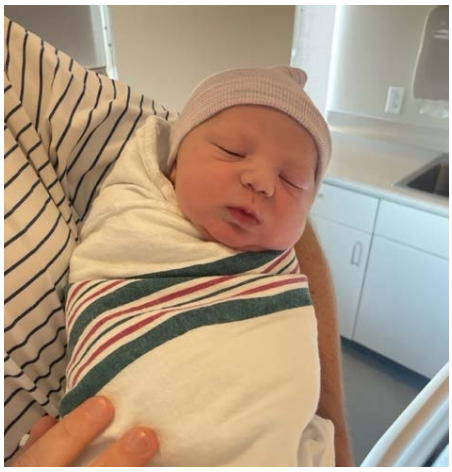
Past

- Fred filled in for Rob, who was called to trial, discussing freight claims with The Machinery Haulers Association in Las Vegas on April 5.
- Rob spoke to the attendees at the Minnesota Trucking Association's Management Conference on April 20.
- Rob spoke on casualty litigation in Orlando for the Captive Connections meeting on April 25.
- Rob presented at the Traffic Captive meeting in Chicago on April 27.
- Rob spoke to the Truck Captive meeting in Dubuque on May 1.
- Rob spoke to the Auto Haulers Association of America May 1-3 in Baltimore.
- Blair presented a webinar with TIDA "Defending Trucking Cases with Vehicle Technology: The Defense Perspective" on May 3.
- Rob spoke on social media and litigation at the Truckload Carriers Association Safety Meeting in San Antonio June 11-13.
- Blair and Donavan attended the Georgia Motor Trucking Association's Annual Convention on June 18-21 in Amelia Island, Florida.
- Rob joined with Reliance Partners at its event in Nashville on July 20
- Rob spoke to the JJ Keller Webinar audience on event recorders and litigation on July 25.
- Rocky attended the National Home Delivery Association Event in Boston from July 30-August 2.
- Rob attended the NCTA Annual Conference in Savannah July 30-August 1.
- Rob attended the ACTA meeting in Chicago on August 17-18. He served on a panel discussing tech insurance.
- Blair, in spite of his UGA fandom, was allowed to cross the state border into Alabama and present to a Fleet Summit Meeting in Montgomery, Alabama on August 18 where he talked about the value of verdicts in today's society.
- Rob discussed broker liability at the Cottingham and Butler Summit in Chicago on August 23.
- Rob spoke to an audience of Swamp Fox insureds in Marshalville, GA on September 1 on nuclear verdicts and their impact upon the trucking world.
- Rob discussed casualty litigation at the DMC Safety Forum in Indianapolis on September 23-26.
- Rob was in Texas for the JJ Keller Client Event in Dallas on September 26.
- Rob spoke on insurance and coverage issues to the MCIEFF in Orlando on October 3-4. Congrats to Tommy Ruke for receiving the Jim Harrison Award for his lifetime of service to the motor carrier insurance industry.
- Rob, Alex, and Robb attended the 31st Annual TIDA Seminar in Las Vegas October 10-13. Rob presented on the topic of FMCSA Regulatory and Enforcement issues.
- Rob spoke to GA Bar on October 19 on the topic of FMCSA Regulatory and Enforcement issues
- On October, 23-24 Rob and Alex participated in an SCTA led examination of SC tort laws affecting trucking companies.

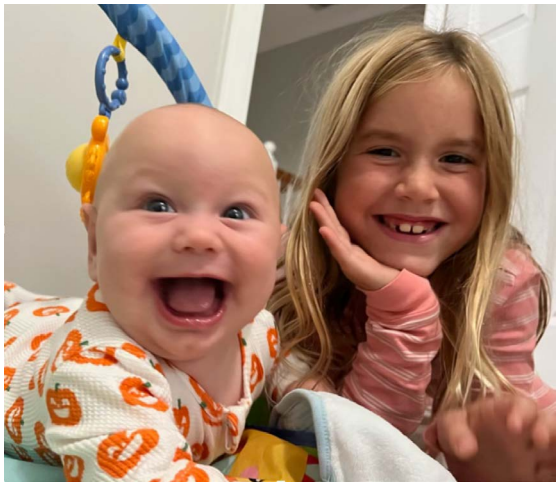
Future (November, December, January)

- Rob will attend the SCTA's Safety and Maintenance Conference in Myrtle Beach on November 9-12.
- Blair and Rocky will attend the Georgia Motor Trucking Association Leadership Conference in Atlanta on November 16 and 17. Blair and Rocky will participate in a panel on Strategic Legal Planning for GMTA members.
- MoMar Attorneys will descend on Greenville for our Annual Planning Meeting on December 13. Rob will try out new dad jokes. Fred will experiment with new winter facial hair. Fun will be had by all.
- Ashton will brave the Winter in Chicago for the Transportation Lawyers Association Regional Seminar and Bootcamp on January 18 and 19.
- Fred will seek refuge from the Winter to attend the Conference of Freight Counsel Meeting in Sedona, AZ on January 5-8.

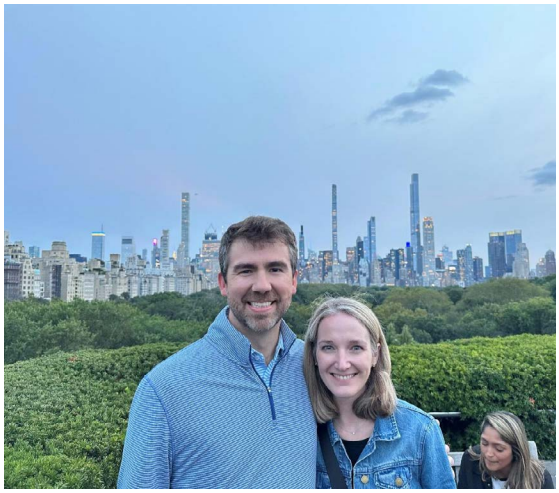
CONGRATULATIONS CORNER



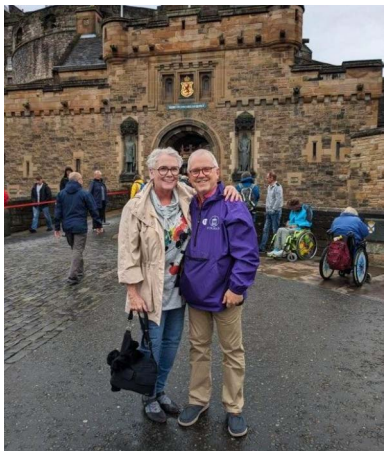
Rocky and Allison Rogers welcomed Graham Andrew Rogers on November 2nd at 8 lb 14 oz and 21 ¼" long! Congratulations to the addition to their family.

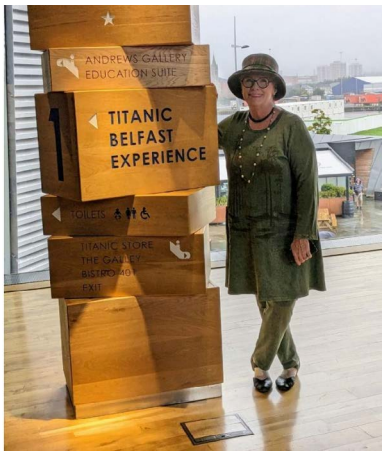


On May 2, Donavan and Ashley Eason welcomed their son, Emery Davis Eason, into the world. The Firm was proud to add another Junior Associate to its ranks, especially big sister Ellie, who helped Davis learn how to roll over!

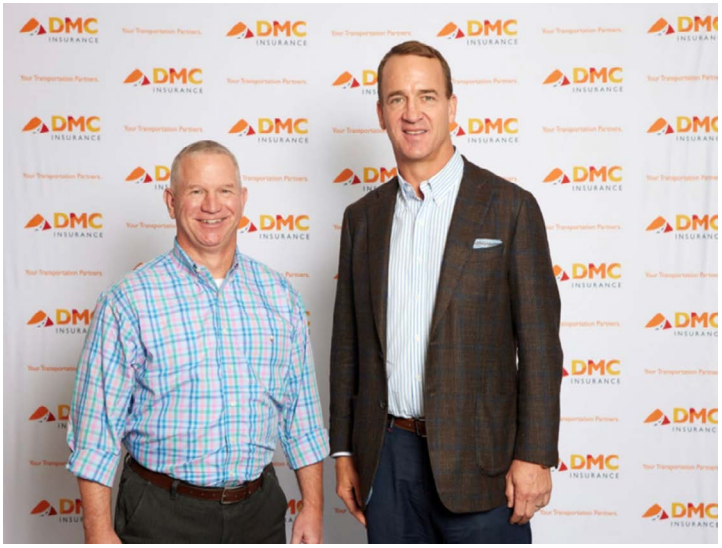


In September, Blair and his wife Amanda enjoyed a 10-year wedding anniversary trip to New York. It rained the whole time except for the first night! Congratulations on 10 years, Blair and Amanda!



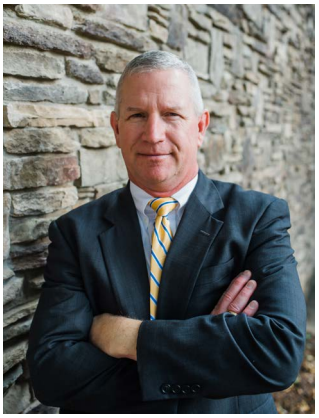


In September, our office manager Karen and her husband Doug spent a few days in London and then hopped on a 10-day British Isles cruise. They can't wait to go back and explore on their own!



Rob tried out his dad jokes on Peyton Manning at the DMC Conference as part of his audition for the Peyton and Eli Monday Night Football broadcast. We are sure he will be a guest on the show soon.

Your MoMar Team



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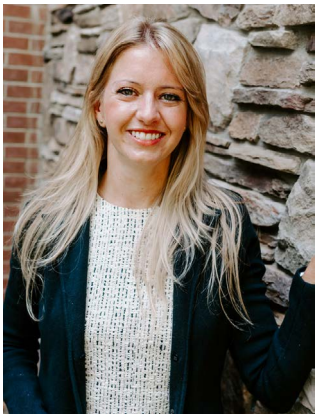

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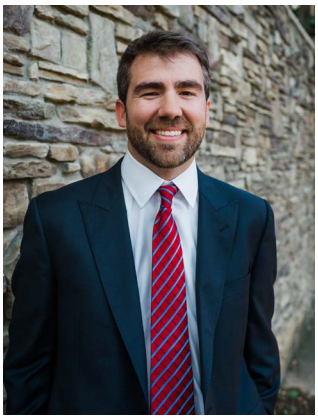

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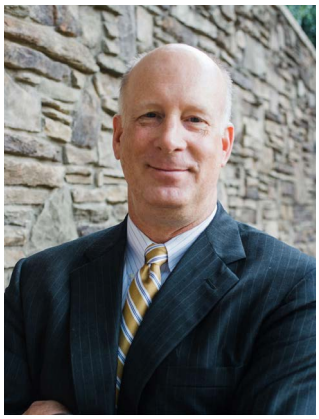

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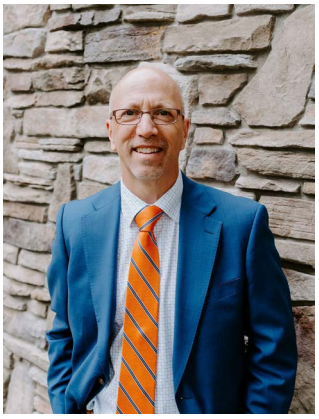

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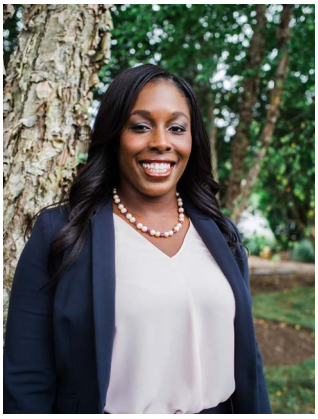

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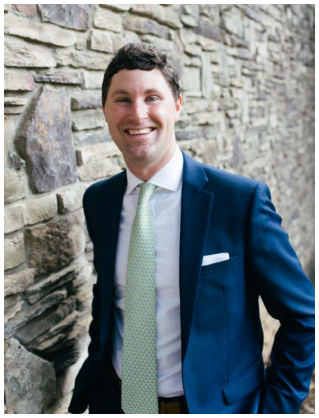

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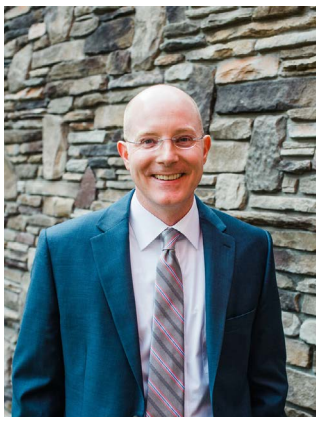

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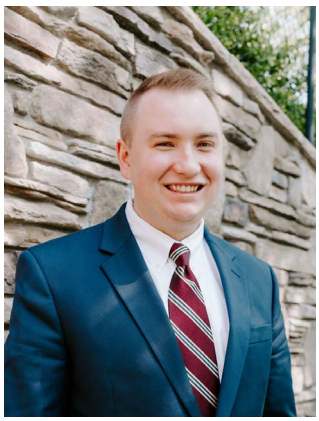

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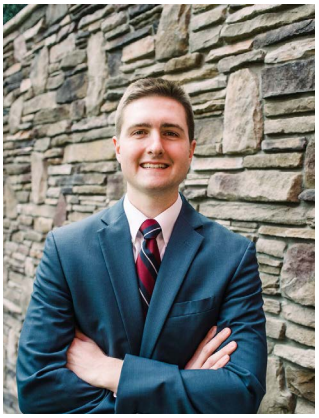

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