MAKING TRACKS

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Who's To Blame? Georgia Court of Appeals Grapples with Plaintiff's Attempts to Disarm Defense From Assigning Blame to Non-Parties

BY DONAVAN EASON

In our January 2022 Newsletter, Blair outlined the Supreme Court of Georgia's ruling in *Alston & Bird, LLP v. Hatcher Management Holdings, LLC,* [cite]. As a brief recap, *Hatcher* held that a defendant in a single defendant case in Georgia cannot apportion fault to non-parties based on the Court's reading of O.C.G.A. § 51-12-33(b). And following this ruling, many wondered what the fallout would be and how quicky it would materialize, especially in trucking cases which typically involve the driver, the motor carrier, and the insurer. One strategy in particular surfaced rather quickly among members of the Plaintiff bar—to file separate lawsuits against each defendant in suits that previously may have named all three. In doing so, plaintiffs would effectively supercharge the risk posed to each individual defendant and increase litigation costs as well. Although the Georgia General Assembly passed House Bill 961 in 2022, revising the statute to apply to instances of single defendant and multi-defendant scenarios, suits filed before the law took effect on May 13, 2022, remained under the post-Hatcher framework. And right on cue, the first case confronting the difficulties posed by the Hatcher decision now lies with the Court of Appeals in the case of *Deaton Holdings v. Tiffany Reid*, Case No. A23A005.

In Deaton, Brandon Byers attempted to make a left-hand turn along Highway 20 in Rome, Georgia, when he was struck by another motorist, Laticia Taylor. Riding with Byers was Tiffany Reid and her three minor children. Reid alleged she and her children were severely and permanently injured in the accident, so much so that one of her children even had a leg amputated. The Floyd County Police investigated the collision and found Byers was the only individual at fault for the collision, charging him with driving under the influence of marijuana, two counts of serious injury by vehicle, one count of reckless driving, and three counts of child endangerment. Reid eventually filed suit, but she did not sue Byers nor Taylor. Instead, she sued Deaton Holdings, Inc.; no one else. At the time of the collision, a tractor-trailer owned by NFI Industries, Inc. was sitting broken down in a turn-lane along Highway 20 and Deaton had been dispatched to repair the NFI truck. According to Reid's complaint, Deaton's truck obscured Byers's view of traffic at the time of his turn. And because of the *Hatcher* ruling, Deaton was forced with the very real possibility of shouldering the risk of all the parties that played some role in the collision.

Deaton then asked the trial court to add Byers, Taylor, and NFI as "indispensable parties" to the lawsuit under O.C.G.A. § 9-11-19(a)(1). As a safe harbor of sorts, Deaton also filed a third-party complaint seeking contribution against those same non-parties. But the trial denied Deaton's request to add the non-parties, simply stating the third-party complaint was the proper mechanism to pursue contribution and indemnity against the others. So, the matter was put before the Georgia Court of Appeals.[1]

On appeal, Deaton argued the post-*Hatcher* landscape had placed it in a Catch-22. Not only had Hatcher eliminated Deaton's ability to apportion fault to non-parties, but its third-party complaint was useless as well. According to a 2019 Georgia Supreme Court opinion, claims for contribution can only be brought against tortfeasors who act in concert to cause an injury. And because Deaton

[1] Unsurprisingly, and following the playbook outlined above, Reid filed another suit in Gwinnett County alleging NFI was the sole cause of the collision—the same allegation made against Deaton in Floyd County. And just as with Deaton, Reid was attempting to hold NFI responsible for all damages associated with the accident.

did not coordinate in any way with NFI, Byers or Taylor, contribution would be precluded as well. Consequently, the only viable remedy would be to join NFI, Byers, and Taylor as necessary parties under Georgia's joinder statute, O.C.G.A. § 9-11-19(a)(1). Reid, citing a 1974 decision by the Court of Appeals, countered the Court's focus should be on the indivisibility of the injury—not the indivisibility of fault. In other words, because *Hatcher* is the law, joint and several liability is the standard once more, and one cannot be a necessary party to a suit when it is also joint and severally liable. The Georgia Defense Lawyers Association also filed an amicus brief in support of Deaton's position, underscoring the procedural gamesmanship unintentionally encouraged by the *Hatcher* decision and the opportunity the Court of Appeals now has to clarify the fraught landscape facing defendants.

The Court of Appeals should hand down its decision over the next couple of months, but to say its ruling will have an impact on cases under the *Hatcher* framework cannot be overstated. A ruling in favor of the defense would permit at least some relief to defendants who find themselves procedurally isolated by plaintiffs in a multi-party scenario. Otherwise, the status quo will persist for any cases filed prior to May 13, 2022, when the legislative fix took effect, and with it, an unfair system of fault that was put to an end nearly twenty years prior.

I'm Never Gonna Financially Recover from This: S.C. Supreme Court Holds that Worker's Compensation Exclusivity Bars Co-Employee's Ability to Recover UM Benefits

BY MARTIN E. CAIN

On January 11, 2023, the South Carolina Supreme Court issued a ruling[1] reversing the South Carolina Court of Appeals in a case involving the intersection of the South Carolina uninsured motorist (UM) statute (S.C. Code Ann. § 38-77-150 (2015)) and the South Carolina Worker's Compensation Act (S.C. Code Ann. § 42-1-10 to -19-50 (2022)). The case stemmed from a motor vehicle accident involving two co-employees: Trezona, the driver, and Connelly, the passenger. There was no dispute that Trezona and Connelly were acting within the course and scope of their employment at the time of the accident. Connelly was injured and sought worker's compensation benefits. However, those benefits were not enough to fully compensate Connelly's injuries, so she filed a claim seeking benefits under the policy of Trezona's motor vehicle insurer. Trezona's insurer denied Connelly's claim, so Connelly then filed claims seeking UM benefits from Trezona's insurer and her own motor vehicle insurer. Both insurers denied her claim, so Connelly brought a declaratory judgment action, arguing that, because the insurers had denied her claim, she was entitled to recover UM benefits under each of the policies.

While the parties stipulated that Trezona had negligently caused Connelly's injuries, the insurers argued against Connelly's ability to recover UM benefits. The insurers moved for summary judgment and asserted that the exclusivity provision of the Worker's Compensation Act precluded Connelly from ever being "legally entitled to recover" [2] a judgment against Trezona, her co-employee, meaning that Connelly could never fulfill the requirements of the UM statute.

The trial court rejected the insurers' argument, finding the phrase "legally entitled to recover" ambiguous and determining that Connelly was entitled to seek UM benefits. The Court of Appeals affirmed the trial court, citing an apparent jurisdictional split on the issue and holding that a co-employee need only show fault on the part of the uninsured driver and resulting damages.

In its unanimous ruling reversing the Court of Appeals, the Supreme Court found the phrase

[1] *Connelly v. The Main Street America Group*, Op. No. 28130 (Jan. 11, 2023).
[2] A phrase found in the UM Statute, *S.C. Code Ann. § 38-77-150(A).*

"legally entitled to recover" unambiguous and determined that, in the context of the South Carolina UM statute, the phrase could be defined as the amount for which a plaintiff has secured a judgment against the at-fault defendant after overcoming any defenses the defendant may have presented. Because the exclusivity provision of the Worker's Compensation Act provides an immunity defense to an employer and a co-employee and prevents an employee from ever being able to obtain a judgment against a co-employee, the Court determined that Connelly was not legally entitled to recover against her co-employee and, thus, failed to meet the requirements of the UM statute.

While the Court noted that its decision in this case depended only on its interpretation of the South Carolina UM statute, it found, in contrast with the Court of Appeals, that a majority of courts across the country (including courts in Alabama, Arizona, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, and West Virginia) had ruled that an employee was precluded from being "legally entitled to recover" for the negligence of an employer or co-employee in cases similar to the one at hand.

The ruling is pertinent for employers of any industry but particularly for motor carriers which employ "team drivers," i.e., two drivers who operate a single truck in tandem. A motor carrier facing a potential claim for an accident involving co-employees should consider this ruling if the employees seek UM benefits in addition to coverage under an applicable worker's compensation act. While much of the determination in an action involving co-employees may depend upon the relevant policy language, a state's particular UM statute, and holdings of courts in the given jurisdiction, motor carriers and insurers may want to consider the exclusivity argument while reviewing potential UM coverage issues.

FMCSA Pre-Employment Screening Program Under The FCRA

BY ROB MOSELEY

Now is a good time to review some little known laws related to driver onboarding. The Federal Motor Carrier Safety Administration (the "FMCSA") launched its pre- employment screening program service (the "PSP Service") in May 2010. The PSP Service compiles information regarding driving records of commercial drivers for use by motor carriers in making employment decisions. The PSP Service is operated by National Information Consortium Technologies, LLC ("NICT"). Of course, this is just one of a number of sources most carriers use to onboard drivers, such as MVR services, criminal background checks and collaborative databases.

Essentially all employment background screening of any kind is subject to the Fair Credit Reporting Act (the "FCRA"), and the PSP Service is not exempted from the general rule. For example, the trucking industry standard Drive-A-Check Reports (commonly, "DAC Reports"), purchased through HireRight[1], are consumer reports that are subject to the same FCRA requirements as the PSP Service. Therefore, if any background screening tools have been used in the past, the PSP Service does not require anything particularly new. However, compliance with the FCRA in hiring processes is extremely important as failure to comply could subject employers to both civil lawsuits and penalties enforced by the Federal Trade Commission ("FTC").

The Fair Credit Reporting Act

The name of the FCRA is misleading in that it implies that the law covers only credit reports used by lending institutions in making loans. In fact, the scope of the FCRA is much broader and covers any process whereby a third-party compiles information on individuals and sells those reports to other businesses, including companies that perform background screening on potential employees.[2] These reports are defined as "consumer reports" and the entities that distribute the consumer reports are defined as "consumer reporting agencies.[3]

The FCRA controls the use of consumer reports for employment purposes in two primary ways: (i) employers must get written consent of the applicant to obtain a report, and (ii) employers must inform the applicant if adverse action is taken due to the report.

[1] DAC Reports were formerly purchased through US Investigation Services ("USIS").
[2] The FCRA allows consumer reports to be transmitted if the end user will use "for employment purposes." 15 USC § 1681b(a)(3)(B). It should be noted that this has been held to apply even under a typical trucking industry situation where the driver is actually considered an independent contractor rather than an employee.
[3] The three large credit bureaus (Experian, Transunion, and Equifax) are by far the most well-known consumer reporting agencies, but any company that meets the definition is subject to the FCRA.

Written Consent of Applicant

Generally, prior to obtaining a consumer report, an employer must first make a written disclosure to the job applicant that the employer intends to obtain a consumer report, and must obtain a written authorization to do so.[4] The disclosure and authorization must be clear and conspicuous and must be on its own separate document (as opposed to being a part of the employment application).

The employer must also certify to the consumer reporting agency that the employer will comply with the FCRA[5], although this is more of a burden on the agency than the employer. The FMCSA accomplishes this requirement by using the "Monthly Account Holder FCRA Employer Certification" form included in the PSP application.

Interestingly, the trucking industry obtained an exemption from the requirement that the disclosure and the authorization have to be written when a driver applies for a job.[6] Rather, the disclosure and authorization could be by oral or electronic means. Specifically, the exemption applies to applications for positions "over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency," and only where the applicant applies by some means other than in person.[7] This exception would appear to cover all consumer reports under the PSP system, as all such reports would be on driver applicants who are governed by the Secretary of Transportation. Presumably, this exemption was in recognition of the fact that truck drivers are often on the road and have no access to mail or fax machines.

Even more interesting is that the FMCSA unilaterally dispensed with the statutory exemption by contractually requiring that the motor carrier employers obtain a written authorization from the applicant to obtain a PSP report.[8] Therefore, even if motor carrier employers previously relied on oral authorization to pull an applicant's consumer report (e.g., for DAC Reports), in order to obtain a PSP report, employers must obtain written consent. Furthermore, pursuant to the same contract, the written consents must be kept on file and are subject to audit by the FMCSA (or its designees) at any time.

Adverse Action

Generally (but see partial exemption below), prior to taking any adverse action against the applicant (e.g. deciding not to hire the applicant, or assigning the applicant for remedial training in orientation) which is based in whole or in part on information obtained from the consumer report, an employer must first provide a "pre-adverse action" notice to the applicant.[9] This pre-adverse action notice must provide a copy of the consumer report and provide a description of the applicant's rights under the FCRA in a form promulgated by the FTC. This notice allows time for the applicant to challenge or correct any errors in the consumer report before final adverse action is taken.

[4] 15 USC § 1681b(b)(2)(A).
[5] 15 USC § 1681b(b)(1).
[6] 15 USC § 1681b(b)(2)(B).
[7] 15 USC § 1681b(2)(C).
[8] See Terms and Conditions of Monthly Account Holder Agreement required to sign up for the PSP Service.
[9] 15 USC § 1681b(b)(3)(A).

If after providing the pre-adverse action notice, the employer does, in fact, take adverse action against the applicant based on the consumer report, then the employer must provide notice of the adverse action[10] to the applicant within three (3) business days of taking such action. This notice must contain the following:

> (i) the name, address, and telephone number of the consumer reporting agency,
> (ii) a statement that the agency did not make any decision and cannot provide any reasons why the adverse action was taken,
> (iii) notice of the applicant's right to obtain a free copy of the consumer report, [11] and
> (iv) notice of the applicant's right to dispute the accuracy or completeness of the information in the report.

While the adverse action notice can be oral, written, or electronic, given the need to satisfy each of the conditions above, it is recommended that a written notice be used to document that all necessary information was conveyed.

Special Exemption for Trucking Industry

As with the written consent requirement, the trucking industry obtained a special exemption for taking adverse action.[12] Motor carrier employers may dispense with the pre- adverse action requirement if the driver applicant applies by means other than in person (i.e. mail, telephone, computer, or other similar means). Instead, the motor carrier employer can simply proceed with the adverse action and send the adverse action notice. However, if the applicant requests a copy of the consumer report from the employer, the employer must comply with the request within three (3) business days, as well as provide a copy of the FTC's notice of consumer's rights form (which should be provided by the agency when the report is sent).[13]

Employers using PSP reports must be particularly careful with the "in part" requirement. For example, the PSP report may reveal a small blemish on a driver's safety record which slightly affects the decision to hire a different applicant without any blemishes, but the primary reason is that the other applicant is much more experienced. The employer must still follow the adverse action requirements.

[10] 15 USC § 1681m(a).
[11] In the employment context, this requirement is a bit redundant as the employer must generally provide a copy of the report to the applicant prior to taking adverse action. Of course, if the applicant wants to verify the authenticity of the report, the applicant is entitled to do so. More likely, this redundancy is inadvertent. Whether redundant or not, employers must still comply with the statute. In the motor carrier context, the pre-adverse action notice is generally not required, so there is no redundancy anyway.
[12] 15 USC § 1681b(b)(3)(B).
[13] 5 USC § 1681b(b)(3)(B)(ii).

Unlike the written consent requirement, FMCSA does not require motor carriers to contract out of the adverse action statutory exemption in order to participate in the PSP program.

Therefore, if the applicant does not apply in person, the pre-adverse action notice is not required when taking adverse action based on a PSP report. Instead, the motor carrier employer can simply take the adverse action (e.g. not hiring the applicant) and send the adverse action notice in a form similar to the notice attached hereto as Exhibit A. A cover letter expressing any sentiments such as thanking the applicant for applying, etc. should be set forth separately.

If the applicant does apply in person, the pre-adverse action notice is required (including a copy of the PSP report and a copy of the FTC notice of rights). Also, if adverse action is taken, the same notice attached as Exhibit A is required, along with an extra requirement that the applicant be informed of their right to obtain a copy of the PSP report from the FMCSA as well.

Other laws

Obviously, the FCRA is not the only law that employers must comply with when obtaining the PSP report. Rather employers must comply with all other employment and privacy laws with regard to the PSP report.

FMCSA Disclosure and Authorization Form

The FMCSA provides a template disclosure and authorization form with the PSP application (the "Important Notice Regarding Background Reports from the PSP Online Service"). The disclaimer at the bottom of the page suggests that employers not rely on this form, but instead consult legal counsel regarding the proper form to be used. While it is true that the FMCSA "stamp of approval" is not necessarily binding on a court or the FTC, using the form promulgated by the FMCSA could be of some benefit. For example, if the FMCSA performs an audit, it would be hard-pressed to criticize a form that it promulgated. On the other hand, any changes to the language or form could be scrutinized by the FMCSA to determine whether such language sufficiently complies with the FCRA.

For the most part, the form provided by the FMCSA appears to be in line with the FCRA as written. Flowever, the form appears to ignore the ability of the motor carrier employer to forego the pre-adverse action notice, when the application was made by mail, telephone, or other means other than in person. In those circumstances, the motor carrier employer may want to delete the sentence beginning "If the Prospective Employer uses any information . . . ." as this sentence suggests that notification will be received prior to adverse action being taken. In fact, if the motor carrier employer wants to take advantage of the ability to forego the pre-adverse action notice, then it should certainly delete this sentence from the form. Otherwise, the form appears to comply with the FCRA requirements.

EXHIBIT A

YOUR LETTERHEAD HERE

ADVERSE ACTION NOTICE UNDER THE FAIR CREDIT REPORTING ACT

This notice is to inform you, pursuant to the Fair Credit Reporting Act ("FCRA"), that adverse action was taken on the basis of information contained in a consumer report provided by one of the following:

1. The Federal Motor Carrier Safety Administration (the "FMCSA") and National Information Consortium Technologies, LLC ("NICT") under their Pre-Employment Screening Program ("PSP");
2. HireRight background checks; and
3. {{{**other services**}}}}

Collectively, these reports are referred to as the "Consumer Reports." You have the right to request a copy of your consumer reports by contacting us at

[insert contact information].

Upon your providing proper identification, we will provide a free copy of your Consumer Reports, along with a copy of your rights under the FCRA as set forth by the Federal Trade Commission ("FTC") within three (3) business days.

You also have the right to dispute incomplete or inaccurate information in your Consumer Reports.

1. The PSP database is maintained by the FMCSA, and only the FMCSA, not NICT, is authorized to receive proposed corrections to the PSP database or determine if such information is in need of correction. You may contact the FMCSA to dispute any information at

   Federal Motor Carrier Safety Administration
   1200 New Jersey Avenue SE, Washington, DC 20590
   (800) 832-5660, TTY (800) 877-8339

   Or by visiting

   https://dataqs.fmcsa.dot.gov

2. HireRight (**provide contact information**)

3. **Other Contact info here**

None of these providers of Consumer Reports made any decisions with regard to taking adverse action and will be unable to provide you with any specific reasons why adverse action was taken.

Sincerely,

FMCSA Proposes Big Changes to the Current Safety Measurement System

BY STEPHANIE BESSELIEVRE

The Federal Motor Carrier Safety Administration ("FMCSA") is looking for comments and input on proposed changes to FMCSA's Safety Measurement System (SMS). The Notice of the proposed changes can be found at https://www.govinfo.gov/content/pkg/FR-2023-02-15/pdf/2023-02947.pdf. SMS is the FMCSA's current system it utilizes in order to prioritize high risk motor carriers for investigations. SMS determines the priority of investigation through Behavior Analysis and Safety Improvement Categories (BASICS). Motor carriers are grouped by performance in each BASIC, and ranked by percentile, with lower percentiles indicating better performance in each BASIC. The BASIC percentiles are ultimately intended to rank motor carrier safety performance. The proposed changes to the SMS follow a 2017 study conducted by the National Research Council of the National Academy of Sciences (NAS) that was conducted pursuant to the 2015 FAST Act. The NAS study recommended, among other recommendations, that the FMCSA develop and test a new statistical model, the Item Response Theory (IRT) model to be utilized in place of SMS, if it performed well.

Ultimately, the FMCSA determined that the recommended IRT model did not perform well for FMCSA's use for several reasons that are named in the Notice regarding the proposed changes. In lieu of adopting the IRT model, the FMCSA has proposed changes to its current SMS system. The FMCSA proposes the following changes be made:

(1) reorganized and updated safety categories ("safety categories" would formerly be known as BASICs), including new segmentation;
(2) consolidated violations;
(3) simplified violation severity weights;
(4) proportionate percentiles instead of event safety groups;
(5) improved Intervention Thresholds;
(6) greater focus on recent violations; and
(7) an updated Utilization Factor.

The FMCSA indicates that reorganizing the BASICs, or "safety categories," will make it easier for both motor carriers and the FMCSA to address safety issues. The new "safety categories" would be as follows:

(1) Unsafe Driving;
(2) Crash Indicator;
(3) Hours of Service (HOS) Compliance;
(4) Vehicle Maintenance;
(5) Vehicle Maintenance: Driver Observed;
(6) HM Compliance; and
(7) Driver Fitness.

Certain violations would be moved and recategorized under the proposed changes. For example, the new Unsafe Driving safety category would include drug and alcohol violations previously couched under the Controlled Substances/Alcohol BASIC. Likewise, violations for operating while under an OOS Order will fall under the Unsafe Driving safety category, rather than across multiple BASICs, as under the current SMS system. Vehicle Maintenance would be split into two categories: Vehicle Maintenance: Driver Observed, and Vehicle Maintenance, the former of which includes violations that

may be identified by a driver in pre- or post- trip inspections, as well as while on the road, and the latter of which includes all other maintenance violations. The FMCSA also proposes to segment Driver Fitness into Straight and Combination segments, and HM Compliance into Cargo Tank carriers and Non-Cargo Tank carriers as well as adjusting the HM Compliance threshold, in order to more efficiently isolate safety issues by operation.

In addition to the reorganization of the BASICs, or safety categories, the proposed changes would include consolidating violations in order to provide more consistency in violations cited; simplifying the severity weight scale from 1 to 10 to 1 to 2 in order to provide a more objective measure; implementation of a new method of "proportionate percentiles" in measuring inspections and crashes rather than safety event groups, which would instead be used to calculate the benchmark median of each grouping, in order to prevent sudden jumps in percentiles; raising the Intervention Thresholds in HM Compliance and Driver Fitness in order to focus on safety categories with a greater correlation to crash risk; focusing on more recent violations by assigning percentiles to carriers with at least one violation in the past 12 months in HOS Compliance, Vehicle Maintenance (further segmented under proposed new safety categories), and Driver Fitness safety categories rather than the past 2 years as is the case today; and by extending the Utilization Factor to carriers that drive up to 250,000 VMT per PU in the Unsafe Driving and Crash Indicator safety categories to account for carriers with greater exposure.

The stated goal of the proposed changes is to enhance the methodology of identifying motor carriers who require safety intervention in order to reduce crash risk. Whether the proposed new methodology ultimately succeeds at doing so will be told in due time. In the meantime, the FMCSA is providing a preview opportunity of the proposed SMS updates at https:// csa.fmcsa.dot.gov/prioritizationpreview/. This preview will allow motor carriers to view their results under the proposed changes. The FMCSA will also host a series of Q&A sessions beginning Thursday, March 7, 2023 at 3 p.m. Eastern Standard Time (dates and times available at https://csa.fmcsa.dot.gov/prioritizationpreview; note that registration is required and space is limited). The proposed changes are open for comment and input through May 16, 2023.

Ch, Ch, Ch, Choices! Georgia Court of Appeals Issues New Opinion on Choice of Law Application and Spoliation

BY BLAIR J. CASH

A recent decision by the Georgia Court of Appeals, and the pending appeal to the Supreme Court of Georgia, could potentially change the landscape in Georgia choice of law analyses in state courts. The decision is an important opinion on several topics for motor carriers and insurers in Georgia. In *United Parcel Service of America, Inc. v. Whitlock*, 2023 WL 412462 (Ga. Ct. App., Jan. 26, 2023) (hereinafter "Whitlock"), the Court of Appeals addressed questions of choice of law, wrongful death claims, punitive damages, and spoliation of evidence. If you face these claims in Georgia or South Carolina, this decision should have your attention.

The underlying lawsuit in *Whitlock* stems from a tractor-trailer accident in South Carolina. The Plaintiffs rear-ended a tractor-trailer and both vehicles pulled over to the right shoulder of the roadway. After the initial accident, a UPS tractor trailer was traveling in the same direction and struck the vehicles on the side of the road, killing both occupants of the Plaintiffs' vehicle and seriously injuring the other truck driver. There were numerous disputes as to liability, including whether the first rear-end accident caused the Plaintiffs' deaths. Plaintiffs alleged that the UPS driver had driven erratically for miles, failed to maintain his lane, and forced an eyewitness off the road on 3 separate occasions in the minutes before the accident. The Defendants alleged that the Plaintiffs' vehicle was not completely out of the roadway. Plaintiffs countered by showing that the dash camera showed the disabled vehicles for one quarter mile ahead and the UPS driver only applied his brakes one half second before impact.

The parties became embroiled in two disputes that became the dual focus of the Court's opinion. First, the parties disagreed over which state's law applied to the Plaintiffs' claims – Georgia or South Carolina. Second, the Defendants sought reversal of the trial court's imposition of spoliation sanctions. The Court's choice of law analysis will be scrutinized by the Georgia Supreme Court while the Court of Appeals remanded the trial court's decision on spoliation sanctions for an evidentiary proceeding consistent with controlling Georgia case law. The Court's decision on choice of law raised some eyebrows.

Choice of Law Analysis

Regarding the choice of law dispute, the Court of Appeals spent considerable time discussing the recent decision of *Auld v. Forbes*, 309 Ga. 893 (2020). In *Auld*, the plaintiff filed a wrongful death lawsuit over their child's drowning death in Belize. Belize has a 1-year statute of limitations for wrongful death claims. Georgia has a two-year statute of limitations for such claims. The Plaintiffs in *Auld* were barred from pursuing a wrongful death claim in Georgia because the lawsuit was filed outside the limitation period allowed by Belizean law, even though it was filed within the time period prescribed by Georgia law. The Court of Appeals reiterated Georgia's view on choice of law. Georgia follows the doctrine of *lex loci delicti* (law of the location of the injury) for the application of substantive law and *lex fori* (law of the forum state) for procedural matters.
The *Whitlock* trial court found that wrongful death claims, punitive damages claims, and apportionment of liability issues were all substantive matters and, therefore, South Carolina law applied as *lex loci delicti*. "Georgia law affords a remedy for wrongful death in Georgia, but no remedy at all for a wrongful death that occurs outside the state." *Whitlock*, 2023 WL 412462, at *4, citing *Auld*, 309

Ga. at 897-898. Conversely, the Court found that the Plaintiffs' survival claims for conscious pain and suffering and funeral expenses were procedural matters, requiring the application of Georgia law under the doctrine of *lexi fori*.

Defendants tried to limit the application of *Auld* to narrow facts where a cause of action was extinguished under the law of the place where the tort occurred. *Whitlock*, 2023 WL 412462, at *4. The Court of Appeals analyzed Georgia's comity statute, holding that "Georgia courts will enforce the foreign law unless (i) courts are restrained by the General Assembly, (ii) the foreign law is contrary to Georgia policy, or (iii) the foreign law is prejudicial to the interests of this State." *Whitlock*, 2023 WL 412462 at *4. The Court of Appeals suggested that it is for the Supreme Court to evaluate the prejudicial interest exception in the comity statute and refused to upset established Supreme Court precedent. The Defendants unsuccessfully argued that that there were radical dissimilarities in the wrongful death, punitive damages, and apportionment laws of Georgia and South Carolina. These two radical dissimilarities were:

> (1) South Carolina allows for the imposition of punitive damages in wrongful death cases while Georgia does not; and,
> (2) South Carolina allows for uncapped punitive damages recovery while Georgia caps punitive damages awards at $250,000.00 absent specific intent to harm.[1]

Defendants argued that if South Carolina law applied, not only would punitive damages be allowed in a wrongful death claim, punitive damages would be uncapped. If Georgia law applied, punitive damages claims would not even be allowed as punitive damages are not allowed in a wrongful death claim in Georgia. See, e.g., *Ford Motor Co. v. Stubblefield*, 171, Ga. App. 331, 340 (1984). On its surface, there could be no more radical dissimilarity. South Carolina allows the claim whereas Georgia law does not.

The Court of Appeals disagreed, finding that "South Carolina punitive damages law for wrongful death, although it provides a different remedy than Georgia law, does not constitute a form of redress radically dissimilar to anything existing in our own system of jurisprudence." Whitlock, 2023 WL 412462, at *6, citing *Southern R. Co. v. Decker*, 5 Ga. App. 21, 25 (1908) (citations and punctuation omitted). The Defendants have already applied for a writ of certiorari from the Georgia Supreme Court seeking to overturn the Court of Appeals' decision.

Regarding apportionment issues, the Defendants claimed at the trial court level that apportionment of liability is a procedural and not a substantive claim. The Court stressed that both South Carolina and Georgia have apportionment schemes that have abolished joint and several liability. However, South Carolina has an exception to its apportionment scheme that allows the imposition of joint and several liability if the Defendants' conduct is willful, wanton, reckless, or involved the use of drugs or alcohol. In an apparent attempt to reconcile its decision on punitive damages and wrongful death with apportionment, even though the Defendants would be subject to joint and several liability under South Carolina law and not Georgia law, the Court found that "the statutes are not radically dissimilar." *Whitlock*, 2023 WL 412462, at *7.

[1] Georgia law allows for the imposition of uncapped punitive damages in products liability cases and in cases where the defendant acted or failed to act while under the influence of drugs or alcohol. O.C.G.A. § 51-12-5.1(e)-(f).

Yet again, the Court of Appeals refused to find any radical dissimilarity between the two state laws in finding that the trial court was bound to apply South Carolina law to the apportionment of the Plaintiffs' damages.

Spoliation of Evidence

The Court's decision also served as a good reminder on Georgia's evidence spoliation law. Plaintiffs alleged that the spoliation sanctions were warranted over allegations that the UPS driver deleted text messages that were relevant to the accident. Defendants opposed the imposition of sanctions and argued that even if the messages were deleted, they were not material to the facts of the case and that an evidentiary hearing was required to make specific findings of fact before a Judge could impose spoliation sanctions. Plaintiffs asked the Judge to strike the Defendants' Answers but, instead, the Court granted an adverse inference that the deleted text messages were deleted in bad faith and were materially relevant to the issues in the lawsuits.

On appeal, the Court remanded the case with instructions to apply Georgia's spoliation law, namely to hold an evidentiary hearing regarding the Plaintiff's spoliation allegations. The Court stressed that the spoliation sanction of imposing an adverse inference is "one of the most severe sanctions for spoliation and is typically only reserved for exceptional cases, generally only those in which the party lost or destroyed material evidence intentionally in bad faith and thereby prejudiced the opposing party in an incurable way." *Whitlock*, 2023 WL 412462, at *8, citing *Creek House Seafood & Grill v. Provatas*, 358 Ga. App. 727, 731 (2), 856 S.E.2d 335 (2021).

The Court of Appeals reminded us all that a trial court "must determine whether spoliation occurred, whether the spoliator acted in bad faith, the importance of the compromised evidence, and so on." Id. at *9, citing *MARTA v. Tyler*, 360 GA. App. 710, 712 (2021) (citation and punctuation omitted). Once the court has determined that spoliation occurred, it should weigh five factors:

> "(1) whether the party seeking sanctions was prejudiced as a result of the destroyed evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the destroying party acted in good or bad faith; and (5) the potential for abuse if any expert testimony about the destroyed evidence was not excluded."

Whitlock, WL 412462, at *9.

Without an evidentiary hearing supporting the trial court's ruling, the decision is akin to a Motion for Summary Judgment and the party opposing the motion is entitled to have evidence in the record viewed the light most favorable to it and have all reasonable inferences from evidence drawn in its favor. Each factor must be analyzed by the trial court at an evidentiary hearing and specific findings of fact must be made before an imposition of spoliation sanctions is made.

The Court's decision on spoliation serves as a reminder of the importance of understanding spoliation sanctions, when the duty to preserve evidence arises, and the steps a trial court must take before imposing any such sanctions.

Go For Broke: FMCSA's Proposed Changes to Broker Financial Responsibility Regulations

BY LESESNE PHILLIPS

This year the Federal Motor Carrier Safety Administration ("FMCSA") proposed changes to the financial responsibility requirements for freight brokers and freight forwarders with FMCSA authority. For those unaware of current financial responsibility requirements, freight brokers and freight forwarders must secure a bond or trust fund in the amount of $75,000 and submit this information to the FMCSA when applying for authority. The majority of brokers and freight forwarders secure and submit a bond. Often, the bond or trust fund is backed by a third party, who actually submits the filing with the FMCSA. To start, misconceptions abound regarding what this financial responsibility covers. The financial responsibility requirement does not cover cargo claims or personal injury claims alleged against a broker. Instead, this bond or trust fund covers freight charges for motor carriers providing transportation services for loads tendered by the broker or freight forwarder. When the broker or freight forwarder improperly withholds payment to the motor carrier for freight charges, the motor carrier can file a claim with the third party who filed the bond or trust fund on behalf of the broker or freight forwarder.

In theory, $75,000 would be more than enough to cover freight charges for one shipment. However, when a freight broker or freight forwarder improperly withholds freight charges to one motor carrier for one shipment, there are often many different motor carriers not being paid by that same freight broker or freight forwarder. Adding to this problem is that the third-party financial backer usually waits until it believes all claims have been asserted by all motor carriers that have been shorted, and then allocates the $75,000 among all existing claims, with motor carriers sometimes receiving cents on the dollar. This creates issues, as the broker potentially keeps brokering loads while claims against the bond continue to increase.

In order to address these issues, the FMCSA submitted a Notice of Proposed Rulemaking proving stricter requirements for financial responsibility rules. One of the biggest changes is the proposed draw down rule. If a claim is made by a motor carrier against the bond which would make the available financial security fall below the $75,000 limit, then the broker or freight forwarder must replenish the funds within

seven business days. If the broker or freight forwarder fails to replenish these funds within seven days, then the FMCSA will immediately suspend the broker's or freight forwarder's operating authority. For trust funds, the Notice of Proposed Rulemaking proposes that assets supporting the trust fund must be capable of being liquidated within 7 calendar days of an event that triggers payment from the trust. Therefore, assets classes that cannot be readily liquidated will not count towards meeting this financial responsibility requirement. Additionally, certain entities would no longer be eligible to serve as trustees such as loan and finance companies. The FMCSA also proposes that if the third-party financial backer receives notice of insolvency of the broker or freight forwarder, the third party must immediately notify the FMCSA and cancel its financial responsibility filing. In addition to these proposals, the FMCSA wants to increase its enforcement authority by adding penalties for violations of these new requirements.

These proposed changes could be good for motor carriers to secure payment for the transportation services they provide. However, these changes undoubtedly provide increased pressure on brokers and freight forwarders, as well as the sureties and trustees backing these entities. If a broker or freight forwarder has a legitimate reason for withholding payment from a motor carrier and the motor carrier files a claim on the trust or bond, then the broker or freight forwarder might opt to pay the motor carrier instead of risking a threat to cancellation of its operating authority. The Notice of Proposed Rulemaking contemplates a three year-period to implement these changes once a final rule is issued. The comment period for these proposed rules ended on March 6, 2023. We will provide any updates on any final rules promulgated by the FMCSA.

THE ROAD AHEAD- Past and Future Events

Past

- Donavan Eason, Martin Cain and Rob Moseley attended the TLA Chicago Regional and Boot Camp on January 19-20 in Chicago, Illinois.
- Fred Marcinak, Rocky Rogers and Rob attended the Conference of Freight Counsel meeting in St. Petersburg, Florida on January 7-9.
- Blair Cash testified before the Georgia House Judiciary Committee on February 21 on pending tort reform legislation that is important to the trucking industry in the State of Georgia.
- Rob, Blair and Donovan presented at the Marsh Fleet Solutions meeting in Charleston February 21-23.
- Fred presented on broker negligence at the Specialized Carriers and Rigging Association meeting in Orlando, Florida on March 2.
- Rob was joined by friends Mehdi Arradizadeh (ATS) and Dean Newell (Maverick) on a panel at the Truckload Carriers Association meeting in Orlando March 6-8 discussing expectations in accident litigation.
- Megan Early-Soppa co-hosted a talk with Mehdi for the Trucking Industry Defense Association (TIDA), Coffee and Conversations on March 17.
- Blair and Donavan spoke to a group of adjusters at the Marsh McLennan Agency Claims Summit in Peachtree Corners, Georgia on March 20.
- Fred attended and presented at the TIDA Cargo Seminar on March 21 in Phoenix, Arizona.
- Blair and Fred joined Tommy Ruke with the Motor Carrier Insurance Education Foundation on SiriusXM Road Dog Radio discussing the changes to the FMCSA's Compliance, Safety, and Accountability (CSA) system.
- Rob spoke on truck accident litigation and how that is affected by company policies and structure at the SC Trucking Association Truckfest in Columbia on March 29.

Future

- Fred will discuss freight claims with The Machinery Haulers association in Las Vegas on April 5th.
- Blair will be presenting a webinar with TIDA "Defending Trucking Cases with Vehicle Technology: The Defense Perspective" on May 3, 2023.
- Rob will be in the hinterland speaking to the attendees at the Minnesota Trucking Association's Management Conference on April 20.
- Rob will be in Orlando for the Captive Connections meeting on April 25.
- Fred will be in San Diego to speak at the Transportation Lawyers Association meeting April 26-29.
- Rob will be presenting at the Traffic Captive meeting in Chicago on April 27.
- Rob will be at the Truck Captive meeting in Dubuque on May 1.
- Rob will be speaking to the Auto Haulers Association of America May 1-3 in Baltimore.
- Rob will be attending the Truckload Carriers Association Safety meeting in San Antonio June 11-13.
- Blair and Donavan will be attending the Georgia Motor Trucking Association's Annual Convention on June 18-21 in Amelia Island, Florida.

MOMAR PAST AND UPCOMING WEBINARS

- We hope you will attend our upcoming lunchtime webinar on April 12, 2023. The topic will be announced at a later time.

Check the Archive section of our website for previously recorded webinars.

CONGRATULATIONS CORNER

- Rob was included in the Thomson Reuters Standout Lawyers Database. He was anonymously nominated by a client for this designation. He is the hardest-working guy we know!
- Fred is now the Vice Chair of the Conference of Freight Counsel (CFC).
- Megan was featured by TIDA in the TIDA Member Spotlight for February 2023. Way to go, Megan!
- Blair was recognized in the Thomson Reuters Super Lawyers 2023 Publication as a Rising Star in the Personal Injury Defense field.

- Wilson attended the week-long Trucking Safety's NATMI Certified Director of Safety Class in Columbia, SC. He passed the written test and is on his way to earning his NATMI Safety Director certification. MoMar is proud of him! Here is Wilson hard at work with some of the other class attendees.

- Our office manager, Karen Powell, and her husband, Doug, participated in the 34th production of the Anderson Senior Follies at Anderson University. "Blast from the Past" told the story of a group of individuals attending their high school reunion through music and dance. This was Karen's first time participating in a production, but she says it won't be her last. She has the bug now. 4 of the 5 shows were sold out!

- Alex, Martin, Rob, Robin (Rob's wife), Tom, Jinna and her sister went to the opening night production of Blast From the Past. Lesesne took the picture.

CONGRATULATIONS CORNER

- Megan and Philipp's son, Sunday, was baptized the weekend of March 8th. Congratulations to the Soppa family!

- Rob Mehdi Arradizadeh (Anderson Trucking Service, Inc.) and Dean Newell (Maverick Transportation, Inc.) speaking on Managing Expectations In The Midst of Litigation" at the Nashville, Tennessee Truckload Carriers Association Conference.

- Blair and Amanda's son, Bennett, was baptized on March 19th. Congratulations to the Cash Family!

- Blair and Donavan at the Marsh McLennan Agency Summit. Paul Houghton (Marsh McLennan Agency) was kind of enough to pose for a UGA MoMar picture!

CONGRATULATIONS CORNER

- One of our paralegals, Olivia Mann, and her sister Tanya, on a recent trip to Denmark. As you can guess, it was cold!

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