MAKING TRACKS

The Periodic Publication of Moseley Marcinak
A Transportation and Logistics Law Firm

ISSUE 15 ■ FEBRUARY 2024

Moseley Marcinak Newsletter Contents

A Note from Blair Cash

New Year's Resolutions. Whether we make them, or admit that we make them, provide a fun opportunity for a challenge and introspection. Eat healthier. Exercise more. Read more for pleasure. Drink less caffeine. Go to sleep earlier.

A recent sermon by our pastor offered practical advice that New Year's Resolutions have to make common sense and spiritual sense. If they aren't good for your spiritual and mental wellbeing, then perhaps they need to be revisited. We can make as many resolutions as we want, but if they are contradictory or incompatible with reality, they're doomed to fail. And no one likes to be reminded when their New Year's Resolutions fail before Spring.

My New Year's Resolution(s)? Be present in every moment and don't sweat the small stuff. I know there's a book written 20 years ago on the topic, but it remains true today. I never read the book. To borrow one of my favorite Moseley-isms, don't hear what I'm not saying. I'm not saying to ignore details. The devil is in them. Details are important. The transportation world lives on details. We must make sure they are acknowledged, addressed, and appreciated.

What I am saying is that don't be deterred if something does not go your way. If you have a bad day over something small – a disagreement with opposing counsel, a Judge denying your motion, or, God forbid, a client not taking your advice – forget about it and move on. Be present in your next task and give that next task, that next case, that next client your full and undivided attention. Don't sweat the "small stuff" that happened before.

When one of my kids laments a missed shot in a basketball game, I remind them to play the next play. When they miss a step in dance class, refocus and regain your form.

Sounds easy enough, right? Check back with me in April.

New Case Alert – Accident Registers and Reports

BY BLAIR CASH

Discovery in trucking accident cases can take on a life of its own. Before you know it, document production requests number in the hundreds and documents produced in the thousands. It is not death by a thousand cuts so much as it is death by a flood of paper. DOT inspection reports, accident reports, and accident registers, even when those reports are not related to the wreck at issue, are frequent topics of discovery.

You might wonder how all of those items are relevant? What do different accidents in other places across the country have to do with a wreck in Georgia, South Carolina, or wherever? And aren't there admissibility concerns for accident and inspection reports as well? Have no fear, at least in the Western District of North Carolina.

The Court in *Scott v. Waste Connections US, Inc.*, 2023 WL 8628333, C.A. No. 3:23-cv-00142 (W.D.N.C. Dec. 13, 2023) answered these questions and protected these items from production. Scott arises out of a collision between a CSX freight train and a garbage truck. The plaintiff was a freight conductor on the train who alleged he was injured in the accident. The Court in Scott evaluated a number of cases addressing the discoverability of accident registers. *See, e.g., Sajda v. Brewton*, 265 F.R.D. 334, 341 (N.D. Ind. 2009); *Solek v. K&B Transp., Inc.*, No. 21-10442, 2022 WL 2915287, at *7 (E.D. Mich. July 27, 2022); *Sykes v. Bergerhouse*, No. CIV-20-333-G, 2021 WL 5098291, at *1 (W.D. Okla. Nov. 1, 2021).

The battleground with many discovery disputes is not admissibility, as that is an admittedly higher hurdle to clear. The party seeking to admit evidence has to prove that the evidence makes some fact more or less probable. *See, e.g.*, Fed. R. Evid. 401 (requiring not only that the evidence must make a fact more or less probable, but it also must be "of consequence" in determining the action). The Scott Court, relying upon the reasoning of other cases like *Sykes*, held that accident registers are not only inadmissible, they are not discoverable.

In addition to the common sense relevancy arguments that many trucking lawyers advance, the Court also stressed the statutory bar on the admissibility of such reports and registers. 49 U.S.C. § 504(f) provides:

> "No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by the Secretary, and no part of a report of an investigation of the accident made by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation."

In spite of decisions like Scott, discovery requests for accident registers and unrelated accident reports are still commonplace. Litigating these discovery disputes require time and effort, but citing to the growing area of case law interpreting the clear statutory bar provided by § 504(f) should be a trucking defense lawyer's first objection and defense in written discovery.

A Clear and Convincing Reminder of Punitive Damages

BY DONAVAN EASON

Any time the phrase "punitive damages" is included in a lawsuit, plaintiffs believe the actions of the defendants are not simply negligent; they are downright breathtaking. A host of words and phrases reserved for lawyers are tied into every question in deposition and every pleading before the court: willful, wanton, needlessly endanger, conscious disregard, or even malice. For over a hundred years, Georgia called them "vindictive damages." Words of this sort foreshadow a measure of exposure no company wants to face. Perhaps it should come as no surprise that the Latin roots for the word punitive are *pūnīre* and *poena*. In ancient Rome, these words conveyed not simply the penalty or punishment that were being considered, but the moral and social costs that had been exacted, and the justice demanded to restore balance and harmony to society. To state the obvious, damages of this caliber carry a sort of inertia that can hamper efforts to resolve a claim or lawsuit short of tendering applicable insurance limits. The faster the parties confirm whether the facts of the case merit punitive damages, the faster the parties can reach closure on what will be necessary to negotiate a settlement.

This begs a question: When does a party's negligence cross the threshold from simple negligence to one of a punitive nature? As with any case, the answer hinges on the evidence—but more specifically, the *potency or weight* of the evidence. In the legal space, we commonly refer to this as the "burden of proof," and a review of the three different classifications is helpful for context.

The first is called the "preponderance of the evidence." This is the lowest burden of proof, and the one used in most civil cases. The common example used to describe these standards are the scales of justice, a helpful reminder that the *weight* of evidence is not necessarily the same as the *amount* of evidence. If the weight of plaintiffs' evidence is a bit more than the defense, even if only slightly heavier, then they have proven their case by a preponderance of the evidence.

The second, and highest, burden of proof is "beyond a reasonable doubt," the standard reserved specifically for criminal cases. A jury does not have to be completely certain of the prosecutor's position; it just means that any doubts that remain might not be reasonable or are minor. Going back to the scales, the pan containing the prosecutor's evidence does not just tip slightly; it heavily tips toward guilt.

The third burden of proof falls between the two above: clear and convincing. And this, as you may have guessed, is the standard used by Georgia courts in deciding whether punitive damages should be levied. The evidence cannot be just a little bit heavier than the other side; it needs to be significantly

heavier. The arguments and evidence are persuasive enough that there is a high probability that what is being claimed is true.

Georgia courts have not always had the best guidance on applying the clear and convincing standard, however. As mentioned above, since Reconstruction until the late 1980s, the Georgia Code allowed for vindictive damages when the injury suffered by another was to the peace, happiness, or feelings of a plaintiff. But courts could also permit a separate class of damages for "aggravating circumstances," a remedy aimed at deterring the defendant from repeating the same behavior while also compensating the plaintiff. In 1987, these two classes were cast aside, and the modern punitive damages law was passed by the Georgia General Assembly.

The problem is that there are 124 years of case law interpreting behaviors that may or may not qualify as punitive damages under the current law—a point that was underscored last October by the Georgia Court of Appeals in *McKnight v. Love*. Aggravating circumstances, standing alone, are not enough to qualify as punitive damages as it was before. On the other hand, aggravating circumstances may be considered in deciding whether punitive damages may be awarded. The key is whether those aggravating circumstances (or other showings such as willful misconduct, conscious indifference and so forth) could be proven by clear and convincing evidence.

The *McKnight* decision's reminder of the burden of proof needed to prove punitive damages should also serve as a reminder to truck companies, insurers, and their partners of the scope and depth of discovery that will be required as well. Like negligent hiring, retention, supervision, and training claims, discovery in an eventual lawsuit will explore what happened in a tractor-trailer accident in addition to whether the company or driver had a pattern or practice of engaging in similar behavior. If the circumstances surrounding the accident are particularly severe or egregious, discovery may also extend to the company's financial records and corporate structure. Although companies will recoil at the thought of public exposure to sensitive information of this sort, plaintiffs will argue such information is necessary to assess what amount of punitive damages will be necessary to achieve its goals of deterrence and punishment.

This also stresses the importance of thorough, in-person meetings with companies and their drivers. If a long-standing relationship has not been developed with the company, an in-depth interview of the company's safety director and detailed review of client records are critical to discover whether a not yet discovered issue could be leveraged into a basis for punitive damages when and if a claim matures into a lawsuit. There is simply no other way to unearth this information, and many fail to realize the police report and driver interview only factor into a fraction of the liability analysis. Armed with this additional information (and the sooner, the better), decisions can be made to resolve claims and suits. Most importantly, they can be done so with an additional level of closure that is sorely lacking in difficult jurisdictions like Georgia.

In the end, what may be perceived as a windfall to the claimant in the pre-suit phase may be, in reality, a dodged bullet and savings of thousands or more in the form of time, litigation fees, and seemingly interminable claims.

Put Your Money Where Your Mouth Is: FMCSA's Final Rule Changes to Broker Financial Responsibility Regulations

BY LESESNE PHILLIPS

In the March 2023 Making Tracks, I wrote about the Federal Motor Carrier Safety Administration's Proposed Rule proposing changes to the financial responsibility requirements for freight brokers and freight forwarders. On November 16, 2023, the Federal Motor Carrier Safety Administration ("FMCSA") published its final rule providing significant changes to freight broker and freight forwarder financial responsibility requirements. The final rule becomes effective on January 16, 2024, and freight forwarders and freight brokers failing to comply could see their FMCSA authority revoked.

For those unaware of current financial responsibility requirements and do not want to go back and read my previous article in March, 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 order to address issues of non-payment to motor carriers, the FMCSA promulgated its final rule providing stricter requirements for financial responsibility. The biggest change to be implemented is the 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. The ways in which the available financial security may be drawn down is from the broker or freight forwarder consenting to a drawdown, the broker or freight forwarder failing to respond to a valid notice of claim from a surety or trust provider, or the conversion of a claim against the broker or freight forwarder to a judgment. 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.

The final rule published by the FMCSA significantly follows the Notice of Proposed Rulemaking published earlier this year. However, after additional comment from those in the industry, the FMCSA added provisions detailing the process for surety providers or financial institutions to notify the FMCSA of changes in the broker's or freight forwarder's bond or trust status. To address these questions, FMCSA will use its Unified Registration System ("URS") platform to receive information from surety providers, trustees, brokers, and freight forwarders to enforce these regulations. The URS is commonly used to apply for operating authority with the FMCSA and provides an online platform to submit information to the FMCSA. The surety provider or trustee must notify the FMCSA in writing, by electronic means, within two business days of either a payment from the bond or trust making financial security fall below $75,000 or a determination by the surety provider or trustee that payment will be inevitable once the

60-day period for submission of claims has elapsed. The 60-day period refers to the instance where the surety or trustee suspects that the freight forwarder or broker is insolvent. Upon determining the broker or freight forwarder's insolvency, the trustee or surety issues public advertisement to submit claims, and the trustee or surety waits until the end of the 60-day period to issue payment. Under the final rule, the trustee or surety does not need to wait until the end of the 60-day period when payments are dispersed to notify the FMCSA. Instead, the trustee or surety may immediately notify the FMCSA when it determines that financial security falling below $75,000 is inevitable based on the claims submitted but not yet paid.

Some comments to the Proposed Rule raised concerns about the 7-day time period to cure the financial responsibility requirement. Some commenters warned that the 7-day time period did not provide adequate time for the broker or freight forwarder to internally investigate the claims and provide a response. However, many others in the industry stated 7-days would be an adequate time period for a broker or freight forwarder to respond. The FMCSA weighed the concerns for allowing adequate time for a broker or freight forwarder to internally investigate a claim against the need to determine the insolvency of a freight forwarder or broker quickly. Accordingly, the FMCSA adopted the 7-calendar period in its final rule.

For trust funds, the final rule adopts the proposed rule 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. The Proposed Rule provided a list of assets that were prohibited from being used to support a trust fund. After comments from the industry, the FMCSA determined that the final rule would lists assets that could be used for supporting the trust fund instead of assets that were prohibited for fear of the creation of new asset classes that were not on the prohibited list to circumvent this requirement. The list of assets that can support a trust fund are cash, Irrevocable Letters of Credit issued by a Federally insured depository institution, and Treasury bonds.

These changes will be good for motor carriers to secure payment for the transportation services they provide. Additionally, while these new regulations undoubtedly increase standards on brokers and freight forwarders, the final rule provides some clarity and strengthened protections for the broker and freight forwarder from the proposed rule. Specifically, anytime a broker or freight forwarder's trust or bond is in jeopardy of being suspended, the FMCSA will send a notice to the broker or freight forwarder allowing them to respond to the alleged insolvency. These regulations will require brokers to remain vigilant with any claims that are filed for freight charges with their bond or trust. Brokers and freight forwarders will need to address claims timely and provide necessary information to help resolve any claims. Like any change, there will be some initial difficulties particularly for surety providers, trustees, brokers, and freight forwarders. However, if these entities can educate themselves and become familiar with this new system sooner rather than later, they avoid the risk of falling into pitfalls and enforcement from the FMCSA.

I'll be the Judge of That: Changes to Evidence Rule 702 for Expert Testimony

BY ASHTON SCOTT

The United States Supreme Court approved changes to the Federal Rule of Evidence 702, effective December 1, 2023. The revised FRE 702 reads as follows (new language is underlined and deleted language is struck through):

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

The recent amendment to Rule 702 seeks to clarify and emphasize two separate issues: (1) the proponent of an expert opinion must demonstrate that the proffered testimony meets Rule 702's preponderance of the evidence admissibility requirement, and (2) the expert's testimony must remain within the bounds of what can be concluded from the reliable application of the expert's methodology.

The More Likely than Not Requirement

With new language, "more likely than not," the Advisory Committee clarifies and emphasizes that an expert's qualification is based on the preponderance of evidence standard. As such, expert testimony may not be admitted unless the proponent demonstrates that it is more likely than not that the proffered testimony meets this admissibility standard. While that standard may have been previously presumed, its application will be something to watch.

This language reflects an effort to correct courts that have taken a liberal view of the admissibility standard, presuming that expert testimony is admissible and treating the reliability requirements of Rule 702 as questions of weight of the testimony rather than admissibility. Under that liberal view, courts erred on the side of admitting expert testimony, with some going as far as interpreting Rule 702 as implying a presumption of admissibility. These courts left the jury to decide critical questions regarding the sufficiency of the basis for the expert's opinion rather than assessing these issues themselves.

Under the amended Rule 702, expert testimony should not be presumed admissible on its face. Instead, the revised language clarifies the application of the preponderance standard as required by Rule 104(a) and empowers trial courts to judge the conclusions reached by the expert and the methodology applied to reach those conclusions.

The Reliability Requirement

The Advisory Committee also amended Rule 702(d) to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis. The Advisory Committee also amended Rule 702(d) to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. This amendment directs trial courts to more closely scrutinize an expert's proffered testimony before allowing parties to present it to the jury. Before an expert's opinion may be admitted at trial, the trial court must determine that the expert's opinion, as well as the basis and methods used by the expert to reach it, are both relevant and reliable.

The Committee explains that "[j]udicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology reliability support."

The amendment reaffirms the central holding of Rule 702: the principles and methods used by the expert must be both reliable and reliably applied. Experts may not make claims unsupported by basis and methodology. Moving forward, attorneys may expect greater scrutiny and judicial gatekeeping of expert testimony in federal courts. State courts that rely upon the Federal Rules and interpretation of those Rules may also be in for a slight shift as well.

THE ROAD AHEAD- Past and Future Events

Past

- Rob attended the South Carolina Trucking Association's (SCTA) Safety and Maintenance Conference in Myrtle Beach on November 9-12. Rob spoke to the group on corporate depositions and even grilled a few of the attendees.
- Blair and Rocky attended the Georgia Motor Trucking Association (GMTA) Leadership Conference in Atlanta on November 16 and 17. In the coveted post-lunch presentation window, they managed to keep everyone awake and engaged (don't ask for proof, please) by participating in a panel on Strategic Legal Planning for GMTA members.
- MoMar Attorneys convened for our Annual Planning Meeting on December 13 in Greenville. Fun, fellowship, games, and important discussions about the Firm and our big plans for 2024 and beyond. To conclude the meeting and as part of their "hazing," John Dempsey and Ashton Scott kept us all entertained with a rousing game of MoMar Bingo.
- The Firm celebrated with its annual Christmas party on December 13. The Greenville Swamp Rabbits defeated the Gwinnett Gladiators in a battle of the Firm's minor league hockey teams. It was a great night!
- Fred, Rob, and Lesesne realized that Arizona can be cold in the Winter too! They attended the Conference of Freight Counsel Meeting in Sedona, AZ on January 5-8.
- Rob took part in the SCTA's "Truck the State House" event at the Capital on January 17. Trucks were on display in support of tort reform and other legislative needs.
- Fred (or at least we think it was Fred and not some AI, CGI version of Fred) presented on the topic of AI in Logistics at the Transportation Lawyers Association (TLA) Regional Seminar and Bootcamp on January 18 and 19. John, Martin, and Ashton braved the Winter in Chicago to attend the seminar as well. We think they have thawed out.

Future (February, March, April)

- Robb Brown will present at the American Board of Trial Advocates (ABOTA) Masters in Trial mock trial presentation for the South Carolina Bar on February 3.
- Rob will speak to the Charleston Motor Carriers Association on February 15, discussing hot topics and legal land mines for truckers.
- Fred will speak to the Specialized Carriers and Rigging Association on February 20-22 in Houston, Texas on regulatory issues in trucking.
- Rob and Alex will attend the SCTA Meeting in Myrtle Beach on February 23-25.
- Rob and Donavan will attend the 2024 Great West Casualty Leadership Symposium in Knoxville, Tennessee on February 27-29.
- Rob will attend an American College of Transportation Attorneys (ACTA) meeting on February 29 through March 3 in Phoenix, Arizona.
- Fred will present on Top 10 Issues in Cargo Claims Handling at the Trucking Industry Defense Association (TIDA) Cargo Seminar on April 9 in Memphis, Tennessee.
- On April 25-27, Rob will join the CAB team to present to the American Trucking Association (ATA) Safety, Security and HR Conference in Phoenix.
- Former MoMar employee and Rob's daughter, English Moseley, will graduate from law school on April 27. Congratulations, English!
- Rob will attend the Motor Carrier Insurance Education Foundation (MCIEF) Annual Meeting in Orlando from April 28 through May 1.
- Fred will chair the Freight Claims Committee at the TLA Annual Conference on May 1 in Puerto Rico.

Upcoming Webinars

- Thursday February 8 – Brokerage Update
- Friday March 8 – Independent Contractor Update

CONGRATULATIONS CORNER & Momar in The World

Blair and Rocky participated in a panel on Strategic Legal Planning at the Georgia Motor Trucking Association's Annual Leadership Conference.

Rob is lurking in the back of this picture somewhere with the Governor of South Carolina and other members of the South Carolina Trucking Association. Rob was escorted out of the State House after laughing too heartily at his own dad jokes.

Ashton Scott's junior associate, Noah, was worn out from a hard week at work. He slept right through his first fishing trip!

Welcome

In January, the firm welcomed Christian E.W. Fober as an associate in the Firm's Greenville office. Christian comes from another well-respected Southeast firm where he focused his practice on general liability and transportation matters. Christian brings a vast experience and wealth of knowledge to the Firm. Originally from Laurens, South Carolina, Christian earned his undergraduate from Presbyterian College in Clinton, South Carolina. He then obtained his law degree from the Charleston School of Law. Outside of the office, he enjoys spending time with his wife, Lytle, and their three sons, Bennett, Mack, and Ward.

The press release on the following page went out announcing the promotion of two of our associates:

Moseley Marcinak Law Group LLP Announces New Partners: Donavan Eason and Lesesne Phillips

Greenville, SC - January 2, 2024 - Moseley Marcinak Law Group LLP, a prominent transportation and logistics law firm, is pleased to announce the promotion of Donavan Eason and Lesesne Phillips to the position of partner. This strategic move reflects the firm's commitment to excellence and reinforces its position as a leading legal resource in the industry.

Hailing from Rochelle, Georgia, Eason has a wealth of experience and is deserving of the promotion to partnership. With an impressive background defending trucking companies, drivers, and insurers against negligence claims, Eason has earned recognition for his contributions to the field. Notably, he has served as Chair of the Georgia Defense Lawyer Association's Trucking Steering Committee and been a valued member of the State Bar of Georgia's Formal Advisory Opinion Board. Eason practices in the firm's Savannah, Georgia location.

Phillips focuses his practice on general corporate matters, corporate governance, and the drafting and execution of transportation-related contracts for the firm's local and national transportation clients. His knowledge and service to clients extends to cargo claims, FMCSA and state regulatory compliance, and contract disputes. Phillips' dedication and proficiency in his field make him an invaluable addition to the firm's clients. He is located in the firm's Greenville, South Carolina office.

Founding partner Rob Moseley expressed enthusiasm for the promotions, stating, "Donavan and Lesesne have consistently demonstrated exceptional dedication and legal prowess. Their contributions have been integral to our firm's success, and we are proud to welcome them as partners."

Pictured: Lesesne Phillips and Donavan Eason

Your MoMar Team

Robert Moseley

Founding Partner

rob.moseley@momarlaw.com

Fred Marcinak

Founding Partner

fred.marcinak@momarlaw.com

Anna Beaton

Partner

anna.beaton@momarlaw.com

Robb Brown

Partner

robb.brown@momarlaw.com

Blair Cash

Partner

blair.cash@momarlaw.com

Tom Chase

Partner

tom.chase@momarlaw.com

John Dempsey

Partner

john.dempsey@momarlaw.com

Rocky Rogers

Partner

rocky.rogers@momarlaw.com

Alex Timmons

Partner

alex.timmons@momarlaw.com

Lesesne Phillips

Partner

lesesne.phillips@momarlaw.com

Donavan Eason

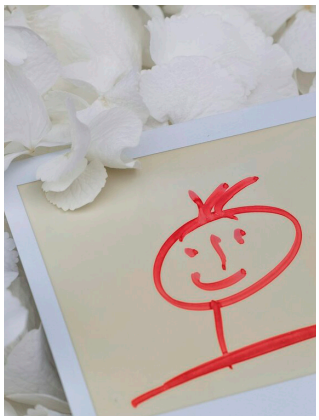
Partner

donavan.eason@momarlaw.com

Martin Cain

Associate

martin.cain@momarlaw.com



Christian Fober

Associate

christian.fober@momarlaw.com

Ashton Scott

Associate

ashton.scott@momarlaw.com