MAKING TRACKS

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A Note From Rob Moseley

Wow, it's still 2020??!? Ok, so what are you more tired of: politics or pandemic? Will either one ever end?

So we are weary people. Ok, short rant here. I am tired of being told to register to vote. So there are people that think, "Wow, I never knew I could vote!"? Guess that is the result of the "helicopter parent/everyone gets a trophy" line of thinking. So if you aren't registered yet, the government will hire an uber to pick you up, take you to the registration office and make sure you get registered. Frankly, if you can't put down the video game controller, get off the couch in your parents' basement, and get up to the voter registration office, then you don't deserve the privilege of participating in the world's greatest democracy. Ok, rant concluded.

Those of you that know me know that I have strongly held political views. I admit to being a single issue voter. But make no mistake – Trump is not my Savior – no politician is. But, as the years go by, I have come to realize that politicians are not trying to torpedo the country, even if they don't want to do things the way I would choose. After all, we all made it through a lot of presidents we disagreed with regardless of our political beliefs, didn't we? At the end of the day, we have the privilege of living in a great country regardless of who is in charge. We are blessed beyond belief whether it's Trump or Biden or hanging chads (now Sanders, that's for another rant). We know the world won't come to an end in 2021 regardless of who the next president is—we'll keep pressing on in the greatest country on earth.

Employee or Independent Contractor: Yet Another Test is Developed

BY FREDRIC MARCINAK

You don't have to be in business long before you start learning the differences between employees and independent contractors. For most purposes employees are entitled to benefits such as unemployment insurance, workers compensation, protection from discrimination, collective bargaining, etc., and employers must withhold taxes and make payroll tax payments for employees. Independent contractors, on the other hand, are usually not eligible for legal protections, are paid under a 1099 with no withholding, and often have contracts in place that allocate rights between the contracting parties. The employee-independent contractor distinction is an important one, especially in the transportation industry where independent contractors such as owner-operators have long played an important role. But the question of whether a worker is an employee or independent contractor is often not easy to answer. There are a variety of legal tests that are used, some employing a dozen or more factors, some used for one purpose—such as classification for tax purposes under federal law—but not for other purposes—such as classification for workers compensation eligibility under state law.

The United States Department of Labor has proposed yet another test—this time for determining eligibility for benefits under the Fair Labor Standards Act (FLSA). The FLSA is the federal law, in place since the 1930s, that regulates overtime, minimum wage, and working hours. Because the new test proposed by DOL applies only to FLSA eligibility, it will not impact entitlement to workers compensation, unemployment insurance, taxes, or other employment laws. But for FLSA purposes, the DOL proposes to adopt the "Economic Realities Test" that looks at five factors to determine classification:

1. The amount of control
2. The worker's opportunity for profit or loss based on their own merit
3. The skill involved
4. The permanence of the relationship
5. The integration of the work

The DOL's proposal would make factors 1 and 2 the most important. If these factors favor either employee or independent contractor status, they will likely control the outcome. However, if these two factors conflict or are unclear, the remaining three factors will be considered. Thankfully, the DOL adds some clarity to the application of the first two factors. For example (and important in the trucking industry), control for safety purposes would not be considered too heavily because DOL wants to encourage safety regardless of classification and because many laws mandate safety for all personnel regardless of classification. Additionally, despite the fifth factor looking at "the integration of the work," the DOL's proposed test expressly disclaims a California-like ABC test that says a worker must be an employee if he is doing work of the same type as the company's work (e.g. an independent contractor driving trucks for a trucking company). Rather, the DOL's fifth factor will ask whether the worker could perform his activities independently of the company.

The DOL's new rule is only a proposal at this point. The public, including various trucking associations, will submit comments that will help shape the final rule. However, if something close to the proposed rule is adopted, the trucking industry will need to take note. Even though motor carriers enjoy an exemption from overtime claims under FLSA for interstate truck drivers operating under DOT hours of service regulations, the new DOL rule will impact drivers who do not cross state lines and operate only locally as well as other personnel such as some mechanics, sales people, office workers, and the like. As with other employee-contractor tests, a worker is not an independent contractor simply because she and the company agree she should be paid on a 1099. Instead, the company must look at the appropriate legal test to determine proper classification and to avoid stiff legal penalties that can arise from misclassification claims. Hopefully as the DOL test is finalized it will provide additional clarity for businesses across the country.

Coverage Spotlight: UM Benefits

BY WILSON JACKSON

The South Carolina Court of Appeals recently decided a case involving uninsured motorist (UM) benefits. In that case, two women, Connelly and Trezona, who worked together at an employment agency, were traveling in a vehicle together in the scope of their employment. They were involved in an accident while Trezona was driving and Connelly was riding as a passenger. The parties stipulated Trezona's negligence caused the collision.

The South Carolina UM statute and the pertinent insurance policies require a claimant to be "legally entitled to recover from the owner or operator of an uninsured auto." The insurers argued Connelly was not "legally entitled" to recover UM benefits because Trezona was immune from suit under the South Carolina Workers Compensation Act's exclusivity provision.

There is a split of authority on the issue of whether a claimant is barred from recovering UM benefits because of the exclusivity provision in the Workers Compensation Act. Several jurisdictions including Iowa, Kentucky, and Mississippi have determined the "legally entitled to recover" language is a fatal obstacle to the ability to recover UM benefits. Other jurisdictions including Oklahoma, West Virginia, and South Carolina have determined the language "legally entitled to recover" is ambiguous and allow recovery of UM benefits so long as the claimant can demonstrate fault on the part of the uninsured party. Additionally, the Court held the immunity granted by the Workers' Compensation Act transforms a fully insured vehicle into an uninsured vehicle.

This result could apply to motor carriers because long-haul drivers sometimes travel with a co-driver. It is important to know that the liability evaluation can vary from state to state if the driver is at fault for causing a collision and the co-driver is injured. This case clarifies that, in South Carolina, the co-driver can maintain an action for UM benefits in addition to a workers' compensation claim. Because UM benefits are mandatory, this case could become a factor any time an accident involving co-workers occurs. Of course, there are other insurance policy provisions that are also implicated when an accident involving a co-driver occurs. In these situations, an insurer or self-insured will want to get an early jump on looking at possible coverage issues.

1. Stephany A. Connelly and James M. Connelly v. The Main Street America Group, Old Dominion Insurance Company, Allstate Fire and Casualty Insurance Company, Debbie Cohn, and Freya Trezona, S.C. Appellate Case No. 2017-002234, Opinion No. 5755 (Aug. 12, 2020).

Take this Job and Shove It: National Labor Relations Board Sets Standard for Employee Outbursts in Workplace

BY LESESNE PHILLIPS

On July 21, 2020, the National Labor Relations Board ("NLRB") rendered a decision impacting how the NLRB will now analyze and determine whether employers unlawfully discharged or disciplined employees engaging in abusive conduct in connection with protected activity under Section 7 of the National Labor Relations Act ("NLRA"). NLRA Section 7 specifically defines employees' rights to act collectively in seeking representation by a labor union. Examples of this conduct include profane attacks against an employer by the employee while also voicing concerns about compensation, writing a profane social media post against the employer while also advocating for union participation, and shouting racial slurs while picketing. These previous examples are all real cases decided by the NLRB where they decided the employer violated the NLRA for disciplining the employee for that behavior. *See Plaza Auto Center*, Inc., 360 NLRB 972, 977-980 (2014); *Pier Sixty, LLC,* 362 NLRB 505, 506-508 (2015); *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 7-10 (2016). The NLRB previously analyzed these different situations under different standards and tests ("Setting Specific Tests"). For workplace outbursts to management involving protected conduct, the NLRB applied the Atlantic Steel test, considering: (1) the place of the conduct; (2) subject matter of the discussion; (3) nature of the employee outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. For social media posts, the NLRB analyzed the totality of the circumstances. Finally, for conduct during picket-lines the test determined whether under all of the circumstances, non-strikers would reasonably have been coerced or intimidated by the abusive conduct.

However, under the NLRB's most recent decision, all of these circumstances will be analyzed under the *Wright Line* Standard. This recent decision, *General Motors, LLC and Charles Robinson*, 14-

CA-197985 and 14-CA-208242, involved an employee, Charles Robinson, who was a labor committee member. There were three separate instances where Mr. Robinson had outbursts in the workplace against management, with Mr. Robinson being suspended for each instance. The Administrative Law Judge, analyzing each instance using the *Atlantic Steel* test, found that Mr. Robinson's activity was protected by Section 7 of the NLRA for the first instance. Upon review, the NLRB replaced the three Setting Specific Tests above, including the Atlantic Steel test, and applied the *Wright Line* Standard. The NLRB pointed towards the failure of the Setting Specific Tests to uphold anti-discrimination laws when the employee creates a hostile work environment while engaging in Section 7 NLRA conduct. If the employer cannot take corrective action to stop an employee engaged in harassing conduct, even before it rises to the level of a hostile work environment, then the employer could become liable to other employees under anti-discrimination laws.

Under *Wright Line* Standard the employee must first prove the worker's protected activity factored into the employer's discipline of the employee. The burden then shifts to the employer to prove it would have disciplined the employee regardless of the protected activity. If the employee fails to prove the first prong or the employer proves its burden under the second prong, the activity is not protected. This new standard will ensure that employers have a greater ability to uphold order in the workplace and prevent discrimination even when it is associated with NLRA protected activity. While employees certainly have rights to engage in protected activity under the NLRA, there are limits to this right. Employers will now have the ability to ensure other employees' rights are protected and maintain a safe working environment despite an employee's NLRA protected yet abusive conduct.

Georgia House Bill 758

Addition to Georgia Motor Carrier Act Furthers Safety and Compliance for Fleets Using Independent Contractors or Owner Operators

BY BLAIR J. CASH

On July 29, 2020, Georgia Governor Brian Kemp signed into law House Bill 758. The bill adds a provision to the Georgia Motor Carrier Act of 2012 that has implications concerning a motor carrier's safety improvement practices.

There has been a noticeable rise in technology used in commercial motor vehicles, including crash cameras (inward and outward facing), other cameras, collision avoidance, lane departure, and adaptive cruise control. This increased use of technology for fleet and driver management provides numerous benefits to motor carriers. Carriers are able to monitor their drivers, watching for potential issues in driving habits. Carriers are also able to use positive reinforcement with drivers – rewarding and encouraging drivers who demonstrate safe driving habits as reflected in the data received from these devices. Insurers are also able to better evaluate claims with data from these devices.

As a result, the trend is that jurors are expecting motor carriers, regardless of size, to have a certain level of "technology" in their trucks. If you are a large motor carrier with hundreds of vehicles, some plaintiffs' attorneys have even begun to argue there is a presumption of negligence in the event of an accident if you do not have this technology. However, even smaller motor carriers feel pressure to implement this technology, either from insurers or attorneys in the context of casualty litigation.

Governor Kemp recently signed HB 758, adding a new Code section to the Georgia Motor Carrier Act of 2012, which provides as follows:

> (a)For purposes of this Code section, the term 'motor carrier safety improvement' means any device, equipment, software, technology, procedure, training, policy, program, or operational practice intended and primarily used to improve or facilitate compliance with traffic safety or motor carrier safety laws, safety of a motor vehicle, safety of the operator of a motor vehicle, or safety of third-party uses of highways of this state.
>
> (b)The development, implementation, or use of a motor carrier safety improvement by or as required by a motor carrier or its related entity, including by contract, shall not be considered when evaluating an individual's status as an employee or independent contractor, or as a jointly employed employee, under any state law.

This new Code has several effects. First, HB 758 has no effect on whether a driver qualifies as a statutory employee under 49 C.F.R. § 390.5. For purposes of respondeat superior liability, HB 758 does not change that landscape.

Second, from an operations perspective, carriers can employ vehicle monitoring software, GPS tracking, and other technologies that could increase operational efficiency and reduce cost. Aside from the obvious safety benefits, motor carriers could actually see long-term savings from implementing

these technologies. For example, our firm has investigated many accidents that could have led to difficult fights over liability but that were instead resolved immediately by viewing available dash cam video. In some cases, the immediate availability of dash cam video even factored into whether law enforcement issued citations or assigned fault for an accident.

Third, it allows motor carriers to implement technology in the trucks of owner operators and independent contractors without fear that requiring such technology will be used against the motor carrier as proof that the driver is an employee. A common rationale behind these technologies is that they encourage safe driving practices and reduce the likelihood of accidents and claims. Therefore, the regulatory scheme should encourage motor carriers to use this technology for all vehicles under its operating authority.

Fourth, for motor carriers who have mixed fleets of independent contractors and company drivers, the bill allows carriers to treat both groups the same with regards to the implementation of safety programs. Carriers can hold joint safety meetings, issue the same safety bulletins to both groups, and provide the same training to both groups. If motor carriers choose to employ certain technologies in trucks used under their operating authority, they can employ the same technologies in all their vehicles regardless of the driver's role as a company driver or independent contractor.

Conversely, for motor carriers who primarily use independent contractors, HB 758 gives these carriers freedom to employ a variety of motor carrier safety improvement measures for their contractors. Carriers can install cameras, vehicle monitoring software, and other technologies in vehicles used by contractors.

Lastly, and most importantly, HB 758 gives motor carriers the ability to implement safety procedures for owner operators and independent contractors without fear that any such procedures will be seen as an element of control contributing to the designation of these operators as employees. This does not just apply to vehicle technology, but to any "procedure, training, policy, program, or operational practice intended and primarily used to improve or facilitate compliance with" safety laws. Driver training, safety courses, bulletins, and materials all fall in this category.

The reasoning behind the bill is sound. Everyone can agree that motor carriers should be incentivized to implement safety practices and procedures. HB 758 is a good tool that should have positive effects on motor carrier safety, compliance, efficiency, and the overall safety of motoring public.

The law will go into effect on January 1, 2021.

Wrecker Service Accident Clean Up: What is Reasonable?

BY TOM CHASE

Towing and related work by wrecker service companies for accidents involving commercial motor vehicles can be a complex and expensive endeavor, creating potential questions about what may be charged, when cargo may be retained, and how disputes regarding such issues can be resolved. In *Wayne's Automotive Center, Inc. v. South Carolina Department of Public Safety*, Opn. #5756 (Ct. App. August 12, 2020), the South Carolina Court of Appeals evaluated a finding of the Administrative Law Court ("ALC") reducing a sanction issued by the South Carolina Department of Public Safety ("SCDPS") against a wrecker service company for billing and retention of cargo for work stemming from the SCDPS wrecker rotation list. The case provides insight not only into the regulatory authority held by the SCDPS associated with wrecker service companies on the list, but also the means by which disputes on billing and cargo retention for the work may be evaluated under South Carolina law.

The sanction at issue arose from cargo retention and billing by Wayne's Automotive Center, Inc. ("Wayne's"), a wrecker service company on the approved rotation list with the SCDPS. Wayne's was called on February 9, 2016 to perform wrecker service operations for an accident involving an overturned tractor-trailer owned by J.H.O.C., Inc. d/b/a Premier Transportation ("Premier") on the I-20 bridge over the Savannah River near the South Carolina/Georgia border. The tractor-trailer was hauling a large load of dog food for a customer at the time of the accident. Wayne's performed towing and related operations, including uprighting of the overturned vehicle, clean-up work and cargo preservation, that required the use of multiple vehicles, laborers, operators and other equipment. Pursuant to request by Premier, Wayne's prepared an invoice on February 11, 2016, but then issued a supplemental invoice on February 15, 2016, while Wayne's retained possession of the cargo and the commercial vehicle. Premier, by and through their insurance representative, contested numerous charges on the invoice and demanded that the cargo be released. After an agreement could not be reached, Premier contacted the SCDPS regarding the billing and cargo issues. The SCDPS then contacted Wayne's and provided recommendations for billing revisions and the release of the cargo. After some disagreement with the recommendations, Wayne's ultimately reduced the bill and agreed to release the cargo. A revised, lowered bill was issued on February 26th and Premier paid the final invoice on March 4th. The cargo was released and picked upon March 7, 2016.

Although the billing and cargo release was resolved, the SCDPS took further action because its representative felt that certain actions by Wayne's were unreasonable, including allegations of overcharging for certain labor, double billing and delayed release of the cargo. A recommendation was made within the SCDPS to remove Wayne's from the approved wrecker rotation list, but ultimately the SCDPS issued a sanction suspending Wayne's from the wrecker rotation list for 120 days. Wayne's initially appealed the sanction within the SCDPS, but the sanction was upheld. Wayne's then appealed the sanction to the ALC, which reduced the suspension to 60 days after a hearing, finding in favor of Wayne's on certain issues but also finding some double-billing and that Wayne's failed to provide supporting documentation of subcontracted labor. Wayne's appealed the decision of the ALC to the South Carolina Court of Appeals claiming the ALC erred in not vacating the suspension entirely. The SCDPS cross-appealed claiming the ALC erred in not upholding the original suspension. The Court of Appeals ultimately upheld the decision of the ALC, finding substantial evidence supported the reduction of the suspension, but not its elimination.

The opinion provides a good explanation of the regulatory law and other standards that apply to wrecker service work performed pursuant to the SCDPS approved rotation list. The following outlines some of the framework that may be useful in evaluating wrecker service work from both the perspective of commercial motor carriers and wrecker service companies.

> *1. The regulation and associated fee schedules for wrecker services performed pursuant to the SCDPS rotation list provide instruction on fees for services and methods of operations.*

Towing companies may voluntarily request, by application, to be placed on a list of approved towing service providers with the SCDPS. S.C. Code Ann Reg 38-600 (2011) provides the general regulatory framework for the operation of wrecker companies in providing wrecker services pursuant to this rotation list. The regulation includes governance on (1) qualification criteria; (2) wrecker service rotation list/responsibilities; (3) complaints/ disciplinary procedures; (4) wrecker classification; and (5) rates. The regulation includes governance of fees that may be charged for wrecker services. However, the regulations on fees only apply to wrecker services provided pursuant to the SCDPS rotation list.

The fees that may be charged by a wrecker service company on the SCDPS list are generally categorized by (1) class of wrecker, and (2) for each class of wrecker, the type of operations involved, to include standard towing, heavy-duty towing, storage and special operations. Each wrecker service company is required to submit proposed fees with its annual application, meaning a fee schedule is created and approved for each year. The approved fee schedule must be kept in the wrecker at all times and is required to be presented upon request at the scene to the person for whom the tow services are provided or their agent. Certain types of standard tows have a fee rate associated with the work. However, "special operations" fees often are dependent on the actual services provided, considering they may involve complex operations. "Special Operations" are defined to

include work associated with the uprighting of overturned vehicles or returning vehicles to a normal position on the roadway which requires the use of auxiliary equipment due to the size or location of the vehicle or the recovery of a spilled load or off-loading and reloading of a load from an overturned vehicle. See, S.C. Code Ann Reg. 38-600 (F)(2)(a)(2)(2011)(Defining "Special operations").

In this case, the fee schedule provided that the wrecker service could recover "the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job" by submission of an itemized invoice or receipt from the provider. Therefore, while certain fees may be readily ascertainable at the scene of the work, other fees will necessarily have to be clarified by means of an itemized bill upon completion of the work. However, the wrecker service should provide only one bill to the owner or operator, including evidence of any fees included for subcontractor costs. S.C. Code Ann. Reg. 38-600(C)(15)(2011). In this case, Wayne's was found to have failed to provide one invoice that accounted for all work, including subcontractors. Additionally, the itemization created questions about double-billing for certain services, as noted.

2. The SCDPS has substantial authority related to wrecker service work performed by companies on the approved wrecker rotation list, including the fees charged.

Although this appeal did not involve the commercial motor carrier, the opinion identifies certain procedures that may be followed by commercial motor carriers to contest billing or cargo retention by wrecker service companies for work performed pursuant to the wrecker rotation list with the SCDPS. Pursuant to the regulation, the SCDPS has substantive discretion to review billing by wrecker companies on the list, including, but not limited to, consideration of the applicable fee schedule, the reasonableness of the charges based on industry standards and comparison to rates charged for similar services. Therefore, a commercial carrier with issues regarding billing practices or cargo retention of a wrecker service provider can present the issues directly to the SCDPS, who will then have the discretion to review the specific circumstances associated with the wrecker service company. The SCDPS has the authority to get directly involved in the dispute and even issue recommendations related to the billing or cargo issues. While the towing company does not have to follow the recommendations of the SCDPS, the SCDPS retains the right to sanction the wrecker service company for unreasonable practices, including related to billing and cargo retention. The Court of Appeals noted that the SCDPS has discretion to sanction with oral reprimand, written reprimand, immediate suspension from the approved list, suspension for cause from the approved list or even removal from the approved list.

The Court of Appeals noted that the applicable regulation provides for an advisory committee to be created to review, upon request of the SCDPS, complaints related to the regulation. S.C. Code Ann 38-600(D)(5)(2011). This advisory committee is made up of experts in the towing industry and may provide opinions on "fair and reasonable resolution" of disputes under the regulation. However, per the Court of Appeals, the committee is merely advisory, meaning the SCDPS may choose whether or not to follow any recommendations from the advisory committee. Therefore, the potential use by the SCDPS does not create a substantial right for any party to the dispute.

Of further note, the payment of the final invoice by the party for whom the services were provided does not render the SCDPS investigation and sanctioning for wrecker service work moot. Therefore, whether or not a sanction by the SCDPS will be upheld is not resolved either way upon payment of the

wrecker service bill by the party for whom the service was provided.

3. A wrecker service company that disputes a sanction by the SCDPS has the ability to appeal the decision.

Where sanctions are imposed, a wrecker service company has the ability to appeal any sanction first within the SCDPS and then to the ALC. Upon appeal to the ALC, the SCDPS has the burden to prove by a preponderance of the evidence that the sanction was warranted under the circumstances. This is a de novo review of the sanction and evidence and witnesses, including experts, may be presented.

Where billing practices and cargo retention are involved, the Court of Appeals noted numerous considerations that provided substantial evidence supporting the ALC's decision in this case, to include the following:

a. Time to complete the work;
b. The rate charged for equipment;
c. Whether a single itemized bill was provided to include subcontractor work;
d. The labor required to perform the work;
e. Certain "mark-ups" for liability, taxes and insurance expenses;
f. Operator costs for equipment;
g. Equipment utilized for the work;
h. The complexity of the work, including for the cargo at issue (recovery, repacking, transportation and storage);
i. Billing for similar work by other companies in the area;
j. Evidence of double-billing; and
k. Reason for retention of the cargo.

4. Whether cargo owned by a third party is considered "personal property" may affect the release of cargo removed from an accident by a company performing wrecker services.

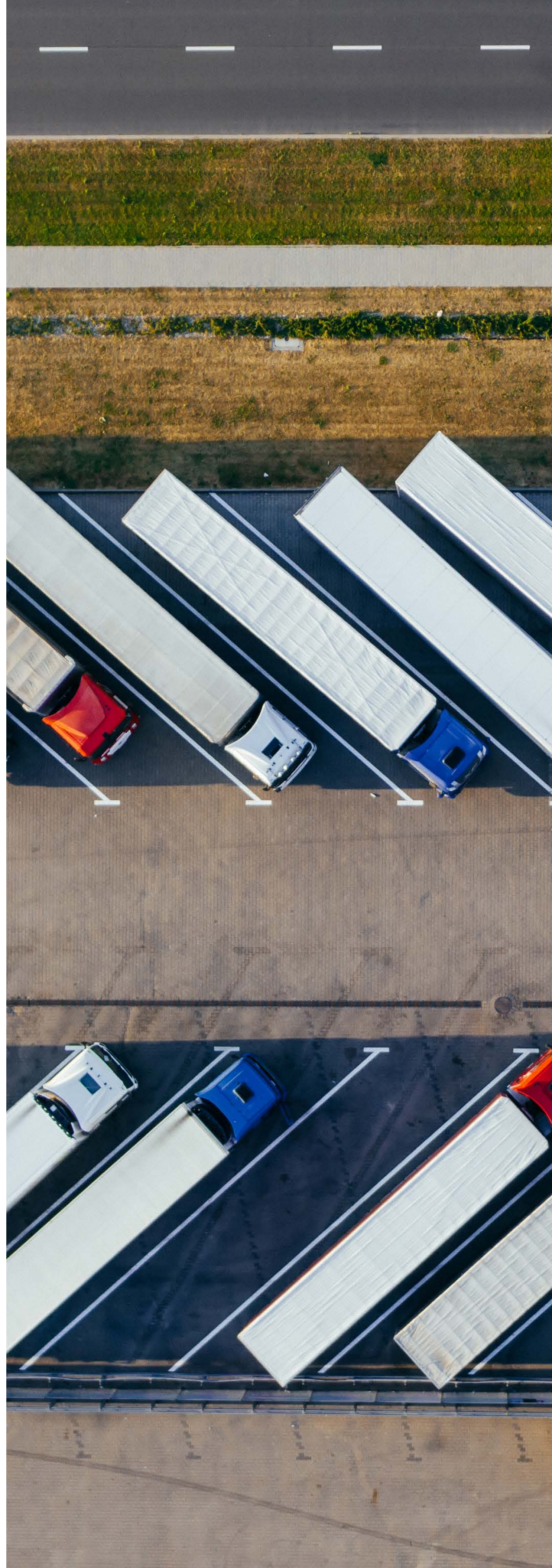
S.C. Code Ann. 56-5-5635(F)(2018) provides the statutory requirements for the release of personal property from a vehicle in the possession of a towing company. Personal property that is in the towed vehicle that does not belong to the owner of the vehicle must be released to the owner of the personal property. However, evidence of ownership of the property is required prior to the release. In this case, Premier was carrying dog food for a third party customer. The ALC determined that the dog food constituted "personal property," as did the SCDPS in its initial evaluation of the circumstances. However, the Court of Appeals did not express an opinion specifically whether the cargo would be considered personal property subject to release under the statute. Rather, the Court of Appeals stated that the statute was open to different interpretations on this issue, meaning that the respective parties to a dispute on the release of cargo should be prepared to provide not only clear evidence of ownership, but also whether the cargo is considered personal property of such owner pursuant to the statute where a cargo retention issue arises.

5. A decision by the ALC will be affirmed by the Court of Appeals where there is substantial evidence in the record to supports its decision.

Although an appeal from the finding of the ALC is available to both the wrecker service company and the SCDPS associated with a sanction issued by the SCDPS, the Court of Appeals will not substitute its judgment for the ALC's decision where there is "substantial evidence" in the record to support the decision. S.C. Code Ann. §1-23-610(B)(2018). Per the Court of Appeals, "[s]ubstantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Holmes v Nat'l Serv. Indus., Inc., 395 S.C. 305, 717 S.C. 2d 751, 752 (2011)(quoting Pierre v Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). In other words, the

fact that reasonable minds may differ as to the judgment will not allow for the judgment to be set aside, given guidance regarding whether an appeal to this level of court will be successful on other cases.

Overall, the decision is limited in application to wrecker service work performed pursuant to the SCDPS wrecker rotation list. However, as to that work, the decision provides guidance on the means to deal with disputes between commercial motor carriers and wrecker service providers regarding wrecker service work. Additionally, the opinion clarifies the SCDPS's authority over wrecker service companies for wrecker rotation list work and also provides guidance on the types of evidence may be considered in evaluating the reasonableness of billing or cargo-retention actions in work by wrecker service providers.



The Tale of Two Courts: Louisiana Court of Appeal vs USDC W.D. Louisiana

BY MEGAN M. SOPPA

Same state, same issue, different courts, different holdings.

On June 25, 2020, the United States District Court (Western Division) in Louisiana found that the Louisiana Supreme court "has and would continue to permit direct negligence claims even against an employer who is vicariously liable for the employee's negligence." *Gordon v. Great W. Cas. Co.*, 2020 U.S. Dist. LEXIS 112281 (W.D. La. June 25, 2020)

Thirty days later, the Louisiana Court of Appeal (First Circuit) determined that "a plaintiff cannot maintain a direct negligence claim, such as negligent hiring, training, supervision, etc., against an employer, while simultaneously maintaining a claim against the alleged negligent employee for which the plaintiff seeks to hold the employer vicariously liable…" *Elee v. White*, 2020 La. App. LEXIS 1115 (La. App. 1 Cir 07/24/20)

This begs the question: how did two Courts in the same state make two fundamentally different holdings regarding the same issue?

In *Gordon*, the Court was asked on a motion for summary judgment to dismiss the plaintiff's claims of negligent entrustment, hiring, and training against defendant Elio's Trucking Corporation. Prior to filing the motion, Elios had stipulated that the driver was acting within the course and scope of his employment at the time of this accident. Gordon, 2020 U.S. Dist. LEXIS 112281, at *2. Defendant Elios argued that because of this stipulation, plaintiffs cannot maintain claims of direct negligence against Elios. Id. at *3.Defendants relied on *Libersat v. J&K Trucking, Inc.*, 772 So.2d 173 (La. Ct. App. 3d Cir. 2000), when asking the Court to erase the direct negligence claims against an employer when it stipulates to liability for the employee's negligence. However, in this instance, this Court found that the while two other courts have relied on *Liberstat*, the Louisiana Supreme Court has not, and as such, the Louisiana Supreme Court would continue to permit direct negligence claims. *Gordon*, 2020 U.S. Dist. LEXIS 112281, at *12-13.

On the other hand, in *Elee*, the Court (faced with the same exact question on appeal from a summary judgment motion), relied on *Liberstat* and the two other cases mentioned in *Gordon*, to find that a "plaintiff cannot maintain a direct negligence claim, such as negligent hiring, training supervisions, etc., against an employer, while simultaneously maintaining a claims against the negligent employee for which the plaintiff seeks to hold the employer vicariously liable" *Elee* v. 2020 La. App. LEXIS 1115, at *9.

So what's the answer? Simple. There isn't one. *Gordon* was heard in front of a Federal District Court that in turn relied upon Louisiana State Law (or the lack thereof). *Elee* was a heard in front of the State of Louisiana Court of Appeals and that Court also relied on Louisiana State Law. Both cases, go to show just how fickle the court system can be.

Clearinghouse- You Must Get Consent

BY ALEX TIMMONS

It has now been over eight months since the Drug and Alcohol Clearinghouse went live on January 6, 2020. As many of you know, the purpose of the Clearinghouse, according to the FMCSA, is to create an online database "that will allow FMCSA employers, State Driver Licensing Agencies, and law enforcement officials to identify – in real time – CDL Drivers who have violated federal drug and alcohol testing program requirements and thereby improve safety on our nation's roads." Over the last eight months, information has been uploaded into this database.

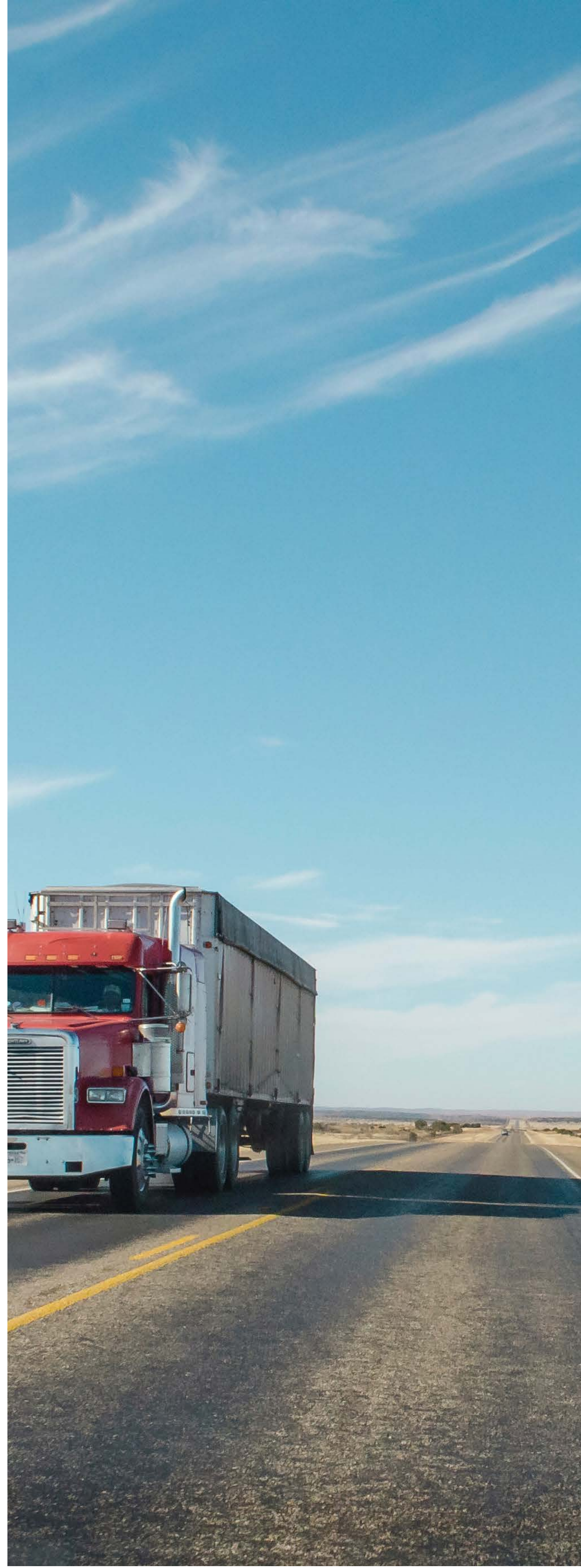
How do I get access to the information in the database? CONSENT!!

FMCSA 382.703(a) "No employer may query the Clearinghouse to determine whether a record exists for any particular driver without first obtaining that driver's written or electronic consent." The type of consent required depends on the type of query being run. There are two types of queries that can be requested: limited and full queries.

Why run a Limited Query?

A limited query allows an employer to determine if any information has been added to a driver's Clearinghouse record regarding any resolved or unresolved drug and alcohol program violations. The limited query does not allow an employer to see any specific information in the driver's record but alerts them that there is information available. Limited queries are used by employers for annual queries of their employees subject to alcohol and substance testing.

General consent is needed to run a limited query on a driver. The general driver consent is obtained outside the Clearinghouse and can be effective for more than one year. Employers and employees are free to work out the details for obtaining general consent for limited queries,



such as when the consent is originally obtained, for how long it is effective, and whether is it is combined with other consent forms. The general consent must specify the timeframe the driver is providing consent for. Employers must retain the consent for 3 years from the date of the last query. The FMCSA website provides a sample consent form for a limited query. (1)

Why would I need to run a Full Query?

Full queries are needed for pre-employment driver investigation as well as any time a limited query shows that information exists in the Clearinghouse about an individual driver. A full query allows the employer to see detailed information about any drug and alcohol program violation in a driver's Clearinghouse record. The employer may not request a full query of a driver without first obtaining a driver's electronic consent through the Clearinghouse. The driver grants this electronic consent by logging into the Clearinghouse and authorizing the release of their records to a specific employer. Unlike the consent for a limited query which can be valid for a specified period of time, a driver must provide an employer electronic consent through the Clearinghouse for each full query.

If the limited query shows information, the employer must conduct a full query within 24 hours of conducting the limited query. If the employer does not perform the full query within 24 hours, the employer must pull the driver from all safety-sensitive functions.

What if the consent is not given?

A driver who refuses to give consent must be pulled by the employer from all safety-sensitive functions.

What Does This Mean?

Employers must ALWAYS get CONSENT before running a query on a driver. General consent is needed for a limited query, and specific electronic consent must be given for a full query. (2)

(1) https://clearinghouse.fmcsa.dot.gov/Resource/Index/Sample-Limited-Consent-Form
(2) The FMCSA website provides great resources including a quick reference chart for queries and consent. https://clearinghouse.fmcsa.dot.gov/Resource/Index/Query-Consent-Factsheet

Insurance Companies Beware: Georgia Court Finds Insurer Failed to Send Timely ROR Letter And Waives Coverage Defense

BY MEGAN M. EARLY-SOPPA

In *Penn-Am. Ins. Co. v. Morgan Fleet Servs. Inc.*, 2020 Ga. App. LEXIS 448 (Ga. Ct. App. Aug. 14, 2020), Penn-America Insurance Company ("Penn-America") sought a declaration that its insurance policy with Morgan Fleet Services Inc. ("MFS") was void on the ground that MFS's application for insurance coverage misrepresented its business purpose.

On August 24, 2017, Armer Early, a bus driver, filed suit against MFS after she was severely injured while going through an emergency exit of a bus that burst into flames. She alleged that MFS had failed to adequately perform its duties. ("Underlying Lawsuit"). *Id*. at *1.

Penn-America had previously issued a policy to MFS, describing MFS's business as a "warehouse" and provided "commercial general liability coverage" and "commercial property coverage." Id. at *2.

On October 6, 2017, after reviewing Early's complaint against MFS, Penn-America contacted its underwriter, noting that the risk for MFS had "always been rated as a private warehouse" and was based on a business description of installing seat covers on buses. Penn-America wanted to know if there were any other policies for MFS or if there was any mention of the buses in the file. *Id*. at *4. On October 9, 2017, the underwriter responded that they had no "notes or indication that [MFS's] operations include inspection" of buses and the "original intention of this policy was simply based on storage of seat covers." The underwriter also had no other policies for MFS "for any kind of inspection operations." *Id.* at *4-5.

Subsequently, on October 10, 2017, Penn-America wrote to outside counsel, while carbon copying two MFS employees, advising that the policy it issued to MFS was "only to cover a warehouse storing bus seat covers," asking if outside counsel had inquired of MFS "who their other carrier is for [the fleet services] aspect of the business," and informing outside counsel that "coverage counsel [was] looking at [the] matter." *Id.* at *4.Then, on October 16, 2017, Penn-America notified outside counsel that it would be "providing a defense of this matter under a Reservation of Rights," and that a "letter will be forwarded shortly." The email further indicated that Penn-America wished for outside counsel to defend MFS in Early's lawsuit. *Id*.

Thereafter, Penn-America filed suit on October 17, 2018 seeking a declaratory judgment that there was no coverage under the policy. The trial court denied Penn-America's motion for summary judgment and granted summary judgment for MFS, finding that Penn-America waived its misrepresentation defense when it assumed MFS's defense without an effective reservation of rights letter. Relying on *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 695 S.E.2d 6 (Ga. 2010), *ACCC Ins. Co. of Ga. v. Walker,* 832 S.E.2d 878 (Ga. Ct. App. 2019)(insurer waived its coverage defenses despite filing its declaratory judgment setting forth its grounds for noncoverage on the same day that defense counsel filed an answer), and *Proudfoot v. Cotton States Mut. Ins. Co.*, 196 S.E.2d 131 (Ga. 1973), the Georgia Court of Appeals affirmed, concluding that the October 16, 2017 email to counsel appointed as defense counsel was merely a statement of future intent. Because an unambiguous reservation of rights letter had not been forwarded to MFS until six months after Penn-America engaged counsel to defend MFS, Penn-America waived its coverage defenses by its untimely reservation of rights. *Id* at *7-8.

In this case, the Georgia Court of Appeals makes clear that there is a requirement for the insurer to issue a formal reservation of rights directly to the insured before defense counsel undertakes any substantive action on behalf of the insured.

THE ROAD AHEAD- Past and Future Events

- September 22-24 Rob spoke for Marsh Fleet Solutions captive in Nashville, Tennessee. Blair butted in and rescued the presentation
- September 29-30 filming of MCIEF occurred in the Moseley Marcinak Law Group office
- On October 15, Moseley Marcinak attorneys Rocky Rogers and Wilson Jackson will play in the United Way Young Leaders Society Fall in the Cup Classic Golf Tournament in Greenville, SC
- October 28 Rob will be presenting with longtime friend of the firm Hank Seaton to the Auto Haulers of America at its virtual meeting
- October 30 Wilson Jackson and Fredric Marcinak will attend the South Carolina Trucking Association Sporting Clays Event where they will try not to kill anyone
- Please join us for our next lunchtime webinar on November 4, 2020.
- November 19-20 Blair will attend the GMTA Leadership Conference in Atlanta

Lesesne Phillips and his new fiancé, Natalie Ecker

CONGRATULATIONS CORNER

- Rob Moseley and Frederic Marcinak have been recognized in the 2021 Edition of the The Best Lawyers in America©. Rob was named as "Lawyer of the Year" in the practice area of Insurance Law and Personal Injury – Defendants, and Fred was recognized in the practice area of Commercial Litigation. Less than 5% of all practicing lawyers are recognized by Best Lawyers and only one lawyer is recognized as "Lawyer of the Year" for each specialty and location
- Congratulations to Lesesne Phillips upon his engagement to Natalie Ecker
- We are excited to announce that our longtime friend Kristen Nowacki will join the firm as a partner the end of October
- Partner Tom Chase is proud to announce that his son is attending The Citadel and his daughter is attending Liberty University
- Rocky Rogers and Megan Early-Soppa have been named to the 2021 Inaugural edition of The Best Lawyers in America©: Ones to Watch
- Megan Early-Soppa is an award winner in the GSA Business Report 2020 Forty Under 40
- Four attorneys have been included in the 2020 Legal Elite of the Upstate:
    - Rocky Rogers – Workers Compensation and Insurance
    - Megan Early-Soppa – Personal Injury
    - Wilson Jackson – Business Litigation
    - Lesesne Phillips – Corporate Law, Mergers & Acquisitions

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