# MAKING TRACKS

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A Transportation and Logistics Law Firm

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## Moseley Marcinak Newsletter

# BLESSINGS AND CHANGES

## A Note From Rob Moseley

April 1 marked the beginning of Moseley Marcinak Law Group LLP. Twenty-seven years ago, I started with the firm of Leatherwood Walker Todd & Mann as attorney number 43. I was so blessed to work with such talented attorneys and professionals in that context and to learn the ropes of a transportation practice. Sitting at the feet of litigation kings such as Jim Watson, Joe Major, Mike Giese, Steve Farrar, and John Johnston was an incredible experience. In 2008, Leatherwood joined Smith Moore to become Smith Moore Leatherwood. Expanding the firm to about 170 lawyers was a tremendous platform for working with clients in a number of different contexts. About that time, I was blessed to add Fred Marcinak as my right hand.

Fast forward to November of 2018. At that point, Fox Rothschild acquired Smith Moore raising the lawyer count to almost 1,000. While this was a tremendous opportunity, a thousand lawyers create a thousand lawyers' worth of conflicts of interest, and it was clear that our existing practice would be affected by our inability to serve many of our client needs based on the sheer number of lawyers and clients. It has been an incredible ride, and we will no doubt continue to collaborate with many of our former partners.

While it was a difficult decision to leave our friends and long-time collaborators, April 1 marked a new opportunity to start a new firm with a sole focus: transportation.

The future is certainly bright for a 9 lawyer law firm with lawyers licensed in North Carolina, South Carolina and Georgia to serve the transportation industry. We have assembled an incredible team to serve as the foundation for what we hope will be a fixture in the industry for years to come. We are working to build and maintain a culture that will facilitate a level of client service that you have become used to. We have been hugely blessed to have so many of our clients join us in this new endeavor. It is with a spirit of gratitude that we thank you and our former associates for all we have done in the past and look forward to building something much larger than any of us.

# It Might be Time to Think About Revising Your Lease Purchase Agreement For Independent Contractors

BY ROB MOSELEY

Traditionally, motor carrier leasing entities engaged in lease purchase arrangements with independent contractors to allow the contractors a way to run their own businesses. Done correctly, it allows a fleet an opportunity to expand capacity and serve as a solution for the back end of the equipment trade cycle. Typically, the accounting for this allowed the leasing company to book revenue only when it received the money. Lately, there has been a push to require the leasing company to book all of the revenue for the life of the lease on the front end.

The latest change involves FASB's Lease Accounting Guidance ("ASC 842"). This applies to public companies for fiscal years beginning after December 15, 2018 and private companies for fiscal years beginning after December 15, 2019.

In the past, most leasing companies leasing equipment under a lease purchase to an independent contractor would simply book the revenue as it was received. However, some accounting experts are projecting that the typical lease purchase would now be "on the books." See www.emagcloud.com/ata/NAFC_Newsletter_May_2018/page_3.html.

Obviously, booking the entire revenue for a multi-year lease purchase is not an ideal solution for most leasing companies. Adding lease purchases as obligations on the balance sheet may affect a company's obligations to its creditors or otherwise change its financial condition. However, it appears that there are ways to draft around the requirement and avoid the lease arrangement being on the books, so to speak. For example, a lease purchase arrangement that has a term of 12 months or less may provide the solution.

In working with our clients, we have drafted a number of lease purchase agreements. Of course, many of those agreements may be affected by ASC 842. Accordingly, if you have a lease purchase agreement that will not be concluded before the effective date of ASC 842, you should consider the account affect this may have on your company. Additionally, because many of these existing agreements may still have three to four years left, you may have the opportunity to revise those agreements for compliance, provided the contractor consents and agrees. Of course, any lease purchase arrangement should be reviewed by an accountant with expertise in the trucking industry to determine if ASC 842 has a substantial effect on your operations.

# Update on Georgia Verdicts

BY BLAIR CASH

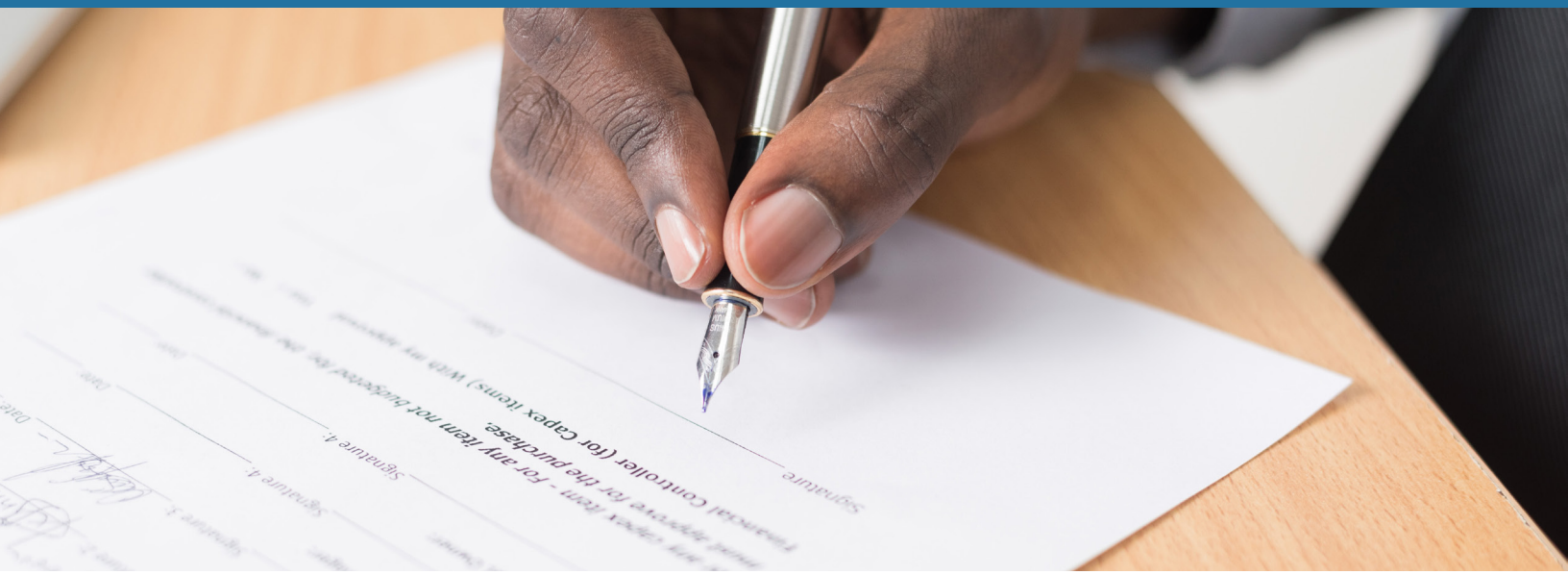
On May 10, 2019, a Whitfield County jury returned a $21.6 million verdict against a trucking company and its driver in a case that serves as a cautionary tale for trucking companies and their insurers.

The case of Monroe v. Lane's Equipment Rental, et al stemmed from a February 2016 accident that occurred in Dalton, Georgia, approximately 30 miles southeast of Chattanooga, Tennessee and 90 miles northwest of Atlanta. The parties' accounts of the accident differed significantly, but according to pleadings, Plaintiff Donald Monroe was helping the defendant truck driver, Daniel McGuffee, pull into the roadway after helping load the trailer with scrap metal. McGuffee was driving for Lane's Equipment Rental at the time of the accident. Monroe maintained that he was not in the roadway yet to help serve as a "spotter" while McGuffee had apparently given different accounts at different times regarding the accident and Monroe's role as a "spotter". The truck was pulling into the roadway when a pickup truck driven by co-defendant Greefus Patterson swerved to avoid McGuffee's tractor trailer. Patterson left the roadway and struck several trash bins and debris on the side of the road, eventually striking and injuring Monroe. Monroe underwent a below-the-knee amputation of his left leg in addition to other leg and hip injuries. Monroe's wife, Rhonda Monroe, also made a loss of consortium claim.

The case was not a simple rear-end accident case. The case was not even a red-light dispute or a lane change case where jurors had to weigh the credibility of two witnesses and compare their testimony with the physical evidence. This case required an analysis of the Defendants' credibility and apportionment of fault between them. McGuffee and Lane's maintained that Patterson should have been able to see the tractor trailer and either stop or otherwise avoid the accident without causing any harm to Monroe. McGuffee and Lane's also argued that Patterson was driving with vision problems that they alleged caused the accident. Patterson maintained that his most recent eye exam showed he met the minimum legal requirements to drive.

The case was tried in the Superior Court of Whitfield County, a predominantly conservative, rural county in Northwest Georgia. A Whitfield County jury took only two hours to return a verdict of $20 million for Mr. Monroe and $1.6 million for Ms. Monroe. The jury also apportioned 0.01% to Patterson and 99.9% of the fault for this accident to McGuffee and Lane's. However, the jury declined to impose punitive damages or attorneys' fees and expenses of litigation. Post-trial motions are currently pending and it is unknown how the case will resolve at this point.

There are several takeaways from this verdict for trucking companies and their insurers. First, a "nuclear verdicts" do not happen overnight nor do they hinge on one fact or another. Nuclear verdicts tend to include such



aggravating factors as drug or alcohol use, violations of company policies, violations of applicable Federal Motor Carrier Safety Regulations, and serious injuries resulting in significant claims for past medical expenses. The Plaintiffs alleged that McGuffee changed his story several times throughout the course of the case. These changes likely happened over the passage of time. While this case does involve serious injuries, it does not appear as though the other factors were present. So why the large award?

The perfect storm of a case that could lead to excess exposure often involves a severely injured Plaintiff and Co-Defendants pointing the finger at one another. Instead of hearing contrary evidence about the accident, the Plaintiff's injuries, and the Plaintiff's damages, the jury gets distracted by blame-shifting from the Co-Defendants. Co-Defendants are too busy fighting amongst themselves while the Plaintiff stands by, succinctly and efficiently putting up their case. Plaintiff's counsel is then able to say, as he did in this case, "Everyone is denying responsibility for this accident, pointing the finger elsewhere. It doesn't matter who is at fault, but we all agree my client did not do anything wrong." An innocent Plaintiff is often the key to these large awards.

Second, apportionment of damages pursuant to O.C.G.A. § 51-12-33 can have an impact. But it can also backfire on a Defendant who is a little too eager to shift blame. Georgia law allows Defendants to apportion fault "for injury to person or property" between all Plaintiffs and Defendants – even non-parties. If a Defendant seeks to apportion fault to another party or non-party in a "nuclear" case, what is the result? In this case, the jury found Patterson a mere 0.01% at fault, meaning that his responsibility for the total damage award is $216,000.00. Compared with the $21 million allocated to McGuffee and Lane's, was the apportionment worth all that effort?

Juries are very deliberate in their awards. Many awards are the result of compromise, especially when it comes to awarding damages. Quotient verdicts – verdicts where jurors write down a damage award, add up the awards, divide by the number of jurors, and agree to be bound by this process ahead of time – are not allowed. See Clayton County Water Authority v. Harbin, 193 Ga. App. 257, 259 (1989). Even though quotient verdicts are not allowed, many verdicts are the result of each juror writing down a number and the jury deciding to use the quotient as a starting point for their deliberations.

Lawyers for all parties in this case are probably left wondering – why apportion any fault to Patterson at all? Patterson's responsibility for the damages awarded – $216,000.00 – is not insignificant. Trial testimony indicates that Patterson was a Whitfield County resident operating his personal vehicle and not on behalf of any corporate entity. It is unknown what, if any, liability insurance or assets Patterson had to protect him in this accident. The jury's award in this case appears to be a clear statement to the trucking company and its driver: we have heard your apportionment defense, considered it, and we find it barely credible enough to warrant anything more than an infinitesimal fraction of our award. If

the jury had not apportioned any fault to Patterson, that finding could have been upset on appeal. Post-trial motions and appeals could still change this verdict, but the jury's message appeared clear, "We do not believe the apportionment argument." Apportioning 0.01% to Patterson is more of a statement to McGuffee and Lane's than if the jury had exonerated Patterson.

Third, jurors are sophisticated. In this case, the Plaintiffs included claims for punitive damages and attorneys' fees and expenses of litigation pursuant to O.C.G.A. § 13-6-11. They alleged that the Defendants' conduct was willful, wanton, reckless, and showing that entire want of care that raises a presumption of indifference to the consequences of their actions. See O.C.G.A. § 51-12-5.1. The Plaintiffs' claims for attorneys' fees boiled down to their allegation that the Defendants acted in bad faith, were stubbornly litigious, and caused the Plaintiffs unnecessary trouble and expense. See O.C.G.A. § 13-6-11. Trials including claims for punitive damages and attorneys' fees are typically bifurcated, meaning that the jury will decide the issues of negligence, causation and damages before deciding whether to proceed to a second phase of the trial involving attorneys' fees and/or punitive damages. On the verdict form, jurors are typically asked to check "yes" or "no" to whether they wish to award punitive damages or attorneys' fees. This second phase adds additional days of trial onto an already-lengthy process.

After a week-long trial, many jurors realize that by checking "Yes", they are subjecting themselves to additional days away from work and their families. In these instances, jurors will often check "No", but combine a punitive-type award into their award of compensatory damages. Jurors do not want to spend additional time in trial in exchange for a daily stipend and a cheap lunch. Jurors may not realize that lumping their punitive damages award into a compensatory damages award may not have their intended effect. Punitive damages are designed not to compensate an injured Plaintiff, but to deter a Defendant's future conduct. See O.C.G.A. § 51-12-5.1(c). As the name implies, compensatory damages do the opposite: "such compensation is the measure of damages where an injury is of a character capable of being estimated in money." O.C.G.A. § 51-12-4. If a jury wants to punish a Defendant for its conduct and deter future conduct, this "combined compensatory" approach does not achieve that goal.

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Lastly, a jury may not realize the taxation consequences of making a punitive damages award compensatory. Compensatory damages received for personal injury are not taxable. Conversely, punitive damages are taxable. Pre- and post-judgment interest are taxable as well, but not the focus here. If a jury intends to punish a Defendant for its conduct and deter the conduct from happening again, combining its compensatory and punitive awards does not fit that purpose. It only serves to give the Plaintiff – and Plaintiff's counsel – a tax-free windfall.

Nuclear verdicts are a reality to everyone in the transportation world. A post-mortem analysis of such a verdict requires a wide-ranging analysis of every detail that might seem insignificant but could change how a jury views a case. If a Defendant feels it is not at fault for a particular accident, it better do some soul-searching as to whether pursuing that defense is worthwhile in the long run. It remains to be seen how this particular case will play out, but one thing is clear: nuclear verdicts are a real threat in every case.

# CBD Oils and DOT Drug Testing

BY MEGAN M. EARLY-SOPPA

With Cannabidiol (CBD) oil shops popping up on every corner, use is on the rise as a natural alternative to pain medicine. From CBD oil doughnuts to gummies, this oil derived from cannabis sativa is something that all trucking companies will have to address with employees and drivers. CBD oil advocates believe CBD oil can be used to treat everything from chronic pain to seizures to anxiety.

CBD oil can be derived from either hemp or marijuana (bred for production of tetrahydrocannabinol a.k.a. THC). CBD is a non-psychoactive compound whereas THC is the principal psychoactive constituent of cannabis (i.e. the part that makes a person feel high). Both compounds interact with the body's endocannabinoid system and stimulate the CB1 receptor in the brain. They have the same molecular structure, but their atoms are arranged differently, which impacts how they affect the human body. The primary difference between CBD and THC is that one is psychoactive and the other is not.

In order for CBD oil to be legal, it has to contain less than 0.3% THC. The THC concentration is based on how the CBD oil is manufactured and how much of the oil a person is using. Even CBD oil derived from hemp can register at a level that would cause a driver to fail a DOT drug test.

DOT regulations are clear that the use of THC is forbidden no matter the source. As such, a medical review officer cannot consider the medicinal use of CBD oil when he or she determines a drug test result. A positive drug test result, whether from THC or CBD oil, will be treated the same.

As an employer, it is imperative that drug and alcohol training include a discussion about the possible effects of using CBD oil in any form can have on a DOT drug test. Possible topics to cover should include (but are not limited to).


1. The use of CBD oil may cause trace amounts of THC to show up in a DOT urine specimen.

2. The MRO will not accept CBD oil as a valid medical explanation for a positive test.

3. It is possible that law enforcement could consider CBD oil in a commercial vehicle as possession of an illegal substance.

4. There is no way to know exactly how much THC is in any CBD oil product (whether it be pure oil or an edible), and therefore trusting a label that says THC-free is not enough.

5. CBD oil is technically illegal on a federal level.

The use of CBD oil isn't going away and the key to keeping your drivers' safe is keeping everyone in your organization informed.

# Walking The Line On Step Down Provisions

BY WILSON JACKSON

Recently, the South Carolina Court of Appeals issued a decision in Nationwide v. Walls, which provided guidance on what the courts deem to be a reasonable limitation on optional insurance coverage. See Nationwide Mut. Fire Ins. Co. v. Walls, 2019 S.C. App. LEXIS 48 (2019). South Carolina's approach to dealing with step-down provisions is important because it reflects the opinions of Arkansas, Kansas, Georgia, Illinois, Colorado, Indiana, and others. Additionally, it could impact step-down provisions in commercial truck insurance policies.

In Nationwide v. Walls, the claimants—Walls, Harper, and Timms—were passengers in a vehicle owned by Walls and being driven by Mayfield. When a state highway patrol officer attempted to stop the vehicle for speeding, Mayfield led the officer on a high-speed chase. Mayfield lost control of the vehicle and crashed into a group of trees. Timms was killed in the collision, while Mayfield, Harper, and Walls suffered catastrophic injuries. Mayfield was ultimately charged with and pled guilty to reckless homicide, a felony.

At the time of the crash, Walls was a named insured on a Nationwide insurance policy with liability coverage of $100,000 per person and $300,000 per accident. With respect to the liability coverage, the policy contained a step-down provision that reduced coverage to the minimum limits required by state financial responsibility laws when someone operating the vehicle was committing a felony or fleeing a law enforcement officer. Relying on the step-down provision, Nationwide tendered the undisputed minimum cover of $50,000 to claimants for their injuries and initiated a lawsuit contending the step-down provision

prevented claimants from receiving more than the minimum limits.

While Nationwide v. Walls was pending at the trial court, the South Carolina Supreme Court issued a decision in Williams v. GEICO. See Williams v. Gov't Emp. Ins. Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705 (2014). In Williams, a husband and wife suffered a fatal accident while riding together in a car insured under both their names. The Williams' purchased an insurance policy with $100,000 in liability coverage. GEICO included a family step-down provision in their insurance policy, which reduced coverage to the minimum limits when the injured person was a relative of the named insured. The South Carolina Supreme Court held the family step-down provision was invalid and noted any policy that "seeks to limit or reduce the coverage afforded by the provisions required by this section is void." Based on Williams, the trial court issued an order in Nationwide v. Walls holding the step-down provision invalid. On appeal, the South Carolina Court of Appeal upheld the Nationwide step-down provisions for committing a felony and fleeing law enforcement officers. The Court of Appeals explained the step-down provision for committing a felony and fleeing law enforcement officers was based on the conduct of the driver and not the identity of the victim.

Nationwide makes sense in comparison to Williams because there are two competing public policies. The first public policy the court considers is construing the policy liberally in favor of providing coverage. The competing public policy is that a person should not be permitted to voluntarily insure against his own intentional wrongdoing. Therefore, Nationwide and Williams establish that an insurer may provide limitations on optional coverage, but it cannot be done based on the identity of the victim.

# A NOTE FROM FRED MARCINAK

In 2008, for my first job as a lawyer, I joined Rob Moseley at Leatherwood, Walker, Todd & Mann and began to learn about the world of trucking and transportation. Rob taught me how to be a transportation lawyer and all about truck wrecks, the Carmack Amendment, the MCS-90, and the FMCSA. And during that time I had the opportunity to meet, work with, and get to know a fantastic group of clients, many of whom have become not just clients but also friends.

What a blessing it was for me, then, to help open Moseley Marcinak Law Group on April 1, 2019. It is a real pleasure to be able to focus on our core practice area of transportation and to continue to work with the same clients I've gotten to know over the past eleven years as well as new folks I meet every week. We have a wonderful group of lawyers at Moseley Marcinak, and our new structure lets us serve our clients even better. I'm excited about building this law practice, and I'm thankful to be able to do a job I love every day.

# MOMAR TEAM ON THE ROAD

## IN THE REAR VIEW MIRROR

- On April 18th, Rob Moseley spoke on Broker liability issues to the Minnesota Trucking Association in Minneapolis.
- On April 30th, Rob Moseley was in Nashville for Cottingham Butler's Transportation Safety Workshop.
  In early May, Fred Marcinak attended the Transportation Lawyer Association Annual Conference in Austin, Texas and led the Freight Claims Committee panel.
- On May 7th, True North asked Rob to give a cargo basics webinar. A deeper dive is in the works.
- Rob presented to the P&S Logistics Panel Counsel meeting on document retention on May 7th.
- On May 21st, Blair spoke at the National Business Institute's CLE presentation on Advanced Insurance Bad Faith, negotiation tactics, and update on Georgia law
- June 9-10th, Greenville was proud to host the Conference of Freight Counsel. Rob, Fred and Megan attended the festivities.
- Rob spoke to TEANA at its annual meeting in Charleston on July 20th. Rob spoke on verdicts and broker liability.
- July 28th-31th, Rob moderated a panel on trucking technology at the NC Trucking Association Annual meeting in Savannah.
- August 15th-16th marked the annual ACTA meeting in Chicago. Rob moderated a panel on ethics in responding to government investigations and another on the plaintiff strategy of presenting the driver as a second victim in the accident.
- Smart Drive hosted their User Conference in Atlanta on June 12, and Rob crashed the party, speaking on technology and motor carrier depositions.
- On November 8th, Fred attended the Transportation Institute in Minneapolis and spoke on federal regulatory issues.

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