MAKING TRACKS

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A Transportation and Logistics Law Firm

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Moseley Marcinak Newsletter Contents

A Note From Rob Moseley

Ok, I would be lying if I didn't admit that I love fall, and I am always disappointed when fall turns into winter. My football teams are long declared irrelevant by winter. And the transfer portal is ruining college football. Don't get me started. And as I get older, I like being cold less (think "It's cold in here. What time is it?" – old people will remember).

So that brings me to a place where I have an appreciation – a gratitude if you will. I am reminded of people who invested in me as mentors. I remember a church member who read The Bible with me as a middle schooler, a senior wrestler who invited me to FCA in high school, and a junior wrestler who invited me as a freshman wrestler to a different FCA. I am also fondly remembering pastors who led churches I attended. Recently, I went to the 90th birthday of my senior law partner mentor, Jim Watson with whom I shared a secretary, as a baby lawyer. He was one of the top lawyers in the upstate of South Carolina. Jim taught me a lot about how to practice law, but I also watched how he treated people.

Whether you see it or not, people are watching you, and young people are sponges looking for stuff to soak up. So I want to challenge you: who is within the circle of your influence, and what do you have to offer?

No, Gunshot Injuries Do Not Arise Out of the Use of an Auto— S.C. Supreme Court Clarifies Conflicting Jurisprudence

BY KRISTEN NOWACKI

Admitting that there is "somewhat conflicting jurisprudence" as to whether certain injuries arise out of the "ownership, maintenance, or use" of an automobile, the South Carolina Supreme Court recently held that gunshot wounds do not, in fact, arise out of the use of an auto. In *Progressive Direct Ins. Co. v. Groves*, No. 2020-001337, 2022 WL 4361910, at *2 (S.C. Sept. 21, 2022), Jimi Redman, while driving his car, killed the passenger of another vehicle with a rifle. Progressive and USAA insured the decedent. Both policies provided uninsured motorist coverage for damages an insured is entitled to recover from the owner or operator of an uninsured motor vehicle when such liability arises out of the *ownership*, *maintenance*, or use of the uninsured motor vehicle.

Following the decedent's claim for uninsured motorist benefits, the insurers filed a declaratory judgment action, arguing the gunshot injuries did not arise out of the use of the Redman (uninsured) vehicle. The circuit court agreed, holding that the plaintiff failed to show the decedent's injuries were "casually connected" to the use of the Redman vehicle. On appeal, the South Carolina Court of Appeals reversed based on *Wausau Underwriters Insurance Company v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) and *Home Insurance Company v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994), cases in which the S.C. Supreme Court concluded that a vehicle was an "active accessory" to the assaults giving rise to the injuries at issue.

The S.C. Supreme Court granted writ of certiorari and clarified that the foreseeability analysis developed after the Court's decisions in *Howser* and *Towe* controlled the instant matter. More specifically, to recover UM benefits, the insured must show that there is a causal connection between the claimed injury and the uninsured vehicle; no act of independent significance breaks the chain of causation; and the vehicle was being used for transportation at the time of the injury. To establish the causal connection, however, the insured must also prove the following "subparts":

> a) the vehicle was an active accessory to the assault; and
> b) something less than proximate cause but more than mere site of the injury; and
> c) that the injury must be foreseeably identifiable with the normal use of the automobile.

Groves, at *2 (internal quotation marks and citations omitted). Applying this test, the Court concluded that "gunshot injuries do not arise out of the use of an automobile," noting that there had been no appellate decision since 1994 finding covering for injuries from a gunshot wound. *Id.* at *4–5. This case is a win for insurers and demonstrates South Carolina courts are willing to recognize limits on what constitutes the "use, operation, or maintenance" of an automobile.

Updates on the Fair Labor Standards Act and Independent Contractors

BY LESESNE PHILLIPS

There are two recent developments regarding the Fair Labor Standards Act ("FLSA") and independent contractors. One development is a court case out of the United States Court of Appeals for the Tenth Circuit. The other involves a proposed rulemaking on the FLSA regulations issued by the Department of Labor ("DOL") seeking to clarify the test between employees and independent contractors. Let's have the good news first.

In *Merrill v. Harris*, the United States Court of Appeals for the Tenth Circuit utilizing the economic realities test, upheld a lower court decision finding a group of drivers leasing their trucks from a leasing company were not employees but independent contractors. *Merrill v. Harris*, 2022 WL 3696669 (10th Cir. 2022). In the *Merrill* case, various drivers, claiming to be employees, filed lawsuits against a leasing company and a motor carrier for FLSA minimum wage claims. The *Merrill* case involved a leasing program instituted by Pathway Leasing, LLC ("Pathway"). In addition to the leasing program, XPO Logistics Truckload, Inc. ("XPO") and Pathway entered into a carrier agreement where Pathway would make a lease financing program for XPO's independent contractors and XPO would assist in closing the lease financing arrangement between Pathway and the independent contractors. Once an independent contractor entered into the lease program with Pathway, XPO offered contracts for the independent contractors to drive under XPO's motor carrier authority. The XPO independent contractor agreements required the independent contractor to secure a lease of a truck or own a truck before entering into the agreement. However, the XPO independent contractor agreements did not subject many restrictions on the independent contractors, which XPO ordinarily placed on its company drivers. For example, the independent contractors did not have to comply with "forced dispatch" meaning that the independent contractors were completely free to choose or decline loads for reasons other than illness, which would include whether the load would be profitable to the independent contractor. The contractors could choose where to drive and which routes to arrive at the destination, they did not have to adhere to fueling requirements, and they were not subject to the requirements found in XPO's driver handbook.

The lower court ultimately determined that the independent contractors were properly classified as

independent contractors instead of employees. In its analysis, the lower court looked to the six *Baker* factors, also known as the "economic realities" test to determine whether the drivers were independent contractors or employees. For the "economic realities test," courts generally look at the following factors (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business. In this test, no one factor is dispositive, but the court looks to the totality of the circumstances to arrive at its decision.

Compared with the ABC Test for independent contractor status, such as California's AB-5, the economic realities test provides a better opportunity for independent contractors in the motor carrier industry. The Tenth Circuit in Merrill agreed with the lower court's decision and upheld the finding that the drivers were in fact independent contractors. Of note, the Tenth Circuit found that the absence of forced dispatch, the ability for the drivers to hire their own employees to complete loads, and the ability of the drivers to determine their own routes pointed towards independent contractor status. For the last factor of the economic realities test, "the extent to which the work is an integral part of the alleged employer's business, the Court found this factor neutral, as XPO had already been dismissed from the case by the time of the Court's decision. If XPO had still been involved in the case, there is a chance that this factor would have shifted towards employee status. However, even with that factor pointing towards employee, the Court could still find the drivers as independent contractors because no one factor is dispositive in the Court's analysis. Conversely, the ABC Test requires that the independent contractor meet all three requirements including factor B "the person performs work that is outside the hiring entity's business." The *Merrill* case provides good guidance to motor carriers and leasing companies when determining rights of its drivers with regard to FLSA claims.

Now for the bad news.

An additional development in this sphere is that the Department of Labor recently issued a Notice of Proposed Rulemaking specifically addressing independent contractor classification with regards to FLSA. While the Notice of Proposed Rulemaking does not utilize the ABC Test, the Notice of Proposed Rulemaking applies the economic realities test but puts stricter requirements on each factor. For example, under the second factor "the worker's opportunity for profit or loss," the DOL will not consider taking more loads as evidence of managerial skill. Instead, the DOL wants to see the independent contractor make other meaningful decisions that impact profitability and loss. The most important factor that is now coming under scrutiny by the DOL is the first factor, which looks at the independent contractor's freedom from control of the company. For this factor, the DOL wants to see that the independent contractor actually serves multiple customers and has decision making authority over rates to charge. The difficulty with this proposal is that the DOL will consider the shipper's requirements placed upon the motor carrier, which is are then foisted upon the independent contractor, as the motor carrier controlling the independent contractor. Finally, the DOL does not consider driving to be a specialized skill, which again will place a higher burden on the motor carrier entity. The end result is that the motor carrier may not be able to sufficiently distance itself from the independent contractor enough to maintain its independent contractor status under this DOL rule.

While it was inevitable that the Biden Administration would withdraw the Trump Administration's test under FLSA, the DOL has placed stricter requirements on motor carriers to show independent contractor status while still using the economic realities test. The Notice of Proposed Rulemaking was issued on October 13, 2022, and will be held open for comment for 45 days.

I Can See Clearly Now, the Waiver's Gone: FMCSA Alternative Vision Certification Standard

BY MARTIN E. CAIN

On March 22, 2022, the FMCSA amended its regulations to eliminate the previous vision exemption program and the grandfather provision of the vision waiver study program in 49 C.F.R. § 391.64. It instead established a new alternative vision program under § 391.41 through which drivers with vision issues can obtain certification to drive a commercial motor vehicle in interstate commerce. The details of the physical requirements of the new rule are set forth in § 391.44. Drivers who cannot otherwise meet the vision standard must now obtain an evaluation by an ophthalmologist or optometrist and a subsequent exam and certification by a qualified medical examiner. Additionally, some drivers, including those seeking first-time interstate travel authority, will be required to complete a road test prior to certification.

The specifics of the new standard provide that an individual with monocular vision who does not satisfy, with the worse eye, either the distant visual acuity standard with corrective lenses or the field of vision standard, or both, can still qualify to operate a commercial motor vehicle in interstate commerce provided: (1) the individual meets the other physical qualification standards in § 391.41 or has an exemption or skill performance evaluation certificate, if required; and (2) the individual has a required vision evaluation and medical examination to certify the evaluation.

During the vision evaluation of the individual, an ophthalmologist or optometrist must complete the Vision Evaluation Report, Form MCSA–5871. After the ophthalmologist or optometrist completes the Report, a medical examiner must examine and certify the results. If the medical examiner does not agree with or has questions about the ophthalmologist or optometrist's report, he or she has the option to consult with that individual. The examination must begin not more than 45 days after the ophthalmologist or optometrist signs and dates the Report. The medical examiner then ultimately determines whether the individual meets the physical qualification standards in § 391.41, et seq. to operate a commercial motor vehicle.

For a medical examiner to deem an individual

physically qualified to operate a commercial motor vehicle, he or she must find that the individual: (1) has, in the better eye, distant visual acuity of at least 20/ 40 (Snellen), with or without corrective lenses, and field of vision of at least 70 degrees in the horizontal meridian; (2) be able to recognize the colors of traffic signals and devices showing standard red, green, and amber; (3) have a stable vision deficiency; and (4) have had sufficient time pass since the vision deficiency became stable to adapt to and compensate for the change in vision. If the examiner determines the individual meets the physical qualification standards, he or she may issue a Medical Examiner's Certificate (MEC), Form MCSA—5876, which is good for a maximum of 12 months. Copies of the Vision Evaluation Report and the Medical Examination Report should be kept in the individual's medical certification file.

Certain individuals qualifying under the new standard for the first time and who do not fall under an exception will also be required to complete a road test, pursuant to § 391.31. While drivers who have three years of intrastate or specific excepted interstate commercial motor vehicle driving experience with the vision deficiency are exempted from the road test Requirement, other drivers who fall under the provisions of § 391.44 should receive a road test. Carriers are responsible for making sure road tests are administered to those drivers by complying with the provisions of § 391.31.

Carriers should take every effort to ensure their drivers are medically qualified under the foregoing FMCSRs, as courts have frequently considered causes of action for negligence per se and negligent hiring, entrustment, and supervision against carriers, when driver vision qualifications are at issue. See, e.g., *Curd v. Western Exp., Inc.*, 2010 WL 4537936, Nos. 1:09-cv-610-LG-RHW, 1:09-cv-774-LG-RHW (Nov. 2, 2010) (allowing a negligence claim to proceed against carrier who knew its driver was medically unqualified due to vision problems); *McKeown v. Rahim*, 446 F.Supp.3d 69, 82 (W.D. Va. 2020) (citing *Denby v. Davis*, 212 Va. 836, 188 S.E.2d 226 (1972) (allowing a negligent entrustment action to proceed when vehicle owner knew driver had vision problems); and *Lewis v. D. Hays Trucking, Inc.*, 701 F.Supp.2d 1300, 1316 (N.D. Ga. 2010) (indicating that summary judgment would not be appropriate when a driver has vision problems but granting summary judgment on other issues); and *Kimberlin v. PM Transport, Inc.* 264 Va. 261, 269, 563 S.E.2d 665, 669 (2002) (finding that jury should not be allowed to consider potentially impaired vision of driver when evidence showed driver's corrected vision met the requirements under the FMCSRs).

The final date by which qualified individuals must be in full compliance with the new provisions of § 391.44 is March 22, 2023. Motor carriers with drivers operating in interstate commerce who previously relied upon the old vision waiver or exemption programs should inform their drivers of this new standard and make sure they receive their yearly evaluation, examination, and certification. Ultimately, it is incumbent upon CDL holders to obtain a vision examination when required by § 391.44 and to submit updated MECs to their respective state Departments of Motor Vehicles. However, pursuant to § 391.41, motor carriers are responsible for ensuring that only medically qualified drivers are operating commercial vehicles in interstate commerce. A motor carrier can avoid incurring unfavorable audits from the FMCSA and exposing itself to potential claims of vicarious liability and even punitive damages by ensuring that its drivers are medically qualified to drive.

For additional details regarding this rule change, please visit the FMCSA's website at: https://www.fmcsa.dot.gov/medical/driver-medical-requirements/general-vision-exemption-package. The full text of the new rule is available at https://www.govinfo.gov/content/pkg/FR-2022-01-21/pdf/2022-01021.pdf, and an informative webinar is available at: https://www.fmcsa.dot.gov/regulations/medical/new-vision-standard-overview-webinar.

Every Truck You Take, Every Trip You Make, We'll Be Watching You: Commercial Motor Vehicle Electronic ID Requirements

BY STEPHANIE BESSELIEVRE

The Federal Motor Carrier Safety Administration ("FMCSA") recently sought comments from the public on a potential amendment to the Federal Motor Carrier Safety Regulations ("FMCSR"), which would require all commercial motor vehicles ("CMVs") operated in interstate commerce to be equipped with an electronic identification system with the ability to communicate an ID number to Federal and State motor carrier law enforcement wirelessly. The FMCSA is considering this change due to the growing number of CMVs on the road and a lack of oversight resources, under the theory that doing so will increase the efficiency of the roadside inspection program by allowing officers to focus on high-risk carriers. Electronic ID technology will allow the identification of CMVs while parked and in motion.

The Commercial Vehicle Safety Alliance (CVSA) originally petitioned the FMCSA for the change in July of 2010. In May of 2013, the petition was denied, with the FMCSA citing a lack of information associated with the costs and benefits of such a mandate. In February of 2015, the CVSA petitioned the FMCSA to reconsider its denial, which was granted in November of 2015. The FMCSA then issued an Advance Notice of Proposed Rulemaking (ANPRM), which was open for public comment through November 22, 2022. An ANPRM indicates the FMCSA is in the preliminary stages of rule creation, and that public input is desired for the formulation of the future proposed rule.

While electronic IDs are currently not required on CMVs, grant funding is provided to states who participate in electronic screening projects. In its ANPRM, the FMCSA identified a host of technologies capable of electronic ID, noting that these technologies serve a limited function in comparison to the ID technology being considered. The FMCSA identified License plate readers (LPRs), USDOT number readers, and transponders. LPRs utilize a plate reader camera and optical character recognition (OCR) software in order to match license plates with registration data. LPRs log the time and date of scan, GPS coordinates of the scanned CMV, and capture images of license plates and images of CMVs. A USDOT number reader utilizes an image of the side of a CMV in conjunction with OCR in order to capture a DOT number from a CMV at

highway speeds. A transponder is affixed to the CMV and transmits identification data wirelessly.

The FMCSA has previously studied the impact of replacing e-screening transponder systems with LPRs at truck inspection and weigh stations and found that LPRs, USDOT number readers, and transponders improve the ability to identify CMVs in motion in comparison to manual roadside inspection identification.

In theory, the mandate could benefit historically well-performing motor carriers by reducing the number of future roadside inspections because law enforcement would have an opportunity to review motor carrier data before making the choice to perform a roadside inspection. Thus, well-performing motor carriers may be less likely to be inspected if the focus is on high-risk motor carriers.

The ANPRM listed a series of questions for comment associated with technological preferences, functionality, data sought, cybersecurity, costs and benefits, and operational implications. The ANPRM received over 2,000 comments regarding the proposed rule, and the benefits behind the mandate did not appear to have garnered much support from the public. Many of the concerns raised were associated with industry overregulation, privacy, safety concerns, and costs associated with the mandate. The bigger question though is if the technology would actually make the roads safer by incentivizing motor carriers to comply with regulations (that they are already required to comply with), or if this technology has no real correlation with safer roads, and instead simply streamlines the process for inspectors while leaving motor carriers more vulnerable to potentially arbitrary inspection guidelines.

To Broker or Not to Broker?

BY FRED MARCINAK

When Congress passed MAP-21 back in 2012, part of the tradeoff for raising the broker bond amount to $75,000 was new provisions to crack down on unauthorized brokerage. Since then, the question has arisen as to what is brokerage and what is not. Dispatch services? Technology platforms? Load boards? Shippers' agents? Carriers' agents? Are these brokers or not? The 2021 infrastructure bill mandated that the FMCSA issue regulations to clarify exactly who is a broker.

On November 15, 2022, the FMCSA issued interim guidelines to bring some clarification to this question. These guidelines try to separate brokers from bona fide agents and dispatch services. While these interim guidelines do not have the force of law (and the public can comment on them for 60 days), they do offer guidance and an indication as to the direction the FMCSA is likely to go with its final regulations. Beginning with dispatch services, FMCSA listed six factors to help determine if a dispatch service needs broker authority. A dispatch service will need broker authority if it:

- Interacts or negotiates a shipment of freight directly with the shipper or a representative of the shipper.
- Accepts or takes compensation for a load from the broker or factoring company, or is involved in any part of the monetary transaction between any of those entities.
- Arranges for a shipment of freight for a motor carrier, with which there is no written legal contract with the motor carrier that meets the aforementioned criteria.
- Accepts a shipment without a truck/carrier then attempts to find a truck/carrier to move the shipment.
- Is a named party on the shipping contract.
- Is soliciting the open market of carriers for the purposes of transporting a freight shipment.

It's important to point out that these factors are a guideline but not an exact checklist. For example, if a dispatch service meets five out of the six factors, it could still be deemed a broker even though it does not meet all six factors.

As far as "bona fide agents," the FMCSA clarified that where an agent handles the transfer of funds between shippers and carriers—i.e. the shipper pays the agent who (presumably after taking a margin) pays the carrier—this "strongly suggests" the need for broker authority. However, FMCSA noted this is not an absolute requirement for one to be considered a broker. The agency further clarified that a "bona fide agent" can represent more than one motor carrier without needing broker authority. To muddy the water further, the agency included catch all language: "Any determination will be highly fact specific and will entail determining whether the person or company is engaged in the allocation of traffic between motor carriers."

The quest to define who is a broker continues. The public has 60 days to comment on the interim guidelines before the FMCSA publishes final regulations. The fact that Congress—spurred on by TIA and other industry groups—continues to push the FMCSA to distinguish between brokers and non-brokers also suggests that the FMCSA may begin enforcing civil penalties (up to $10,000 per violation) for illegal brokering. While the agency has to this point focused on safety issues and not on broker regulatory issues, that could change once the new regulations are finalized. As a result, those who are close to the brokering line will want to review their operations and weigh the pros and cons of obtaining broker authority. For now, broker is in the eye of the beholder—but the beholder will soon be the FMCSA and its new regulations.

THE ROAD AHEAD- Past and Future Events

Past

- Rob joined friends at The Machinery Haulers Association meeting in Lake Geneva, WI on September 7-9.
- Rob joined the Marsh Fleet Solutions Captive at Lambeau Field in Green Bay on September 14-15.
- Rob attended the inaugural meeting of the Transportation Defense Advocates Council on September 21-22 in northwest Arkansas
- Wilson Jackson attended and spoke on Predatory Towing at the Oklahoma Trucking Association's Annual Meeting on September 21-23 in Durant, Oklahoma.
- Rob spoke at the Cottingham Butler client meeting in Dubuque on October 5.
- Rob and Fred joined the annual meeting of the Motor Carrier Insurance Education Foundation on October 6-7
- Rob was in Indianapolis on October 12-13 for the Protective Insurance Claims and Safety Seminar.
- Megan Early, Blair Chase, Tom Chase, Alex Timmons, and Wilson Jackson attended the Trucking Industry Defense Association (TIDA) 30 th Annual Seminar on October 12-14 in Orlando, Florida.
- Blair attended the Georgia Motor Trucking Association's Leadership Conference on November 17-18 in Atlanta, Georgia.

Future

- Fred, Rocky and Rob will attend the Conference of Freight Counsel meeting in St. Petersburg January 7-9. Fred is now the Vice Chair of the CFC.
- Donavan Eason, Martin Cain, and Rob will attend the TLA Chicago Regional and Boot Camp on January 19-20 in Chicago, Illinois.
- Rob will attend the planning meeting of the American College of Transportation Attorneys in Phoenix on February 24.
- Fred will attend the Specialized Carriers and Rigging Association Symposium in Orlando February 28-March 2.
- Rob will join Mehdi Arradizadeh (ATS) and Dean Newell (Maverick) on a panel at the Truckload Carriers Association meeting in Orlando March 6-8 discussing expectations in accident litigation.
- Fred will speak on cargo claims at TIDA cargo seminar March 21 in Phoenix.
- Rob will discuss freight claims with The Machinery Haulers association in Las Vegas on April 5. This does not have anything to do with the fact that Rob has been referred to as a "tool."

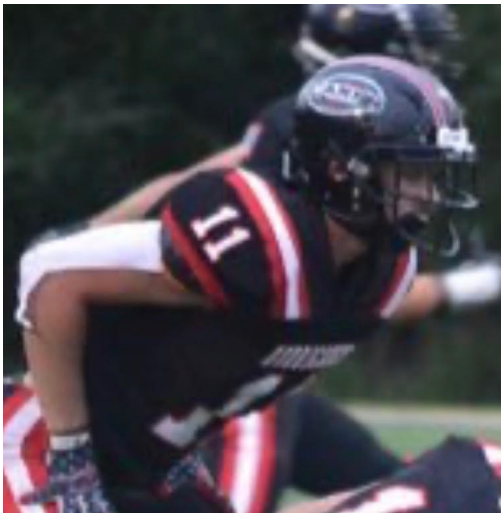
MOMAR PAST AND UPCOMING WEBINARS

- We hope you will attend our upcoming lunchtime webinar on December 7 where Rob will answer any questions you throw his way.

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

CONGRATULATIONS CORNER

- One of our paralegals, Hannah Healey, was joined in matrimony to Aaron Church on October 21, 2022.
- Rob received the Thomas Ruke Fellow Award from the Motor Carrier Insurance Education Foundation.



- Rob's son, Aaron, won team MVP for his high school football team as a junior. Aaron was also invited to play in the All-American Bowl in Gatlinburg, Tennessee.

MEGAN EARLY-SOPPA

Attorney

Moseley Marcinak Law Group

- After a year of service as Chairwoman for the Board of Directors for Euphoria Greenville, Megan has passed the torch. She will serve as Chairwoman for the Hispanic Alliance in 2023.

BUCKY'S REPORT

Bucky wasn't available for his usual photograph in time for publication of the current newsletter. Believe me, the paparazzi were devastated after having hung around outside the office for hours hoping to get a picture. He has jetted off to a warmer climate for some much needed R&R, although he took his laptop with him in order to be able to work on important MOMAR projects. Stay tuned!

Your MoMar Team

Robert Moseley

Founding Partner

rob.moseley@momarlaw.com

Fred Marcinak

Founding Partner

fred.marcinak@momarlaw.com

Tom Chase

Partner

tom.chase@momarlaw.com

Alex Timmons

Partner

alex.timmons@momarlaw.com

Blair Cash

Partner

blair.cash@momarlaw.com

Rocky Rogers

Partner

rocky.rogers@momarlaw.com

Kristen Nowacki

Partner

kristen.nowacki@momarlaw.com

Megan Early-Soppa

Partner

megan.early@momarlaw.com

Donavan Eason

Associate

donavan.eason@momarlaw.com

William Wilson Jackson

Associate

wilson.jackson@momarlaw.com

Lesesne Phillips

Associate

lesesne.phillips@momarlaw.com

Stephanie Besselievre

Associate

stephanie.b@momarlaw.com

Martin Cain

Associate

martin.cain@momarlaw.com