MAKING TRACKS

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

ISSUE 6 ■ MAY 2021

Moseley Marcinak Newsletter Contents

A Note From Rob Moseley

"How bout that?" I used to love watching This Week in Baseball and hearing broadcaster Mel Allen say that after a nice defensive play or a timely hit he was bringing to life. So we aren't out of the woods yet, but we did have opening day of baseball, The Masters (not the fall version), and even got in some spring FCS football. And things are good, with the Red Sox four games ahead of the Yankees (no, it doesn't matter how many games they are ahead of the other teams).

And jury trials are starting back up in most places. Of course, there is now another year's worth of cases in the hopper, so there is a huge backlog even with the most efficient of dockets. Which is a reminder to all of us: jury service is important. One of my family members just got an "invitation" to serve as a juror. Most of the people reading this understand the system and can figure out a way to get out of it. But let me encourage you not to try and avoid it. We need good jurors who take the system seriously. Show up when you get picked and watch your judicial system at work. Sure, it's not perfect, but your participation can change that. Also, "jury shame" your friends who are trying to get out of it. It's a duty and a privilege, not an inconvenience.

Step Up or Step Down: SC Supreme Court Determines Step-Down Provisions in Automobile Policies Unenforceable

By MEGAN EARLY- SOPPA

The SC Supreme Court has made a decision that will likely render unenforceable almost every step-down provision contained in an automobile liability policy issued in the State of South Carolina.

In a recent case, *Nationwide Mut. Fire Ins. Co .v. Walls*, Opinion No. 28012, filed March 10, 2021, the Supreme Court essentially eliminated the "step-down" provision.

In the underlying case, the insured vehicle was being operated by a permissive user, who while in a high-speed chase (over 100 mph) caused significant injures to multiple passengers and a death.

Nationwide relied on the step-down provisions in the automobile policy that stated "flight from law enforcement" and "committing a felony," to reduce its coverage. Instead of excluding coverage for those acts, the Nationwide policy "stepped-down" the applicable coverage from $100,000 per person and $300,000 per occurrence to South Carolina's mandatory minimum liability coverage limits of $25,000 per person and $50,000 per occurrence.

Nationwide paid $50,000 and filed a declaratory judgment action to enforce the step-down provisions. The trial court found the step-down provisions to be unconscionable and void as against public policy. The South Carolina Court of Appeals reversed the trial court and found that insurers were permitted to place reasonable restrictions on coverage above the legal limits. The Court of Appeals found that the statutory mandatory minimum coverage adequately protected the innocent passengers in a vehicle evading law enforcement.

The Supreme Court reversed this holding but acknowledged that a majority of courts across the country have upheld similar policy exclusions as ***not*** being violative of public policy. However, the South Carolina Supreme Court relied on state statutes and prior case law to invalidate the step-down provisions. The Court also noted that its decision was controlled by statute and the South Carolina legislature could codify such exclusions like other state legislatures[1].

It cannot go without mentioning that the dissent accused the majority from legislating from the bench. The very first sentence of the dissent noted that: "Today, counter to every other jurisdiction in the country, a majority of this Court holds that a clear provision in an insurance policy – one which reduces coverage to the statutory minimum where an insured causes damage while fleeing a law enforcement officer – is unenforceable." (Emphasis added).

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[1] The SC Supreme Court notes that Arkansas has done this, referencing in a footnote, Ark. Code Ann. § 23-89-205(1)-(2) (West 2020) (providing that an insurer may include an intentional act exclusion, a felony exclusion, and an evasion-from-law-enforcement exclusion); see also Ark. Code Ann. § 23-89-214 (West 2020) (expressly prohibiting step-down provisions that reduce coverage when the insured vehicle is involved in an accident and the driver is someone other than the insured).

Wilsonart, LLC v. Lopez: Florida's Old Summary Judgment Standard Joins the Retirement Community

BY FRED MARCINAK

Effective May 1, 2021, the Florida Supreme Court, through two concurrent decisions, adopted the federal summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477, U.S. 317, 106 Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The decision, *Wilsonart, LLC v. Lopez*, provided the Florida Supreme Court with an opportunity to amend its summary judgment standard. 308 So. 3d 961 (Fla. 2020). The importance of this decision will have wide-ranging effects on litigation in Florida, presenting parties in civil cases a chance to conclude the case or parts of cases that are clear based on the evidence in the record. The previous Florida summary judgment standard provided a high standard where summary judgment was particularly rare. The previous summary judgment standard provided as follows: "[w]hen acting upon a motion for summary judgment, if the record raises the *slightest doubt* that material issues could be present, that doubt must be resolved against the movant and the motion for summary judgment must be denied." *Jones v. Dirs. Guild of Am., Inc.*, 584 So. 2d 1057, 1059 (Fla. 1st DCA 1991) (emphasis added). Additionally, the previous summary judgment standard was explained by the Florida Supreme Court stating "summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). This high summary judgment standard prevented many cases that were seemingly clear on factual issues to proceed to trial. However, with the *Wilsonart, LLC v. Lopez* case and the concurrent opinion by the Florida Supreme Court, In re *Amendments to Fla. Rule of Civ. Procedure 1.510.*, changing the summary judgment standard in Florida, cases will now have a better chance to be decided at the summary judgment stage thus precluding a trial.

The *Wilsonart* case, spurring this change in the summary judgment standard, involved a commercial

motor vehicle fatality. The facts and evidence in the case provided a demonstration of the difficulty with Florida's previous summary judgment standard. In the *Wilsonart* case, the truck driver brought his tractor-trailer to a stop at a red light. Jon Lopez rear-ended the tractor-trailer and subsequently died. Mr. Lopez's estate brought an action against the truck driver and the motor carrier under whose authority the truck driver drove, Wilsonart, LLC. Importantly, there was a dashcam on the truck driver's tractor-trailer showing that the driver continued traveling in the center lane and gradually came to a stop in that center lane. The dashcam shows that a large impact was experienced, undoubtedly from Mr. Lopez rear-ending the tractor-trailer. Due to the force of the collision, the tractor-trailer is forced into the left lane and crashed into another car in that left lane. Despite this video evidence, there was deposition testimony from a witness to the accident, who testified that the tractor-trailer suddenly changed lanes prior to the impact. The trial court in this case ruled in favor of the truck driver and motor carrier defendants. However, on appeal, the Florida Court of Appeals reversed and remanded the trial court's decision to grant summary judgment in favor of the defendants citing the high summary judgment standard in Florida. In this decision the Florida Court of Appeals acknowledged that the video evidence was compelling that the defendants were not negligent and directly contradicted the plaintiff's evidence in opposition to the motion for summary judgment. Despite this finding, the Florida Court of Appeals had to reverse the trial court due to the high summary judgment standard in Florida. However, the Florida Court of Appeals certified the following question to the Florida Supreme Court:

> Should there be an exception to the present summary judgment standards that are applied by state courts in Florida that would allow for the entry of final summary judgment in favor of the moving party when the movant's video evidence completely negates or refutes any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion and there is no evidence or suggestion that the videotape evidence has been altered or doctored?

Instead of answering this certified question, the Florida Supreme Court set a new summary judgment standard in Florida, which follows the federal and majority summary judgment standard. In changing this rule, the Florida Supreme Court stated that the summary judgment standard shall be construed and applied in accordance with the federal summary judgment standard. The federal summary judgment standard and now Florida's summary judgment now asks whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" and "if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." This standard allows the trial judge to weigh the evidence and determine its reliability. This is particularly important in view of the facts and evidence of the *Wilsonart* case with the objective video footage of the dashcam. Based on this new standard, parties can adequately weigh risks based on objective evidence. This new standard became effective on May 1, 2021.

Pay to Park

BY WILSON JACKSON

The South Carolina Court of Appeals recently affirmed a trial court granting summary judgment to a vehicle that was involved in an accident while parked on the side of the road.

The dispute arose from a vehicular accident that occurred in Folly Beach, South Carolina, which resulted in the death of a motorcyclist. On October 5, 2013, the decedent was driving his motorcycle in a westbound direction through an intersection that contained stop signs. Another motorist who was traveling in a southbound direction, turned left at the intersection and failed to yield the right of way to the motorcycle. This event resulted in an accident that pushed the motorcycle into another vehicle which was parked off the road on the side of the street near the intersection. The owner of the parked vehicle was not occupying the vehicle at the time of the accident.

The estate of the motorcyclist filed a complaint against the owners of both the moving vehicle and the parked vehicle. Regarding the parked vehicle, the estate claimed the vehicle was "illegally parked" in violation of S.C. Code Ann. § 56-5-2530, which prohibits a person from parking a vehicle within twenty feet of a crosswalk at an intersection and prohibits a person from parking a vehicle within thirty feet of a stop sign. The estate attempted to prove the parked vehicle was within ten to fifteen feet of the intersection by using the coroner's accident report.

The Court of Appeals determined the estate's measurements were not based upon personal knowledge as required by the summary judgment standard. The estate admitted it did not personally measure the intersection and instead relied on a generic schematic of an intersection and the measurements noted in the coroner's report. Therefore, the estate failed to present facts sufficient to support the contention that the parked vehicle was "illegally parked."

This case provides a favorable defense position that we should keep in mind when trucks are involved in an accident while parked on the side of the road. It also shows the importance of conducting an investigation immediately after an accident occurs. Such investigation and measurements will help establish a defense by proving the truck was not blocking any portion of the lane of travel and was otherwise compliant with all laws and regulations.

Cutting Class: *Swales v. KLLM Transportation Services, LLC*

BY LESESNE PHILLIPS

A recent case out of the United States Court of Appeals for the Fifth Circuit has provided a major win for motor carriers involved in independent contractor Fair Labor Standards Act ("FLSA") misclassification suits. This case is *Swales v. KLLM Transportation Services, LLC*, 2021 U.S. App. LEXIS 827 (5th Cir. 2021). Specifically, this case involves class action certification of multiple drivers suing the motor carrier under the FLSA for misclassification. To understand the opinion and the implications that it has on certifying class action suits under FLSA classification, it is important to understand the previous framework courts used to certify classes.

At the outset, challenges to a motor carrier's independent contractor program provide serious consequences of liability. This can include back-pay, minimum wage requirements, and attorneys' fees for a successful plaintiff bringing a misclassification action. Depending on the type of action and jurisdiction of the court, two different tests can be used to determine whether a driver is, in fact, an employee or independent contractor. The two tests are the ABC test, which provides a difficult standard for motor carriers to classify their drivers as independent contractors due to the second requirement, and the economic realities test which provides a multi-factor test that is less stringent on the motor carrier to prove that the driver is an independent contractor. The Fifth Circuit in the *Swales* case utilized the economic realities test. However, under previous class certification tests used by District Courts in FLSA actions, even under the economic realities test, litigation could be stirred up due to the notice process given to potential plaintiffs.

Under FLSA, plaintiffs are allowed to proceed as a collective for a class action for employee misclassification actions. Unfortunately, the standard under FLSA to determine whether plaintiffs can form a class action is merely if plaintiffs are "similarly situated." Potential plaintiffs are allowed to opt-in to the FLSA suit via written consent, as opposed to a traditional class action under Rule 23 of the Federal Rules of Civil Procedure where members are bound by the judgment or settlement unless they opt out. Potential plaintiffs cannot benefit from a collective action unless there is timely notice. Therefore, the court will help facilitate notice of the collective action to potential plaintiffs. Courts are advised that while their role is to facilitate notice, the process cannot devolve into a solicitation of claims to potential plaintiffs, and courts must take a neutral position during this process avoiding the appearance of endorsing the merits of the case. However, no guidance was given to courts on how they should facilitate this process without endorsing the merits of the case.

With no guidance on the administration and facilitation of notice to potential plaintiffs, courts utilized the two-step approach of *Lusardi v. Xerox Corporation*, with varying approaches. The first step in this process is the conditional certification of a class. Analysis of whether the proposed members of the class are similar enough to receive notice of the pending action relies on the pleadings and affidavits of the parties. After the first step, notices are sent out to opt-in to the suit. The next step occurs after discovery, where ordinarily the defendant files a motion to decertify the class. If the court finds that the opt-in plaintiffs are not similarly situated to the named plaintiffs, then the opt-in plaintiffs will be dismissed. Another test, the *Shushan v. University of Colorado* test, requires FLSA collective actions to follow the standards under Rule 23 of the Federal Civil Rules of Civil Procedure. Both tests provide their own difficulties in application, such as in the *Shushan* test Rule 23 plaintiffs are opt-out plaintiffs and under FLSA they are opt-in plaintiffs.

The practical hardships of the *Lusardi* analysis arise when a court must determine that the opt-in plaintiffs are similarly situated as under the economic realities test. The economic realities test is a highly individualized test, which considers: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of the alleged contractor's investment in facilities and equipment; (4) the nature and degree of control by the principal; (5) the alleged contractor's

opportunities for profit and loss; (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and (7) the degree of independent business organization and operation. As motor carriers will tell you, this test greatly depends on the individual independent contractor running under the motor carrier's authority, with some independent contractors choosing to lease a truck from the motor carrier and some independent contractors choosing to run loads for only one client. Under the application of *Lusardi*, the consideration of the economic realities test was analyzed at the second step after notices had been sent to potential opt-in plaintiffs. With notice already sent, this certainly would cause an increase in litigation and high bargaining power on the plaintiff's side.

The *Swales* case explicitly rejected the application of *Lusardi*. The *Swales* case states that the court should decide at the outset whether the misclassification case can be decided on a collective action basis. This means that the court should review the economic realities test and all evidence available to the court to decide whether a collective action can proceed. The court may decide to allow further discovery to make this determination or decide at the outset that the plaintiffs are not similarly situated enough to proceed under a collective basis. This decision seemingly erodes the two-step analysis and provides for one step. Additionally, due to the individualized nature of the economic realities test, this creates a difficult standard for plaintiffs to certify a class action for a misclassification action under FLSA in the transportation industry, in particular due to the varying circumstances in which independent contractors drive under a certain motor carrier's authority. This case is undoubtedly a win for the trucking industry and hopefully other courts will follow suit using the Fifth Circuit's analysis.

Comment Period Closed for FMCSA's Proposed Regulatory Guidance Concerning Use of CMVs for Yard Moves

BY KRISTEN NOWACKI

The Federal Motor Carrier Safety Administration ("FMCSA") recently proposed new regulatory guidance pertaining to the use of commercial motor vehicles (CMVs) in yard moves. The guidance would apply to any CMV driver required to record his/her hours of service. According to the proposed guidance, movement of CMVs in "yards" would be considered "yard moves" and may be recorded as "on-duty not driving" time in lieu of "driving" time under 49 CFR 395.8. The FMCSA reasoned that since "yard moves" take place on private property (rather than a public roadway), such time does not constitute "driving time" under the meaning set forth in 49 CFR 395.2. To be clear, to be considered "on-duty not driving time" the yard move must occur "in a confined area on private property (or intermodal facility or briefly on public roads, as described below)." Examples given by the FMCSA include (but are not limited to) moves at: an intermodal yard or port facility; a motor carrier's place of business; a shipper's privately-owned parking lot; or a public road if certain traffic-control restrictions are in place. The FMCSA noted that moves on a public road without traffic-control restrictions and public rest areas would not be considered "yard moves".

Previously, on February 28, 2020, the FMCSA published guidance distinguishing between "yard moves" and off-duty "personal conveyance." A move is considered a personal conveyance if the driver is not on duty and the movement is not for the commercial benefit of a motor carrier, shipper, or consignee.

If finalized, the proposed guidance will not have the force of law— it is meant to "provide clarity to the public regarding the [FMCSA's] interpretations of its existing regulations." The proposed guidance will replace Question 9 to 49 CFR 395.2 at https://www.fmcsa.dot.gov/regulations/hours-service/ss3952-definitions. Comments closed on February 3, 2021. Transportation industry associations and advocates generally expressed support for the proposed regulatory guidance and offered suggestions on how the FMCSA could provide additional clarity to benefit both motor carriers and drivers.

Who Owns Data on a Vehicle?

BY ALEX TIMMONS

Technology these days is capturing more and more data. A modern car is no different with event data recorders, navigation, Bluetooth and other devices capturing gigabytes of data. Our vehicles tell us where to go and how to get there, answer our phone calls, read us our texts and collect data on how we drive. The data can be used for marketing, traffic and urban planning, accident reconstruction, optimizing performance of the vehicle and many other uses. The data is important to car manufacturers, government organizations, insurance companies and car owners. Most modern vehicles have EDRs and other on-board diagnostic information tools. The newer technology included or available in new cars provides location information through navigation, external information gathered by cameras, in-cabin information from sensors used to provide information about occupants, user recognition through physical characteristics used in seat positioning and even tracking eye movement to determine if a driver is falling asleep, and apps through third-party systems.

In this article we are going to focus on one aspect of the data being collected, Event Data Recorders ("EDRs"). EDRs, also known as "black boxes," record a vehicle's dynamic time-series data during the time period just prior to, during and after a crash event, but does not include audio or video data. The information collected by EDRs include speed, accelerator and brake position, seat belt usage, airbag deployment and other information. This information is critical to governmental crash investigators, car manufacturers, accident reconstruction experts and others. The critical questions following an accident are who owns the data that is being collected by the EDR and who has access to the information.

The Federal Standard

The Driver Privacy Act of 2015 tried to provide some clarity on the ownership of the information collected by the EDRs[2]. The Act sets forth that any data retained by an EDR is the property of the owner or in the case of a leased vehicle, the lessee of the vehicle. Only the owner or the lessee may access the information recorded or transmitted by the EDR unless one of the following exceptions apply: (1) a court or other judicial authority authorizes the retrieval of the data, subject to the standards for admission into evidence required by the court; (2) the owner or lessee of the motor vehicle provides written, electronic or recorded audio consent; (3) the data is retrieved pursuant to an investigation or inspection authorized by federal law, subject to limitations on the disclosure of the personally identifiable information and the vehicle identification number; (4) the data is retrieved to determine the need for, or facilitate, emergency medical response to a motor vehicle crash; and (5) the data is retrieved for traffic safety research without the disclosure of the personally identifiable information of the owner or lessee and the vehicle identification number. The federal standard considers the owner to be the person who owns the vehicle at the time of the download not at the time of the accident. The Driver Privacy Act is narrow in its scope and only applies to EDRs and not other data repositories in the vehicle.

State Standards May Differ from the Federal Standard

A number of states have their own statutes that are similar or more restrictive in addressing the privacy of the information collected on EDRs. The state laws have varying exceptions state to state and before

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[2] Driver Privacy Act of 2015, pub. L. No-114-94, § 24302 (2015).

any information is collected from an EDR a search for a state statute must be conducted in order to confirm compliance with the statute before accessing the data.[3] State legislation is being introduced every year in states that do not currently have statutes, so it is important to do a search for current or newly enacted statutes.[4]

States such as Arkansas, Oregon and several others have restrictive statues concerning the EDR data. Arkansas requires the consent of all owners in writing whether it is a single owner or multiple owners.[5] They further hold that the owner of the vehicle at the time of the collision holds the exclusive ownership of the data and such ownership does not transfer to a lienholder or insurer who takes ownership after a collision such as a salvage situation. Oregon is similar to Arkansas in that it also requires the written consent of all owners and retains the ownership of the data to the owner at the time of the collision.[6]

What Does this Mean for the Employer?

Because most monitoring programs apply to employees operating vehicles owned or leased by the company, the company has access to the EDR information because of their ownership of the vehicle. Although it is not required, notifying an employee of the monitoring may deter abuse of the company vehicle. In situations where the employee operates their own vehicles or rental vehicles, the federal and specific state statues must be followed to obtain EDR information from the employee-owned or rented vehicle.

Where Do We Go From Here?

As technology continues to improve and vehicles become more autonomous and "smarter" they will generate more data. Although the data may be utilized in many societally beneficial ways, it can also create many privacy concerns for the consumer. The law and statutes surrounding this data is continuing to evolve. With the ever-changing landscape of vehicle data and technology, it is important that anyone retrieving EDR or other vehicle data be aware of the current applicable federal and state laws.

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.

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[3] https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-of-data-from-event-data-recorders.aspx.

[4] An example of this is that in South Carolina a bill regarding EDR data has been introduced in 2007, 2009, 2011, 2013, 2015 and 2017 but has failed to be approved.

[5] A.C.A. § 23-112-107.

[6] ORS § 105.925 through § 105.945.

THE ROAD AHEAD-
Past and Future Events

- On April 23, 2021 Rocky and Blair participated in the GMTA Clay Shoot in Savannah, Georgia
- On April 28, 2021 Fred and Rob spoke to the ATA Transportation and Security Counsel on hot topics in cargo claims.
- On May 12, 2021 Rob was a guest presenter to the Great West Leadership Symposium which was presented virtually. Rob's talk concerns risk management and corporate management in the age of nuclear verdicts.
- On May 27, 2021 Rob will conduct a webinar as part of the Cottingham and Butler Summit series. Rob will be talking on transportation contracts.
- June 5 – 7, 2021 Fred and Rocky will attend the Conference of Freight Counsel in Annapolis, Maryland
- On June 23-26 Megan and Rocky will present at the Transportation Lawyers Association Annual Meeting in Lake Tahoe, California.
- Blair will attend the GMTA Annual Meeting June 20-23, 2021 in Amelia Island, Florida.
- Rob will speak on corporate governance to the North Carolina Trucking Association Annual Conference to be held in Charleston on July 18-21, 2021.

MOMAR PAST AND UPCOMING WEBINARS

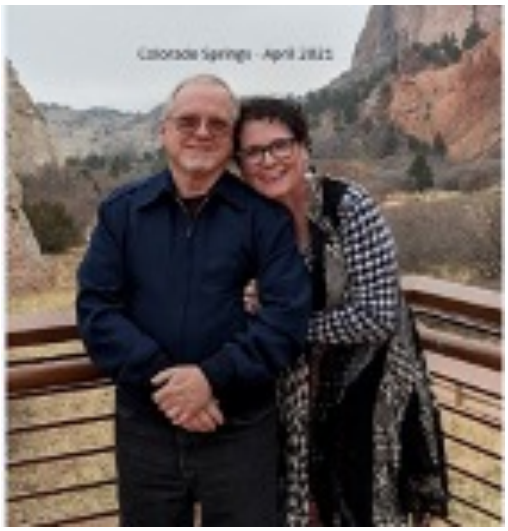
•Look for an e-blast about our upcoming Webinar and join the roundtable where you can "Ask the Firm Anything."

Check the Archive section of our website for previously recorded webinars, some of which include:

- 2020 Year in Review series
- November, 2020 - Fraud in the Transportation Industry
- August, 2020 – The State of Freight

CONGRATULATIONS CORNER

- Congratulations to our Manager, Karen Parker, who accepted Doug Powell's proposal on February 5th. They will be married on June 12th.
- Trish Timmons, wife of Alex Timmons, won the firm's (just for fun – no money involved) NCAA basketball bracket contest. Fred and Rocky were ranked in the top 1% of all brackets in the ESPN listing for the first 4 rounds. Rob was the only one who entered the firm's NCAA wrestling bracket contest.
- Rob gave team devotions to The Citadel football team to get them fired up for a big win over rival Wofford College (where Megan graduated). The team was so fired up, they beat Furman University (where Tom Chase graduated) the next week.
- Rob and Robin are celebrating 3 graduations this Spring:
    - Caleb, The Citadel (starting Air Force career)
    - Josh, North Greenville University (reminds his older brother he graduated first)
    - Adam, high school (planning to attend USC or Presbyterian or ??)

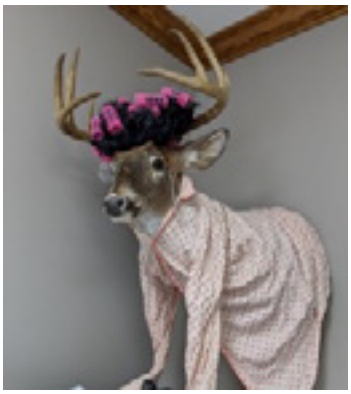


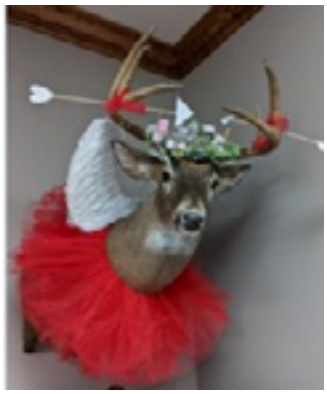
Karen Parker and her fiancé Doug Powell

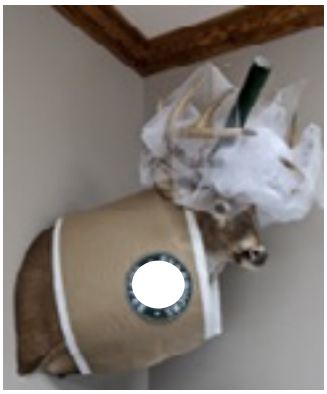
NEW-- BUCKY'S REPORT

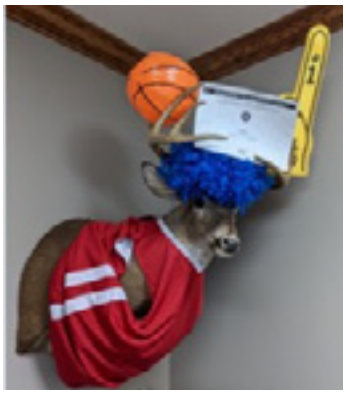
We are pleased to introduce you to MOMAR's firm mascot, "Bucky" the deer. Bucky is handsome, obedient and a good sport when it comes to dressing stylishly. He easily beat out two other entries (the "Fish" and the "Pheasant" shown below) for the coveted position.

In his spare time Bucky reads transportation periodicals because he never knows when he will be called upon to offer advice. Below are a few of our favorite photos. Look for more information about Bucky in future newsletters.









Second Place

Third Place

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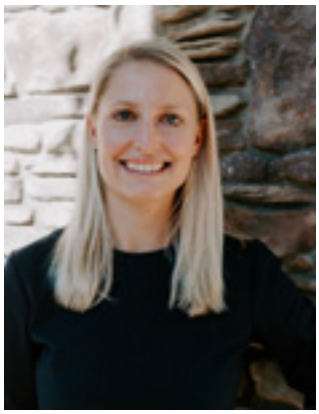

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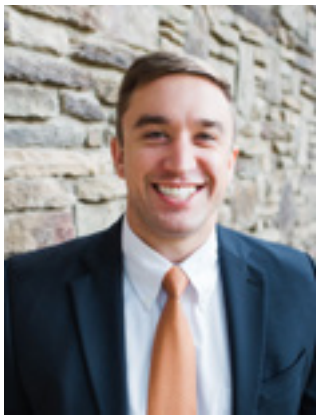

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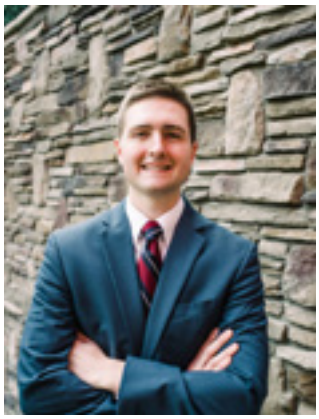

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