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Litigation Forum

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LITIGATION FORUM is an informational newsletter provided regularly by the law firm of CRANFILL SUMNER & HARTZOG LLP. It is designed to provide helpful and current information in all areas of our practice, which include general liability litigation, workers' compensation, medical & professional malpractice, employment law, business/commercial litigation, insurance coverage law, construction law, products liability, appellate litigation, education law, and a variety of other areas related to civil litigation. Obviously, only a limited amount of information can be given within the confines of a short newsletter, so if further information is needed, or if there are any questions, please contact any of our attorneys in Raleigh, Charlotte or Wilmington.

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UPCOMING EVENTS

Client Continuing Education Seminar:

NOVEMBER 19, 2009
9:00am
Sisters Garden
2400 E. Millbrook Rd.
Raleigh, NC

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Fire and Arson Law

FIRE LOSSES: NO EXPERT REQUIRED (BUT YOU SHOULD HAVE ONE…)

By F. Marshall Wall (RAL), Fire and Arson Practice Group

The evidence necessary to prove causation in a fire loss, specifically whether expert testimony is required, was the subject of a recent North Carolina Court of Appeals case. In *Worthy v. The Ivy Community Center, Inc.*, No. COA08-458 (N.C. App. Aug. 4, 2009), the Court reversed Summary Judgment for all defendants in a lawsuit arising from a 2004 Durham apartment fire. (To read the full opinion, go to: http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/080458-1.pdf). The fire began at about 2:30 a.m. while one of the residents was cooking French fries. He testified in deposition that electrical wiring in the hood above the stove began to spark and a spark dropped into the oil in his pan, igniting the oil. Two residents of the apartment were badly burned by the resulting fire.

The defendants argued that the young man's testimony should not be considered because he was not an expert witness and expert witness testimony is required to prove causation in a fire case in North Carolina. The Court disagreed. Three North Carolina appellate cases cited by the defense allowed certain expert witnesses (for example, a fire marshal) to testify about the origin and cause of fires, but did not require expert testimony to prove causation.

The plaintiffs presented no expert evidence in opposing Summary Judgment, but relied on the testimony of the witness, as well as his mother, who testified that wires came loose from the exhaust mechanism from time to time before the fire and that she saw wires hanging when she went into the kitchen just after the fire started. She also mentioned hearing "popping" sounds around the time the fire began. The Court discussed the difficulty of proving causation in fire losses and noted that circumstantial evidence can be enough to take the issue to a jury. In the end, the Court held that the witnesses' testimony was sufficient to withstand Summary Judgment.

Next, the defense argued that their expert's testimony showed that the witnesses' version of events was impossible. The defendants retained an engineer who examined photographs of the stove taken after the fire. He was unable to examine the hood, fan, or wires, however. The expert testified, by way of affidavit, that the photographs showed no evidence of electrical faults or damaged insulation in the hood or the wires within it. He also said that, "in general, sparks would not ignite cooking oil." While the Court felt that the defense might have shown that the witnesses' version of events was *unlikely*, they did not show that it was *impossible*.

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While the facts are unusual, the case may be the first in North Carolina to clearly state that an eyewitness can give enough evidence about causation to defeat Summary Judgment in a fire case, even without supporting testimony from an expert.

Worthy is a reminder of the importance of early retention of an expert to help determine origin and cause and the necessity of ensuring that physical evidence is preserved and maintained in order to allow a good evaluation of the fire. While the Court did not explain the defense expert's inability to examine the exhaust hood and wiring, this clearly hindered the Court's opinions. Had the defense expert been able to inspect the key physical evidence shortly after the fire, it is almost certain that he would have been in a better position to determine the origin and cause of the fire.

More than perhaps any other kind of loss, time is critical after a fire. Homeowners want to repair their houses and move back in. Businesses want to reopen at the earliest opportunity. Evidence in a fire loss can be fleeting, often disappearing in days or even hours. It is crucial to gather as much evidence as possible, as quickly as possible. Failing to properly assess and document a fire scene can also lead to later cries of spoliation of evidence from opposing parties and result in a lost opportunity to prove arson or recover from a negligent party. Usually this requires hiring a qualified and experienced fire investigator to sift through the scene to help determine whether a fire was intentionally set or the result of an accident. Involving counsel at an early stage can help protect this investigation and ensure that it is performed properly. Let us know if we can help with the investigation, defense or prosecution of claims involving a fire loss. ◆

For information about the "Fire and Arson" Practice Group at CSH, go to: http://www.cshlaw.com/fire-and-arson.asp

Employment Law

EMPLOYERS CAN AVOID BECOMING "VICTIMS" OF WORKPLACE VIOLENCE

By Frank J. Albetta (WILM), Employment Practices Group

A. INTRODUCTION

Over the past 40 years, the "center of gravity" in the lives of many has shifted, making the workplace of equal or greater weight relative to the home and family. One result has been that the workplace is increasingly beset with personal anger and frustration on the part of employees, which sometimes erupts into violence. Bad economic times can aggravate such anger and frustration, and can link them with the workplace through job loss or insecurity, or other employment-related disappointments. Even during boom times, homicide has generally been the third greatest cause of death in the workplace (trailing, no doubt, bad coffee and boredom). Yet many employers remain uninformed regarding their potential liability for workplace violence.

Workplace violence threatens employers in at least two ways. First, there are the direct effects of violence or angry confrontations themselves upon morale, productivity, organizational operations, and the reputation of the employer's business. Employers also, however, can become the target of legal actions by both employees and third parties who are victims of workplace violence.

B. HOW CAN AN EMPLOYER BE LIABLE FOR WORKPLACE VIOLENCE?

Although employee violence can be directly attributed to the employer when the violence is within the scope of the employee's duties – e.g. security officers, bouncers, etc. – the issue more commonly arises when the employee's duties do not entail the potential for the use of force and the employee merely succumbs to personal impulses. In such cases, victims of employee violence – other employees or third parties – must prove some element of fault on the part of the employer in order to create employer liability.

1. NEGLIGENCE

Like most entities, employers are generally under a legal duty to use reasonable care to prevent a foreseeable risk of injury to others. A failure to discharge that duty constitutes negligence. That can be a source of liability for an employer in regard to workplace violence, subject to the exclusive workers' compensation remedy discussed subsequently.

a. Duty to warn

Courts have held that if an employer has reason to know of a potential threat posed by an employee, the employer has a duty to warn others, especially if there is a known threat toward a specific person.

Example: In one California case, an employer had hired a parolee upon his release from prison for kidnapping and rape. The parolee sexually harassed a female co-worker, but they thereafter became friends. Four years later, the parolee kidnapped and killed the co-worker. The employer was held liable for failing to warn the female employee of the parolee's record of violence. The court found it determinative that there had been a specific threat toward the woman in the form of sexual harassment. *Duffy v. City of Oceanside*, 179 Cal.App.3d 666; 224 Cal.Rptr. 879 (1986). The court did not address, however, whether there would have been a duty upon the employer to disclose such information in the absence of a particular employee's need to know. It also did not address the potential for claims of invasion of privacy and defamation by the party about whom information was disclosed as part of a warning.

b. Negligent Hiring and Retention

A claim for negligent *hiring* can arise from employee violence if the employer, at the time of hiring the employee, knew or should have known of the employee's violent or dangerous propensities, and the employer, by hiring the employee, provided the further opportunities for instances of violence. The issue of the employer's negligence usually turns upon (1) the adequacy of the employer's pre-employment background and reference checking, particularly when the prospective employee will have special access to third persons – *e.g.*, in home repairs – or (2) the employee's access to particularly vulnerable populations – *e.g.*, children, invalids, etc.

A claim for negligent *retention* or *supervision*, however, may arise when the employer becomes aware of an employee's violent propensities only after hire, and fails to take steps to protect others. In *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn.Ct.App. 1993), Honeywell had employed an individual who had attacked a co-worker. When the former employee was released *after five years imprisonment*, Honeywell rehired him as a janitor. He became friendly with a female employee, but when she tried to distance herself, he harassed her. She sought help from management, but received none. At one point, a death threat was scratched on her locker. The janitor resigned, but, eight days later, killed the female employee in her home.

Honeywell was found liable for negligent *retention*. The court found that the issue was not negligent hiring because the individual had been hired as a janitor, and therefore was not a foreseeable risk of harm to others – a questionable determination at best. When he harassed the female co-worker, however, Honeywell was on notice of an actual threat, and its failure to take steps to protect the female employee constituted actionable negligence.

Note that Honeywell was liable even though the janitor murdered the female employee away from the workplace, and after he was no longer employed by Honeywell, reflecting the court's view that once the employer had brought the two parties into contact with each other, it had a continuing duty to act to protect the employee whom

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DID YOU KNOW?

DIVERSITY AT CSH

In 2008 the Management Committee formalized its commitment to diversity by creating a firm-wide Diversity Committee. Committee members include partners, associates and staff from each of the three offices who meet regularly to discuss the firm's diversity efforts. Over the last eighteen months, our Diversity Committee has been hard at work:

- *Drafting a Diversity Statement, adopted by firm management and posted on our web site to serve as an internal touchstone and an external reminder of our commitment to a diverse and inclusive workplace.*
- *Increasing our pool of diverse candidates by attending the Southeastern Minority Job Fair, and recruiting at law schools with large minority populations.*
- *Conducting a firm-wide survey to examine our firm culture and pinpoint areas of future committee focus.*
- *Inviting Verna Myers, a nationally recognized expert in diversity matters, to be the keynote speaker at this year's attorney retreat.*
- *Exploring and engaging in local diversity efforts of the bar, the community, and defense organizations.*
- *Serving as a clearing house and coordinator for diversity information, education and volunteer efforts.*

At CSH we understand that diversity is a long-term commitment, not a short-term goal. We strive to make our workplace one that reflects and respects the richness and depth of our community and our world. We think a variety of talent, experiences, backgrounds, and perspectives will help us serve our clients better. Please contact any of our committee members to ask questions or hear more about our efforts.

Raleigh	Charlotte	Wilmington
Trish Holland, Chair	Pat Flanagan	Ben Rose
Rob Griffin, Chair	Janelle Lyons	
Donna Rascoe	Mica Nguyen	
Meghan Knight		
Pam Dickson		

it had made vulnerable. As Honeywell took no action in response to the woman's request for assistance, the adequacy of its response was not an issue. But if the janitor had killed the woman away from the workplace after Honeywell had acted upon the woman's request for help – *e.g.* by firing him – it would have been harder to find a basis for Honeywell's liability.

The key element to liability is the employer's knowledge of the threat. Thus, in *Hoke v. Mays Dept. Store*, 133 Or. App. 410, 891 P.2d 686 (1995), the employer was held liability for negligent retention and supervision of a security guard who obtained sexual intercourse with a 15-year-old female shoplifting suspect in exchange for releasing her, because the employer was aware of prior sexual misconduct by the guard.

c. Duty of Owner or Occupier of Land to Provide Security

An owner or occupier of land has a duty to exercise reasonable care to maintain the property in a safe condition. In North Carolina, that duty is owed to all "lawful visitors," *Nelson v. Freeland*, 349 N.C. 615 (1998), and encompasses the obligation to take precautions to protect others from foreseeable violence by third parties and to warn of threats or risks. Where there has been violence on the premises previously, an employer may have a duty to protect or warn lawful visitors by all reasonable means, regardless of whether the prior violence was by employees, customers, or other lawful visitors so long as the threat still exists.

2. OSHA

Related to the common law duty of the owner/occupier, employers have a statutory duty to protect against workplace violence under the federal Occupational and Health Safety Act. Inspectors of the Occupational Safety & Health Administration will cite employers for "unsafe working conditions" on the basis of the criminal activity of other employees, and such citations carry the threat of fines and even criminal penalties for the employer.

OSHA regulations generally require covered employers to orally report incidents, including those involving workplace violence, that result in (1) the hospitalization of three or more employees, or (2) a fatality. 29 CFR 1904.8. In addition, covered employers are required to keep a log and summary of all recordable occupational injuries and illnesses sustained by their employees, including those that are the result of workplace violence when the events occur on the employer's premises. 29 CFR 1904.2. If the event occurs off the employer's premises, it is recordable if the worker had engaged in work-related activities at the site of the violence, or was present at the site as a condition of employment. *Id*.

C. POTENTIAL LIABILITY FOR EMPLOYER EFFORTS TO ADDRESS WORKPLACE VIOLENCE

As with many aspects of employer liability, there is a "damned if you do, and damned if you don't" risk to preventing or addressing employee violence. Termination of an employee on the basis of an inadequate or non-existent investigation of allegations of violence can give rise to a claim for wrongful discharge, discrimination, and similar claims. An employer's fulfillment of its duty to warn of potential threats posed by a particular employee can give rise to claims for defamation or invasion of privacy. In responding to actual or

threatened violence in the workplace, an employer must exercise caution and restraint, and recognize the most common pitfalls.

A more peculiar risk, now largely nullified, was exemplified by one case in which an employee who was discharged for bringing a gun to work and threatening another employee with it, sued under the Americans with Disabilities Act, claiming he was discharged due to a disability because his assault was due to depression. *Schutts v. Bently Nevada Corp.*, 966 F.Supp. 1549 (D.Nev. 1997). Fortunately, that claim was dismissed, and the ability of a potentially violent employee to hide behind a disability under the ADA is currently negligible. EEOC guidelines provide that an employer may exclude an individual from employment if the employer can show that the individual presents a significant risk of substantial harm to the health or safety of the individual or others, and that the risk cannot be avoided by a reasonable accommodation. The determination of whether an individual poses a direct threat is made on a case-by-case basis, but the limitation of "undue hardship" is likely to relieve employers from any accommodation obligation when a potentially violent employee is involved.

D. WORKERS' COMPENSATION

State workers' compensation acts provide the exclusive remedy for injuries sustained "in the course and scope of employment." That exclusive remedy has been applied to victims of employee violence in some states, including North Carolina. To qualify for workers' compensation, however, the violence must have come from another employee. An attack in the workplace by an angry spouse or another personal contact puts the injury outside "the course and scope of employment."

In all cases, applicability of the exclusive remedy is determined on a fact-specific basis.

E. REDUCING THE THREAT OF WORKPLACE VIOLENCE

1. IDENTIFY AND REJECT APPLICANTS WITH VIOLENT HISTORIES

Individuals with instances of workplace violence in their histories are likely to be looking for new jobs more frequently than others, and employers can and should implement measures to identify them so they can be avoided. Application questions regarding disciplinary history in prior employment, forced resignations, etc., as well as specific queries to prior employers during reference checks, can help identify applicants with a history of workplace violence.

In addition, a skillful interviewer may be able to elicit signs of problems regardless of whether the applicant acknowledges such a history on the application or in the employment interview. Such an approach must be used with caution, however. An employer who rejects an applicant on little more than a "hunch," courts a charge of discrimination.

2. ADDRESS ACTUAL AND POTENTIAL VIOLENCE BY EMPLOYEES

There are a variety of means easily available to employers to help prevent and control employee violence.

a. Adopt a Clear Policy and a Response Plan Regarding Employee Violence

Employers can and should adopt a policy clearly prohibiting actual and threatened physical violence. Such a policy should be clear on what will be considered "violence" and a "threat" of violence. It should also include a "self-defense" exception to allay employees' concerns about the scope of their right to protect themselves.

Although the preventative effect of such a policy may be doubtful, it will provide an employer with clear bases for post-incident disciplinary actions, and standards for justifying them, if need be.

In addition to a published policy prohibiting violence and threats of violence, an employer should have a response plan for responding to instances of violence. Unfortunately, this aspect of preparation is often overlooked. It is a mistake to believe that an incident of employee violence can be addressed spontaneously. Such incidents can be shocking and traumatic, such that those in a position to respond may not be doing their best thinking in the moment. Advance planning should include identification of the responses to be undertaken, describe the roles of those will be responsible for each, identify the circumstances and limits of apprehension or restraint, etc. The existence of an internal supervisory policy can itself go a long way toward defeating a claim of employer negligence in the wake of injuries to employees or third parties.

b. Train Supervisors to Recognize the Potential for Violence

Supervisor training offers real potential for the prevention of workplace violence. Discussions of warning signs of workplace violence, as well as information for more formal training, are both readily available online. Training of those responsible for taking actions under the employer's internal response plan is essential. Of course, effective supervision begins with a steady awareness of the status of relationships among employees supervised. A decision to counsel or warn should proceed only upon internal reporting and a response approved by management, if not legal counsel.

An essential element of both supervisor training and of the organization's procedures for responding is documentation regarding both the identification of potential issues and responses thereto. As workplace violence is not completely preventable, a record of supervisory awareness and reasonable attempts to prevent problems provide the essential foundation for avoiding or defending against claims of negligence.

c. Provide Security in Appropriate Cases

The use of temporary security personnel should be considered in certain cases. Threats of violence by employees should be addressed

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far in advance of the point at which security personnel are necessary, but domestic violence can spill into the workplace. Employers have fewer options for addressing threats of violence to employees by spouses or romantic/domestic partners, but the employment of temporary security personnel is often the most effective one available. Valued employees do not always make wise personal choices, and, far from being an "intrusion" into a personal matter, the use of temporary security personnel is actually a means by which the employer can protect the workplace and other employees from the distraction and potential disruption of such a threat.

3. THE NORTH CAROLINA WORKPLACE VIOLENCE PREVENTION ACT

North Carolina, New York, New Jersey, Illinois, and a few other states have adopted statutes that afford employers the ability to obtain protective orders against third parties who threaten or harass their employees. *See, e.g.*, N.C. Gen. Stat. § 95-260 *et seq*. An employer may thereby seek to protect its workplace by obtaining a "civil no-contact" order from a court, similar to restraining orders available in cases of domestic violence. No-contact orders are available to prohibit a third party from having any contact with the employer's employee in the workplace when such third party has threatened or attempted bodily injury to an employee or stalked an employee. The parties against whom such orders are issued may be directed cease, or refrain from, engaging in a variety of actions and contacts that are threatening or harassing to the protected employee. A third party who violates a no-contact order is subject to fine or imprisonment for contempt.

An employer may obtain a temporary no-contact order for up to ten days on an *ex parte* basis without notice to the third party. A "permanent" no-contact order can be effective for up to one year from the time of issuance. The employer must first consult with the threatened employee, however, who may refuse to participate, and may not be penalized by the employer for such refusal.

Although an order issued under the North Carolina Workplace Violence Prevention Act may not be as effective as a preventative measure as the use of security personnel, in appropriate cases it offers an additional tool by which employers may reduce the threat of distraction and disruption in their workplaces.

F. CONCLUSION

The direct potential effects of workplace violence upon an employer range from distraction and disruption to the shutdown of all operations in extreme cases. Secondary impacts include potentially serious liability to victims or their families. Such risks can be substantially reduced by relatively simple and inexpensive measure. Contact qualified employment counsel for guidance and review of your program. ◆

Insurance Law

INSURANCE COVERAGE FOR GENERAL CONTRACTORS FOR SUBCONTRACTORS' DEFECTIVE WORK

By Susan K. Burkhart (RAL), Insurance Law Practice Group

North Carolina courts have long held that defective workmanship does not constitute "property damage" within the meaning of a liability insurance policy. *Production Systems, Inc. v. Amerisure Ins. Co, et al.*, 167 N.C. App. 601, 605 S.E.2d 663 (2004). However, in a new case from our federal appellate court, *Breezewood of Wilmington Condominiums Homeowners' Assn., Inc. v. Amerisure*, 2009 WL 1877465 (4th Cir. July 1, 2009) (unpublished), the Fourth Circuit Court of Appeals revisits this rule in a suit against a **general contractor** for the **defective work of subcontractors**. In order to understand *Breezewood*, it is necessary to "track" the history of *Production Systems*.

In *Production Systems*, the insured had been hired to design, construct, and install foam rubber sheet line systems at the claimant's rubber manufacturing plant. The rubber manufacturer experienced problems with the lines almost immediately after they began operating. Investigation revealed that components of conveyor belts were misaligned and did not track properly. As a result, the oven feed line systems did not operate properly, the defective conveyor belt assemblies caused damage to other parts of the oven line systems, and the rubber manufacturer had to shut down the line systems repeatedly until repairs were made. After the rubber manufacturer withheld payment of the contract price, the insured sued for contractual sums owed and the rubber manufacturer counterclaimed for damages for the cost of repairing the two line systems and for loss of use of the line systems. After insurers refused to defend and indemnify the insured on the counterclaim, the insured filed a declaratory judgment action.

In addressing these issues, the court noted that it was undisputed that the insured "acting alone or through its subcontractor, failed to properly install certain components of the conveyor belts that were a part of the completed line systems." 167 N.C. App. at 606, 605 S.E.2d at 666. The court further noted that the insured contended that "the mistracking of the conveyor belts and damage to other parts of the oven feed line systems, caused by the negligence of subcontractors, constituted "property damage" arising from an "occurrence." *Id*. The court disagreed, stating:

> The term "property damage" in an insurance policy has been interpreted to mean damage to property that was **previously undamaged**, and **not** the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance. *Hobson*, 71 N.C. App. 586, 322 S.E.2d 632.

Id. (Emphasis in Original). The court then discussed *Hobson Construction Co., Inc. v. Great American Ins. Co.*, 71 N.C. App. 586,

590, 322 S.E.2d 632, 625 (1984) and *Wm. C. Vick Constr. Co. v. Pennsylvania Nat. Mut.*, 52 F. Supp. 2d 569, 582 (E.D.N.C. 1999). With respect to Hobson, the court stated: "Hobson indicates that damages based solely on shoddy workmanship (i.e., damages seeking repair costs and/or completion costs) are not 'property damage' within the meaning of a standard form CGL policy."). *Id.* The court concluded, in *Productions Systems*, that both the repair costs and lost profits resulting from the defective work were not covered under the CGL policy.

Production Systems arguably indicates that insurers for general contractors have no duty to defend or indemnify claims for *any* defective work performed by subcontractors. However, the simmering question, post-Production Systems, is whether insurers nevertheless owe coverage for general contractors where the *defective work* of one subcontractor causes damage to the *non-defective work* of *another* subcontractor. Although the *Productions Systems* court implicitly held that no such coverage exists, it declined to expressly address the exception in the "work exclusion" in the CGL policy that exempts from the exclusion the "work of subcontractors," arguably a carve-back of coverage for subcontractors' work.

In *Breezewood*, the Fourth Circuit tackled that issue. In *Breezewood*, the court considered whether coverage existed for a general contractor for damages for the cost to repair and replace defects in a condominium development in Wilmington. The court held that there was no coverage because there was no "property damage" under North Carolina law, citing *Production Systems*. The court stated:

> North Carolina state courts and federal courts sitting in diversity have consistently held that "property damage" in the context of commercial general liability insurance policies means "damage to property that was previously undamaged" and does not include "the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance" by the insured. [citations omitted]. The rationale underlying this view is that "the quality of the insured's work is a 'business risk' which is solely within his own control," and that "liability insurance generally does not provide coverage for claims arising out of the failure of the insured's work or product to meet the quality or specifications for which the insured may be liable as a matter of contract." . . . Rather, such business risks are the purpose of performance bonds, not liability insurance policies. [citations omitted].

Id. at p. 4. The Fourth Circuit then discussed *Travelers Ind. Co. v. Miller Building Corp.*, 97 F. Appx. 431, 2004 WL 1118620 (4th Cir. May 20, 2004) (unpublished) (finding coverage for a general contractor *only* for the cost to repair or replace owner-provided carpet, and not for the cost to repair or replace defective construction).

The Fourth Circuit, in *Miller Building Corp.*, did <u>not</u> distinguish between defective work of one subcontractor and nondefective work

of another subcontractor. Nevertheless, the same court, in *Breezewood*, went on, in dicta, to discuss this distinction and the effect of the subcontractor exception in the work exclusion.

The CGL policy, in Exclusion l, the "work exclusion," provides that there is no coverage for:

> ***1. Damage to Your Work***
>
> ***"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."***
>
> ***This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.***

For years, insureds, agents and producers have argued that coverage exists for the general contractor under the subcontractor exception, above, in the second sentence of the work exclusion, when a subcontractor performed the defective work. In *Breezewood*, the court attempted to reconcile Production Systems with the subcontractor exception.

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In *Breezewood*, the court acknowledged that in its previous decision, *French v. Assurance Co. of America*, 448 F.3d 693 (4th Cir. 2006), decided under Maryland law, the court held that the subcontractor exception required coverage for the general contractor for the costs of repairing or replacing damage caused by a subcontractor's faulty work, but not the cost to repair or replace the *faulty subcontractor's work*. Similarly, in *Stanley Martin Co., Inc. v. Ohio Cas. Group*, 2009 WL 367589 (4th Cir. Feb. 12, 2009) (unpublished), the Fourth Circuit, construing Virginia law, also rejected the result in *Miller Bldg.*, noting that "the Miller court did not base such a determination of an analysis of the 'your work' exception." 313 F. Appx. 609, 614, 2009 WL 367589 at *4, n. 3. In *Stanley Martin*, the Fourth Circuit held that coverage existed for a general contractor for mold remediation when damage from a subcontractor's defective work caused damage to another subcontractor's *nondefective* work.

Breezewood and *Stanley Martin* suggest that our state courts could retreat from a strict reading of *Production Systems*. Conversely, our state courts could adhere to *Production Systems*, in the future, reasoning that with respect to the work of a general contractor, the entire project or building is the "work" of the **general contractor**, including the work of subcontractors. This is because the CGL policy definition of "your work" includes work or operations performed "on your behalf," (*i.e.* by subcontractors). Thus, if one subcontractor's work is defective, then the general contractor failed to properly construct the "property to begin with."

Significantly, in the briefs and record in *Production Systems*, **the parties argued that the subcontractor exception in the work exclusion created ambiguity; however, the Court of Appeals apparently disagreed.** In its opinion, the court omits any mention of the work exclusion or the subcontractor exception thereto and focuses solely on the "property damage" requirement in the insuring agreement. Of course, if an insured fails to satisfy the "property damage" requirement in the insuring agreement, the court need not address any exclusion, such as the work exclusion or the subcontractor exception contained therein.

Nevertheless, in light of *Breezewood* and *Stanley Martin*, and the Fourth Circuit's apparent retreat from *Vick* and *Miller Bldg.*, our state courts could conclude, in the future, that the subcontractor exception creates ambiguity. If our courts reach that conclusion they would likely adopt the rationale of *Breezewood*, and hold that coverage exists for a general contractor for damage caused by one subcontractor's defective work to another subcontractor's *nondefective work*. Even under this rule, no coverage exists for any subcontractor's work that is alleged to have been defective from the outset.

Significantly, there is no logical way to reconcile the result in *Breezewood* with the fact that an entire project or building is the "work" of a general contractor, and that CGL policies are not intended to serve as "performance bonds" for an insured's defective work. Our courts have long adhered to the principle that CGL policies are not intended to serve as performance bonds for defective work. In *Barbee v. Harford Mut. Ins. Co.*, 330 N.C. 100, 103, 408 S.E.2d 840, 842 (1991), the court stated:

> Since the quality of the insured's work is a 'business risk' which is solely within his own control, liability insurance generally does not provide coverage for claims arising out of the failure of the insured's product or work to meet the quality or specifications for which the insured may be liable as a matter of contract. . . The cases interpreting this kind of exclusion recognize, as we do, that *liability insurance policies are not intended to be performance bonds*.

(Emphasis in Original). *In accord, W. World Ins. Co. v. Carrington*, 90 N.C. App. 520, 524-25, 369 S.E.2d 128, 130-31 (1998).

Of course, insurers always have a duty to defend/indemnify when damage to third-party property is alleged, such as damage to homeowners' personal property as in *Miller Bldg.* In particular, where **water intrusion** or **mold** is alleged, there is almost always some resultant damage to homeowners' personal property.

Significantly, insurers have a duty to undertake a **reasonable investigation** prior to declining a defense if the allegations of the complaint do not clearly exclude coverage. *See, Waste Management of Carolinas, Inc. v. Peerless*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986) ("Where the insurer knows or could reasonably

ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage.") As a result, insurers should rarely decline a defense where water intrusion or mold is at issue, unless a specific exclusion otherwise bars coverage (such as a mold exclusion). In virtually every such case, a homeowner will have some item of personal property (coffee table, drapes, etc.) damaged by moisture intrusion or mold.

In light of *Breezewood*, and until our state courts expressly address the subcontractor exception in the work exclusion, I recommend that insurers defend general contractors under a reservation of rights in cases where:

(1) there were multiple subcontractors and one subcontractor's defective work damaged the *nondefective* work of another subcontractor; or

(2) the general contractor or its subcontractors damaged the personal property or real property of the owner or another third-party; and

(3) there is no endorsement such as the endorsement found in policies issued by Builder's Mutual Insurance Company, which eliminates the work exclusion and replaces it with an endorsement clearly excluding coverage for work of subcontractors. In that event, there is no "ambiguity" with the subcontractor exception.

Of course, in the exceptional case, in my opinion, insurers can deny a defense and indemnity to the general contractor when:

(1) the general contractor hired only one subcontractor and the only claimed damages are solely for the cost to repair or replace that subcontractor's defective work; or

(2) the general contractor hired multiple subcontractors and the only claimed damages are for the cost to repair or replace defective work of all such subcontractors; and

(3) for both (1) and (2), above, **the insurer conducts a reasonable investigation and conclusively determines that there is no evidence or allegation of resultant damage to nondefective work or owner property.**

In my experience, the circumstances listed immediately above rarely occur. Moreover, in virtually every case, the insured will attempt to create an issue of fact as to whether the insurer conducted a "reasonable investigation" into the existence of resultant damage. To avoid additional litigation on the adequacy of the insurer's pre-denial investigation, and when in doubt, insurers should proceed cautiously and defend general contractors under a reservation of rights in defective work cases. ◆

PEOPLE GET READY, THERE'S A TRAIN COMING: MEDICARE MANDATORY INSURER REPORTING REQUIREMENTS

By J. Gregory Newton (RAL) Insurance Law Practice Group

I. INTRODUCTION

In December 2007, Congress passed the Medicare, Medicaid and SCHIP Extension Act ("MMSEA"), and Section 111 of this Act, commonly referred to as the Medicare Mandatory Insurer Reporting Requirements ("MMIRR"), requires insurers of and self-insureds for liability and workers' compensation claims to electronically report certain information to the Centers for Medicare and Medicaid Services ("CMS") concerning Medicare beneficiaries. CMS is responsible for the administration of the Medicare program, which includes ensuring compliance with the Medicare Secondary Payor statute ("MSP"), and the MMIRR was crafted with the specific goal of ensuring compliance with the MSP.

Essentially, the MMIRR will enable CMS to ensure that Medicare remains a secondary payor and is quickly and properly reimbursed for any conditional payments Medicare has made for medical treatment that should have been paid by a primary payor. Any entity covered by the MMIRR, known as Responsible Reporting Entities ("RREs"), that fails to comply with its reporting requirements is subject to a civil penalty of $1,000 per day, per claimant. (It should also be noted that pursuant to the MSP statute, CMS is entitled to double damages if it has to file suit to collect its conditional payment lien.) These severe penalties are the "teeth" in the MIRR which will allow CMS to better and more effectively enforce the MSP. Although RREs will be allowed to use agents to during the reporting process, the RRE remains solely liable for compliance with the reporting requirements under the MMIRR and the accuracy of the data submitted.

Although it has taken CMS sometime to implement the MMIRR since its passage in 2007, it has made quite a bit of progress in the past year. Much like a runaway train gaining speed by the second, the effective date for the MMIRR is quickly approaching. As such, insurers and self-insureds need to be intimately familiar with its provisions and requirements and ensure that they have the systems and resources in place to get on board the MMIRR train.

II. IMPLEMENTATION SCHEDULE

The implementation of MMIRR began on May 1, 2009, when registration opened on the CMS website. RREs must register with CMS by September 30, 2009. Beginning on January 1, 2010 and continuing through March 31, 2010, registered RREs can make test submissions as a trial of the submissions process. RREs are required to pass the testing process prior to submission of "live" production files. RREs must begin live reporting submissions during the second quarter of 2010 and report on a quarterly basis thereafter. CMS has made it clear that it expects RREs to comply

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with these timeframes and that neither extensions nor exceptions will likely be granted.

III. REGISTRATION AND TESTING PROCESS

Before RREs can being reporting the necessary claim information to CMS, they must first register with CMS and test the data submission process. The RRE must register with CMS its website as both registration and reporting under the MMIRR will be entirely electronic. RREs, themselves, must complete the registration process even it uses third-party administrators ("TPAs") for claims administration or intends to use another agent for reporting purposes. <u>Neither TPAs nor any other reporting agents will be allowed to register on behalf of RREs</u>.

RREs are required to register with CMS and complete testing of their data submission process before submitting live productions files. RREs may continue testing until they must first submit live production files. Following registration and testing, RREs will be assigned an RRE ID and a quarterly submission timeframe (a 7 day period) during which they must submit their production files. CMS will only accept submissions from RREs during their assigned quarterly timeframes.

Prior to registration, RREs with multiple lines of business or subsidiaries must decide how they will handle reporting with respect to those lines of business and subsidiaries. As noted above, RREs will be assigned an RRE ID upon completion of registration and testing. RREs may register separately for different lines of business and/or subsidiaries, including identifying a separate reporting agent for each line of business and/or subsidiary. However, neither RREs nor their agents may mix data of the different lines of business and/or subsidiaries if registered separately.

IV. REPORTING PROCESS AND REQUIREMENTS

All claims involving Medicare beneficiaries where a settlement, judgment, award or other payment is made on or after January 1, 2010, as well as all such claims where there was ongoing responsibility for medical expenses as of July 1, 2009, must be reported in the initial file submission to CMS. Subsequent quarterly submissions will allow RREs to update existing claims, including changes in information and the termination of ongoing responsibility for medical expenses, and report new claims that must be reported for one reason or another. RREs are encouraged to review CMS' User Guide 2.0 for a full outline and explanation of the information and data required to be reported as part of an initial file submission as well as any subsequent quarterly updates. The User Guide 2.0 can be viewed at https://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPUserGuide2ndRev082009.pdf.

There are three basic steps in complying with reporting requirements of the MMIRR. The first of these is to determine whether the claimant is a Medicare beneficiary. RREs are to report only with respect to Medicare beneficiaries. However, the MSP statute and the MMIRR place the responsibility for determining whether a claimant is a Medicare beneficiary solely on RREs. A signed interrogatory or affidavit from a claimant, or a letter from a claimant's counsel, will not relieve RREs of this obligation or potential liability. Although interrogatories, requests for production of documents, requests for admissions, correspondence to plaintiff's counsel or a review of medical records may provide guidance regarding whether a claimant is Medicare eligible, the safest, most reliable way to determine a claimant's Medicare eligibility was to communicate with CMS directly. Up until very recently, however, the only way to do so was through the use of a consent form, which was a time consuming process.

In order to expedite this determination, CMS has made an electronic query program available since July 1, 2009 to aid RREs in making this determination. However, RREs can only use the query function once they have completed the registration process and then only once per month per claim. Moreover, the query system requires certain information (claimant's name, SSN, DOB and gender), the obtaining of which can, itself, be a time consuming process. Accordingly, RREs will need to develop and implement systems to gather the necessary information as quickly as possible and to keep track of claimants whose eligibility status needs to be determined or updated.

The second step in complying with the reporting requirements is to determine whether the claim needs to be reported, and specifically whether either of two triggering events has occurred. These triggering events are commonly referred to as Total Payment Obligation to Claimant ("TPOC") and Ongoing Responsibility for Medicals ("ORM"), and a complete understanding of them is critical for compliance with the MMIRR.

TPOC refers to a settlement, judgment, award or other payment to a claimant, but it does not include periodic payments of indemnity benefits in workers' compensation claims such as payment of weekly temporary total disability benefits. Claims involving a TPOC (i.e. settlement, judgment, award or other payment) on or after January 1, 2010 must be reported to CMS. Generally speaking, TPOC is the only event that will ever be reported to CMS in liability claims since most are denied or disputed and no money is paid at all until the time of full and final settlement. This may not necessarily be the case with workers' compensation claims since some of those are accepted or responsibility for medicals otherwise assumed. However, it should be noted that the fact that a claim is disputed or denied has no bearing whatsoever on responsibility to report. If a claimant is Medicare beneficiary and money is paid to the claimant, the claim must be reported, even if it was disputed in its entirety.

ORM obviously refers to the ongoing responsibility for medical expenses and is most common in workers' compensation claims. However, ORM refers to medical expenses for actual treatment and does not include a one-time payment to a physician or other medical provider for a defense evaluation. Claims where ORM has been assumed and continues as of July 1, 2009 or later must be reported to CMS with one main exception. If ORM was assumed

prior to July 1, 2009, it is not required to be reported if the claim is actively closed or removed from the RRE's current claims system prior to January 1, 2009. If such a claim is later subject to reopening with further ORM, it must then be reported. If a claimant is not a Medicare beneficiary when ORM is assumed, the RRE must monitor the status of the claimant and report when the claimant becomes a Medicare beneficiary, unless ORM has terminated before the claimant becomes a Medicare beneficiary.

If an RRE has assumed and continues ORM on a claim as of July 1, 2009 or later, as is the case with many workers' compensation claims, then the RRE must report two events—an initial submission record to reflect the assumption of that ongoing responsibility and a second submission record to reflect the end or termination of that responsibility whether it be by operation of law (*e.g.* running of medical statute of limitations), settlement (*e.g.* clincher) or otherwise (*e.g.* treating physician's statement that no additional medical treatment will be required). Because reporting is done on a quarterly basis, there may be some situations in which RREs report the assumption of ORM and the termination of ORM in the same submission record. During the claims handling process in ORM cases, quarterly reporting will also need to be done if the information to be reported to CMS regarding the claim has changed.

CMS has also established interim reporting thresholds which set a *de minimis* dollar threshold for reporting purposes. Subject to certain exceptions, TPOC for both liability and workers' compensation claims incurred during the period from January 1, 2010 through December 31, 2011, up to the amount of $5,000, do not need to be reported. This threshold is lowered to $2,000 from January 1, 2012 through December 31, 2012, and is lowered again to $600 from January 1, 2013 through December 31, 2013. There are no such TPOC thresholds as of January 1, 2014. For ORM *in workers' compensation claims only*, the claim does not need to be reported if it is a "medicals only" claim where there is no "lost time" beyond the seven day waiting period and medical payments do not exceed $750. CMS has noted that these are "interim" thresholds and it reserves the right to change these thresholds at any time.

The third and final step in complying with the MMIRR is to determine who the RRE is for a claim. In most claims, the answer will be obvious—either the insurer or self-insured making payment on the claim, but the answer may not be so obvious in cases involving TPAs, substantial deductibles or retentions. CMS has made it clear that TPAs are never considered RREs for MMIRR purposes. Although a TPA can be a reporting agent for the RRE, the RRE, itself, has ultimately responsibility under the MMIRR. CMS has also indicated that deductibles and retentions are viewed as self-insurance, suggesting that the insured would be the RRE to the extent of the deductible or retention. However, CMS has indicated that if the insurer makes the initial payment and is then subsequently reimbursed by the insured for the deductible or retention, the insurer is considered the RRE.

V. CONCLUSION

Undoubtedly, the MMIRR imposes numerous obligations and costs on, not to mention additional potential liability, with respect to insurers of and self-insureds for both liability and workers' compensation claims. However, with a working knowledge of the MMIRR and implementation of certain key systems and resources, insurers and self-insureds should be able to comply with its requirements as effectively and efficiently as possible. As noted above, the MMIRR train is quickly approaching, and unfortunately, the options are either to get on board with it or get run over by it. Accordingly, insurers and self-insureds want to make sure they are prepared to get on board with the MMIRR when it does arrive. ◆

Land Condemnation

Cranfill Sumner & Hartzog's Land Condemnation Group represents property owners who are having their land taken from them by governmental authorities. The group consists of George Autry, Stephanie Autry, and Brady Wells, and they recently have had several favorable recoveries for their clients:

At trial in Richmond County, we represented an 80-year old church whose heart-pine and wainscoting sanctuary was being taken due to the widening of U.S. Highway 1 in Rockingham. The entire church was lost, and a replacement church was built further back on the property. Disputed issues included the depreciated value of the original church and replacement costs. NCDOT's first offer was $127,600, and a jury returned a verdict of $636,403 (with interest). NCDOT appealed the verdict but lost that fight as well. ***NCDOT v. Marston Baptist Church***

Onslow County Water and Sewer Authority (ONWASA) needed our client's 157-acre farm for the construction of a new wastewater collection and disposal system. ONWASA's first offer was $820,125 and was based upon the land's highest and best use being agricultural. We argued that the land's highest and best use was for residential development, and we convinced ONWASA to pay $2.04 million. ***ONWASA v. Hood***

We recently had a jury trial in Brunswick County, where NCDOT took only .02 acres but severely limited access to our clients' prime commercial site. Although NCDOT's first offer was only $10,400, we convinced a jury to return a verdict of $707,497 (includes interest) for the damage done to the property. ***NCDOT v. SJL Properties***

Across the intersection from this property in Brunswick County is another commercial site we represented. NCDOT offered $783,968 to its owners, and they rejected it and hired us. A day before trial, NCDOT agreed to pay $1.36 million to settle the claim. ***NCDOT v. Street, et al***

We represented a popular car wash in Burlington, where NCDOT is widening Mebane Street. Although the car wash buildings were not being taken outright, both sides agreed that too much land was being taken to make the car wash work in the future. NCDOT initially offered $880,000. The parties went to mediation, and we reached a settlement of $1.325 million. ***NCDOT v. Walker***

Civic/Professional Notes

PATRICIA HOLLAND (RAL) has been appointed to serve on the North Carolina Chief Justice's Commission on Professionalism. Established in 1998 by order of the North Carolina State Supreme Court, the Commission's primary charge is to enhance professionalism among North Carolina's lawyers.

PATRICIA HOLLAND (RAL) was a member of the faculty at the 32nd Annual Employment Law Seminar of the Defense Research Institute (DRI) held in Orlando, Florida, and presented a program entitled "Going to Court to Enforce Your Restrictive Covenants."

PATRICIA HOLLAND (RAL) participated as a speaker at The Harmonie Group Employment Conference held in New Orleans, Louisiana, and spoke on the topic of "Love is in the Air – Dealing With Workplace Romance When Cupid's Arrow Strikes."

PATRICIA HOLLAND (RAL) presented a program entitled "Using the Internet to Investigate Job Candidates: Useful Tool or Legal Nightmare?" to the North Carolina Chapters of the Construction Financial Management Association Conference in Greensboro, North Carolina.

PATRICIA HOLLAND (RAL) participated as a speaker at the Centennial Conference of the North Carolina League of Municipalities in Charlotte, North Carolina, at which she presented a program entitled "Hear No Evil, See No Evil, Speak No Evil: Don't Throw a Monkey Wrench Into Your Political Career!" to an audience of elected municipal officials.

JENNIFER ADDLETON WELCH (RAL) is currently serving as co-chair of the food drive committee for the Young Lawyers Division of the Wake County Bar Association.

M. ROBIN DAVIS (RAL) and **ALLISON SERAFIN (RAL)** co-authored an article in North Carolina Business Magazine entitled "Tinkerbell's Tryst" which addressed social networking sites and the employer - employee relationship. May, 2009.

ALLISON SERAFIN (RAL) authored "The Effect of the ADA Amendment on the 'Regarded As' Analysis." DRI Government Liability Newsletter Volume I Issue 5, July 30, 2009.

M. ROBIN DAVIS (RAL) and **ALLISON SERAFIN (RAL)** recently spoke at the Equal Employment Opportunity Commission's Technical Assistance Program focusing on employer compliance with the federal anti-discrimination laws.

GREER VANDERBERRY (RAL) and **ASHLEY K. BRATHWAITE (RAL)** participated in the Muscular Dystrophy Association's Executive "Lock-Up" in August and raised over $2,000 for muscular dystrophy research.

ASHLEY K. BRATHWAITE (RAL) was recently appointed to the Health Law Section Council of the North Carolina Bar Association and will serve a three-year term as Co-editor of Prognosis, the newsletter of Health Law Section of North Carolina Bar Association and North Carolina Society of Healthcare Attorneys.

NICK VALAORAS (CHAR) and **MICA NGUYEN (CHAR)** spoke at the annual Carolina Case Management Educational Seminar in Charlotte on September 17, 2009. They gave a presentation on Workers' Compensation Case Law Updates for adjusters and nurse case managers.

NICK VALAORAS (CHAR) and **MICA NGUYEN (CHAR)** recently participated in the "Lunch with a Lawyer" program with Charlotte-Mecklenburg Schools. The program allows eighth-grade students who have expressed interest in the legal profession to gain insight and perspective by interacting with a lawyer from their local community. The students were specifically nominated by the principal or guidance counselor in each participating middle school. The program has been described as a "pipeline program" to assist students, who might not otherwise have had the resources and/or encouragement to achieve their goal of being a lawyer.

BILL POLLOCK (RAL) is serving as a member of the Board of Directors of the North Carolina Association of Defense Attorneys.

RICHARD BOYETTE (RAL) was recently elected president of the National Foundation for Judicial Excellence (NFJE). The NFJE is a 501(c)(3) charitable organization based in Chicago, dedicated to supporting an independent, well-informed judiciary in order to preserve excellence and fairness in the civil justice system. For each of the past five years, the NFJE has produced a first-rate annual symposium attracting 10% of state appellate judges. The symposia have featured an array of nationally distinguished legal experts and scholars discussing contemporary and complex legal issues relevant today in courtrooms across the country. The end result is a top-quality, tuition-free series of educational programs provided by the NFJE which assist our nation's appellate judges to perform at their highest levels.

THE NFJE was founded by DRI - The Voice of the Defense Bar, in 2004 during **MR. BOYETTE'S** term as president of DRI. It is the only organization of its type run by the defense bar.

AMANDA SIFFORD SMILEY (CHAR) began serving as the Chairman of the Mecklenburg County Bar Association's Young Lawyers Section, Community Service Committee earlier this year. She organized a clothing drive benefiting the Crisis Assistance Ministry in Charlotte this past Spring.

Recent Case Results

Pro Bono Case:

BILL POLLOCK (RAL) and **CHIP CAMPBELL (RAL)** successfully represented an elderly couple, in a fraudulent home renovation case.

In June of 2006, the clients hired a contractor to renovate their 1,100 square foot home in Wake Forest, NC. The primary purpose of the renovation was to make the house handicap accessible after the client husband had become wheel-chair bound due in large part to complications from a stroke. The defendant gave our client wife, who was legally blind, a contract indicating that the sum total of the work would be $78,345 and that it would be completed no later than Fall of 2006.

After several months, the defendant stopped work at the house on a regular basis despite the lack of progress on the home. By May of 2007, the client wife had written at least 61 checks to the defendant totaling over $125,000. The checks she wrote were actually personal loans to the defendant, not for work done. However, when the contractor would ask her for just a personal loan, she would give him that money as well.

MR. POLLOCK and **MR. CAMPBELL** were retained pro bono in June of 2007. At that time, the once functional home was left in shambles by the defendant. There were exposed wires, large holes in the roof and floor and unfinished work all over the house. The house was nowhere near completion in June of 2007 and, in fact, had a lower value than when the defendant started work on the house.

When **MR. CAMPBELL** attempted to contact the defendant, he fled and never returned to the clients' home. Lynda Melton, a paralegal at CSH, contacted the North Carolina Attorney General's office to ask it to investigate the suspected fraud.

It was learned through CSH and the Attorney General office's investigation that the defendant charged around $20,000 to the clients' credit cards for supplies that were never delivered to the job site and that the defendant actually pawned. It was also learned that the defendant misrepresented himself as a general contractor when, in fact, he was not a licensed contractor and could never obtain the necessary permits. The defendant also admitted that he smoked on average about $200 to $300 worth of crack cocaine a day when he was working at the clients' home.

Both the Attorney General's office and CSH filed lawsuits against the defendant. Injunctions were obtained which barred the defendant from ever again engaging in a home remodeling project in North Carolina. Additionally, an order was entered that required any proceeds from the sale of his house to go to the court to potentially reimburse the clients.

The Attorney General's office and CSH contacted the local media, including WRAL and the News & Observer, to encourage donations and volunteers to assist with repairing and renovating the clients' home. The outpouring of volunteers was overwhelming and after approximately $90,000 in donated materials and labor, the clients' home was completely renovated and made handicap accessible at no additional cost to the clients.

The defendant was criminally prosecuted for multiple crimes and was sentenced to several months in jail and was ordered to pay over $124,000 in restitution.

In the clients' civil action that was filed by CSH, an insurance company made an appearance on behalf of the defendant under a full reservation of rights. The insurance company filed a separate declaratory judgment action asserting that there was no coverage for the defendant under the CGL policy for the defendant's actions. CSH was permitted to intervene in the declaratory judgment action to protect the clients' interest. CSH was able to obtain a settlement from the insurance company so that the clients could pay off the credit card debt that the defendant left them with while preserving the clients' ability to pursue a civil judgment against the defendant.

For video, photos and links to various news stories on this case see: http://www.wral.com/5onyourside/story/4100028/

ROBIN TERRY (RAL) prevailed in a claim wherein Plaintiff sought a computerized prosthetic leg replacement. Plaintiff had lost his left leg 24 years before. In 2008, Plaintiff sustained a compensable low back injury and claimed physiologic changes from the low back injury caused Plaintiff to need a new computerized prosthetic leg. Defendants provided a replacement socket but argued that Plaintiff was not entitled to replacement of the entire prosthetic since Plaintiff had previously been compensated for the leg, had been prescribed a replacement prior to his low back injury and had the means to purchase same without contribution by the workers' compensation carrier.

In a permanent and total claim wherein Plaintiff was seeking 24 hour attendant care services to be provided by Plaintiff's family members, **ROBIN TERRY (RAL)** succeeded in limiting attendant care being provided to Plaintiff to 18 hours per day and prevailed in obtaining from the Industrial Commission and the Court of Appeals a continuation of Defendants' right to provide said care using professional caregivers as opposed to family members. Plaintiff and his family members subsequently declined to allow professionals to provide the care recommended and additional litigation appealed through the Full Commission again confirmed Defendants' right to provide care through professional caregivers and found the family's refusal to allow professional caregivers into the home to be unjustified barring family members from receiving approximately one year of caregiver fees. The Full Commission ordered the family to cooperate with Defendants' attempts to place professional caregivers into the home.

RYAN BOLICK (CHAR) obtained Summary Judgment for a corporate sponsor of an event after which a sheriff's deputy who had been hired to provide security for the event caused an automobile accident. The Court held that the sheriff's deputy had completed his duties at the time of the accident, and was not an agent of the corporate sponsor.

RYAN BOLICK (CHAR) successfully appealed a denial of a Motion for Summary Judgment on behalf of a teacher based upon the doctrine of sovereign immunity. The trial court denied the defendant Teacher's Motion for Summary Judgment holding that she had been sued in her individual capacity. On appeal, the Court of Appeals reversed this finding and held that sovereign immunity applied to the teacher as she was not sued in her individual capacity.

PATRICK FLANAGAN (CHAR) and **BRAD KLINE (CHAR)** obtained a per curiam decision from the Fourth Circuit Court of Appeals affirming the Western District of North Carolina Federal Court's granting of Summary Judgment to a defendant municipality and police officer. Plaintiff alleged that he was subjected to an unreasonable search and seizure and was deprived of his substantive and procedural due process rights, all in violation of the Fourteenth Amendment of the United States Constitution. The complaint arose out of a traffic stop of a vehicle owned by the plaintiff and the subsequent search of the vehicle and arrest of the plaintiff for possession of a controlled substance. The case was dismissed with prejudice after the defense successfully argued that probable cause existed for the arrest and that the plaintiff failed to meet the standard

Recent Case Results

for federal constitutional claims against municipalities set by *Monell v. Department of Social Servs., 436 U.S. 658 (1978)*. Oral arguments were held before the Fourth Circuit, and the Court issued an Order in which it held that Plaintiff had failed to meet the standard required by *Monell*, and the decision of the lower court granting Summary Judgment had, therefore, been proper.

BRAD KLINE (CHAR) obtained a "no-cause" finding from the NC Department of Labor regarding a Retaliatory Employment Discrimination Act claim brought by a former employee who claimed he was terminated because he had filed a worker's compensation claim.

JENNIFER ADDLETON WELCH (RAL) tried a motor vehicle negligence case in Pitt County Superior Court in March, 2009 and received a no negligence verdict.

CHIP CAMPBELL (RAL) recently obtained a favorable defense award in an Uninsured Motorist (UM) binding arbitration. The two plaintiffs claimed significant injuries, but the arbitration award was less than 1/2 the amount that was offered by the defendant carrier prior to the arbitration.

ALLISON SERAFIN (RAL) succeeded in obtaining a "No Cause" determination in a recent case where a housing authority employee who was discharged raised claims of age and disability discrimination.

ALLISON SERAFIN (RAL) and **M. ROBIN DAVIS (RAL)** successfully obtained three "No Cause" determinations on Charges of Discrimination made by the same employee who was discharged and raised claims of discrimination based on: religion, disability and retaliation.

ALLISON SERAFIN (RAL) and **PATRICIA HOLLAND (RAL)** recently obtained a "No Cause" determination where an employee who was discharged thereafter alleged race discrimination and retaliation. The employer established the employee was previously suspended that year and received written warning that further misconduct would result in termination of employment.

ALLISON SERAFIN (RAL) and **M. ROBIN DAVIS (RAL)** successfully obtained a "No Cause" determination where a municipal employee was discharged for poor work performance and thereafter raised a claim of race discrimination. The employer established other employees outside of the protected class were not treated more favorably than the charging party.

ALLISON SERAFIN (RAL) and **M. ROBIN DAVIS (RAL)** successfully obtained a "No Cause" determination in a matter in which a temporary part time municipal employee's project concluded and the employee thereafter alleged a claim of discrimination based on the "regarded as" prong of the statute. The employer established that the employee's assignment merely concluded and the employee was not treated differently than other similarly situated employees.

ANN SMITH (RAL) and **ALLISON SERAFIN (RAL)** recently obtained Summary Judgment in the Eastern District of North Carolina in favor of a municipality which had been sued by a former employee alleging discrimination on the basis of his race. Specifically, the African-American employee claimed that he was disciplined more severely than his white counter-parts. The Court granted Summary Judgment, finding that the employee had failed to exhaust his administrative remedies as to his discriminatory discipline claim and ruled that the employee failed to present sufficient evidence to show that other employees, who were not African-American, engaged in similar misconduct and were subjected to more lenient discipline.

ANN SMITH (RAL) and **ALLISON SERAFIN (RAL)** recently won a substantial victory both in the Motion to Dismiss made at the preliminary stage of litigation and, later again, at Summary Judgment representing a local municipality in a claim brought by a former employee in the Eastern District of North Carolina who was a female firefighter alleging gender discrimination, hostile work environment and retaliation. The employee claimed that she was discriminated against on the basis of her gender because the male firefighters did not want to work with her. She also claimed that there was a hostile work environment because of profane language the male firefighters "used amongst themselves." The Employer's Motion to Dismiss was granted as to both of these claims. Plaintiff was allowed to proceed to discovery on her claims of gender discrimination alleging that she was treated differently than the males because 1) her station assignment was undesirable 2) she missed training opportunities and 3) she was not provided with full gear prior to her first day of work. The Court granted Summary Judgment as to all of these claims. Plaintiff had also alleged a Title VII retaliation claim, but this claim was dismissed at the Summary Judgment stage as well.

ANN SMITH (RAL) and **KATIE WEAVER HARTZOG (RAL)** successfully defended three high school coaches in a lawsuit brought by a member of the school soccer team. The student brought a negligence claim seeking damages for injuries allegedly arising from a sexual assault committed by one or more fellow students when the soccer team returned to school on an activity bus from an away game. The Court dismissed the claims against the coaches based on sovereign immunity. The case has not been appealed.

KATIE WEAVER HARTZOG (RAL) recently prevailed on a Partial Motion to Dismiss on behalf of an employer who was sued for breach of contract, wrongful discharge, fraud and misrepresentation by a former employee. MS. HARTZOG successfully argued that the plaintiff's claims for fraud and misrepresentation should be dismissed for failure to state a claim upon which relief may be granted.

KATIE WEAVER HARTZOG (RAL) recently obtained a "No Cause" finding from the EEOC with regard to a charge of discrimination made by a former employee who claimed that her employment was terminated due to her race. **MS. HARTZOG** successfully argued that the charging party's employment was terminated due to insubordination, not because of her race.

KATIE WEAVER HARTZOG (RAL) recently prevailed on behalf of an employer at a hearing of the Employment Security Commission when the hearing officer reversed the prior ruling that the former employee was entitled to unemployment benefits. The hearing officer determined that the former employee should be partially disqualified from benefits because his employment was terminated due to substantial fault on the part of the employee.

KATIE WEAVER HARTZOG (RAL) recently obtained a "No Cause" finding from the EEOC with regard to a charge of discrimination made by a former employee who claimed that her employment was terminated due to her age. The charging party, who was a person over the age of 40, claimed that she suffered from age discrimination because the position which was left vacant due to the charging party's termination was filled by a younger person. **MS. HARTZOG** successfully argued that the charging party's employment was terminated due to her poor work performance, not because of her age.

Recent Case Results

ANN SMITH (RAL) and **MEGHAN KNIGHT (RAL)** recently obtained a "No Cause" finding from the EEOC of a charge alleging race discrimination under Title VII. The complainant/employee believed that he was not given a promotion due to his race. **MS. SMITH** and **MS. KNIGHT** prepared a position statement setting forth the employer's position that the complainant was not promoted because he was not qualified for the position. The EEOC issued a "No Cause" finding and right-to-sue letter; however, the former employee did not file suit and his statute of limitations has now expired.

ANN SMITH (RAL) and **MEGHAN KNIGHT (RAL)** recently obtained a "No Cause" finding from the EEOC of a charge alleging gender discrimination under Title VII. The complainant/employee believed that she was treated differently than male employees with regard to her annual evaluation due to her gender. **MS. SMITH** and **MS. KNIGHT** prepared a position statement setting forth the employer's position that the complainant could not show discrimination because, among other things, she could not show that her performance was satisfactory, that she suffered an adverse employment action, or that she was treated differently than any similarly situated male employee. The EEOC issued a "No Cause" finding and right-to-sue letter; however, the former employee did not file suit and her statute of limitations has now expired.

ANN SMITH (RAL) and **MEGHAN KNIGHT (RAL)** favorably settled a charge filed with the EEOC alleging race discrimination under Title VII. The employee had been terminated for his admitted use of a racial slur against a co-worker, but alleged that other employees used racial slurs and were not terminated.

MARSHALL WALL (RAL) represented a large farming operation that was sued by the estate of a former employee under a Woodson theory, claiming that the employee died as the result of serious violations of OSHA regulations. **MR. WALL** was able to convince the plaintiff's attorney that there was insufficient evidence to support the claims and the case was dismissed, with prejudice, before any discovery was done or motions filed.

On behalf of an insurance carrier, **MARSHALL WALL (RAL)** pursued a commercial insured who was improperly underreporting payroll in order to significantly lower workers' compensation premiums. MR. WALL won Summary Judgment for breach of contract but continued to press claims for unfair trade practices and fraud. Ultimately the insured's answer was stricken for discovery violations. After a judge denied the insured's motion to set aside this order, the case was resolved and the insured paid virtually all of the money owed.

MARSHALL WALL (RAL) represented a business that was sued as a result of a motor vehicle accident involving one of its employees. Using an accident reconstruction expert, **MR. WALL** was able to show that the plaintiff was traveling in excess of the speed limit and likely could have avoided the accident had she been following the law. The plaintiff suffered significant injuries, underwent several surgeries and was hospitalized for a period of time after the accident. The case was settled for a fraction of the plaintiff's medical expenses shortly before a hearing on a motion for Summary Judgment based on the plaintiff's negligence.

FRANK ALBETTA (WILM), **CHRIS HINNANT (WILM)**, and **MELODY CANADY (WILM)**, obtained dismissal of a $24 million lawsuit filed against Co-operative Bank of Wilmington, now First Bank, in the federal District Court for the Eastern District of Virginia. The complaint in the case – over 200 pages and 1300 paragraphs long – was filed on behalf of 130 purchasers of lots in coastal development communities in North Carolina and South Carolina, and named Cooperative as a defendant along with developers, marketers, six other mortgage lender banks, and others. The plaintiffs alleged violations by Cooperative of the Interstate Land Sales Act (ILSA), the North Carolina Unfair and Deceptive Trade Practices Act, as well as conspiracy and fraud. The seven lender banks and one developer moved for dismissal of all claims. **MR. ALBETTA**, **MR. HINNANT**, and **MS. CANADY** produced memoranda in support of dismissal based upon extensive research and drafting by **MS. CANADY**, sorting out and analyzing complex issues of jurisdiction, statutory construction, conspiracy, and fraud raised by the lengthy complaint. At oral argument during the July 1, 2009 hearing, **MR. ALBETTA** addressed the ILSA issues on behalf of all the moving parties. On August 28 2009, U.S. District Judge Gerald Bruce Lee dismissed all claims against Cooperative and the other lending banks, with prejudice and without leave to amend.

KARI JOHNSON (RAL), with assistance from **DAN HARTZOG, JR. (RAL)**, obtained Summary Judgment on behalf of a police department and its officers in a case pending in Superior Court where the plaintiff claimed that she was wrongfully arrested for larceny. The defendants prevailed on all of the claims which included malicious prosecution, false imprisonment, defamation, intentional infliction of emotional distress and punitive damages.

KARI JOHNSON (RAL) obtained Summary Judgment on behalf of a police department and its officers in a case pending in Superior Court where the plaintiff claimed that he was wrongfully arrested for driving while impaired and that his car, which was subsequently sold without his knowledge, was wrongfully seized in connection with the arrest.

KARI JOHNSON (RAL) prevailed in a Fourth Circuit appeal where she represented various deputies and a Sheriff's Department in a case where the plaintiff claimed that her federal constitutional rights were violated when she was allegedly arrested without probable cause. The plaintiff also alleged that she was the victim of racial profiling.

KARI JOHNSON (RAL) obtained Summary Judgment in favor of a police officer in a case pending in the United States District Court (Eastern District) where the plaintiff claimed that his federal constitutional rights were violated when he was prosecuted for felonies as opposed to misdemeanors resulting in harsher habitual felon sentencing. The plaintiff had also asserted that the defendant officer provided false testimony against him before the grand jury.

KARI JOHNSON (RAL), with assistance from **DAN HARTZOG, JR. (RAL)**, obtained Summary Judgment in favor of a municipality in a case pending in the United States District Court (Middle District) where the plaintiff claimed that his federal constitutional rights were violated when he was allegedly wrongfully arrested. The plaintiff also claimed that the municipality engaged in discriminatory practices concerning districting and the treatment of handicapped individuals.