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CRANFILL, SUMNER & HARTZOG, L.L.P.

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# Litigation

forum

**LITIGATION FORUM** is an informational newsletter provided regularly by the law firm of **CRANFILL, SUMNER AND HARTZOG, L.L.P.** 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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## ► Sex Harassment Investigations:

Avoiding Pitfalls While Conducting Effective Workplace Investigations

Patricia L. Holland

The sex harassment issue launched into the public conscience more than a decade ago as Americans watched Anita Hill allege that U.S. Supreme Court nominee Clarence Hill had sexually harassed her when the two worked together. Arguably, the Thomas confirmation hearings resulted in a raised "national conscience" regarding the subject of sex harassment. Despite the fact that sex harassment policies now exist in most workplace settings, claims of sex harassment and resulting litigation continue to increase.

How serious is the problem? An American Management Association survey conducted of more than 500 companies found that 52% of them had dealt with allegations of sex harassment in the preceding five

years, and that nearly 60% of those complaints had resulted in disciplinary action. In a survey conducted by Working Woman Institute, 70% of employed women said they had been harassed at some time in their careers. The number of sex harassment charges filed with the Equal Employment Opportunity Commission increased from approximately 6,000 charges in 1990, to 15,475 charges in 2001.

Ignoring harassment issues is bad business judgment. Sex harassment complaints cost employers millions of dollars per year in settlements, judgments, attorney fees, absenteeism, unproductive work time and bad publicity. How does your Company avoid getting to that point? How do you minimize the risk of a sex harassment complaint turning into a staggering financial and morale problem for your Company?

A prompt and thorough investigation of all complaints is essential to preventing and/or limiting liability. The manner in which a company handles its investigation of a sex harassment complaint is a significant factor in determining whether it will be held liable for the inappropriate conduct. There are a number of pitfalls that the unwary employer can encounter. Here are some suggested guidelines to help you avoid those pitfalls.

- **Act promptly.** The first and foremost rule in responding to a harassment complaint is to take prompt action. The law is clear that when an employer receives notice of a harassment complaint, it has a duty to conduct a prompt and thorough investigation. Prompt means now—not next week. The EEOC and the courts look favorably on an employer's prompt effort to resolve the complaint. Conversely, a failure to act promptly can be used as evidence that the employer did not take the complaint seriously.

Numerous problems can result if an employer fails to take prompt action. A complaining employee may suffer increased emotional distress the longer resolution of the complaint is delayed, which can result in a significant increase in the value of an emotional distress lawsuit. The workplace environment can be significantly disrupted if harassment is allowed to continue. Evidence may be lost, witnesses may leave for other jobs and memories of witnesses may fade as time passes.

- **Decide if interim measures are advisable.** Depending on the circumstances of the complaint, the employer may need to consider taking intermediate steps while the investigation is ongoing. It may be advisable to offer either the complainant or the alleged harasser paid temporary leave pending resolution of the complaint. If the alleged harasser is the supervisor, consider temporarily reassigning the complainant to another supervisor. Note that it is advisable to determine in advance if these interim measures are acceptable to the complainant, since such

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## Richard Boyette Installed as President of Defense Research Institute

On October 9, 2004, RICHARD BOYETTE, a partner in our Raleigh office, was installed as President of the Defense Research Institute at its annual meeting in New Orleans. DRI is the national membership organization of all lawyers involved in the defense of civil litigation and corporate counsel. DRI provides numerous educational and informational resources to members and offers many opportunities for liaison among defense trial lawyers, Corporate America, and state and local defense organizations. DRI also has an international presence, seeking to enhance understanding of the law among members of the defense community concerned with the expanding globalization of litigation defense. Congratulations to Richard and DRI!

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## ► Construction Law

Several recent decisions in the North Carolina appellate courts have affected positions typically taken by defendants in construction litigation. In *Associated Industrial Contractors, Inc. v. Fleming Engineering Inc.*, the Court of Appeals held that expert testimony is not required to prove a professional negligence claim against a surveying company. In *Fleming*, the surveyor was retained to pinpoint column locations. When it failed to do so, the general contractor who retained the surveyor filed a lawsuit alleging the surveyor had breached the standard of care, *i.e.*, the degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect, and his negligence causes injury, he will be liable for that injury. Although generally expert testimony is required to establish the standard of care, the *Fleming* court held that proof of Fleming's negligence fell within the "common knowledge" exception of the requirement that experts testify. In that regard, the court believed that it was within the common knowledge of the trier-of-fact (in this case the judge) that a surveyor hired to pinpoint columns for a rectangular building site must be precisely square, must accurately mark column locations so as to result in two sets of parallel lines connected by four 90 degree angles. Because this task does not involve any esoteric knowledge or uncertainty that calls for professional judgment, and further because it is not beyond the knowledge of the trier-of-fact as to whether lines and angles staked by a surveyor were straight and square, the common knowledge exception would apply and expert testimony is not required to prove a claim.

The Court of Appeals also recently affirmed that a buyer/purchaser can enter into a binding agreement with a builder/vendor waiving the implied warranty of habitability. In *Rodney A. Base, et al. v. Pinnacle Custom Homes, Inc.*, the plaintiffs contracted with the builder to construct and sell a house. At the time of closing, the plaintiffs accepted a 2-10 Homebuyer's Warranty which had language that purported to waive all other warranties. During imposed construction, the plaintiffs complained of various defects at the home. A lawsuit ensued wherein the plaintiffs argued that the builder had breached the implied warranty of habitability in that the dwelling and all of its fixtures were not sufficiently free from major structural defects, and...had not been constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction. The appellate court affirmed that a builder and

purchaser can enter into a binding agreement waiving this implied warranty. But, the court emphasized that such an exclusion if desired by the parties must be accomplished by clear, unambiguous language, reflecting the fact that the parties fully intend such a result. The court affirmed that the language in the 2-10 Homebuyer's Warranty constitutes an express waiver of this implied warranty of habitability. The relevant language is as follows "THIS IS AN EXPRESSED LIMITED WARRANTY OFFERED BY YOUR BUILDER. To the extent possible under the laws of your state, all other warranties *express or implied*, including but not limited to *any implied warranty of habitability*, are hereby disclaimed and waived. No one can add to or vary the terms of this warranty, orally or in writing." (emphasis added)

As a final note, the Supreme Court denied review of the controversial *Kaleel Builders, Inc v. Ashby* decision. As such, contractors and subcontractors are reminded that absent an express indemnification provision contained in their contracts, the only right available to recover under the subcontractor or sub-subcontractor for the deficient service provided is breach of contract, which has a three year statute of limitations from the date of the breach. Please remember that where two (2) parties contract with each other to perform work, their relationship is defined in contract and claims in tort, including negligence are barred. As such, there is no common law right to indemnification or contribution, which claims arise out of tort law. ■

## ► Appellate Litigation

Effective May 6, 2004, the North Carolina Rules of Appellate Procedure were amended in several respects. The most significant amendments concern the process of settling the Record on Appeal and Reply Briefs. With respect to settlement of the Record on Appeal, Rule 11 of the Rules of Appellate Procedure was amended to provide that the Record on Appeal will consist of any items required by Rule 9(a) to be included, or that are requested by a party to be included and agreed upon by all other parties to the appeal. If not all parties agree to the request for inclusion, the item will not appear in the printed Record on Appeal, but may be filed as a part of the Record on Appeal in the same manner as transcripts and exhibits. This amendment effectively removes the possibility of judicial settlement of the Record on Appeal except in limited circumstances, thereby removing the time and expense of such a process. Under the new

Rule 11, judicial settlement may be requested if a party objects to inclusion of materials as not having been filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered. Judicial settlement may no longer be used to determine whether materials desired to be included by either party are relevant, non-duplicative, or otherwise suited for inclusion.

With respect to Reply Briefs, Rule 28 has been amended to provide for an additional circumstance under which such a brief may be submitted. Under the new Rule 28, when the parties are notified by the Court that the matter has been sched-



uled for oral argument, the appellant has 14 days to file a motion for leave to file a reply. The new provision effectively gives the appellant the “last word” prior to oral argument. ■

## ► Products Liability

### North Carolina Supreme Court Expressly Rejects Daubert

The United States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993) that expert testimony may only be admitted after the trial judge makes a preliminary determination that the scientific testimony is relevant and reliable. The Supreme Court then suggested five flexible factors indicating whether expert testimony is reliable including whether the scientific theory has been tested, whether the theory “has been subjected to peer review and publication” the “known or potential rate of error” of the technique, the standards controlling the technique’s operation, and general acceptance within the scientific community. *Id.*

However, in *Howerton v. Arai Helmet, Ltd, et al.*, 358 N.C. 440 (2004) the North Carolina Supreme Court recently held that North Carolina law does not follow the federal *Daubert* standard. In *Howerton*, plaintiff alleged his quadriplegic condition was caused by a negligently designed motorcycle helmet that failed to adequately protect his neck when he was thrown from his motorcycle. More specifically, plaintiff contended a properly designed chinguard on his helmet should have restricted the movement of his neck to prevent his spinal injury. To prove his contentions, plaintiff sought to present testimony through four experts. However, the trial court judge excluded the testimony of all four experts on detailed grounds, including a lack of testing hypothesis, lack of peer review, lack of information, failure to publish findings, and the fact that the experts could not point to any evidence of general acceptance. The North Carolina Court of Appeals affirmed the trial court’s exclusion of the expert opinions on grounds that North Carolina has adopted the holding in *Daubert*.

On appeal, the North Carolina Supreme Court rejected the court of appeals holding that North Carolina has adopted the federal standard for admitting expert testimony outlined in *Daubert*. The court explained that the holding in *Daubert* was intended to relax the barriers to opinion testimony as required by the Federal Rules of Evidence. However, the application of the *Daubert* standard in other courts has caused reluctance on the part of judges to stray from the original factors outlined in *Daubert*, leading to the exclusion of otherwise valid expert testimony. Furthermore, the court criticized the case-dispositive nature of *Daubert* proceedings, noting that excluding expert opinions often leads to dismissal of the entire case upon motion for summary judgment. The court adamantly proclaimed that “North Carolina is not, nor has it ever been, a *Daubert* jurisdiction.”

Instead, the North Carolina Supreme Court recognizes *State v. Goode*, 341 N.C. 513 (1995) as a suitable and more flexible framework for ruling on the admissibility of expert testimony. *Goode* sets forth a three-step inquiry for evaluating the admissibility of expert testimony including 1) whether the expert’s method of proof is sufficiently reliable, 2) whether the witness is qualified as an expert and 3) whether the expert’s testimony is relevant.

In ascertaining the reliability of the expert’s testimony under the *Goode* three-step approach, the trial court should first determine whether precedent justifies recognition of an established scientific theory or technique. Where there is a lack of precedence for a scientific theory or technique, the trial court should focus on other flexible indicators such as the expert’s use of established techniques, the expert’s professional background, the use of visual aids in explaining scientific hypothesis to the jury, and independent research conducted by the expert. The court noted that to qualify as an expert in the field, “it is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness, “because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.” ■

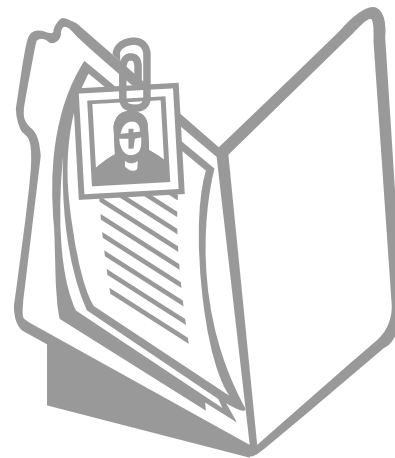
## ► Workers’ Compensation

### Constructive Refusal to Perform Suitable Employment- Seagraves Analysis

In *McRae vs. Toastmaster, Inc.*, the Supreme Court adopted the Court of Appeals balancing test for analyzing cases where it is alleged an employee is terminated for reasons unrelated to the injury, thus keeping her from returning to work and barring the recovery of benefits under NCGS § 97-32. This test was set out in the Court of Appeals decision of *Seagraves vs. Austin Co. of Greensboro*, 123 N.C. App.228, 472 S.E.2d 397 (1996). The test adopted requires that, in order to bar payment of benefits, an employer must demonstrate initially that (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee and (3) the termination was unrelated to the employee’s compensable injury. If the employer establishes this, it is deemed to constitute constructive refusal by the employee to perform suitable employment, barring recovery of benefits, *unless* the employee is then able to show that his or her inability to find or hold other employment at a comparable wage is due to the work related injury. The Supreme Court then went on to analyze the test under the facts of the case and determined that the Court of Appeals had improperly determined that plaintiff’s termination was unrelated to her compensable injury since she was terminated for failing to perform her assigned duties, which the Supreme Court indicated was due to her compensable injury.

### Medical Records Required When Submitting Forms for PPD Rating to the Commission

The Supreme Court entered a Per Curiam decision that discretionary review was improvidently allowed in *Atkins vs. Kelly Springfield Tire Co.* This decision reinstated the Court of Appeals decision which found that the Commission must review all available medical records when approving a Form 21 or 26 (in addition to clincher agreements—which they already required) to make certain that the award is fair and just. As a result of this case, the Commission has created a new Form 25A which is a certification that all medical records known to the parties are submitted with the Form 21 or 26. Both parties must sign the document.



### Constructive Refusal to Perform Suitable Employment- Vocational Rehabilitation Efforts

The Supreme Court overturned the Commission and Court of Appeals in *Johnson vs. Southern Tire Sales and Service* ruling that an employer is not required to show that an employee is offered a job, but simply show that jobs were available through expert testimony. That testimony also indicated plaintiff failed to keep appointments for job interviews and that plaintiff could have found work if he made a diligent effort to do so. Furthermore, the Commission’s conclusory findings that “in no way were plaintiff’s actions regarding these job leads inappropriate” were not supported by an evidence and that the Commission is required to make specific findings of fact.

### Maximum Medical Improvement and Vocational Rehabilitation

In *Collins vs. Speedway Motor Sports Corp.* the Court of Appeals determined that maximum medical improvement is defined as the point where the employee’s healing period has ended. The court then rejected what they defined as the *dictum* set out in *Walker vs. Lake Rim Lawn & Garden*, 15 N.C. App. 709

(2003) and stated that maximum medical improvement does not include “maximum vocational recovery”. Because of this, defendants were entitled to a credit for TTD benefits paid after plaintiff was determined to reach MMI and plaintiff and, therefore, he would get greater benefits for TPD than PPD, after the credit was taken for the TTD benefits.

### Asbestos-Burden of Proof Required

In *Vaughn vs. Insulating Services*, the Court of Appeals affirmed the Commission’s denial of benefits because plaintiff failed to meet his burden of establishing credible evidence of exposure sufficient to prove that he was last injuriously exposed while working for defendant-employer. Plaintiff worked for defendant-employer for 17 years and his duties included installation for repair work and new construction. Surveys conducted on three occasions over an eight year period indicated that there were areas in the plant where asbestos existed. Plaintiff told two doctors he was exposed to asbestos in his employment, but did not identify any specific instances of exposure. While the Court agreed that plaintiff did not have to provide specific medical and scientific evidence of toxicity measurements, the Commission could properly consider the lack of such evidence when determining the credibility of the witness and whether they have met their burden of proof. Plaintiff’s own testimony showed he did not know when or if he was exposed to asbestos while working for defendant.

### Recovery of Liens Against Negligent Third Parties

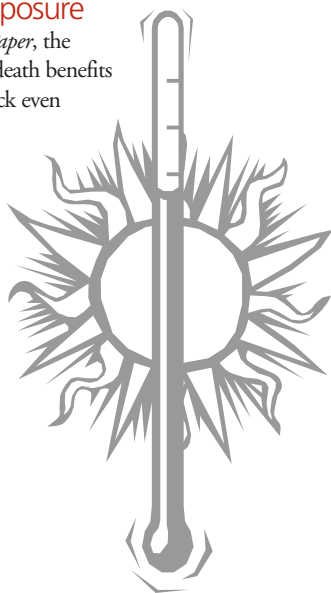
The Court of Appeals in *Childress vs. Flour Daniel, Inc.* determined that the Industrial Commission does not have jurisdiction to determine the amount of defendant’s subrogation lien out of a third-party recovery until a final award by the Commission. Thus, where defendants have appealed a decision of the Deputy, the Commission cannot give a credit to defendant for funds recovered against a third party and until the final award of the commission the right to determine the amount of lien recovery for defendant rests with the Superior Court Judge.

### Ex Parte Communications and Attorney’s Fee

In *Hodges vs. Equity Group*, the Court of Appeals addressed two distinct issues. First, they determined that communications between the “company” doctor for defendant-employer who initiated communications with other physicians regarding Plaintiff’s ability to work, at the employers’ request, had engaged in *ex parte* communications with those doctors. Next, the court determined that the Commission had properly denied plaintiff’s claim for attorney fees for unfounded litigiousness. Interestingly, the court stated that although the Commission’s decision to award attorney’s fees is discretionary, whether defendants had a reasonable ground to bring a hearing is reviewable by the Court of Appeals *de novo*.

### Heart Attack due to Heat Exposure

In *Madison vs. International Paper*, the Court of Appeals affirmed the award of death benefits for an employee who died of a heart attack even though there was evidence of prior heart problems. The Court determined that plaintiff’s work in extreme heat conditions increased his risk of suffering the heart attack and was a “contributing factor” to his heart attack.



### Dismissal of Action

The Court of Appeals ruled, in *Jackson vs. Flambeau Airmold Corp.*, that in order for a dismissal of an action for failure to prosecute a hearing to be valid, the Commission must make specific findings regarding notice that is provided to the plaintiff and his failure to appear.

### Death Benefits and Interpretation of N.C.G.S §97-38

N.C.G.S. §97-38 provides that if death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of benefits, whichever is later, the employer shall pay or cause to be paid (death benefits). In *Apple vs. Commercial Courier Express*, employee died more than six years after he was brutally attacked and robbed. Defendants entered into a Form 21 agreement paying disability compensation for “necessary weeks”. Plaintiff continued receiving TTD benefits. The Court found that the Form 21, as written was not a final award of benefits, and since plaintiff was never declared Permanently and Totally disabled, the death had occurred within two years of a final award and were owed to the estate.

### Carpal Tunnel Syndrome Burden of Proof

In *Faison vs. Allen Canning Co.*, the Court of Appeals determined that the doctor’s opinion that the employment possibly caused plaintiff’s CTS was insufficient to establish causation to the required standard of a reasonable degree of medical certainty. ■

## ► Education Law

Although it is well established that local boards or education are governmental entities under North Carolina Law, the exact character or these entities is very much open to debate. Many have assumed that local boards or education are more akin to municipalities than to agencies or the state and thus subject to liability for money damages under 42 U.S.C. § 1983. However, one case currently winding it, way through North Carolina’s courts could dispel this assumption and forever change the scope of a local board’s liability under § 1983.

### Background

The case of *Ripellino et al. v. North Carolina School Boards Assn. et al.*, 158 N.C. App. 423, 581 S.E.2d 88 (2003), initially began as a claim for personal injury and property damage that occurred when a traffic control gate at Clayton High School closed unexpectedly and struck the windshield of a student’s car. The local board of education (the “Board”) paid for the damage to the student’s car, but asserted its Immunity when the plaintiffs, years later, asserted the personal injury claim. The plaintiffs subsequently filed suit against the Board, alleging violations of both of the United States and North Carolina Constitutions and 42 U.S.C. §1983.

42 U.S.C. §1983 provides a private right or action against any person who, acting under color of law, deprives any citizen of the United States of his constitutional rights. In this case, the plaintiffs alleged that settlement or the property damage claim together with the assertion or immunity as to the personal injury claim violated the plaintiffs’ constitutional rights to due process and equal protection or the law. Consequently, the plaintiffs contended that they were entitled to recover damages under §1983. Following discovery, the trial court granted summary judgment in favor of the defendants and the plaintiffs appealed.

The Court of Appeals affirmed in part and reversed in part. Plaintiffs argued that the Board had waived its immunity by participating in the North Carolina School Boards Trust. Citing *Lucas v. Swain County Bd. of Educ.*, 154 N.C. App. 357, 573 S.E.2d 538 (2002) the Court or Appeals held that the Board had not waived its immunity except to the extent of any excess insurance coverage.

The plaintiffs also argued that the Board could not assert the defense of sovereign immunity as to either the constitutional or § 1983 claims. The Court of Appeals agreed, citing *Peveall v. County of Alamance*, 154 N.C. App.

426, 573 S.E.2d 517 (2002), wherein it held that sovereign immunity could not be asserted “as a defense to a section 1983 claim.” See *id.* at 432, 573 S.E.2d at 521. The Court nevertheless noted that there may be grounds other than sovereign immunity that would bar the plaintiffs claims, but declined to discuss those grounds since the appeal was limited to the issue of sovereign immunity. *Ripellino*, 158 N.C. App. at 430-31, 581 S.E.2d at 94.

Ultimately, the Court of Appeals concluded that summary judgment had been improperly granted as to the constitutional claims and remanded the case to the trial court. The North Carolina Supreme Court denied the plaintiffs’ request for further review.

The Board, on remand, moved for judgment on the pleadings was to plaintiffs’ constitutional claims. This time, the Board’s argument was centered on its contention that it was not a “person” under § 1983. The theory behind this argument was quite simple. Both the United States and North Carolina Supreme Courts have held that since neither the State nor any of its agencies are “persons” within the meaning of § 1983, neither may be sued for money damages under that statute. The Board contended that it, as well as all other local boards of education in North Carolina is considered an “agency” or “arm” of the State. Accordingly, the plaintiffs’ § 1983 claims seeking money damages failed as a matter of law.

Although no North Carolina case had squarely addressed this issue, the concept was not entirely new. In 1992, a federal district court concluded that local school districts in South Carolina were not “persons” under §1983. See *Stewart v. Laurens County School District No. 55*, 1992 WL 12014673 (D.S.C. Oct. 2, 1992)(unpub’d). The North Carolina Court of Appeals also intimated that grounds other than sovereign immunity may bar the recovery of money damages under § 1983 from agencies that were once thought to be purely local in nature. See *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc review denied*, 334 N.C. 621,435 S.E.2d 336 (1993); *Peverall v. County of Alamance*, 154 N.C. App 426, 573 S.E.2d 517 (2002, *disc review denied*, 356 N.C. 676 577 S.E.2d 632 (2003).

At the hearing before the trial court, Stephanie Autry of our Raleigh office, argued on behalf of the Board that the determination of “personhood” under § 1983 was dependent on an analysis of state law (*i.e.* how North Carolina law viewed and defined a local board of education). Stephanie then cited numerous authorities concluding that, under North Carolina law, local boards of education are agencies of the State. Ultimately, the court agreed, concluding that a local board of education in North Carolina is not a “person” for purposes of § 1983 and, granted the Board’s motion for judgment on the pleadings.

### Practical Impact of Ripellino

This case is significant for two reasons. First, *Ripellino* is illustrative of what appears to be a growing trend in Education Law litigation: attacking the constitutionality of a local board’s decision to assert or not assert its immunity. Currently, no North Carolina appellate court has expressly ruled on the constitutionality of any particular school boards practice.

Second, and most significantly, is the dramatic impact that *Ripellino* could have on the scope of a local board’s liability under § 1983. Since the plaintiffs have already noted their intention to appeal, the case is yet again poised for review by the North Carolina Court of Appeals. If it is upheld, local boards of education in North Carolina will, like local school districts in South Carolina, be effectively immune from suit under § 1983 when the remedy sought is money damages. Given the “landmark” potential that this case presents for boards of education across the state, it is one that will certainly be worth watching in the future. ■



## General Liability Litigation

There is good news from the front concerning an insurer’s accountability in regards to medical provider liens. As reported earlier, an insurer is accountable jointly and severally for retaining funds from settlement proceeds where it has notice of a medical provider lien and the person with whom the person makes settlement who received the medical care is not represented by an attorney. The North Carolina Court of Appeals, in *Smith v. State Farm*, 157 NC App 596 (2003) stated that “notice” of such a lien could be as little as the receipt of an insurance claim form. In this case, a RRB-1500, was enough notice of a medical provider’s lien on settlement proceeds to make State Farm accountable for not retaining funds from settlement proceeds to satisfy that lien when they paid the settlement proceeds to the claimant.

However, on August 13, 2004, the North Carolina Supreme Court reversed the Court of Appeals and adopted the dissenter’s opinion in *Smith*. Their ruling states, in the words of Judge Levinson of the North Carolina Court of Appeals that “...when an insurance carrier settles directly with an un-represented injured party, the carrier does not have valid ‘notice’ of a ‘just and bona fide claim’” pursuant to N.C. Gen.Stat. § 44-50, unless it receives documentation that (1) constitutes a valid assignment of rights signed by the injured; or (2) contains unambiguous language that the medical provider is asserting alien under the provision of N.C. Gen. Stat §§ 44-49 and 44-50, or the language asserting an interest or a claim to settlement proceeds. *Smith v. State Farm*, 559 S.E.2d 905 (2004).

Thus, an insurer need not perform an investigation of medical providers from whom it receives a bill or an insurance claim form to ascertain whether or not there is a valid lien on settlement proceeds, when the injured person is not represented by an attorney. However, if the insured does receive a notice of assignment signed by the person receiving medical care or written notice that a medical provider is claiming a lien or an interest in settlement funds and the injured person is not represented by an attorney, it must retain funds from the proceeds of settlement to satisfy the lien and then investigate whether the lien or assignment is valid. Of course, when a claimant is represented by an attorney, that attorney is accountable to the medical provider if he or she does not retain funds from settlement proceeds to satisfy a valid medical provider lien pursuant to N.C. Gen. Stats § 44-50. One should also remember that the above only applies to medical provider liens established pursuant to N.C. Gen. Stats §§ 44-49 and 44-50. This ruling does not affect in any way an insurer’s obligation to satisfy liens on settlement proceeds established pursuant to federal law or through other state statutory schemes. ■

## ► Insurance Coverage Law

### New Trigger of Coverage for Property Damage

North Carolina courts have significantly changed the trigger of coverage under liability insurance policies for property damage. Until recently, North Carolina courts held that property damage is deemed to have “occurred” on the date of discovery of the damage, unless the parties stipulate as to the exact date of the injury in fact. See, *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000); and *West American Ins. Co. v. Tufco Flooring East*, 104 N.C. App 312, 409 S.E.2d 692 (1991), *disc. rev. improvidently allowed*, 332 N.C. 479 (1992). Thus, if property damage continued over several policy periods or only became apparent long after the completion of the construction, the policy in effect on the date of discovery governed the loss. However, in *April 2004*, in *Hutchinson v. Nationwide Mut. Fire Ins. Co.*, 594 S.E. 2d 61 (2004), the North Carolina Court of Appeals changed that result.

In *Hutchinson*, the plaintiff homeowners contracted with the insured general contractor for the construction of a house. The project included the creation of a retaining wall which was built during the summer of 1999. Construction ceased on the entire project by the end of October 1999. Nationwide insured the general contractor prior to the start of the construction (in 1998) and then again commencing on November 15, 1999. On November 18, 1999, the plaintiff homeowners discovered the defect in the retaining wall. Under the “old” *Tufco* rule, Nationwide would have owed the coverage because the damage was discovered in the Nationwide policy period. However, in *Hutchinson*, the court interpreted the *Gaston County* case to mean that if the court can determine with certainty when the cause of the damage occurred, that coverage will be triggered under that policy period. The court further held that if the court can determine when the defect occurred from which “all subsequent damages flow,” the court cannot use a “continuous” trigger of coverage, but can only use the specific policy on the risk when the defect occurred. The court reasoned, in *Hutchinson*, that the general contractor’s “actions and inactions at the time the retaining wall was constructed caused the subsequent problems with water entry into the soil surrounding the retaining wall,” and thus that the damage occurred outside of the Nationwide policy period.

Significantly, the claimant did not appeal the decision in *Hutchinson*. Thus, the decision is now binding on the North Carolina state courts. Thus, in virtually all construction defect cases, the trigger of coverage will now be the date of “injury-in-fact,” *i.e.*, the date of the completion of the defect by the insured or its subcontractors. In all such cases, however, insurers should check to be sure that the insured did not perform “punch-list” work or other remediation during a later policy period. ■



(continued from page 1)

## Sex Harassment Investigations

actions could be perceived by the complainant as retaliatory.

- **Beware of the employee who asks that her complaint be kept “confidential.”** On occasion, an employee may “confide” in a supervisor that she has been harassed, and then ask that the information be held confidential, stating that she does not want anything done about the problem at that point in time or that she wants take care of the problem herself. On occasion, an employee will state that she “just wants something to be done about the harassment,” but that if she is identified as the complainant, she will deny that she made the complaint! Should this occur, the supervisor should immediately respond that since the employer has received notice of the harassment, it has an obligation to conduct an investigation. Assure the employee that the complaint will be kept as confidential as possible, and that information about the investigation will be communicated only to those who need to know about it. However, inform the employee that absolute confidentiality cannot be guaranteed, as such a guarantee could obstruct the employer’s ability to conduct a fair and thorough investigation.

- **Look for corroborative evidence and motive.** On occasion, an investigator will run into a case of “he said/she said,” and feel that there is simply no way to determine the truth of the allegations. Don’t be discouraged. Instead, look for corroborative evidence. Ask the complainant for items such as diaries, notes, calendars, e-mails, voice mail recordings, cell phone records, photographs or other similar items. Contemporaneous documentation of offensive conduct can be compelling evidence. Ask the complainant if she complained to friends or co-workers when the offensive conduct occurred, and if so, interview those individuals. Review the alleged harasser’s personnel file to determine if similar complaints have been made. Ask co-workers if they have experienced similar problems.

Explore whether the complainant might have a motive to concoct or exaggerate the complaint. Review the complainant’s personnel records to determine if she has recently received a poor performance evaluation or been the subject of a disciplinary action. Consider whether the complainant is simply trying to build protection from further disciplinary action, or whether the complaint has been lodged in retaliation against a supervisor.

- **Re-interview the parties involved.** You may find that new information comes to light during the investigation. Do not hesitate to re-interview those involved. It is better to ask a party to an investigation to respond to newly developed information than to accept such information without appropriate follow-up.

- **Look out for retaliatory conduct.** Inform the complainant at the outset of the investigation that any retaliation against her for coming forward with her complaint is illegal and will not be tolerated, and that she should report any such conduct immediately. Inform the alleged harasser that any retaliation against the complainant or any witness will not be tolerated, and that such conduct can form the independent basis for disciplinary action.

- **Take appropriate disciplinary and/or corrective action.** When an employer determines that harassment has occurred, it has a duty to take prompt, effective remedial action that is designed to end the harassment and prevent future harassment. The nature of the remedial action depends on the nature and severity of the conduct at issue, whether the harasser has engaged in similar conduct on other occasions, and whether previous remedial steps were effective. A prompt and thorough investigation provides no legal defense to the employer in any subsequent legal action if it has failed to take prompt, remedial action.

- **Do not be discouraged if the investigation does not reach a definitive conclusion.** Occasionally, an employer will complete an investigation, only to find that it simply cannot determine if the alleged offensive conduct occurred. The employer finding itself in this situation should discuss this fact with the complainant, encourage the complainant to report any further evidence or offensive conduct, and reiterate that the complaint was taken seriously and that no retaliatory conduct will be tolerated.
- **Conclude the investigation.** Inform the complainant that the investigation has been concluded, and that remedial action was taken. While it may not be appropriate to tell the complainant the details of the remedial action taken, she should be assured that action was taken.
- **Make follow-up inquiries.** Make follow-up inquiries and/or monitor the situation to ensure that the conduct has not resumed and to ensure that the employee and witnesses have not experienced retaliation. Check back with the complainant and co-workers to confirm, preferably in writing, that there have been no further problems.
- **Reiterate the Employer's Zero Tolerance of Harassment.** Re-train supervisors and employees and re-publish the Company's zero tolerance policy after each investigation of harassment complaints. ■

## Civic / Professional Notes

RICHARD BOYETTE, of our Raleigh office, was recently named the inaugural recipient of the North Carolina Association of Defense Attorneys (NCADA) Award for Professional Excellence. This award was just established this past year, and among the criteria set out by the NCADA for receiving the award are that the recipient exemplify "the highest standards of professionalism, integrity, and ethics," and that the recipient demonstrate "sustained, excellent service to individual and corporate defendants in civil litigation, to the Bar, and to the community." Richard, who is a past president of the NCADA, received the award at the NCADA Annual Meeting on June 12, 2004.

ERIN TAYLOR, of our Raleigh office, was a speaker at a recent seminar conducted in Concord on March 12, 2004, by Dr. Steven St. Clair and Northeast Medical Center. Erin's presentation dealt with the issue of ex parte communications with treating physicians in workers' compensation claims.

RACHEL ESPOSITO, of our Raleigh office, was recently appointed as the secretary/treasurer of the Education Law Section of the North Carolina Bar Association for the 2004-2005 term. The Education Law Section focuses on issues such as current state and federal education legislation, education financing, and employment within schools and universities.

COLLEEN SHEA COLLIS, of our Wilmington office, has been selected to teach Trial Advocacy as an Adjunct Professor at the Norman Adrian Wiggins School of Law at Campbell University. Colleen will be teaching second year students one day a week during the Spring 2005 semester.

JEFFREY HOWLE, of our Charlotte office, will be conducting a presentation entitled "North Carolina Workers' Compensation Law Update 2004" to a group of insurance adjusters in a continuing education event sponsored by Carolina Case Management.

TRISH HOLLAND, of our Raleigh office, recently authored an article entitled "Love is in the Air: Dealing With Workplace Romance," which was published in the June, 2004 issue of Business North Carolina magazine.

ROB GRIFFIN, of our Raleigh office, recently spoke to the 4th and 5th grade classes at Hunter Elementary School about lawyers and trials.

During the school year, the classes were participating in a course entitled "Characters on Trial," where literary characters were put on trial with the students participating as lawyers, judges, witnesses, etc.

LEANNE MULLIS, of our Raleigh office, recently authored the lead article in "The Course and Scope," the newsletter of the Workers' Compensation Section of the North Carolina Bar Association. Leanne's article was entitled "Subrogation Claims: Three's Company or Three's a Crowd."

RACHEL ESPOSITO, of our Raleigh office, was a featured speaker who gave an overview of the Americans With Disabilities Act, along with several attorneys across the state speaking on various areas of practice, at the Mid-Year Seminar and CLE/CP Review Course of the North Carolina Paralegal Association in September, 2004.

ERIN TAYLOR, of our Raleigh office, is scheduled to speak on October 15, 2004, in Raleigh and on October 22, 2004, in Asheville at the North Carolina School Board Association's 8th Annual Workers' Compensation Fall Workshop. Erin will be speaking on Suitable Employment/Return-to-Work Issues and Ex Parte Communications.

SCOTT FULLER, of our Raleigh office, is the current editor of "The Course and Scope," the newsletter of the Workers' Compensation Section of the North Carolina Bar Association.

TRISH HOLLAND and ROBIN DAVIS, of our Raleigh office, and PAT FLANAGAN AND NICK VALAORAS, of our Charlotte office, were all speakers at the Summer Conference of the North Carolina Association of Municipal Attorneys in August, 2004, in Kill Devil Hills. Trish and Pat presented a program entitled "Handling Personnel Matters in Federal Court." Robin and Nick presented a program entitled "The Tangled Web: Workers' Compensation, FMLA, ADA, REDA, and Other Employment Law Issues."

SCOTT FULLER, of our Raleigh office, has been named a member of the Workers' Compensation Council of the North Carolina Association of Defense Attorneys.



## Recent Case Results

**DAN HARTZOG** and **STEPHANIE GASTON**, of our Raleigh office, recently won a jury trial in Wake County Civil Superior Court. The lawsuit was filed by the estate of a tenant who lived at one of the defendant's rental properties. The decedent lived at a high rise apartment complex for the elderly which was owned and operated by the defendant. The Plaintiff made claims for personal injuries and wrongful death arising out of an assault on the decedent by an unauthorized non-resident who had gained access to the building. The decedent sustained injuries as a result of the assault, and was taken to the hospital for treatment of these injuries. She was admitted to the hospital and not long after her admittance, was discovered to have advanced lung cancer. The decedent died of pneumonia, secondary to lung cancer, after about six weeks in the hospital. However, the autopsy report also listed the assault as a contributing factor to the decedent's death. The plaintiff claimed that the defendant was negligent in failing to provide reasonable security measures at this particular apartment complex, and that this negligence caused the injuries to and eventual death of the decedent. The plaintiff sought damages for pain and suffering as well as reimbursement for over \$200,000 in medical expenses for the decedent's hospitalization and treatment from the date of the assault until her death. After a trial lasting eight days, the jury returned a verdict in favor of the defendant on all issues.

**LEIGH ANN SMITH**, of our Raleigh office, recently won a medical malpractice case in Guilford County. The lawsuit involved a traumatic birth injury, and Leigh Ann represented the OB/GYN physician from Greensboro. Leigh Ann successfully argued for dismissal based upon several grounds: (1) inadequate expert testimony in that Plaintiff's experts applied a national standard and did not know the training, education, and experience of our OB/GYN physician client as required by Rule 9(j); and (2) Leigh Ann also argued there was insufficient evidence on the issue of causation. The Court allowed our Motion for Summary Judgment.

**NICK VALAORAS**, of our Charlotte office, represented one of a number of defendant-carriers in a workers' compensation asbestos claim. The North Carolina Court of Appeals ruled that the Industrial Commission had properly weighed the lay witness and expert witness and testimony in finding that Plaintiff had not carried his burden of proving that he was injuriously exposed to asbestos while working for the employer or that he had developed asbestosis as a result of his employment with the employer.

**ROBERT JONES**, of our Wilmington office, recently won a dismissal of a case in New Hanover Superior Court. Robert moved successfully to have the plaintiff's complaint dismissed with prejudice, and for an award of attorney's fees entered against the Plaintiff for filing a frivolous lawsuit. The plaintiff had alleged that certain representations made by defendants were fraudulent, but plaintiff had brought the same claims previously in a separate lawsuit against the same Defendants. The Court dismissed the plaintiff's complaint on the grounds that the complaint failed to state a claim for relief, and awarded sanctions on the grounds that plaintiff's complaint was not well-grounded in fact or law and was filed for an improper purpose.

**JONATHAN ANDERS AND TRACY MYATT**, of our Raleigh office, won a workers' compensation claim on appeal at the Full Commission. The Full Commission reversed the Deputy Commissioner in this occupational disease claim involving a former pathologist assistant for a pathology lab. As a pathologist assistant, plaintiff handled small specimens and used a scalpel to make specimen cassettes for viewing under the microscope. Plaintiff performed these job duties on average for nineteen hours a week. Plaintiff alleged that job duties as a pathologist assistant placed her at an increased risk of developing, and significantly contributed to her development of ulnar neuropathy and resulting reflex sympathetic dystrophy (RSD). Plaintiff had undergone multiple surgical procedures and was undergoing pain management treatment at the Cleveland Clinic in Ohio. She was at the maximum compensation rate. Medical and indemnity exposure easily exceeded \$500,000. The Full Commission relied on the testimony of Dr. George Edwards of Raleigh Hand Center and literature supporting his opinion in reversing the Deputy. The Full Commission gave little weight to the testimony of two Cleveland Clinic treating specialists as plaintiff's counsel showed neither doctors the stipulated job videotape and analysis, and neither doctors had a sufficient understanding of plaintiff's job duties. The Full Commission also gave little weight to another neurologist who testified favorably for plaintiff after viewing the videotape, but

then testified that he knew nothing about the job, that he was speculating, and that the job was comparable to the tire building job at Firestone. The Full Commission also gave considerable weight to lay testimony indicating that plaintiff stated that she injured her elbow when one of her children struck her, to plaintiff's testimony that her job duties did not aggravate her condition any more than "normal living", to plaintiff's testimony that her symptoms began after lifting her child out of a high chair and into the car before work, and to plaintiff's testimony that she filed the workers' compensation claim eight months after surgery only after her medical malpractice attorney suggested filing the claim in lieu of filing a law suit against her surgeon. Plaintiff has appealed to the Court of Appeals.

**JONATHAN ANDERS AND MICHAEL RICCI**, of our Raleigh office, recently won a workers' compensation claim involving a legal assistant with a Chapel Hill Law firm. Plaintiff alleged an injury by accident when she slipped on a recently mopped floor in the common area of the law firm's building. Plaintiff was later fired for unrelated trustworthiness issues. Plaintiff then moved to Connecticut where she treated a few times for back pain but was never taken out of work. Plaintiff made the issue at hearing whether she was justifiably terminated, and focused little on the issue of whether plaintiff's injury was not compensable pursuant to the coming and going rule. The Deputy Commissioner denied plaintiff's claim placing great weight on the credibility of the two lawyers who testified on behalf of the law firm, and little weight on plaintiff's credibility. The Deputy Commissioner found that plaintiff did fall in the common area, but that the fall did not occur within the course and scope of plaintiff's employment pursuant to the coming and going rule, and that plaintiff was later fired for a justifiable cause.

**JONATHAN ANDERS AND MICHAEL RICCI**, of our Raleigh office, recently won a workers' compensation claim involving a volunteer EMT who was injured riding a go cart at a Fire and Rescue "Fun Day." Plaintiff allegedly injured her back during a collision and remained disabled for many months following the accident despite a lack of objective findings, and despite a release to return to work without restrictions by on physician. The Deputy Commissioner denied plaintiff's claim and found that "Fun Day" was a voluntary event supported by community funds that was not well attended and was not considered a benefit of being a volunteer. Even though plaintiff contended she was "on duty" at the time of her accident, the Deputy Commissioner denied plaintiff's claim as she was riding a go cart and not acting in her capacity as an EMT. Thus, the Deputy Commissioner concluded that plaintiff's alleged injury by accident did not arise out of, and occur within the course and scope of her volunteer position.

**LEE POOLE** and **MISSY SUMMERELL**, of our Charlotte office, recently prevailed in a highly publicized case in Mecklenburg County. Lee and Missy represented the Carolina Panthers football team, defending it against claims made by a former wide receiver alleging medical malpractice by team physicians regarding a knee injury. The plaintiff alleged that the Panthers were negligent in their hiring and retention of the physicians and that the Panthers' conduct was tantamount to an intentional tort (a Woodson claim). Lee and Missy successfully argued that the plaintiff's state court claims against the Panthers were preempted by federal law and were precluded by the Collective Bargaining Agreement and the contract signed by the plaintiff, which contained mandatory arbitration provisions. The judge agreed that the claims against the Panthers should be sent to arbitration with the NFL, pursuant to those documents. The plaintiff has appealed that decision to the N.C. Court of Appeals.

**MISSY SUMMERELL**, of our Charlotte office, recently obtained summary judgment in a slip and fall case pending in the federal court. Plaintiff, who was working at a plant in Asheville, walked through a slick, slippery substance known as "slurry," which she admitted was often on the floor in that particular area of the plant. She successfully walked the puddle and on her way out of the area slipped in the substance, but caught herself before completely falling. She claimed that she hurt her back during this incident. The judge granted our Motion for Summary Judgment on the grounds that plaintiff was contributorily negligent as a matter of law.

**ROB GRIFFIN**, of our Raleigh office, recently prevailed in a wrongful death action in Durham County Superior Court. We represented a

## Recent Case Results

rental car agency, which rented a car to one of the defendants. She allegedly allowed her husband to use the car, and he ultimately struck the decedent and left the scene of the accident. He was later arrested, and it was subsequently determined that he was driving the rental car at the time of this incident. We argued that the rental car agency was not liable for this incident, in that the husband was not an authorized driver of the vehicle. We also argued that N.C.G.S. § 20-71.1 did not apply to create a presumption of agency between the unauthorized driver and the rental car agency. The judge agreed, and granted summary judgment in favor of the rental car agency.

**SUSAN BURKHART**, of our Raleigh office, obtained summary judgment in an insurance coverage dispute in the United States District Court for the Middle District of North Carolina. We argued that an insurance policy issued to a corporate insured did not afford coverage for damages incurred by the son-in-law of the president of the corporation, even though the son-in-law was driving a declared auto, because the vehicle was not "owned" by, i.e., titled to the named insured.

**SUSAN BURKHART**, of our Raleigh office, obtained summary judgment in two land use cases in which we represented municipalities. We presented the Town of Weddington in a case that was pending in the United States District Court for the Western District of North Carolina. The District Court ruled that the Town of Weddington properly enacted a "moratorium" on continued development in the town and that the Town did not violate the plaintiff's constitutional rights in denying site plan approval to the plaintiff. Neither of the plaintiffs in these cases appealed to the Fourth Circuit Court of Appeals.

**GLORIA BECKER**, of our Raleigh office, obtained summary judgment in favor of a defendant manufacturer on the basis that the statute of repose barred the products liability claims. This case arose out of a single car collision when the plaintiff, a quadriplegic, was a student driver undergoing handicapped driver training in an evaluation van equipped with a handicap driver steering device. The plaintiff argued that since the handicap driver steering device had to be installed with each new student driver that the statute of repose should run from the date of the installation. The plaintiff also argued that since the accident occurred within the statute of repose and the lawsuit was filed within the statute of limitations, the lawsuit was timely. Mrs. Becker argued, and the court agreed, that the statute of repose in N.C. Gen. Stat. 1-50(6) runs from the "date of initial purchase for use and consumption" and since the lawsuit was filed more than 6 years after this date, even though the accident occurred within 6 years and the lawsuit was filed within the statute of limitations, the statute of repose barred the claims against the manufacturer of the handicap driver steering device. The plaintiff had made a settlement demand of \$1.2 million.

**GLORIA BECKER**, of our Raleigh office, successfully argued a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in favor of a defendant psychiatrist who was being sued by a plaintiff for violation of civil liberties arising out of a court ordered mental competency examination. The case was pending in the United States District Court, Middle District, North Carolina.

**TRISH HOLLAND** and **RACHEL ESPOSITO**, of our Raleigh office, and **NORWOOD BLANCHARD**, of our Wilmington office, recently prevailed in the appeal of a hotly contested public employment lawsuit filed in the United States District Court for the Eastern District of North Carolina. The lawsuit was brought by a police sergeant against the city by whom he was employed and two management level employees of the city's police department. The plaintiff alleged that he had been demoted because he had testified on behalf of a colleague in a grievance hearing challenging a disciplinary action taken against the colleague for damaging a police vehicle. He then filed suit, advancing constitutional claims for violation of his First Amendment rights, as well as Due Process and Equal Protection claims. After the close of a lengthy discovery period in which the plaintiff conducted numerous depositions, Chief District Court Judge W. Terrance Boyle granted summary judgment in favor of all of the defendants. The plaintiff then appealed to the Fourth Circuit Court of Appeals. Amicus briefs were submitted in support of the plaintiff and the defendant by several different organizations. In a published opinion which addressed several novel issues, the Fourth Circuit Court of Appeals affirmed the summary judgment in favor of the defendants.

**TRISH HOLLAND**, of our Raleigh office, and **NORWOOD BLANCHARD**, of our Wilmington office, recently obtained summary judgment in two police liability cases pending in Lenoir County Superior Court. The plaintiff, a private investigator, was arrested for larceny after taking the wrong automobile in a botched repossession attempt. She then filed separate suits against two police officers, claiming that the officers had wrongfully arrested her. At the hearing on the Motions for Summary Judgment, Norwood argued that the plaintiff's arrest was supported by probable cause. The judge agreed and granted summary judgment in both cases. The plaintiff was also ordered to pay more than \$1,500.00 in litigation costs.

**NORWOOD BLANCHARD**, of our Wilmington office, successfully defended a lawsuit filed in the United States District Court for the Eastern District of North Carolina against a Sheriff's Department and one Deputy Sheriff. The plaintiff was a suspect in an armed robbery of a local restaurant. He was detained for several months pending trial, and then the criminal charges against him were voluntarily dismissed by the District Attorney because the two other suspects in the case had been extradited to another state to face a number of felony charges. He then filed suit, claiming that he had been wrongfully arrested and detained by the Sheriff's Department. United States District Judge Malcolm Howard dismissed some of the claims at the pleadings stage and granted summary judgment on the remaining claims after the close of discovery.

**BILL POLLOCK** and **CHIP CAMPBELL**, of our Raleigh office, were able to have a case against a general contractor for serious injuries incurred by an employee of a subcontractor at a construction site dismissed based solely on the allegations of the complaint, and prior to any significant discovery. In a case filed in Wake County Superior Court, an employee alleged dangerous conditions at a work site made the general contractor liable for the plaintiff's injuries. The case was able to be dismissed based upon case law finding that, even with the allegations of the complaint, there is no duty owed by a general contractor to provide a safe workplace for employees of subcontractors under most circumstances.

**ALYCIA LEVY** and **RICHARD BOYETTE**, of our Raleigh office, obtained summary judgment, on a matter of first impression, in favor of their clients, two certified real estate appraisers, in Guilford County Superior Court. Defendants prevailed on an argument that the statute of repose for "professional malpractice" is applicable to certified real estate appraisers. The case involved causes of action for negligence, professional malpractice, and negligent misrepresentation based on an appraisal which allegedly misrepresented the square footage of a residence.

In a recent case before the Industrial Commission, **TAYLOR PACE**, of our Raleigh office, not only persuaded the Commission to set aside a Form 60 agreement for compensation entered into by a carrier's adjuster, but also obtained an order imposing significant sanctions and penalties against the plaintiff for pursuing a fraudulent claim. The claim arose out of a slip and fall to the floor witnessed by other co-workers in the plant, and resulting in a diagnosis of an ostensibly acute back condition. The carrier's adjuster entered into a Form 60 and commenced payment of benefits. However, a few weeks following the incident, the adjuster learned of potential new evidence suggesting plaintiff suffered from back problems pre-dating his hire, and referred the case to defense counsel. After visiting the plant and interviewing witnesses, Taylor developed evidence establishing that the plaintiff had lied on his employment application about a prior back condition, and suggesting that the plaintiff's fall was likely staged in order to obtain medical and indemnity coverage for surgery the plaintiff had needed before he was employed with the insured. Following a hearing and depositions, the Commission agreed with the defendants' position that the plaintiff had completed a fraudulent employment application regarding his pre-existing medical condition, and that he staged his fall. The Commission ordered that the Form 60 be set aside. The Commission then further ordered that the plaintiff fully reimburse the carrier for all indemnity and medical benefits paid, all defense attorneys' fees expended, and all deposition and expert witness costs incurred. The carrier and the attorneys are in the process of executing against the plaintiff recovery of over \$34,000 in workers' compensation benefits and costs expended. A criminal fraud action against the plaintiff in Superior Court is also being pursued.

**ROB GRIFFIN** and **SUSAN BURKHART**, of our Raleigh office,

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were recently successful in obtaining dismissals of two companion cases in New Hanover County Superior Court. The first case was a tort action arising out of a motor vehicle accident. The second case was an action for declaratory judgment, bad faith, unfair and deceptive trade practices, and punitive damages against our client, an insurance carrier, which was alleged to have UIM coverage for the plaintiff. Plaintiff further contended that the insurer engaged in bad faith and unfair and deceptive trade practices by denying UIM coverage to the plaintiff. We argued that there was no UIM coverage available to plaintiff under defendant's policy, and as such defendant could not be guilty of bad faith, unfair and deceptive trade practices, etc., because its position was correct. We filed a Motion for Summary Judgment in New Hanover Superior Court, and the day before the motion was to be heard, plaintiff took voluntary dismissals with prejudice of both actions.

**LEIGH ANN SMITH**, of our Raleigh office, recently obtained summary judgment on behalf of Wake Med Hospital. The Plaintiff was a temporary employee working at the hospital and was injured when wet concrete fell on her in an elevator. We argued that her case was barred by the exclusivity provision of the North Carolina Workers' Compensation Act, since plaintiff was a dual or joint employee. We also argued that the hospital did not cause the defective condition, and did not have constructive or actual notice of a defective condition. The Court allowed our Motion for Summary Judgment.

**TACKER LECARPENTIER, REID GONELLA** and **MARANDA FREEMAN**, of our Raleigh office, worked on an ERISA-preempted long term disability income case involving over \$1/2 million in denied LTD benefits for a management level, 50 year old employee who claimed that a serious cardiac condition justified payment of these benefits. The U.S. District Court for the Fourth Circuit recently unanimously affirmed summary judgment for our client, Life Ins Co of North America.

**RICHARD BOYETTE AND GEORGE SIMPSON**, of our Raleigh office, obtained summary judgment in Wake County Superior Court for their client, an insurance carrier, in a declaratory judgment action to determine the applicability of a homeowners policy to a case involving allegations of sexual molestation at a home daycare center. The court agreed with the insurer's arguments that the acts of sexual molestation did not constitute an "occurrence," as defined in the policy's granting provisions. In addition, the court concluded that the claims were barred from coverage based on policy exclusions for sexual molestation, home daycare activities, and intentional conduct.

**GEORGE SIMPSON**, of our Raleigh office, obtained a favorable verdict in an auto accident case, following a two day jury trial in Franklin County Superior Court. The case involved a rear end fender bender, which the plaintiff claimed caused him to suffer a herniated disc and soft tissue injuries. The defense stipulated to negligence at trial, leaving damages as the only issue before the jury. Prior to trial, the plaintiff's lowest settlement demand was for \$37,000.00, while the defendant's highest settlement offer was for \$18,000.00. The jury returned a verdict in the amount of \$12,500.00.

**GEORGE SIMPSON**, of our Raleigh office, obtained a no negligence verdict on behalf of the defendant in an auto accident case, following a two day jury trial in Vance County District Court. The case involved a dispute as to whether the plaintiff or the defendant had the green light. Based upon the testimony of three eyewitnesses and the investigating officer, the jury concluded that the defendant, not the plaintiff, had the green light.

**VAN BARNETTE** and **REID GONELLA**, of our Raleigh office, prevailed in a construction case before the North Carolina Court of Appeals. Van previously won a motion for summary judgment base upon North Carolina's 6 year statute of repose. Plaintiffs filed their suit more than 6 years after the original construction of their home. The defendant home builder performed several repairs WITHIN 6 years of plaintiff's filing suit. Plaintiffs argued that these repairs should serve as a "last act or omission" under the statute and that the 6 years should run from the date of the last repairs. Van and Reid cited case law holding that the nature of the repairs performed should not serve to restart the statute and that plaintiffs claims should be barred. The North Carolina Court of Appeals agreed and affirmed the trial court's order granting summary judgment.

**JONATHAN ANDERS AND TRACY MYATT**, of our Raleigh office, recently won a workers compensation claim. Plaintiff worked in the

shipping department for her employer performing shift work averaging 41 hours a week. During some weeks, she worked considerably more than 41 hours due to overtime, but her hours were not excessive. She began treating for marital problems and related depression in 1993. As of early 2000, her depression and anxiety disorder had improved following a hysterectomy, and she was back to her behavioral baseline. Plaintiff quit in March of 2000 under pressure from her husband despite the fact that she loved and gained great satisfaction from her job. Plaintiff stated that shift work was causing too much stress in her family. She testified that she would have gone back to work the next day had the employer told her that a requested day job was available. Plaintiff contended that she was disabled due to the occupational diseases of depression, anxiety disorder, bipolar disorder, and fibromyalgia which were caused and/or aggravated by sleep deprivation related to shift work and excessive work hours. The deputy commissioner denied plaintiff claim and found that based on the competent medical testimony, plaintiff did not suffer from an occupational disease or any condition related to her employment, that plaintiff voluntarily removed herself from her employment, and that plaintiff had not suffered any disability since leaving the employer.

**JONATHAN ANDERS**, of our Raleigh office, recently prevailed in a workers compensation claim. Plaintiff and his son were involved in the landscaping business. Plaintiff was involved in a motor vehicle accident while traveling to the store to pick up supplies for the business. While waiting for police, plaintiff was sitting on the tailgate of his truck when he was struck by a drunk driver and suffered life threatening injuries, and the eventual amputation of plaintiff's left leg. The issue in the case was whether plaintiff was covered by the business' workers' compensation insurance policy. Plaintiff had 49% ownership of the business and his son had 51% ownership of the business, but the son handled the all business insurance purchases and related matters. According to the insurance agent, during the year prior to the accident, the son had added a trailer to the general liability policy. During this conversation, the agent notified the son that the business name on the policy needed to be changed as the business had been incorporated. The agent testified that the son requested exclusion of both himself and his father (plaintiff), the two officers, due to the expense associated with such coverage. The son testified that such a discussion did not take place. The agent then corresponded with the insurer and requested that the business name be changed. In a post script, she requested that both the plaintiff and son be excluded from coverage. Plaintiff contended that the agent was biased against him due to her business relationship with the insurer, but presented no evidence in support of this contention. Furthermore, the business had renewed all coverages with the agent for more than 2 years since this alleged miscommunication without requesting coverage for plaintiff and son. Plaintiff and son both testified that neither had ever read a copy of the workers' compensation but that the same had been mailed by agent to son each year. The policy had and continued to contain the exclusion endorsement excluding both officers (plaintiff and son) from coverage. Note also that plaintiff waited to file a workers compensation claim until after he had recovered approximately \$200,000 from four third parties in his liability / UIM claims. The deputy commissioner denied plaintiff claim, found that plaintiff's son did request that both he and plaintiff be excluded from coverage, and that both were excluded on the date of plaintiff's injury.

**JEFF HOWLE**, of our Charlotte office, recently prevailed in a case before the Full Commission. We successfully argued to reverse a Deputy Commissioner's award of sanctions and attorney's fees against defendants. The Full Commission ruled that the defendants had reasonable ground to defend the claim and no sanctions or attorney's fees were appropriate. Plaintiff's attorney had submitted an affidavit for attorney's fees which would have awarded him \$20,000.

Our Land Condemnation Team consisting of Raleigh lawyers **GEORGE AUTRY, STEPHANIE AUTRY** and **BRADY WELLS**, has prevailed in several cases recently:

(1) We represented Sno White Cleaners in downtown Charlotte, where Mecklenburg County plans to construct a new courthouse and parking deck. After Mecklenburg County deposited the sum of \$875,455.91 as its estimate of just compensation, we argued for a higher value, and the county later agreed to settle the case for over \$1.55 million.

(2) In a recent trial in Alamance County, George and Stephanie

## Recent Case Results

Autry obtained the highest jury award ever in that county. The DOT had taken approximately eight acres of land and deposited the sum of \$400,800 as its estimate of just compensation, and the jury returned a verdict of over \$2.55 million.

(3) We represented the Pan Pan Diner in Durham. The DOT had given an estimate of just compensation of \$427,475. The jury returned a verdict of over \$1.7 million.

(4) At a recent Commissioner's Hearing, involving the condemnation of the Heart of Durham Hotel by the City of Durham, a favorable Commissioner's award was obtained. Although the City offered evidence that the property was worth only \$620,000, the Commissioners returned an award of over \$1.4 million.

(5) We recently obtained another favorable result on behalf of another Durham County landowner. The DOT initially offered \$19,455 for taking .75 acres. On the Friday before trial, the DOT offered to settle for \$148,000.

(6) In another jury trial, the DOT had offered our client nothing for 16 acres of land taken, claiming that it was partially contaminated land. The jury returned a verdict of \$209,763.73, which included interest.

**KATHY MILES**, of our Raleigh office, recently prevailed in a jury trial in Wake County. The defendant made a left turn at an intersection, and there was an accident when the plaintiff collided with defendant while traveling through the intersection in the opposite direction. The plaintiff had \$3,700 in medical expenses and \$400.00 in lost wages. Plaintiff's last settlement demand was \$9,000, and our last settlement offer was \$4,000. The jury returned a verdict for \$3,672.14.

**KATHY MILES**, of our Raleigh office, recently won a jury verdict in Wake County. The plaintiff was injured in a motor vehicle accident occurring in an intersection. Plaintiff's last demand was \$29,550, with the possibility of future plastic surgery on his face. Our last settlement offer was \$760.00. The jury returned a defense verdict on the issue of contributory negligence.

**DONNA RASCOE**, of our Raleigh office, recently won a case before the Fourth Circuit Court of Appeals. *Cone v. Randolph County Schools* involved the issue of an appropriate placement for a 13 year old severely disabled student diagnosed with Fragile X syndrome, autism and other conditions. In 2000, there was an agreement to fund the student's placement at Benedictine School, a private residential program in Maryland. In 2001, school officials proposed a change of placement to a new program in North Carolina. The new program was closer to the student's home and was able to provide the services set out in the student's individualized education program. In August 2002, an administrative law judge ruled in favor of the parents, finding that the school district committed procedural and substantive errors in proposing the change of placement. A state review officer reversed this decision and a federal district court judge granted summary judgment in favor of the school district. The federal court found that the school district complied with the procedural requirements of special education law and that the proposed placement was an appropriate one for this student. In July 2004, the Fourth Circuit affirmed the decision of the district court. In August 2004, the Fourth Circuit also denied the parent petition for rehearing.

**DONNA RASCOE**, of our Raleigh office, recently obtained a dismissal in federal court. Parents of an elementary school student sued the board of education and eleven school officials alleging a violation of privacy rights and various other "human and civil rights." The case grew out of various disciplinary actions by school officials and an alleged improper videotaping of the student. We argued that the case should be dismissed because prior case law, including that of the United States Supreme Court, did not allow a private cause of action for the parents' allegations. The court granted our motion to dismiss, finding that plaintiffs were not authorized to bring a claim under the federal privacy law in question or under Section 1983.

**JOE CHAMBLISS** and **MICHAEL ALLEN**, of our Raleigh office, recently obtained a dismissal of an action against a chiropractic physician during pretrial motions. In this case, the plaintiff contended that chiropractic treatment led to a disc herniation and subsequent cervical fusion. The defendant argued that plaintiff's current claim was precluded by an earlier resolution of a similar matter before the North Carolina Industrial Commission, and the

Court agreed with defense arguments.

**DAVID BATTEN**, **MICHAEL ALLEN** and **REID GONELLA**, of our Raleigh office, recently prevailed on a Motion to Dismiss all claims against our client, a national provider of pharmacy services. Plaintiff contended that a prescription error led to the development of meningitis, requiring prolonged hospitalization and a lifetime of additional drug therapy. The defendant challenged the sufficiency of the pre-suit expert review, and the Court dismissed the claim.

**DAVID BATTEN** and **MICHAEL ALLEN**, of our Raleigh office, recently obtained dismissal of a wrongful death action against a family practitioner located in eastern North Carolina. Plaintiff contended that the practitioner failed to adequately evaluate symptoms of depression and inappropriately prescribed medication, leading to the patient's suicide. The defendant challenged sufficiency of the pre-suit expert review, and the Court dismissed the claim.

**MICHAEL ALLEN**, of our Raleigh office, along with **NORWOOD BLANCHARD** and **ROBERT JONES**, of our Wilmington office, recently obtained summary judgment on behalf of a law enforcement officer in a complaint alleging slander, unconstitutional seizure of forensics and arrest without probable cause. Plaintiff filed notice of appeal to the Fourth Circuit Court of Appeals, and that action was likewise dismissed.

**PATRICIA HOLLAND** and **RACHEL ESPOSITO**, of our Raleigh office, obtained a favorable "no-cause" determination from the Equal Employment Opportunity Commission (EEOC) where a female former employee within a police department alleged that she had been sexually harassed and retaliated against for having reported such alleged sexual harassment. Some of the allegations involved sex toys having been placed in indiscreet locations of the workplace to "harass" the employee. Significantly, the employee had engaged in some of the very same sex toy "harassment" in the workplace, and was not an entirely innocent charging party. We are convinced that this evidence, in part, led to the successful outcome at the EEOC stage. Fortunately, the employer has also avoided a lawsuit in this matter as the former employee has allowed her 90-day statute of limitations to expire without filing suit.

**PATRICIA HOLLAND** and **RACHEL ESPOSITO**, of our Raleigh office, successfully defended an EEOC Charge where the United States Department of Justice ultimately decided not to pursue a matter involving a Caucasian employee who alleged reverse race discrimination arising from her lay-off. The employee alleged that she had more seniority than an African-American employee who was selected for the position that the Charging Party purportedly wanted. We argued that the decision to lay-off the Charging Party, but retain the African-American employee, had nothing to do with race as it was not an "either/or" decision between the two employees (i.e., the employer was not deciding which of the two employees to keep). The Charging Party's position had become redundant during a consolidation of two comparable departments, and another Caucasian employee had been chosen to assume the Charging Party's job responsibilities; therefore, the employer had to lay-off the Charging Party. The employer proved that it had not made any race-based decision.

**PATRICIA HOLLAND** and **RACHEL ESPOSITO**, of our Raleigh office, obtained a favorable decision from the North Carolina Department of Labor (NCDOL) within twenty-four hours of having submitted the employer's formal response explaining the legitimate business reasons for which a former employee's employment was terminated. The employee had alleged that his employment was terminated in retaliation for his assertion of rights under the state Wage and Hour Act. He had allegedly complained about a company leave policy, and his employment was terminated the following week. Despite the temporal connection between the alleged "protected activity" (i.e., complaining about a leave policy) and the termination of employment, the NCDOL found that the employee's questions about a leave policy did not constitute a "protected activity" for purposes of triggering the protections of the Retaliatory Employment Discrimination Act.

**RACHEL ESPOSITO**, of our Raleigh office, obtained a dismissal of a federal lawsuit where a former employee had alleged that his employer discriminated against him based upon his disability, gender and race. The plaintiff proceeded pro se in this action, as well as at least a dozen other lawsuits that he

## Recent Case Results

had filed against prior employers or places where he had applied for employment and was rejected. The Court granted our motion to dismiss on grounds of insufficiency of service of process as well as repeated discovery failings by the pro se plaintiff.

**RACHEL ESPOSITO**, of our Raleigh office, obtained a dismissal of a state court action where the plaintiffs alleged that a local board of education was negligent in preventing a student's injury in a physical education class. Based on grounds of governmental immunity, the Court granted the board's motion for summary judgment despite plaintiffs' argument that the board had waived its governmental immunity through the purchase of insurance.

**STEPHANIE HUTCHINS AUTRY AND RACHEL ESPOSITO**, of our Raleigh office, along with the briefing talents of **ALYCIA LEVY** and **MICHAEL EPPERLY**, all of our Raleigh office, successfully defended a state court action involving a student's auto accident on school property where the plaintiffs alleged that a local board of education had been negligent and had also violated the plaintiffs' constitutional rights. Please see the Education Law article in this issue addressing the victory in *Ripellino v. Johnston County Board of Education*, where all claims were dismissed with prejudice.

**TRISH HOLLAND**, of our Raleigh office, and **CATHI HUNT**, formerly of our Raleigh office, successfully argued a motion for summary judgment seeking dismissal of a Complaint filed by an former employee who had been terminated from his employment with a College. The lawsuit was filed in federal court in Raleigh, and was handled by Chief Judge Terrence W. Boyle. In the lawsuit, the plaintiff alleged a slander cause of action against his former supervisor; and also alleged claims pursuant to Title VII, 42 U.S.C. Section 1981 and a Negligent Supervision and Retention claim against the College. Trish and Cathi represented the supervisor, and obtained summary judgment on the slander claim which resulted in a full dismissal of the lawsuit against the supervisor."

**ERIN TAYLOR**, of our Raleigh office, recently prevailed in a workers' compensation claim. Plaintiff sustained a compensable work injury and defendants accepted the claim on a Form 60. Plaintiff returned to work following his injury, but was later terminated. Plaintiff stipulated that his termination was for misconduct or fault for which a non-injured employee would also have been terminated. The Deputy Commissioner ruled in favor of defendants, finding that plaintiff had not met his burden of proving that following his termination, he was disabled as a result of the work injury. Plaintiff's claim for further benefits for total disability was denied, and his recovery was limited to a 3% permanent partial disability rating.

**ERIN TAYLOR**, of our Raleigh office, recently prevailed in a workers' compensation case. While Plaintiff did prove that he sustained a specific traumatic incident resulting in an back injury, we successfully argued and established that plaintiff had no disability as a result of that injury. The Deputy Commissioner denied the plaintiff's claim for disability benefits and further found that defendants were not responsible for any additional medical treatment.

**ERIN TAYLOR** and **JAMIE BLACK**, of our Raleigh office, recently won a workers' compensation claim. Defendants had accepted plaintiff's claim for injuries to his back and knee on a Form 60. Plaintiff has been receiving temporary total disability benefits since his injury. A few years after plaintiff's work injury, his health declined and he had to be hospitalized for multiple health problems, including congestive heart failure. Following his release from the hospital, plaintiff went to an assisted living center for additional follow-up care. Plaintiff contended that defendants should be responsible for payment of medical compensation for the hospitalization and assisted living center stay, the basis of the contention being that plaintiff's lifestyle became sedentary following his work injury thereby causing his congestive heart failure to worsen. Several depositions were taken of plaintiff's doctors as well as a cardiologist retained by defendants. The Deputy Commissioner denied the plaintiff's claim for medical compensation. Plaintiff has now appealed to the Full Commission, and that appeal is currently pending.

**ANN ESTRIDGE**, of our Raleigh office, recently prevailed in a federal case in the Eastern District of North Carolina. Suit was filed against the school superintendent and other defendants. The plaintiff had made an allegedly obscene phone call to one of the individual defendants. Plaintiff

alleged that the individual defendants then conspired with the superintendent and school system to terminate his employment. After exchanging informal discovery and two depositions, we convinced plaintiff's attorney that his client's claims as to the superintendent were without merit and that if he continued to pursue them, we would seek attorney's fees for continuing to litigate an obviously frivolous claim. As a result, plaintiff dismissed his claims against the superintendent.

**ANN ESTRIDGE**, of our Raleigh office, also prevailed in a Jackson County lawsuit against a school superintendent. The plaintiff argued that his contract with the school board had been improperly terminated. We successfully argued that the superintendent was not a party to the contract, and therefore he could not be liable for a breach of contract claim.

**ANN ESTRIDGE**, of our Raleigh office, recently prevailed in the North Carolina Court of Appeals. The plaintiff had attempted to appeal an adverse decision from a Cumberland County lawsuit. The plaintiff was unsuccessful in perfecting the appeal in that plaintiff failed to timely request a judicial settlement of the Record on Appeal. The Cumberland County Superior Court determined that plaintiffs' request for judicial settlement was moot as the Record on Appeal was settled by operation of the North Carolina Rules of Appellate Procedure. Plaintiff subsequently filed a Record on Appeal with the North Carolina Court of Appeals. We made a Motion to Dismiss at the appellate level and the motion was granted.

**ANN ESTRIDGE**, of our Raleigh office, recently prevailed in the North Carolina Court of Appeals. The Court affirmed the grant of a Motion for Judgment in favor of a school superintendent. The superintendent had been sued by plaintiffs, who contended that the superintendent wrongfully terminated their summer employment.

**ANN ESTRIDGE**, of our Raleigh office, recently successfully defended a suit in Lenoir County Superior Court. Plaintiff had asserted a whistleblower claim defamation claim against a school principal and school superintendent. We served discovery and plaintiff failed to respond fully and completely. We pursued a Motion to Compel, which was granted. When plaintiff failed to comply with the terms of the Order, we served a second Motion to Compel. Prior to that hearing, the plaintiff took a voluntary dismissal. We pursued a Motion for Sanctions, and the trial court awarded over \$1,500 in sanctions.

**ANN ESTRIDGE** and **TRISH HOLLAND**, of our Raleigh office, recently prevailed in an employment law claim. A terminated employee brought an EEOC Charge against a Housing Authority. The employee contended that during her employment with the Housing Authority, she had been unlawfully sexually harassed. We obtained a "no cause" finding from the EEOC on behalf of employer.

**JEFF HOWLE**, of our Charlotte office, recently won a case before the Full Commission. We represented the defendants, who won a denial of benefits where plaintiff was attempting to prove that she contracted RSD and an osteochondral lesion as a result of a compensable accident where boiling water was spilled upon her foot. We were able to prove through deposition testimony that the conditions were not related to the original accident.

**JEFF HOWLE**, of our Charlotte office, and **MAGGIE BENNINGTON**, of our Wilmington office, recently won a case before the Full Commission. We represented the defendants, who won a denial of benefits. The Full Commission reversed the Deputy Commissioner, where the plaintiff was attempting to prove that she had suffered a compensable injury by accident to her shoulder. We proved, however, that plaintiff's description of the accident was not credible.

**NICK VALAORAS** and **JEFF HOWLE**, of our Charlotte office, recently prevailed in a workers' compensation matter. We won a denial of benefits before the Industrial Commission, where the Deputy Commissioner ruled that the plaintiff was not entitled to collect benefits pursuant to N.C.G.S. § 97-31(24) for her osteomyelitis condition.

**JEFF HOWLE** and **NICOLE VIELE**, of our Charlotte office, recently won a workers' compensation case before the North Carolina Industrial Commission. The Deputy Commissioner denied benefits after we proved that the plaintiff's version of the accident was not credible.