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CRANFILL SUMNER & HARTZOG LLP

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Litigation

forum

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

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► Employment Law

The Impact of Social Networking Tools: The Risks and Benefits of Incorporating Personal Information into Employer Personnel Decisions

By Patricia L. Holland, Chair, Employment Practices Group

According to a survey conducted by the National Association of Colleges and Employers, nearly 27% of employers acknowledge that they check profiles of potential job candidates on social networking sites such as MySpace, Facebook and similar Internet “hangouts.” Other employers acknowledged using Google to search for online information about prospective employees. In a survey conducted by the business social network Viadeo, which was released in March of 2007, one in five employers reported that they had turned to the Internet to find information about job applicants, with 59% of those responding stating that the information gained through such searches influenced their hiring decisions. In that same survey, 25% of human resources decision makers reported that they had rejected applicants based on personal information found online.

The “Millennials” – generally considered persons between the ages of 16 and 24 – use sites like MySpace and Facebook the same way that older generations used the telephone, e-mail, letters and meetings at the corner bar to communicate. Social networking sites are a very easy and convenient way to communicate, and Millennials are completely comfortable in the online environment offered by these sites. Unfortunately, many fail to consider their Internet reputations (“NetRep”) when posting to these sites and many do not realize that it is more difficult to remove information from these sites than it is to remove a tattoo. Personal information posted online may remain on the World Wide Web indefinitely, easily accessed by potential employers, clients, and even business rivals.

Should your business incorporate personal information gained from the Internet into hiring decisions?

Few employers would consider it prudent to hire an employee without some sort of background check. Yet employers find themselves placed in the unenviable position of balancing increasing pressures to investigate applicants against a number of legal restrictions on their ability to conduct investigations. The logistics of conducting traditional background investigations of job candidates have become increasingly subject to regulation. Employers often turn to outside agencies or Internet sites to obtain what are termed “investigative consumer reports” such as employment background checks. Employers who use consumer reporting agencies for information when evaluating applicants are subject to significant disclosure requirements under the Fair Credit Reporting Act (FCRA). The FCRA applies to all employers, regardless of size, and if willfully violated, can subject the employer to significant damages including actual and punitive damages, costs and attorney’s fees. Great care must be taken by employers who conduct Internet background investigations of potential employees not to violate the FCRA.

In light of these restrictions, many employers have begun to rely more heavily on the Internet to conduct their own investigations of prospective employees. Since most of the information found on social network sites such as MySpace and Facebook are self-published, the information is open for anyone with an Internet connection to see. MySpace profiles are by default public, and can be viewed

In this issue:

<i>Employment Law</i>	1	<i>Land Condemnation</i>	5
<i>Construction Law</i>	3	<i>Civil/Professional Notes</i>	6
<i>General Liability</i>	3	<i>Recent Case Results</i>	8
<i>Education Law</i>	4		

New Flood Insurance CE Course

In response to the Department of Insurance’s new requirement that each person holding a property and liability, personal lines or adjuster license must complete a CE course on Flood Insurance and the National Flood Program within two years after January 1, 2008, Cranfill Sumner & Hartzog LLP will offer a three-hour CE course to help you meet this requirement. Our course will be approved by the Department of Insurance. Once we have a date, time and location established for this course, we will send out a notice, and, at that time, you will be able to register on our website.

(continued on page 2)

Employment Law

by anyone who searches for a person's name. Facebook profiles are private to search engines, but are often open to networks to which an employer has access.

Employers may view checking out the information about a prospective employee which is available on the Internet as a way to reduce the risks of making a bad hiring decision. For example, there is a legitimate concern about workplace violence. About 900 work-related homicides occur annually. From 1993 to 1999, 1.7 million people a year were attacked as they worked.¹ If you could determine from "Googling" a job candidate or checking their MySpace profile that he had bragged about a violent act, would you not want to know that?

Should an employer hire a job candidate who posted on his web log that he "likes to set things on fire?" or a candidate who responds "yes" to a MySpace survey question asking "In the past month, have you stolen anything?" What about a candidate who listed his college minor as "drinking"? On the other hand, how seriously should employers take such information in making the decision whether to hire the job candidate? What if the information was posted while the candidate was still in high school or college? (Do you really believe everything that your teenager or college student says?) Yet, whether the information posted was true or just immature boasting, would you want to hire a candidate who had exercised poor judgment in an online posting?

The use of this "public" information is not without legal risk either. Most company administrators and managers are well-trained regarding what questions can and cannot be asked in an interview. However, it is tempting for employers to do an "end run" around discrimination laws by searching Google, Yahoo, MySpace, Facebook and other such sites for personal information that would never be asked of a candidate in person or on a printed application. For example:

(1) Employers may not ask questions that would allow the employer to screen candidates based on a protected class under Title VII of the Civil Rights Act of 1964. It is very easy to determine the race and age of a candidate on an Internet social networking site – information that you would not otherwise be entitled to glean from an interview or application.

(2) North Carolina General Statute § 95-28.2 makes it an unlawful employment practice for an employer to fail or refuse to hire a prospective employee because he or she engages in, or has engaged in, the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours. This statute often comes into play when an employer decides that it does not want to hire candidates who smoke cigarettes or drink alcohol – information that can often be easily determined by accessing social Internet sites, but cannot be used in the decision-making process as long as the legal activity occurs off premises and/or off-duty.

(3) North Carolina does not prohibit employers from considering criminal convictions in the selection process, but the EEOC prohibits employers from considering records of arrests that do not lead to conviction – the thinking being that a disproportionate number of African Americans and racial minorities are arrested, but not convicted.

Most employers do not have established policies or procedures addressing how to use information obtained from the Internet, or whether to use Internet searches at all. Employers therefore face potential liability for using information gained from searching the Internet to screen out candidates if they would have otherwise been prohibited from using that same information gained pursuant to traditional pre-screening methods.

So, what is a savvy employer to do? The wise employer should consider the following:

- Be familiar with sites such as MySpace, Facebook and other similar social networking sites;
- Consult with a qualified employment lawyer to discuss the pros and cons of the use of information obtained from such sites for employee background screening;
- Develop appropriate hiring procedures that address procedures for background screening and record checks; and
- Consider having a non-decision maker conduct the Internet search and filter out information relating to characteristics protected by Title VII and similar laws before the search results are passed along to the ultimate decision maker who will be making the hiring decision.



Conclusion

Employers face the increasing risk of negligent hiring or retention claims if their employees cause harm to co-workers or third parties. Employers also face severe restrictions by statutes such as Title VII and the Fair Credit Reporting Act when they attempt to gain background information regarding prospective employees. Finding themselves caught between the proverbial "rock and a hard place," employers may be tempted to turn to the plethora of information about job candidates which is available on the Internet – information that is often placed there by the job candidate without much thought as to who will be reading the information. These inquiries are not without risks however. Employers face a substantial risk from using information obtained from the Internet that they would otherwise be prohibited from securing from their normal pre-screening process. Accordingly, IMNSHO², employers should exercise caution when using information obtained from Internet sites when making hiring decisions. ■

Next Issue: Should (Can) You Google Your Current Employees?

¹ Violence in the Workplace, 1993-1999. Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/abstract/vw99.htm>.

² In My Not So Humble Opinion – Source: Netlingo.com

► Construction Law

Case Law Update

Submitted by William Pollock, Co-Chair of the Firm's Liability Litigation Section

Several decisions by the North Carolina Court of Appeals in the last year have better defined the rights of construction litigation Defendants. In *Kennedy v. Speedway Motorsports, Inc.*, the Court of Appeals used the statute of repose to protect the Charlotte Motor Speedway. In 1995, the Charlotte Motor Speedway, acting as general contractor, hired a subcontractor to build a 320 foot pedestrian walkway over Highway 29. Unbeknownst to the Speedway, the subcontractor knowingly used an unapproved grout containing calcium chloride. The calcium chloride eroded the steel within the walkway and ultimately compromised its structural integrity. On May 20, 2000, hundreds of NASCAR patrons were injured while leaving the Coca-Cola 600 when an 80 foot section of this walkway collapsed. The walkway and patrons fell approximately 25 feet and their injuries ranged from minor to life threatening. Approximately 100 Plaintiffs originally filed suit against the Speedway on May 20, 2003.

The trial court dismissed the complaint because of the North Carolina statute of repose dealing with improvements to real property. This statute requires any cause of action resulting from an improvement to real property be brought within 6 years from the latter of: (1) substantial completion of the improvement or (2) the specific last act or omission giving rise to the lawsuit. An exception to this statute is when the Defendant either *knew or should have known of the defective or unsafe condition*. Here, Plaintiff argued the subcontractor's knowledge should be imputed to the Speedway general contractor as a matter of law. However, the cases cited by Plaintiff for imputing a subcontractor's knowledge to a general contractor dealt with *inherently dangerous activities* such as trenching or blasting that were not present here. The Court of Appeals protected general contractors by refusing to impute a subcontractor's knowledge for purposes of the statute of repose absent any *inherently dangerous activities*.

The Court of Appeals recently affirmed the rule that a general contractor is not liable for the negligence of a subcontractor unless the general contractor exercises control over the subcontractor's operations. In *Henderson v. Apac-Atlantic, Inc.*, the Iredell County school system formed an agreement with the general contractor Defendant for a construction project on school property. Defendant hired a subcontractor to do certain work on the project. In September of 2001, an area between the school and a parking lot became muddy. To fix this problem, the school maintenance department constructed a plywood walkway. In October of 2001, the Plaintiff fell and injured herself while walking across this make-shift walkway and filed suit in negligence. The Plaintiff alleged that either the Defendant or the subcontractor created the dangerous condition on the make-shift walkway by driving a vehicle across it. The Court of Appeals upheld Summary Judgment in favor of the Defendant because there was no evidence that any vehicle was driven across the walkway. The Court stated that even if the Plaintiff proved the contractor had been negligent, the

Plaintiff failed to allege that the general contractor exercised control over the subcontractor's operations. Therefore, Plaintiff has failed to show why any alleged negligence on the part of the subcontractor should be imputed to the Defendant general contractor.

The Court of Appeals also recently re-affirmed the *economic loss rule*. This rule forbids recovery for pure economic losses as a result of negligence where the dispute is governed by a contract. In *Lord v. Customized Consulting Specialty, Inc.*, a general contractor entered into an agreement to build a home for the Plaintiff. Defendant general contractor hired a subcontractor to install trusses beneath the house, which were eventually found defective. The subcontractor reached this agreement solely with the Defendant and not with the Plaintiff homeowner. When both the general contractor and subcontractor were sued for deficiencies in the house, the subcontractor argued the *economic loss rule* prohibited the Plaintiff's negligence claim against them. The *economic loss rule* prohibits recovery for pure economic loss as a result of negligence in situations governed by contract. The theory behind this rule is that contracting parties should be able to allocate risk through contractual terms as they see fit. Here, the Court did not accept the subcontractor's argument to apply the economic loss rule because the subcontractor never specifically contracted with the Plaintiff. The Court held that when there is no governing contract, Plaintiffs are free to seek recovery for pure economic loss in negligence.

Lastly, the Court of Appeals this year specifically refused to define the often used contractual term "*workmanlike manner*." In *Vignola v. Apogee Construction Co.*, the Plaintiffs entered a contract with Defendant to erect a single family home. The contract contained warranties that all aspects of the project would be completed in a "*workmanlike manner*." Within one year of the home's completion, the Plaintiffs filed suit against Defendant for 25 specific defects. The jury returned a verdict in favor of the Plaintiff for \$49,000.00. On appeal, the Defendant argued the trial judge committed reversible error by not instructing the jury on the definition of "*workmanlike manner*." In rejecting the Defendant's argument, the Court of Appeals noted that the courts of this state have never required trial judges to define "*workmanlike manner*." ■

► General Liability

Blame it on Your Server?

By Caroline Powell, Attorney in the Firm's Charlotte Office

For once we are not talking about the Internet. Many states across the country have enacted laws that govern taverns, liquor stores, and other commercial establishments that serve alcoholic beverages, known as "*dram shop laws*." Under these laws, a party injured by an intoxicated person can sue the establishments contributing to that person's intoxication. Generally, liability arises out of the sale of alcohol to visibly intoxicated persons or minors, who then cause injury or death to third parties as a result of alcohol-related accidents, most commonly car crashes, which translates into high liability exposure

for retailers and insurers alike.

The laws were originally established with the intention of protecting the general public from the hazards that can arise by serving alcohol to minors and intoxicated customers. Dram shop legislation has been quite divisive in the general public, however, with groups such as Mothers Against Drunk Driving (MADD) advocating for the laws against sharp criticism that the laws downplay the role of personal responsibility.

Despite the recent debate, dram shop laws are far from novel, dating back to the 19th century temperance movement. The term “dram shop” actually comes from 18th century businesses in England that sold gin by the spoonful, called a “dram.”

Unfortunately, their long historical presence has not translated into clear and easy legal application. In fact, there is a great deal of variation in the laws across the United States. Several states, including Nevada, impose no dram shop liability, while the remaining forty-two states and Washington, D.C. impose dram shop liability to greatly varying degrees. States such as California impose liability on retailers only in cases of illegal alcohol sales to clearly intoxicated minors, while other states, such as Illinois, are more extreme and may impose liability whether or not the vendor knew or should have known the customer was intoxicated.

Currently, North Carolina state law only requires a bar to stop serving someone they know, or have reason to know, is a minor or intoxicated, limiting dram shop recovery to \$500,000 per occurrence. As clear as it may sound, the application of this legislation is often deceptively blurry, so blurry that North Carolina’s highest state court has decided to take up the issue by reviewing an extremely controversial case involving a deadly drunk driving accident that occurred ten years ago. The Court’s decision may provide some clarity to the now murky area of dram shop liability in this state.

In 1997, a Torero’s customer left the Durham restaurant intoxicated, got into his car, crossed the center line and collided with a car driven by Michael Hall, with his wife Theresa in the passenger seat. Michael Hall died as a result of the crash, while his wife sustained serious injuries. Hall’s wife sued the restaurant for negligence, and was awarded \$1.2 million in damages. The Durham County Superior Court set the verdict aside, and the Court of Appeals affirmed, holding that the restaurant owner did not have an affirmative duty to prevent the intoxicated patron from driving his car. *Hall v. Toreros II, Inc.*, 176 N.C.App. 309, 626 S.E.2d 861 (2006).

If the Supreme Court rules in Theresa Hall’s favor, it could mean that servers will be legally obligated to actually take the keys from intoxicated patrons, or physically put them in a cab, hugely expanding the legal duty and liability exposure of any establishment that serves alcoholic beverages, which inevitably means increases in insurance costs. The controversy has sparked zeal in a once latent debate. Those who believe the establishments should bear responsibility for the acts of the patrons from whom they profit are again pitted against those who believe personal responsibility is prime and find placing blame for what a person does when they leave the establishment unfair. The Court may decide the issue by the end of the year. ■

► Education Law

United States Supreme Court Busy with School Law Cases

By Meghan Knight, Attorney in the Firm’s Raleigh Office

Towards the end of its last term, the United States Supreme Court decided several cases that directly impact public schools. The Court’s opinions address a variety of issues, including parental rights under the Individuals with Disabilities Education Act (IDEA), student free speech, and race-conscious student assignment plans. Following are brief summaries of those opinions:³

- *Parents Have Individual, Enforceable Rights under the IDEA*

On May 21, 2007, the Supreme Court, in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), held that the IDEA grants parents individual, enforceable rights, including the right to a Free and Appropriate Public Education (FAPE) for their child. Historically, competent adults could represent themselves as to their own claims. However, courts typically have not allowed non-attorney parents to litigate the claims of their minor children; rather, children must be represented by an attorney.

The *Winkelman* decision means that a non-attorney parent, who is dissatisfied with the outcome of a due process hearing under the IDEA, may seek review in federal court, unrepresented by counsel, because in doing so, they are litigating their own claims under the IDEA. Because the Court held that parents had their own rights under the IDEA, the Court did not consider the issue of whether the IDEA entitles non-attorney parents to litigate their children’s rights under the IDEA.

- *Schools May Limit Student Speech Reasonably Regarded as Encouraging Illegal Drug Use*

On June 25, 2007, the Supreme Court, in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), narrowly held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.” In *Morse*, the Olympic Torch Relay was to pass in front of a public high school in Juneau, Alaska, during the school day. Students were allowed to leave class and observe the relay, supervised by teachers and administrators. After a student refused to take down a fourteen-foot banner bearing the phrase “BONG HiTS 4 JESUS,” the sign was confiscated and the student was suspended. The Court found the principal could restrict student speech at a school event where she reasonably concluded the speech promoted illegal drug use, without running afoul of the First Amendment. The Court noted: “Student speech celebrating illegal drug use at a school event in the presence of school administrators and teachers . . . poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.”

³ These summaries are not intended to be legal advice. School systems potentially impacted by these decisions are advised to consult with their attorneys in order to address their specific situations.

- *Two Voluntary Desegregation Policies Found Unconstitutional*

On June 28, 2007, a sharply divided Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), held that the voluntary desegregation policies of school districts in Seattle, Washington, and Jefferson County, Kentucky, were unconstitutional. Both districts relied “upon an individual student’s race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole.” The issue addressed by the Court was “whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments.”

The Court found that the districts’ policies violated the Equal Protection Clause of the Fourteenth Amendment. Because racial classification was involved, the Court considered the issue using a “strict scrutiny” analysis. This means that for the school systems to justify the use of racial classifications, they were required to demonstrate that the use of such classifications is “‘narrowly tailored’ to achieve a ‘compelling government interest.’” The Court noted that, to date, in the context of racial classifications in public schools, it had only recognized two interests that would qualify as “compelling”: (1) the interest in remedying the effects of past intentional discrimination, and (2) the interest in student body diversity in the context of higher education.

The Court found that the interest in remedying the effects of past intentional discrimination was not present in these cases, because Seattle schools were never segregated by law, nor were they ever subject to court-ordered desegregation plans. The Jefferson County schools, though previously segregated and subject to a court-ordered desegregation plan, had been declared “unitary” in 2000, and therefore that district had no further interest in remedying the effects of past intentional discrimination.

The Court distinguished these cases from those involving diversity in colleges. In the *Grutter v. Bollinger* case, race was one consideration for college applicants, as part of a “highly individualized, holistic review.” However, the Court found that under the plans in Seattle and Jefferson County, “when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*, it is *the* factor.” The districts provided for no “‘meaningful individualized review of applicants’ but instead rel[ied] on racial classifications in a ‘nonindividualized, mechanical’ way.”

Furthermore, the Court found that the voluntary desegregation plans in Seattle and Jefferson County only shifted small numbers of students between schools. The “minimal effect” classifications had on student assignments suggested that other means would be effective, and therefore were not necessary to achieve their stated goals. The Court also found that the districts had “failed to show that they considered methods other than explicit racial classifications to achieve their stated goals” and that “[n]arrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives.’”

It appears that the opinion leaves open the possibility that school boards may use means to achieve diversity that are race

conscious but do not lead to different treatment on an individual basis, as such means would not be subject to strict scrutiny analysis by the Court. ■

► Land Condemnation

The land condemnation section won an important victory in the North Carolina Court of Appeals last month in a case requiring the North Carolina Department of Transportation to compensate townhome owners for the loss in value to their homes caused by a highway project. The DOT took common area owned by the Fernwood Hill Townhome Homeowners’ Association for the construction of the Henderson Loop. Although the DOT’s elevated highway would be built on the common area just a few feet from the townhomes, the DOT refused to add the townhome owners as parties to the eminent domain lawsuit or to compensate the townhome owners for the diminution in value of their homes. **STEPHANIE AUTRY** and **GEORGE AUTRY** argued in the trial court that although the DOT’s taking only included the common area, the townhome community as a whole, including the individual units, had to be considered in determining the damages to be awarded. The trial judge agreed and his opinion in the owners’ favor was affirmed by a unanimous panel of the Court of Appeals, which also stated that this was a case of first impression in the nation. The case is *Department of Transportation v. Fernwood Hill Townhome Homeowners’ Association*, 649 S.E.2d 433 (Sept. 4, 2007).

BRADY WELLS of the land condemnation section also filed two inverse condemnation cases against the DOT arising out of the DOT’s condemnation of a townhome community’s common area. The DOT had settled the claim for the taking of the common area with the homeowners’ association, without obtaining the consent of the individual unit owners. Wells represented the owners in actions to receive payment for the diminution in value of their individual units. The DOT originally offered the two owners no compensation at all, but faced with the threat of liability for the owners’ attorney’s fees and costs, the DOT capitulated to the owners’ settlement demands and paid \$45,000.



In June, 2007, **DAN HARTZOG (RAL)** was inducted into the Litigation Counsel of America at the LCA's Spring Conference and Induction of Fellows in New York City. This honor is awarded to attorneys who are among the elite trial and appellate lawyers within their practice areas throughout the United States.

ROBERT B. JONES, JR., formerly of the firm's Wilmington office, was sworn in as a United States Magistrate Judge for the Eastern District of North Carolina by The Honorable James C. Fox, Senior U.S. District Judge, in Wilmington on October 12, 2007

In October, 2007, **ANDREW AVRAM (CHAR)** spoke at a NC Bar Association Seminar for young attorneys on workers' compensation and evaluating claims from the Defendants perspective. The seminar was held at the North Carolina Bar Association in Cary. Avram also participated in the Muscular Dystrophy Association Lock-Up in August, 2007 and raised over \$4,000. The Charlotte MDA Lock-Up event raised over \$265,000.

ROB GRIFFIN (RAL) was recently accepted for membership in the Trucking Industry Defense Association (TIDA). TIDA and its members are devoted to sharing knowledge and resources in defense of the trucking industry. Founded in 1993, TIDA consists of over 1000 motor carriers, trucking insurers, defense attorneys, and claims servicing companies, both in the United States and Canada. Griffin is the chair of our firm's Trucking and Commercial Transportation Section, and is also a member of the Defense Research Institute (DRI) Trucking Law Committee and the Harmonie Group Transportation Committee.

In September, 2007, **SUSAN BURKHART (RAL)** presented "Insurance Coverage Issues in Construction Claims" to the construction law section at the NC Defense Attorneys Association annual meeting in Greensboro, NC.

In October, 2007, **DONNA RASCOE (RAL)** was appointed to serve on the Disciplinary Hearing Commission of the North Carolina State Bar Council. The Disciplinary Hearing Commission (DHC) acts as the North Carolina State Bar's trial court. It is composed of 12 lawyers and 8 public members, who sit in panels of three to hear complaints of lawyer misconduct referred to it by the Grievance Committee. Rascoe's term will expire on June 30, 2008.

Earlier this year, Governor Michael Easley reappointed **DONNA RASCOE (RAL)** to another two-year term on the North Carolina Child Care Commission. Pursuant to General Statute § 143B-168.4, Rascoe's reappointment went into effect on July 1, 2007. Rascoe has served on the North Carolina Child Care Commission since 2001 and currently serves as the Commission's chair.

WILLIAM POLLOCK (RAL) was elected to a three-year term to the board of directors of the North Carolina Association of Defense Attorneys, which is the statewide organization of attorneys that represents business and industry in defending civil lawsuits.

RICHARD BOYETTE (RAL) has been accepted by the Conflict Prevention & Resolution (CPR) Panels of Distinguished Neutrals as a mediator to the CPR Insurance/Policyholder Coverage and North Carolina Panels. CPR's Panels include many preeminent lawyers, law professors, former judges, and public officials, and are a

source of the most qualified neutrals for the resolution of significant business and public disputes.

AMY PFEIFFER (RAL) has been selected by the N.C. Industrial Commission to serve as the representative for the defense bar on its new strategic Plan for Claims Task Force pursuant to the Industrial Commission Strategic Plan/Report Section 13.4(a) G.S. 97-78 amendment. The purpose of this task force is to assist the I.C. in developing a Strategic Plan for the handling of claims and for expedited medical motions. Pfeiffer is the only defense attorney selected for the task force.

Earlier this year, **ERIN TAYLOR (RAL)** served as Conference Chair and participated as a speaker at the N.C. Workers' Compensation Conference presented by the Council on Education in Management held in Chapel Hill.

BETH FLEISHMAN (RAL) was recently appointed to the Board of Law Examiners by the NC State Bar Council. The Board of Law Examiners examines applicants and provides rules and regulations for admission to the bar, including the issuance of licenses.

BETH FLEISHMAN (RAL) has also agreed to be a faculty member at the International Association of Defense Counsel Trial Academy which will be taught at Stanford Law School next summer. The IADC Trial Academy is one of the oldest and most well respected programs for developing defense trial advocacy skills. The Academy provides intensive, comprehensive and participatory education to young defense trial lawyers. Its faculty members are experienced, well-recognized trial lawyers with extensive trial experience. Faculties and directors rotate on an annual basis.

REGAN TOUPS (WILM) was selected as Chairman of the Young Lawyers Division for the North Carolina Association of Defense Attorneys.

ROBIN DAVIS (RAL) was selected as Chairman of the Employment Practices Group Division for the North Carolina Association of Defense Attorneys.

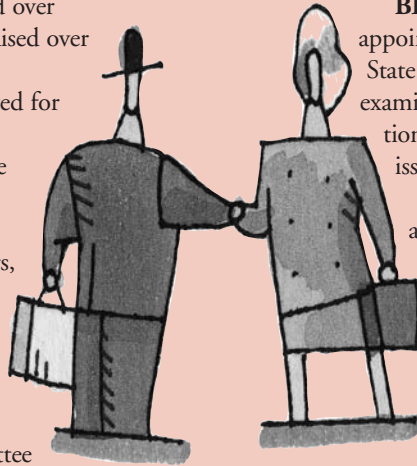
ASHLEY BRATHWAITE (RAL) and **PAUL HOLSCHER (RAL)** recently served as judges in the 2007 Campbell Law School Intramural Moot Court Competition.

PAUL HOLSCHER (RAL) recently participated in the 7th Annual North Carolina League of Municipalities Golf Tournament in Fayetteville, NC.

PAUL HOLSCHER (RAL) became a member of the 2007-2008 NCBA YLD Pro Bono/Poverty Issues Committee.

Cranfill Sumner & Hartzog LLP recently supported Kids' Chance at the Annual Industrial Commission Educational Conference held in August, 2007. Kids' Chance is a nonprofit organization that provides scholarships for children whose parents have been permanently or catastrophically injured or killed on the job. For the live auction held during the conference, **AMY PFEIFFER (RAL)** arranged for the firm to donate a basketball autographed by Sidney Lowe, Head Coach of the NCSU basketball team and the proceeds were given to Kids' Chance.

In October, 2007, Cranfill Sumner & Hartzog LLP was recognized at the Annual Conference of the North Carolina League of Municipalities as a Founding Patron of the NCLM Local Leadership Foundation. **PATRICIA HOLLAND (RAL)**,



SUSAN BURKHART (RAL), **ROBIN DAVIS (RAL)** and **ANN ESTRIDGE (RAL)** attended a conference function during which all founding Foundation Donors were recognized.

In August, 2007, Cranfill Sumner & Hartzog LLP sponsored the President's Reception of the North Carolina Association of Municipal Attorneys Annual Summer Conference held in Atlantic Beach, North Carolina.

JOHN BOWEN "BO" WALKER (RAL) and **ASHLEY KAMPHAUS BRATHWAITE (RAL)** were recently notified they have passed the South Carolina Bar Exam and will be admitted to practice there upon the completion of continuing education requirements. Both are currently licensed to practice in North Carolina.

RACHEL ESPOSITO (RAL) was elected to Chair the Education Law Council of the North Carolina Bar Association in May, 2007. Under her leadership, the Section is debuting a premiere program, the Law Institute for Teachers ("*LIFT*"), in August 2008. *LIFT* will be a program for educators, teaching them about the practical aspects of the law as it relates to them and their jobs (e.g., personnel rights, safety in schools, tort liability, student discipline, special education, First Amendment, Title IX, FERPA). Additionally, the Education Law Section is planning a CLE in April, 2008 to address the Prevention of School Violence on our campuses - a timely and critical topic in light of the Virginia Tech and other school shooting tragedies.

In November, 2007, **RACHEL ESPOSITO (RAL)** was a guest speaker at the School Cyberlaw Academy held in Kenan Center on the UNC Campus. This Academy was geared toward Information Technology Directors, Principals and Assistant Principals from schools across the state. Esposito's speech addressed e-mail and Internet privacy issues in the workplace, including such topics as: monitoring employees' e-mail/Internet use; appropriate policies; googling job applicants; and litigation holds under the revised Federal Rules of Civil Procedure.

PATRICIA HOLLAND (RAL) was recently selected as a Charter Fellow of the Litigation Counsel of America, a trial lawyer honor society. Fellows of the LCA are chosen based upon evaluations of effectiveness and accomplishments in litigation, and superior ethical reputation.

The 2007 edition of Chambers, USA: America's Leading Lawyers for Business recognized Partner **PATRICIA HOLLAND (RAL)** as a "Leading Lawyer" in the field of Litigation. The Chambers ratings are based on extensive interviews of the law firm's clients, colleagues and competitors, and inclusion is determined through a rigorous vetting process whereby Chambers researchers evaluate attorneys on a number of factors.

PATRICIA HOLLAND (RAL) recently completed six years of service as an elected Councilor on the North Carolina State Bar Council, the governing body of the North Carolina State Bar.

PATRICIA HOLLAND (RAL) was recently appointed by Chief United States District Judge Louise W. Flanagan to a three year term as Co-Chair of the Local Rules Committee for the Eastern District of North Carolina, a committee tasked with reviewing and suggesting revisions to the Local Rules of Practice and Procedure of the United States District Court for the Eastern District of North Carolina.

PATRICIA HOLLAND (RAL), Chair of our Firm's Employment Practices Group, was the featured speaker at the October meeting of the Triangle Chapter of the CPA/Law Forum. Holland presented a two-hour program entitled "Practical Tips for Protecting Your Workplace From Employee Complaints and Claims."

PATRICIA HOLLAND (RAL) participated as a speaker at the Fall Seminar of the North Carolina Association of Defense Attorneys. Holland spoke on the topic of "Traps for the Unwary in Employment Release Agreements."

PATRICIA HOLLAND (RAL) recently participated in two 5K road races including the "27th Annual Historic Beaufort Road Race" benefiting the local Rotary Club's work with Carteret County children; and the "Friesen 5K" sponsored by the Carolina Hurricanes Hockey Club benefiting the Leukemia & Lymphoma Society of Eastern North Carolina.

LEIGH ANN SMITH (RAL), **GLORIA BECKER (RAL)**, and **KATHLEEN MILES (RAL)** also participated in the "27th Annual Historic Beaufort Road Race" benefiting the local Rotary Club's work with Carteret County children.

In September, 2007, fourteen attorneys from Cranfill Sumner & Hartzog LLP were selected by their peers for inclusion in *The Best Lawyers in America*® 2008 edition. They are:

Charlotte Office:

- M. Andrew Avram, Workers' Compensation Law

Raleigh Office:

- George B. Autry, Jr., Eminent Domain and Condemnation Law
- Stephanie H. Autry, Eminent Domain and Condemnation Law
- David H. Batten, Medical Malpractice Law, Personal Injury Litigation and Commercial Litigation
- Richard T. Boyette, Alternative Dispute Resolution
- Susan K. Burkhart, Insurance Law
- Paul L. Cranfill (10), Workers' Compensation Law
- W. Scott Fuller (*), Workers' Compensation Law
- Dan M. Hartzog, Personal Injury Litigation and Commercial Litigation
- Patricia L. Holland, Alternative Dispute Resolution and Labor and Employment Law
- C. D. Taylor Pace, Workers' Compensation Law
- Robert W. Sumner, Personal Injury Litigation
- David D. Ward, Medical Malpractice Law and Personal Injury Litigation

Wilmington Office:

- John D. Martin, Medical Malpractice Law and Personal Injury Litigation

(*) Lawyers who are listed for the first time in Best Lawyers.

(10) Lawyers who have been listed in Best Lawyers for at least 10 years.

Since the Spring issue of *LITIGATION FORUM*, the following attorneys have joined Cranfill Sumner & Hartzog LLP:

- Andrew David Hathaway (RAL)**
- Christopher M. Hinnant (WILM)**
- Caroline Hardesty Powell (RAL)**
- Amanda K. Sifford (CHAR)**

MELODY CANADY (CHAR) and **LEE POOLE (CHAR)** successfully argued and obtained dismissal as a matter of law at the pleading level of two of three claims against an attorney brought by former clients in an Adversary Proceeding before the U.S. Bankruptcy Court. The claims dismissed included allegations of Violations of the Automatic Stay in Bankruptcy and Violations of the Fair Debt Collection Practices Act.

MELODY CANADY (CHAR) obtained Summary Judgment on behalf of a volunteer fire department and one of its members individually in an action brought by a former member alleging breach of employment contract, negligent supervision and retention, and malicious prosecution.

DAN HARTZOG (RAL) and **KARI JOHNSON (RAL)** obtained Summary Judgment on behalf of a municipality and several of its police officers in a case where the Plaintiff claimed that he was the victim of excessive force and a wrongful arrest. The Plaintiff asserted numerous federal constitutional claims and several state claims, including assault and battery. This action was pending in federal court.

KARI JOHNSON (RAL) obtained Summary Judgment on behalf of a municipality in a case where the Plaintiff sought to recover damages for serious injuries sustained when she fell on the municipality's sidewalk. The Plaintiff alleged that the sidewalk, which was cracked and broken, was defective and maintained in an unreasonable manner. The Court ruled in favor of the Defendant as a matter of law based on lack of evidence of a breach of duty and contributory negligence.

GEORGE SIMPSON (RAL) recently prevailed in Mecklenburg County Superior Court on a motion for Summary Judgment in a wrongful death case against an assisted living facility. Simpson successfully argued that the case should be dismissed because the Plaintiff had not filed suit against the proper corporate Defendant within the statute of limitations.

GEORGE SIMPSON (RAL) obtained a favorable decision from the North Carolina Court of Appeals, which affirmed a jury verdict in his client's favor in Wake County Superior Court. The case arose out of a one-car accident that occurred when Simpson's client fell asleep at the wheel while the sixteen year old Plaintiff was in the back seat. The Plaintiff's parents also sued to recover the hospital bills they paid on behalf of their daughter. The minor Plaintiff claimed to have suffered a broken nose and torn knee ligaments that required multiple surgeries as a result of the accident. In closing arguments, Plaintiffs' counsel asked the jury to return a verdict of \$300,000. Plaintiffs appealed after the jury awarded the parents only \$4,000 and the minor Plaintiff only \$500. On appeal, the Plaintiffs contended that the trial court erred by allowing Simpson to cross-examine the minor Plaintiff regarding her positive marijuana test results following the accident. The Court of Appeals held that the trial court did not err, observing that the Plaintiffs waived any objection to this evidence when they introduced copies of all of the medical records, including the marijuana test, and then published those records to the jury.

CHRISTOPHER BROOK (RAL) obtained a defense verdict at the Deputy Commissioner level in a case in which the Plaintiff claimed her multiple physical problems arose out of her employment. During the course of the hearing and subsequent depositions, Brook focused on the fact that the Plaintiff had a history of medical problems pre-dating her employment with Defendant. Based on this evidence, Brook was able to successfully argue that the Defendants should not be responsible for the time Plaintiff had missed from work or the medical expenses she had accrued.

MIKE ALLEN (RAL) and **DAVID WARD (RAL)** successfully defended a two week medical malpractice trial in Johnston County. The Plaintiff alleged that our client failed to follow through on certain diagnostic studies that he ordered thereby failing to diagnose carotid artery stenosis. The Plaintiff had a stroke that Plaintiff alleged was caused by his carotid artery disease. The jury returned a verdict in favor of our client, a family practice physician in Smithfield.

PATRICIA HOLLAND (RAL) and **ALYCIA LEVY (RAL)** obtained a Temporary Restraining Order and subsequent Consent Order granting injunctive relief on behalf of an employer against a former employee in a case where the company's former IT Network Engineer, after termination, was accessing the company's computer network system, without authorization, in an attempt to thwart their ability to do business. Specifically, after termination, the employee was entering his former employer's network system remotely and deleting and/or converting for his own use computer programs, company files, and diverting various electronic communication correspondence. On behalf of the plaintiff/employer, Holland and Levy filed a lawsuit against the former employee alleging, among other things, violations of federal and state computer trespassing statutes, unfair and deceptive trade practices, tortious interference with prospective business advantage, and injunctive relief. Plaintiff filed a Motion for Temporary Restraining Order and Motion for Preliminary Injunction. Following a hearing, the Court granted Plaintiff's Motion for Temporary Restraining Order in its entirety. Prior to the hearing on the Plaintiff's Motion for Preliminary Injunction, the former employee entered into a Consent Order admitting to his unauthorized access of the employer's computer system, prohibiting him from entering the system, and requiring the return of all proprietary and/or confidential information, in electronic form or otherwise, belonging to the company.

PATRICIA HOLLAND (RAL) successfully defended a lawsuit brought against a former President of a Company which included claims of Civil Conspiracy, Tortious Interference with Contract and Unfair and Deceptive Trade Practices. The Plaintiff first filed a Third-Party Complaint against the former Company President. Holland filed a Motion to Dismiss that lawsuit, and before the Motion to Dismiss could be heard, the Plaintiff dismissed the Third-Party Complaint. The Plaintiff then filed a Motion seeking Leave of Court to file a second lawsuit against Holland's client -- an Amended Third-Party Complaint. A hearing was held on the Plaintiff's Motion during which Holland argued

that the Court should not allow the Plaintiff to file the second lawsuit based on an argument that to do so would be futile given that the pleading contained no viable claims against her client. After a hearing was held on the matter, the Superior Court Judge denied the Plaintiff's Motion for Leave to File an Amended Complaint, thus ending the lawsuit against Holland's client.

PATRICIA HOLLAND (RAL), RACHEL ESPOSITO (RAL) and NORWOOD BLANCHARD (WILM) successfully defended a lawsuit brought against a Town, its former Town Manager and its Former Police Chief. Two of the Town's police officers resigned after being told that their employment was about to be terminated. They then filed a lawsuit in federal court alleging wrongful discharge under Title VII of the Civil Rights Act (race and sex discrimination) and related constitutional claims, as well as numerous state tort claims. The defense filed a Pre-Answer Motion to Dismiss, arguing immunity, statute of limitations and failure to state a claim defenses. The Court granted the defense's motion, dismissing all of the federal claims outright, but dismissed the state tort claims under the condition that the Plaintiffs had one year to re-file those claims. The Plaintiffs then filed a lawsuit in state court alleging claims of Intentional Infliction of Emotional Distress, Slander and Libel, Tortious Interference with Business Relations, Invasion of Privacy and False Light and Breach of Contract. Plaintiffs also sought recovery of punitive damages against the individual Defendants. The defense filed a motion to dismiss all claims against the Town and the former Town Manager on the grounds that those Defendants had not been timely served, the summonses had lapsed and the statute of limitations had passed and barred all claims against those two Defendants. The Court granted the Motion to Dismiss all claims against those two Defendants. The defense filed a Motion to Dismiss all claims against the former Town Police Chief. At the hearing on that Motion, the Court granted the Motion to Dismiss all claims except the Slander claim, which the Court took under advisement. In an interesting turn of events, the Plaintiffs then dismissed their lawsuit, *with prejudice*, before the Court Order could be entered, thus ending the lawsuit before any discovery had begun. Soon after the Plaintiffs dismissed their lawsuit, the Court notified defense counsel that the Motion to Dismiss the one remaining claim – the Slander claim against the former Chief of Police – had also been dismissed.

PATRICIA HOLLAND (RAL) and DAN HARTZOG, JR. (RAL) obtained a favorable "No Cause" determination from the Equal Employment Opportunity Commission ("EEOC") in a case where a former employee who had been discharged from employment claimed race discrimination, retaliation and wrongful termination. The employer demonstrated that the termination occurred due to serious, inappropriate workplace conduct that endangered one of its residents. Ultimately, the EEOC found that there was insufficient evidence to establish any type of discrimination or retaliation, and accordingly dismissed the Charge.

ANN ESTRIDGE (RAL) and ALLISON SERAFIN (RAL) successfully argued a Motion to Dismiss in Wayne County Superior Court in which the Plaintiff, a former employee of Defendant, filed a lawsuit against her employer alleging claims of Wrongful Termination, Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress. Defendant argued that the employer's basis for terminating the employee was legitimate when it discharged the employee for failing a drug test although the Plaintiff / employee denied using illicit drugs and the results of the drug test later proved to be a "false positive." Defendant also argued that Plaintiff failed to establish the requisite elements of a lawsuit necessary to defeat a Motion to Dismiss. The Court agreed with Defendant and, after oral arguments, dismissed all of Plaintiff's claims against the Defendant employer with prejudice.

ALLISON SERAFIN (RAL) successfully obtained a "No Cause" determination from the EEOC recently in a case where a former employee who had been discharged claimed sexual discrimination and retaliation. The employer demonstrated that the termination was in fact based upon the employee's poor work performance and repeated attendance problems. After a thorough investigation, the EEOC concluded there was insufficient evidence to support the employee's allegations of sexual discrimination and retaliation and ultimately dismissed the Charge. In the same matter, a "No Cause" determination was also obtained from the North Carolina Department of Labor where the same discharged employee complained she was terminated in violation of the North Carolina Retaliatory Employment Discrimination Act "REDA". The employer presented evidence supporting the position that the employee was terminated due to serious performance problems as opposed to the Plaintiff's allegations she was discharged because she made a workers' compensation claim. The NC DOL investigated the complaint and found that there was insufficient evidence to determine a violation of REDA. Accordingly, the Department dismissed the employee's Charge.

PATRICIA HOLLAND (RAL) and ALLISON SERAFIN (RAL) successfully obtained a "No Cause" determination from the EEOC in a case where a former employee was terminated and later claimed racial discrimination. The former employee claimed that despite the previous warnings she received from her employer about her personal use of the company's Internet, she was nonetheless terminated because of her race. The employer demonstrated that the employee's discharge was based entirely upon poor work performance including abuse of the company Internet policy. Additionally, the employer argued that the former employee's Charge of Discrimination was not timely filed and, therefore, she was precluded from lawfully pursuing a cause of action under Title VII. The EEOC concluded there was insufficient evidence to support the employee's allegations of race discrimination and dismissed the Charge.

JOHN MARTIN (WILM) and JESSE BLYTH (WILM) After a two-week trial in Robeson County, a jury returned a verdict in favor of the Hospital in a wrongful

death case. The case involved the shooting of a visitor to the Hospital by the Hospital's armed security guard. The Plaintiff alleged that the security guard used excessive force in fatally shooting the decedent. The decedent was in an altercation with another visitor involving a knife. The defense argued that the security guard was justified in using deadly force in the defense of himself and others. The jury returned a verdict in favor of the Hospital after deliberating for 2 hours.

WILLIAM POLLOCK (RAL) successfully defended two recent arbitrations, and in both cases the arbitration award completely relieved the Defendants of any liability. One arbitration proceeding involved a claim by the purchaser of a new home under a home warranty company, in which our firm represented the warranty company. The homeowner complained of leaks in her basement, and alleged that the builder constructed the house improperly, and that she was entitled to coverage under the warranty issued on the home. At arbitration, we successfully showed that the homeowner failed to comply with the terms of the warranty in timely submitting a claim, and that any claims submitted were not covered by the warranty. In another arbitration, Pollock represented a home inspector who was sued by former clients for allegedly failing to find structural defects in the home. At arbitration, we were able to show that the inspector performed a reasonable inspection, and that the defects complained of occurred during a drought that happened after the inspection.

DANIEL KATZENBACH (RAL) obtained a defense jury verdict at trial in Durham County in May, 2007. Katzenbach represented a general contractor sued by a homeowner Plaintiff alleging that his house was sinking due to bad soils, and asked the jury to award \$89,000 for helical piers to be installed all around his house. After a week long trial, the jury agreed with defense experts that the house was not sinking, and only awarded the Plaintiff \$5,000 for miscellaneous minor repair issues.

DANIEL KATZENBACH (RAL) obtained a Rule 12(b)(6) dismissal of a Complaint where the Plaintiff sued his employer and alleged that the claim fell under the *Woodson* exclusion to the Workers' Compensation Act. The Court agreed with Katzenbach that the Plaintiff had failed to allege sufficient facts to support a *Woodson* claim and survive a 12(b)(6) motion.

DAN HARTZOG (RAL) and **KATIE WEAVER HARTZOG (RAL)** recently obtained a defense verdict in a highly contentious wrongful death shooting case in Johnston County, in which they represented the alleged owners and manager of a mobile home community who sold lots to residents. Plaintiffs claimed that the death of their husband and father occurred because Defendants failed to remove a resident from the community who, from time to time, engaged in the act of masturbating in his window where his neighbors could see him. This shooting death occurred after the decedent learned that this resident may have exposed himself and masturbated in the view of his son. The decedent, who was highly intoxicated, walked to the home of the resident and began beating and kicking the door, and ordering the resident

to come out. Meanwhile, the resident, who was still inside his mobile home, called 911 to report the incident. While the resident remained on the phone with 911, the decedent kicked the door open and entered the residence. While pointing a shotgun at the decedent, the resident demanded that the decedent leave his residence no less than 14 times. Instead of leaving the residence, the decedent shouted obscenities at the resident and threatened him with bodily harm. The resident testified at trial that he shot the decedent when the decedent lunged at him. At the end of a seven day trial, the jury found that the resident acted in self defense and that the Defendants were not negligent.

DAN HARTZOG (RAL) and **KATIE WEAVER HARTZOG (RAL)** recently obtained Summary Judgment for a corporate client which is involved in the business of leasing and managing parking lots and facilities in the Raleigh area. Plaintiff brought claims of unfair and deceptive trade practices, trespass, property damage, and malicious prosecution against Defendants after his car was booted in a parking lot in downtown Raleigh. The Plaintiff parked his car in a private lot while he had lunch despite the fact that there were two signs in the parking lot indicating that the lot was not open to the public. When the Plaintiff returned to his car after lunch to find an immobilization device attached to his wheel, instead of paying \$50 to have the boot removed as indicated on the notice on his car, Plaintiff removed his wheel along with the boot from his car. Plaintiff then placed the spare tire on his car and drove away with the Defendant's boot. After lengthy discovery undertaken by the Plaintiff, all parties filed motions for Summary Judgment. At the hearing on the motions, Summary Judgment was granted in favor of the Defendants as to all claims.

DAN HARTZOG (RAL) and **KATIE WEAVER HARTZOG (RAL)** recently obtained a voluntary dismissal on behalf of a school administrator who was sued for wrongful death after his son, a student at a public university in North Carolina, raped and killed a fellow student. The Plaintiffs alleged that despite the fact that the administrator knew or should have known of the violent propensities of his son, the Defendant used his position as an administrator within the UNC system to help his son gain admission to the university, eventually resulting in their daughter's death. The Plaintiffs voluntarily dismissed their claims against the administrator after the defense served a brief in support of their Rule 12(b)(6) Motion to Dismiss.

KATIE WEAVER HARTZOG (RAL) recently obtained Summary Judgment on behalf of an apartment complex in a slip and fall case where the Plaintiff fell due to the presence of water on the floor of her apartment caused by a water leak. The judge agreed with Hartzog's argument that the Plaintiff knew or should have known about the presence of the water and the apartment complex did not breach any duty to the Plaintiff.

JOHN MARTIN (WILM) and **REGAN TOUPS (WILM)** received a favorable ruling on a motion for Summary Judgment in a section 1983 case filed by a pro se Plaintiff against a prison doctor. The prisoner alleged the doctor failed to provide adequate medical care for his back. The

prisoner was diagnosed with a herniated disk and a neurologist recommended surgery. The request for surgery was denied on several occasions by the State's Utilization Review Board. The prisoner eventually received the surgery after the lawsuit was filed. The basis of the Motion was that Plaintiff did not have sufficient evidence to move forward with his section 1983 claim against the doctor. The Defense argued that the Plaintiff was provided ongoing care by the doctor over a period of several years and the doctor appealed the decisions of the Utilization Review Board. The Court ultimately agreed and dismissed the case.

JOHN MARTIN (WILM) and **REGAN TOUPS (WILM)** were granted Summary Judgment in a case brought by a patient against a hospital. The Plaintiff filed suit against the hospital claiming the staff failed to remove a piece of gauze in an open wound that was treated by the staff during his hospital stay. The Plaintiff only included an ordinary negligence claim and argued that under *res ipsa loquitur*, the hospital was liable for failing to remove a "foreign body." The Defense argued the claim was a medical malpractice claim and asked for a dismissal since the Plaintiff failed to include Rule 9(j) certification. The Defense argued that the gauze was intentionally placed to help the wound heal, and the Plaintiff was responsible for performing dressing changes to the open wound after he left the hospital. Also, there was no evidence that the gauze ultimately found was the gauze placed by the hospital staff. The Court determined that the *res ipsa loquitur* doctrine did not apply and found dismissal of the case was proper.

COLLEEN SHEA (WILM) and **SHANE WALKER (WILM)** obtained a dismissal in a catastrophic residential elevator case. An 11 year old child was killed on the elevator while attending a birthday party. The Estate alleged that their client improperly installed the elevator and violated numerous applicable codes. Shea and Walker successfully argued that a co-Defendant's negligence insulated and superseded any alleged negligence of their client due to the fact that the co-Defendant disabled the safety features of the elevator after the installation and inspection had occurred.

JOHN MARTIN (WILM) and **COLLEEN SHEA (WILM)** forced counsel for Plaintiff into taking a Voluntary Dismissal in a medical malpractice case involving the death of a pregnant patient and her fetus. Counsel for Plaintiff identified two 9(j) experts who were subsequently deposed. Based upon their testimony, Martin and Shea immediately filed a Motion to Dismiss for the Plaintiff's failure to comply with the substantive requirements of Rule 9(j). Prior to the hearing on the Motion, counsel for Plaintiff took a Voluntary Dismissal. Martin and Shea informed counsel for Plaintiff that re-filing the action could not cure their failure to comply and that they would move to dismiss on the same grounds if the case is re-filed.

PATRICIA HOLLAND (RAL), **RACHEL ESPOSITO (RAL)** and **PAUL HOLSCHER (RAL)** won Summary Judgment on three of four claims brought by two Plaintiffs arising from the separation of their employment. The

Plaintiffs alleged that it was not because of a reduction in force that they lost their jobs; rather, it was an alleged unlawful plot to fire them without cause and in breach of their so-called contracts. The one claim of breach of employment contract went to trial after a contentious discovery period involving extensive electronic discovery requests. The defense prevailed on a motion for protective order where the Court entered a fee-splitting order requiring the Plaintiffs to pay 50% of the costs incurred by the defense in searching computer data for responses to the Plaintiffs' discovery requests. At the trial on the contract claim, two former Directors of the Defendant/employer were slated to testify *against* the defense. However, after jury selection, opening statements and a day-and-a-half of testimony, the Plaintiffs' settlement demand fell precipitously to less than one-fifth of their initial demand on the first day of trial, and the matter was resolved.

RACHEL ESPOSITO (RAL) obtained a "No Cause" determination from the EEOC in a case where the Charging Party alleged that he was discriminated against based on his race, and that he was discharged in retaliation for his so-called report of discrimination, under Title VII of the Civil Rights Act of 1964. The Charging Party/former employee alleged that he was discharged, in part, because he complained that a female employee in another department got hired for a position based on favoritism. The defense argued that this complaint of favoritism did not constitute a "protected activity" under Title VII, and was therefore not actionable. The former employee further asserted that his conduct in changing his subordinates' performance ratings, after these ratings had been approved by management, did not merit termination. The defense presented evidence to the EEOC that the employee surreptitiously upgraded ratings for 19 of his 24 subordinates in a self-serving motive to have these subordinates rate him better on his end-of-year performance evaluations. The right-to-sue letter was issued to him, but his statute of limitations has now expired, he has not filed suit, and he has lost his rights to pursue any Title VII claims.

ERIN TAYLOR (RAL) won a case before the N.C. Industrial Commission that involved a denied claim for an alleged back injury. The Deputy Commissioner found Plaintiff failed to establish that she sustained a compensable injury and that she presented insufficient medical evidence that the alleged work incident caused her back injury. The Deputy Commissioner further held Plaintiff did not prove she was disabled due to a compensable work incident. Plaintiff's claim was denied in full. Plaintiff appealed to the Full Commission who affirmed the Deputy's denial of the claim.

ERIN TAYLOR (RAL) prevailed in a case that involved a denied claim for an alleged back injury. Plaintiff was walking across the floor at work when his back "went out." Defendants denied the claim on the basis that Plaintiff did not sustain a specific traumatic incident arising out of his employment. Plaintiff also had significant pre-existing back problems and Defendants further alleged Plaintiff's condition was related to these prior problems. While the Deputy Commissioner found Plaintiff did sustain a specific traumatic incident, he further concluded that Plaintiff presented insuffi-

Recent Case Results

cient medical evidence to establish that the work incident caused Plaintiff's disability. Therefore, Plaintiff's claim for compensation was denied in full.

ERIN TAYLOR (RAL) won a case that involved mediating and enforcing a settlement agreement. The parties participated in a mediated settlement conference and reached a settlement. The terms of the settlement were set forth in a Mediated Settlement Agreement that was signed by the parties. The next day, Plaintiff decided she did not want to go through with the settlement and refused to sign the clincher agreement. Defendants filed for a Hearing to enforce the settlement. The Deputy Commissioner found there was a meeting of the minds among the parties as to all essential terms of the agreement. The Deputy Commissioner concluded the Mediated Settlement Agreement was a valid contract and was enforceable, that it complied with Rule 502 and N.C.G.S. 97-17, and that the settlement was fair and just and in the best interest of all parties. Plaintiff appealed to the Full Commission who affirmed the Deputy's decision.

ERIN TAYLOR (RAL) prevailed in an occupational disease case before the Full Commission. Plaintiff's claim for bilateral carpal tunnel syndrome had been accepted, but Defendants denied Plaintiff's claim for CMC joint arthritis. The Deputy Commissioner had found Plaintiff's bilateral CMC joint arthritis was compensable and awarded benefits. The Full Commission reversed. First, they pointed out that Plaintiff only filed a claim for left CMC joint arthritis and not bilateral. Second, they found the greater weight of the evidence failed to show Plaintiff's employment placed her at an increased risk of developing CMC joint arthritis and failed to show her employment caused or significantly contributed to the development of her CMC joint arthritis. Therefore, Plaintiff's claim was denied.

VICTORIA STREET (CHAR) successfully defended a Charlotte Apartment Complex and its Property Manager against a complaint filed with the U.S. Department of Housing and Urban Development ("HUD") alleging discriminatory housing practices under the Fair Housing Act and Title VII of the Civil Rights Act. The complainant claimed that he was subjected to different terms and conditions during the rental application process on the basis of his race. The matter was ultimately assigned to The Charlotte-Mecklenburg Community Relations Committee ("Community Relations Committee"), which is a statutory human relations agency that enforces fair housing ordinances on behalf of HUD. Upon investigation, the Community Relations Committee found insufficient evidence to find that a violation of the Charlotte Fair Housing Ordinance occurred, and accordingly dismissed the complaint.

SAMUEL POOLE (CHAR) and **VICTORIA STREET (CHAR)** obtained a dismissal in the Western District of North Carolina Federal Court. The Plaintiffs, two real estate entities, brought suit against a California corporation, its President, and two former employees in a matter including claims for breach of contract, intentional interference with contractual relations, intentional interference with business relations, misappropriation of confidential information,

unfair trade practices, unjust enrichment, and defamation. The defense filed a Motion to Dismiss based on lack of personal jurisdiction on behalf of the California corporation, its President, and one of the former employees. The Court held that it did not have personal jurisdiction over these Defendants and therefore dismissed all claims against them with prejudice.

SAMUEL POOLE (CHAR) and **VICTORIA STREET (CHAR)** successfully defended a lawsuit brought against a Utah corporation in the Western District of North Carolina Federal Court, which included claims for breach of contract, tortious interference with contractual relationship, unfair and deceptive trade practices, fraud, and damages in excess of Five million dollars (\$5,000,000.00). The defense filed a Motion to Dismiss, or in the Alternative, Motion to Transfer Venue to the United States District Court for the District of Utah. After hearing oral arguments, the Court agreed with the defense and granted Defendant's Motion to Transfer Venue holding that venue was proper in Utah.

PATRICK FLANAGAN (CHAR) and **VICTORIA STREET (CHAR)** obtained Summary Judgment in favor of a corporate Defendant in the Western District of North Carolina Federal Court. The case involved claims for sex discrimination and age discrimination in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act ("ADEA"). In dismissing Plaintiff's claims with prejudice, the Court concluded that the defense had successfully demonstrated that Plaintiff was terminated due to chronic tardiness, absenteeism, and poor work habits and not because of his sex or age.

Pro Bono:

MELODY CANADY (CHAR) provided pro bono representation through the Mecklenburg County Volunteer Lawyers' Program to a grandmother seeking permanent custody of her four young grandchildren from their mother who had neglected them and left them in their grandmother's care for extended periods of time since their birth. At the permanent custody and child support trial, Melody obtained an order awarding the grandmother permanent custody of all four grandchildren as well as ordering the mother to pay child support.