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DEFENSE COUNSEL: **John Ong, Matt Lilly**

FIRM: **Cranfill Sumner & Hartzog LLP**

HEADQUARTERS: **Raleigh, NC**

PRODUCT LIABILITY/ PERSONAL INJURY

Table Saw Manufacturer Sued for \$750,000 for Loss of Fingers

Plaintiff alleged that a table saw manufactured and distributed by the Defendants was negligently designed in that its blade guarding system was not of the modular type that became common after the saw was manufactured and because it did not include flesh detection technology. The Plaintiff suffered a severe laceration resulting in the loss of use of three fingers after the table saw fell while he was making a cut. The Defendants contended that the saw was appropriately designed and was in conformance with all applicable safety standards. After evaluating the evidence, the testimony from a number of expert witnesses, and closing arguments in which Plaintiff's counsel asked for \$750,000 or more, the jury found no negligence and returned a verdict in favor of both Defendants. Because they found no negligence, the jury did not reach the issue of contributory negligence, which Defendants also argued barred Plaintiff's claims. ♦

MEDICAL MALPRACTICE

Medication Reaction Malpractice Case Appealed

Court affirmed a defense jury verdict in favor of medical providers, holding that the burden of proof for intervening negligence remains with a Plaintiff. The estate of a patient sued the providers, alleging their negligence in prescribing and titrating a medication. Both during the four-week trial and on appeal, the parties contested which party bore the burden of proof for intervening negligence when a non-party medical provider failed to detect and diagnose the patient's classic, textbook reaction to the medication. The Court of Appeals relied on the pattern jury instructions and long-established case law, holding that intervening negligence was an elaboration of proximate cause, an element of negligence, for which the Plaintiff bore the burden of proof. The Court rejected arguments that the burden of proof shifted when an instruction on intervening negligence was requested or that a Plaintiff was required to disprove the intervening negligence of another. ♦



ERISA SUBROGATION

ERISA-Qualified Plan Sues on Lien against Personal Injury Attorney

A participant of a self-insured, ERISA-qualified employee benefit healthcare plan (“Plan”) was injured through the negligence of a third party. The Plan paid out benefits in the form of medical expenses for the participant’s treatment. The participant hired an attorney to proceed with a personal injury claim against the at-fault tortfeasor. The Plan claimed a lien over the proceeds of any recovery on the tort claim pursuant to language in its plan documents creating rights of reimbursement/subrogation. The Plan put the participant and her attorney on notice of its claimed lien; however, the tort claim was settled, and the Plan’s lien was not paid. The Plan filed suit against its participant and her attorney, seeking payment of its claimed lien. The participant’s attorney moved to dismiss the claims against him, citing prior case law from within the district holding that the attorney bore no liability under ERISA. The Court, however, allowed the Plan’s ERISA claims against the attorney to proceed, citing recent developments in the law throughout the other federal circuits as well as at the Supreme Court level. ♦

DEFENSE COUNSEL: **Christopher M. Hinnant**

FIRM: **Cranfill Sumner & Hartzog LLP**

HEADQUARTERS: **Raleigh, NC**

MEDICAL MALPRACTICE/ WRONGFUL DEATH

ER Physician Sued for Prescribed Medications in Patient's Death

Defense obtained summary judgment on behalf of an emergency medicine physician and his group in a wrongful death case. The Plaintiff alleged that the emergency room physician, and several subsequent physicians, improperly prescribed and administered anticoagulant medications for the decedent's heart arrhythmia. Plaintiff went on to allege that the anticoagulant therapy ultimately caused the decedent's death from a fatal brain hemorrhage several days later. The trial court held that the Plaintiff failed to prove any causal connection between the single dose of anticoagulant medication prescribed by the emergency medicine physician and the decedent's ultimate death. The Court of Appeals unanimously upheld the summary judgment decision. ♦



DEFENSE COUNSEL: **Patrick M. Mincey**
FIRM: **Cranfill Sumner & Hartzog LLP**
HEADQUARTERS: **Raleigh, NC**

CONSTRUCTION DEFECTS/ PROFESSIONAL NEGLIGENCE

Civil Engineer Firm Sued in Derivative Action Involving Alleged Defects

A commercial construction defects case brought by hundreds of property owners in a planned community who alleged engineering firm negligently designed and constructed marina bulkhead and common amenity ponds. The defense successfully obtained dismissal of corporate derivative claim and set North Carolina precedent in corporate derivative actions law. ♦



DEFENSE COUNSEL: **Patrick M. Mincey**
FIRM: **Cranfill Sumner & Hartzog LLP**
HEADQUARTERS: **Raleigh, NC**
(Location: **Wilmington, NC**)

LEGAL MALPRACTICE

Real Estate Attorney Absolved Of Liability Because Of Quasi-Judicial Immunity

Plaintiff sued real estate attorney who conducted court ordered partition of property Plaintiff owned with her partner. After Plaintiff alleged breach of fiduciary duty for attorneys failure to garner sufficiently high bid on property, appellate court upheld dismissal of claims because attorney had quasi-judicial immunity. ♦



POLICE LIABILITY – EXCESSIVE FORCE

City and Police Officers Sued in Fatal Shooting

The case involved two city police officers who responded to reports of a shooting at a residence. While the two officers were investigating the scene, Plaintiff, who had been staying at the residence, returned to the scene, driving his vehicle in a reckless and dangerous manner in the direction of the officers. After Plaintiff narrowly missed hitting both officers once, Plaintiff drove his vehicle directly towards one of the officers. Both officers fired their service weapons at the driver, who was fatally injured as a result. Plaintiff alleged that the fatal shots were fired into the side of the vehicle after it had passed the officer, and that the officers were not in any actual danger when the use of force occurred. The Court found that the officers acted reasonably under the circumstances, due to the threat to their safety resulting from the Plaintiff's actions. As a result, the Court granted summary judgment on all claims in favor of Defendants. ♦

DEFENSE COUNSEL: **Robert Rubin, Mica Worthy /
Appellate attorney Jaye Bingham-Hinch**
FIRM: **Cranfill Sumner & Hartzog LLP**
HEADQUARTERS: **Raleigh, NC**
(Office Location Involved: **Charlotte, NC/Raleigh,NC**)

PREMISES LIABILITY/ PERSONAL INJURY

Plaintiff's Attempts to Add Hotel to Lawsuit before Statute of Limitations

Plaintiff claimed he was a guest of a Charlotte area hotel when he slipped and fell on ice on the premises and required medical treatment. This case was procedurally complex because Plaintiff originally incorrectly sued the president of the company that owned the hotel as an individual, failed to accomplish service on the individual, and then later amended the Complaint to attempt to bring the corporation into the action. Plaintiff obtained an Entry of Default against the individual, which defense counsel was able to have set-aside and ultimately dismissed.

As for the corporation, defense counsel successfully argued that Plaintiff failed to name the correct legal entity as a Defendant and failed to properly serve the corporation with the lawsuit before the statute of limitations ran. Plaintiff relied upon a Certificate of Assumed Name, which counsel for Plaintiff alleged at the Motion to Dismiss hearing was misleading or deceiving. Defense counsel successfully overcame this argument emphasizing that the correct corporate entity was plainly listed on the same Certificate of Assumed Name.

Plaintiff's counsel appealed the dismissal alleging error in dismissing the case or in the alternative equitable estoppel based on the allegedly misleading Certificate of Assumed Name. The Court of Appeals was convinced by counsel for Defendants' Memorandum of Law that Plaintiff's failure to amend his Complaint within the period prescribed in the applicable statute of limitation was not based on Defendants' misrepresentations, that Plaintiff failed to add the correct legal entity within the statute of limitations, that Plaintiff knew or should have known which legal entity was the owner and operator of the hotel and that it was a separate and distinct legal entity from its owner; and that the purported amended Complaint did not relate back to the original Complaint.

Had the Defendants not prevailed on the Motion to Dismiss, litigation would have required extensive discovery and document production into the procedures and policies of the hotel and the potential award to Plaintiff could have been significant considering the medical treatment received. ♦

DEFENSE COUNSEL: **Pat Flanagan, Mica Worthy, Virginia Wooten**
FIRM: **Cranfill Sumner & Hartzog LLP**
HEADQUARTERS: **Raleigh, NC**
(Office Location Involved: **Charlotte, NC**)

CONSTRUCTION/ENVIRONMENTAL/ PREMISES LIABILITY

Student Housing Owner Sued for Alleged Causation of Flood Damage

Plaintiffs owned property situated downhill from the site of a new student housing development in Western, NC. After significant and historical flooding of the area, Plaintiffs alleged negligence, nuisance, trespass and violation of the NC Sedimentation Pollution Control Act against the owner of the student housing development and a local subcontractor. E-Discovery and document production was extensive prior to summary judgment. However, Defendant owner was able to prevail at the hearing on its motion for summary judgment by challenging Plaintiffs' evidence on causation. Counsel for Defendant retained two experts to address the Sedimentation Pollution Control Act violations and the causation element respectively. Plaintiffs failed to designate an expert alleging a lay person could determine the cause of the damages from the uphill development project. The trial judge granted Defendant owner's motion for summary judgment.

Had the Defendants not prevailed on the Motion to Summary Judgment, the potential award to Plaintiffs could have been significant considering their claims of damages which included the shutdown of Plaintiff's entire business due to flooding, damage of inventory and personal effects in the basement of the flooded residence and theft from the unsecured residence after the floods. ♦

CONSTRUCTION/ PROPERTY DAMAGE

Recovery Denied in 2.4 Million Fire Loss

At the end of the first week of trial after Plaintiffs rested, all Defendants were granted a directed verdict when Plaintiffs failed to establish liability on any Defendant for the spread of a fire believed to have started accidentally in a mulch bed. Plaintiffs were unable to elicit adequate expert testimony that an improperly installed and supported gas line, which eventually failed during the fire, contributed in any significant way to the spread of the fire. While the Court had denied pretrial motions for summary judgment and the exclusion of one of Plaintiffs' experts, the motion practice "set the table" for the directed verdict. The jury was polled after the decision and all agreed that Plaintiffs had failed to show any fault on the Defendants. ♦



PERSONAL INJURY

Amusement Park Injury Appealed

Koch Development Corporation (the owner and operator of the Holiday World amusement park) was sued in a suit related to the release of chlorine gas at the park. The Plaintiff and his family were visiting Holiday World in 2009 when, in the process of re-setting a breaker connected to the filter pump, excess bleach and hydrochloric acid accumulated in the shutdown filter, resulting in the discharge of chlorine gas once the pump was restarted. Although the Plaintiff was not near the area of discharge at the time the chemicals were released, he went to the emergency room later that evening and was treated for mild chemical exposure. More than 14 months later, he was diagnosed with reactive airways dysfunction syndrome (RADS) and chronic asthma and subsequently filed a negligence suit. The district court ultimately disqualified the Plaintiff's intended causation expert and rejected the Plaintiff's argument that he did not need an expert to prove negligence and that a layperson could, in fact, understand what caused the injury. The district court also rejected his alternative argument that his treating physician, a pulmonologist, could act as a causation expert. Without a proper causation expert, the district court held that the Plaintiff could not prove negligence and granted summary judgment in favor of our client. The federal appellate court agreed, holding that "Unlike dizziness in the wake of extended exposure to paint fumes or a broken leg suffered during a car crash, a typical layperson does not possess the requisite knowledge to draw a causative line, without the assistance of a medical expert, between a brief encounter with chlorine gas and the onset of either RADS (a disease with which, we are confident, most laypeople have no familiarity) or asthma." The Plaintiff further failed to show that his doctor had ever treated another patient for chlorine gas exposure or had any training in toxicology. The Plaintiff also failed to establish that his treating physician had used a reliable methodology in forming her causation opinion. Rather, it appeared that she had based her diagnosis largely on the Plaintiff's description of events. As such, the district court's summary judgment was upheld in favor of the Defendant. ♦

PERSONAL INJURY

Plaintiff Sues for \$1.8 million in Vehicle-Pedestrian Accident

Pedestrian alleged motorist struck him in the parking lot of an Indianapolis hospital. The Plaintiff had been departing work for the day when he was allegedly struck. There was no evidence to show that the Defendant had been speeding or distracted. Despite the Plaintiff's claim that Defendant had been driving the wrong way, there was no evidence to support that accusation. Defense presented an expert witness to dispute the Plaintiff's claims that he suffered from cognitive defects as a result of the accident. The Plaintiff requested \$1.8 million during closing argument, but the jury found in Defendant's favor, placing 100 percent of the fault for the accident on the Plaintiff. ♦

PERSONAL INJURY

Apartment Complex Exonerated When Young Boy Struck by Car

A young boy was playing in the parking area of an Orlando area apartment complex while being watched by his older pre-teen sister. The minor rode his skateboard through a parking spot and into the travel lane where he was struck by a visitor to the complex. The minor was struck by the front of the vehicle and pulled under the car where he was pinned until emergency personnel arrived. The minor suffered significant injuries including extensive facial scarring which continues to require care. Plaintiff argued children at play signs and a lower speed limit would have prevented the accident and sought over ten million in damages. The jury rejected the Plaintiff's arguments and returned a complete defense verdict. ♦



WRONGFUL DEATH

Young Boy Struck and Killed in Neighbor's Driveway

Plaintiffs, parents of a young boy with Down Syndrome, filed suit against the driver of the vehicle who struck and killed their son. The Defendant was a resident of Canada, visiting Florida, annually renting the home neighboring the Plaintiffs for approximately a month. Defendant was backing out of his driveway when he ran over and killed the minor. There was no clear evidence as to the minor's position in the driveway immediately prior to impact. Investigation by the FHP and several experts were unable to determine the exact path of the minor to the area of the accident but Plaintiffs, through their experts, argued the minor should have been visible and that the Defendant was driving too fast down the driveway. The Defendant never saw the Plaintiff prior to the accident, drove out of the driveway in his usual manner, and was not able to avoid the fatal accident. The jury found the Defendant was not responsible for the accident. ♦

PERSONAL INJURY

Motorcyclist Loses Leg after Impact with Construction Company Truck

Plaintiff was a military veteran who had returned to Florida to care for his elderly mother. Plaintiff reportedly left his home to run errands early in the morning and was returning home shortly before sunrise on his Harley Davidson motorcycle. The accident occurred near a curve on a rural road in Orange County. The Defendant did not see the Plaintiff until a brief moment before the impact. Both parties argued the other crossed the double-yellow center line of the roadway. As a result of the impact Plaintiff suffered several injuries, most significantly a below the knee amputation of his right leg. Plaintiff requested over \$8,000,000 for his injuries. The jury found the Defendant was not negligent. ♦

DENTAL PREMISES LIABILITY

Plaintiff Sued Dentist after Tripping over Hoses to Dental Equipment

Plaintiff, a dental hygienist student intern, fell when she tripped over hoses from delivery unit in a dental treatment room while retrieving equipment for a procedure during her first day on the premises. Plaintiff claimed injuries to her ankle, knee, hip and shoulder as a result of the fall, as well as damages for surgeries performed on the knee, hip and shoulder. Plaintiff alleged the Defendant failed to maintain the premises in a reasonably safe condition, and argued Defendant should have shortened the hoses to the delivery unit or kept them in a more orderly manner. Defendant disputed liability and the relationship of the three surgeries to the fall. ♦

PERSONAL INJURY/ PRODUCTS LIABILITY

Plaintiff Partially Amputates Foot while Grinding a Stump

Plaintiff sued the manufacturer, distributor and lessor of a stump cutter for personal injuries. After leasing and using the equipment for a day and a half, Plaintiff sustained a partial amputation of his foot while using the equipment to grind a stump. Following the testimony of the manufacturer's in-house engineering expert at trial, Plaintiff chose to dismiss all claims against the manufacturer and distributor mid-trial and focus on his claims against the renter of the equipment. ♦



DEFENSE COUNSEL: **David Corso**

FIRM: **Fisher, Rushmer, PA**

HEADQUARTERS: **Orlando, FL**

PREMISES LIABILITY

Orlando Hotel Visitor Lured by Woman Battered and Robbed by Two Unidentified Men

Plaintiff was visiting the Orlando area when he claimed he met a woman who asked him for a ride when he was leaving the area. He accompanied her to her reported room at Defendant's hotel near downtown Orlando. Upon arrival, he was pulled into the room by two men, battered and robbed. Plaintiff sued the hotel property for failure to maintain a safe premises and for failing to enact additional security measures as a result of other possible crime in the general area. The Judge directed a verdict for the Defendant after Plaintiff failed to establish necessary elements of the underlying cause of action. ♦

SLIP AND FALL

Plaintiff Slips on Water in Women's Restroom

Plaintiff was visiting the restroom of the theater after attending a movie when she slipped on water on the floor. Subsequent inspections and photographs revealed a toilet had overflowed, but Plaintiff alleged the water was beyond that area and was throughout the bathroom. Plaintiff claimed Defendant failed to inspect and maintain their premises in a reasonably safe condition and failed to follow their written procedures during the restroom inspection which preceded Plaintiff's fall. Defendant moved for summary judgment based on Florida's transient substance statutes, lack of actual or constructive notice of the water which caused Plaintiff's fall, and a lack of evidence proving negligence or failure to inspect at reasonable periods. Summary Judgment was granted for the defense, and Defendant was able to use an early proposal for settlement to expedite entry of final judgment and a waiver of Plaintiff's right to appeal. ♦



DEFENSE COUNSEL: **James M. Campbell, David M. Rogers and
Thomas A. Mountain**

FIRM: **Campbell Campbell Edwards & Conroy, P.C.**

HEADQUARTERS: **Boston, MA**

PRODUCT LIABILITY

Electrocution Case Involving Catastrophic Injuries

Plaintiff, a power company lineman, was electrocuted while changing an electrical cutout on a high voltage power line. He sustained catastrophic burns which resulted in loss of both arms. The Plaintiff and his wife sued multiple Defendants, including the manufacturer of the allegedly defective cutouts, seeking recovery under theories of negligence, breach of warranty and the Massachusetts consumer protection statute. The Plaintiffs alleged that the electrical cutouts Plaintiff was working on at the time of the electrocution were unreasonably dangerous and defective. The cutout manufacturer then filed a third-party complaint alleging design, manufacture and warning defects in the bucket lift Plaintiff was using at the time of the accident, and further alleging that the Bucket Lift Entities were liable for the Plaintiff's injuries as successors in interest to the actual designer and manufacturer of the lift (the "Manufacturer").

During the course of discovery it was determined that the subject lift was manufactured in 1998. It was further determined that more than 10 years after the manufacture and sale of the lift, one of the Bucket Lift Entities entered into an asset purchase agreement to acquire certain assets of the Manufacturer in a cash transaction. The three other Bucket Lift Entities were not parties to the asset purchase agreement. The agreement expressly provided that the purchaser did not assume any liabilities related to products manufactured or sold by the Manufacturer prior to December 31, 2008, including product liability and warranty claims. Also, neither the Manufacturer nor its sole shareholder received stock in the purchasing entity, or maintained any control over the assets following the sale. Finally, the sole shareholder did not assume any position of management or control at the purchasing entity.

Following discovery, defense counsel filed a Motion to Dismiss or in the Alternative for Summary Judgment contending that the Bucket Lift Entities (1) did not design or manufacture the bucket lift; and (2) are not liable as successors in interest to the Manufacturer. The court agreed and granted Summary Judgment in the clients' favor. ♦

PRODUCT LIABILITY

Plaintiff's Metallurgical Expert Limited, Case Appealed

Omega Flex, Inc. won a defense verdict in a product liability case involving Corrugated Stainless Steel Tubing (CSST). Plaintiff alleged the CSST manufactured by Omega Flex was defective and unreasonably dangerous, and caused a fire at Plaintiff's insureds' home. In response to a Daubert motion filed by Omega Flex to exclude the opinions of Plaintiff's sole designated design expert, the district court issued a Memorandum and Order that precluded MIT metallurgy professor Dr. Thomas Eagar from testifying on issues involving product design and warnings. The district court simultaneously granted Omega Flex summary judgment on Plaintiff's failure to warn and breach of warranty claims, leaving only its claims for negligent design and strict liability – defective design. After a four-day trial and three and one-half hours deliberating, the jury returned a defense verdict finding that Omega Flex neither failed to use ordinary care in designing the product, nor sold the product in an unreasonably dangerous and defective condition. After the district court denied Plaintiff's motion for a new trial, Plaintiff appealed to the Eighth Circuit, arguing the district court abused its discretion when it excluded the opinion of Plaintiff's metallurgical expert that the product was defectively designed, and admitted testimony by a defense expert criticizing Plaintiff's fire causation theory. The Eighth Circuit affirmed the district court's earlier rulings in an opinion dated April 15, 2015. ♦

DEFENSE COUNSEL: **Richard L. Campbell, Brandon L. Arber
and Diana A. Chang**
FIRM: **Campbell, Campbell, Edwards & Conroy, P.C.**
HEADQUARTERS: **Boston, MA**

PRODUCT LIABILITY/CLASS ACTION

Massachusetts Schools Sue in Class Action Claiming Injuries from PCBs

Defense represented Pharmacia, LLC, Monsanto Company and Solutia Inc. in a product liability class action concerning polychlorinated biphenyls found in caulk. The Plaintiffs proposed class consisted of all Massachusetts schools built or renovated between 1950 and 1978. After defeating class certification, the case was ultimately resolved in Pharmacia's favor on summary judgment. At summary judgment, defense successfully argued that Lexington failed to offer expert testimony demonstrating that Pharmacia's design of PCBs was defective and that Lexington failed to demonstrate that "airborne PCB levels presented a reasonably foreseeable risk at the time of the sale of the PCBs in 1961". ♦



DEFENSE COUNSEL: **William J. Conroy and Lynne O. Ingram**
FIRM: **Campbell, Campbell, Edwards & Conroy, P.C.,**
Co-counsel: Poyner Spruill, LLP.
HEADQUARTERS: **Boston, MA**

BREACH OF CONTRACT/ NEGLIGENCE

Court Affirms Summary Judgment on \$19 Million in Favor of Fumigation Company

Court affirmed the district court's grant of summary judgment in favor of Defendants Industrial Fumigant Company and Rollins, Inc. Plaintiffs' Severn Peanut Company and its insurer Travelers brought breach of contract and negligence claims against Defendants alleging negligent fumigant application resulting in a peanut dome fire and explosion causing more than \$19 million in damages. The Court held that the subject contract's "consequential damages exclusion" barred the breach of contract claim, and that state law does not allow Plaintiff to veil that claim in tort law. ♦

FRAUD/BREACH OF FIDUCIARY DUTY

Trustee Sues In-House Counsel in Alleged Ponzi Scheme Conspiracy

RE Loans and Mortgage Fund '08 were thriving multi-million dollar mortgage investment funds. After allegations of multiple improprieties, including the use of investor funds from Mortgage Fund '08 to prop-up the failing RE Loans, the businesses and principals were the targets of investigations by the FBI, DOJ and the SEC. Multiple criminal prosecutions, civil suits by investors, class actions and bankruptcies occurred in the aftermath of these investigations.

After Mortgage Fund '08 filed bankruptcy, its Trustee initiated suit in September 2013 seeking to recover damages against banks and other entities who allegedly wronged the company. Attorneys for the companies who were not involved in making decisions as to the companies' investments were named as Defendants. The Trustee's Complaint sought damages based on theories of legal malpractice and breach of fiduciary duty. Ultimately, a Second Amended Complaint added fraud claims and withdrew the legal malpractice claims.

Defense filed demurrers on behalf of Defendant attorneys under the doctrine of *in pari delicto*, asserting that a bankruptcy Trustee essentially stands in the shoes of the principals and principal decision-makers at the companies and as such, can only recover damages against those company employees who either committed acts that were as bad or worse than the principals or had the power to stop the improper actions and failed to do so.

The Court issued a decision on our clients' demurrers to the Second Amended Complaint rejecting the Trustee's theories of liability against them without leave to amend based on the doctrine of *in pari delicto* and the respective statute of limitations. ♦

PREMISES LIABILITY/ PERSONAL INJURY

Apartment Complex Owner Prevails on MSJ against Claims of Dangerous Condition

This was a premises liability lawsuit filed by the Plaintiff based on an accident where she slipped on water while she was a guest at her son's apartment. Plaintiff alleged that the water leaked from behind the wall. Defense filed a motion for summary judgment on behalf of Essex Property Trust, Inc., the REIT Apartment Complex Owner, on two grounds. First, the Plaintiff had no evidence to prove that Essex had actual or constructive notice of the water leak. Essex never received complaints about leaks in the apartment before the accident. Plaintiff testified that she and her son were not aware of the leak until after she fell, so they never reported the leak to the management until after the accident.

Second, the Plaintiff was precluded from recovery by the terms of the lease agreement between her son and Essex, which mandated that Essex was not liable to the resident, guests or invitees, for personal injuries resulting from water leaks.

Defense argued that based on these undisputed material facts, Plaintiff had no evidence upon which a jury could find liability against Essex. Plaintiff failed to oppose the motion. In an apparent last-ditch effort to win the court's sympathy, the Plaintiff relieved her counsel and substituted into the case in pro per. She appeared at the hearing to oppose the motion by oral argument. The court found that the facts were undisputed and there was no triable issue of material fact, and that the Plaintiff failed to produce admissible evidence to establish the essential elements to prove her causes of action. The court granted the motion for summary judgment and dismissed the case with prejudice. ♦

COMMERCIAL LITIGATION/ FINANCIAL INSTITUTIONS

Plaintiff Attempts to Bypass Administrative Processes in Defunct Bank Case

Plaintiffs obtained a construction loan from Imperial Capital Bank (“ICB”) in November 2006, the proceeds of which were to be used to build a hotel. The construction process encountered significant delays. Plaintiffs attributed fault for these difficulties to ICB and filed a state court suit against ICB in February 2010 seeking punitive damages and equitable remedies.

ICB was closed by the California Department of Financial Institutions in 2009 and our client, the Federal Deposit Insurance Corporation, was appointed receiver (“FDIC-Receiver”). Shortly thereafter, the assets of ICB were purchased by City National Bank (“CNB”). According to Plaintiffs, CNB appeared for and defended ICB in the state court litigation.

Two Plaintiffs made an administrative claim with the FDIC-Receiver attaching their state court complaint in support thereof. The claim was denied because all liability had passed to CNB. Plaintiffs failed to file a federal lawsuit challenging the denial of the claim as required by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”).

Plaintiffs filed a second amended complaint. No party appeared on behalf of ICB and CNB indicated to Plaintiffs that any prior appearance it made for ICB was mistaken. Defense filed a motion on behalf of FDIC-Receiver to intervene as proper party Defendant for ICB. The motion was granted following strenuous opposition by Plaintiffs.

After removing the case to federal court, defense filed a motion to dismiss Plaintiffs’ claims against FDIC-Receiver and ICB based on Plaintiffs’ failure to exhaust FIRREA’s administrative and filing requirements. Plaintiffs argued in opposition that FDIC’s intervention was untimely, that FDIC should be estopped from asserting an interest in the case because it previously denied Plaintiffs’ administrative claims based on all liability having passed to CNB and that FDIC waived its right to raise the bar of the administrative claims process because it allegedly permitted CNB to defend ICB in the state court litigation.

The Court granted FDIC's motion without leave to amend finding that Plaintiffs' claims must be dismissed for lack of subject matter jurisdiction because Plaintiffs failed to exhaust FIRREA's administrative claims process. In doing so, the Court found that FDIC timely intervened under the applicable statute, that FDIC had an interest in the case so long as ICB remained a party and that Plaintiffs' claims of waiver and estoppel were unavailing and, in any event, could not vest the Court with subject matter jurisdiction. ♦



DEFENSE COUNSEL: **Christy D. Jones**

FIRM: **Butler Snow LLP**

HEADQUARTERS: **Ridgeland, MS**

PHARMACEUTICAL PRODUCT LIABILITY

McNeil and Johnson & Johnson Win First Tylenol Liver Damage Trial

Johnson & Johnson and McNEIL-PPC, Inc. won the first trial where the Plaintiff alleged liver damage from acetaminophen, the active ingredient in Tylenol® products.

After a roughly four-week trial, the jury returned a unanimous verdict in favor of Johnson & Johnson and McNeil, finding that the Plaintiff had not proven she ingested Extra Strength Tylenol®. ♦



MEDICAL PRODUCT LIABILITY

Ethicon and Johnson & Johnson Win First Trial over Proxima Pelvic Mesh

Jury found for Ethicon, Inc. and Johnson & Johnson on all counts in the first trial involving Ethicon's Proxima pelvic mesh device. Jurors, who deliberated for about seven hours after seven days of testimony, rejected the Plaintiff's claims that the device was defectively designed and that the company did not adequately warn physicians about the product's risks. ♦



MEDICAL PRODUCT LIABILITY

Appellate Court Overturns \$1.2 Million Verdict

Appellate court reversed a jury's damages award against Ethicon, Inc. and Johnson & Johnson, rendering a judgment that Plaintiff take nothing. The jury had found for Defendants on Plaintiff's failure to warn and punitive damages claims, but awarded Plaintiff \$1.2 million on the design defect claim.

The Fifth Court of Appeals held the Plaintiff failed to offer legally sufficient evidence that any specific defect in Ethicon's TVT-O pelvic mesh, rather than the device itself, was the cause of the alleged injuries. ♦



MEDICAL MALPRACTICE

Urologist Sued in Case Alleging Negligence in Adult Circumcision

Attorneys William C. McDow and Richard A. Jones III recently obtained a defense verdict for their physician client and his urology practice in a case involving allegations of medical malpractice relating to an adult circumcision.

The Plaintiff was a 52-year old male with a history of cigarette smoking who suffered from diabetes, chronic obstructive pulmonary disease, morbid obesity, and low testosterone. Plaintiff was referred to the Defendant urologist for chronic phimosis and underwent a circumcision. Plaintiff alleged that too much foreskin was removed during the procedure, which resulted in multiple plastic surgeries. The Plaintiff also alleged gross negligence and asked the jury for punitive damages. Plaintiff's wife asserted a loss of consortium claim as well.

The defense argued that the Defendant urologist complied with the standard of care in performing the circumcision and that any complications with Plaintiff's healing were attributable to his numerous co-morbidities.

After a four day trial, the jury returned a defense verdict for the physician and his practice. ♦

MEDICAL MALPRACTICE

Hospital Sued in Case Alleging Wrongful Discharge After Surgery

Deceased was a 54-year old female who presented for elective hernia repair surgery. She was morbidly obese and had left ventricular hypertrophy, hyperlipidemia and hypertension. The Plaintiff also alleged that the deceased was a borderline diabetic and that she had borderline and/or abnormal EKGs and echocardiograms prior to the outpatient surgery.

The Plaintiff alleged that the deceased should have received a cardiac evaluation and clearance prior to surgery and that she was overloaded with fluids in the hospital, which caused pulmonary edema and death approximately 3.5 hours after discharge. The Plaintiff also alleged violations of hospital policies and procedures by nursing staff and that the deceased should not have been discharged from the hospital because she had not voided and was tachycardic in the recovery area.

The defense argued that the pre-operative workup, the administration of fluids and the discharge from the hospital complied with the standard of care. After a seven day trial, the jury returned a defense verdict after deliberating for less than one hour. ♦



PERSONAL INJURY – MEDICAL TRANSPORT

Ambulance Transport Sued for \$450,000 in Alleged Drop of Patient

This matter arose from an alleged incident that occurred during a non-emergency medical transport. The client, a medical transport company, was dispatched to take Plaintiff, an incomplete quadriplegic, to and from a doctor's appointment. Plaintiff alleged that our client's employees dropped his stretcher while they were removing him from the ambulance. Before the accident, Plaintiff utilized a manual wheelchair. As a result of the alleged fall, Plaintiff claimed permanent injuries to his neck and shoulders. He further claimed his injuries prevented him from using a manual wheelchair and he had to obtain an electric wheelchair.

Plaintiff filed suit seeking \$450,000. At trial, Defense used an exemplar stretcher to demonstrate to the jury that Plaintiff's version could not have occurred due to the stretcher's safety mechanisms. After deliberating for about one hour, the jury returned a verdict in favor of our client. ♦



EXCESSIVE FORCE/FALSE ARREST

Police Officer Accused of Battery and False Arrest during Traffic Stop, \$425,000 Demand

Police officer initiated a traffic stop of the Plaintiff for a traffic violation. The Plaintiff did not initially stop, but continued into his neighborhood and eventually his driveway. Once stopped in the driveway, Plaintiff testified he exited his car and placed his hands on the hood of the car in “submission” to the officer’s authority. This testimony was corroborated by an independent witness. After placing his hands on the hood, Plaintiff testified the officer slammed him on the hood of the car, wrenched his arms behind his back, and intentionally tried to injure his shoulders. The officer testified that his actions were necessary for officer safety, that he used reasonable force under the circumstances, and that there was probable cause to arrest the Plaintiff based on his actions. The officer placed the Plaintiff under arrest for obstruction of justice and transported him to jail. The Plaintiff had surgery on his right shoulder three months after the arrest and surgery on his left shoulder four months after the arrest. Plaintiff’s ad damnum sought \$1,000,000 and his last pre-trial settlement demand was \$425,000. The jury deliberated for six and a half hours before returning a verdict in favor of the Defendant. The malicious prosecution claim resulted in a hung jury. ♦



TRACTOR TRAILER ACCIDENT

Plaintiff Sues for \$175,000 in Alleged Traumatic Rotator Cuff Injury

Defendant tractor trailer rear-ended Plaintiff's vehicle. Plaintiff sustained a laceration to the back of his head and was transported to the ER for treatment, which included a head CT. Diagnoses included concussion and head laceration, requiring multiple staple-closure. Within a week of the accident, claimant complained of left shoulder problems, which his orthopedic surgeon diagnosed as a labral tear and rotator cuff tear proximately caused by the accident. Following failed conservative care, Plaintiff underwent a labral and rotator cuff repair. Medical specials exceeded \$80,000 and lost wages were approximately \$25,000. An orthopedic surgeon performed a peer review for the defense and concluded the rotator cuff and labral tear were not traumatically-caused, but were the result of an on-going, degenerative process. This opinion was challenged by the fact that there were no pre-accident complaints of left shoulder problems. Defendant admitted liability and that Plaintiff's head injury and ER treatment plus several follow-up visits were causally related, but disputed the causal relationship of the shoulder injuries. Pre-trial offer was \$175,000. Jury returned a verdict of \$7,500. ♦

EDUCATION/DISABILITY

Parent Denial Tuition Reimbursement Claiming School Failed to Accommodate Disability

A public school district won an appeal before the U.S. Court of Appeals Eighth Circuit following a four-day administrative hearing over allegations that they had failed to provide a student with a disability with an appropriate special education program. A parent of a high school student with a disability initiated litigation against the school district after the student failed to qualify for the high school's competitive varsity show choir program. The parent removed the student from school and placed her in a residential boarding school, and filed an administrative action demanding reimbursement for the facility's six-figure annual tuition and room and board package. The hearing officer, citing the student's high academic performance and demonstration of progress in her special education program, determined that the school had met its obligation to provide the student with an appropriate education, and thus, declined to award the requested tuition reimbursement. On appeal, the Eighth Circuit affirmed the decisions of the lower court and administrative agency and ruled in favor of the school district. ♦



DEFENSE COUNSEL: **Miriam Van Heukelem and Lindsay Vaught**

FIRM: **Ahlers & Cooney, PC**

HEADQUARTERS: **Des Moines, IA**

EMPLOYMENT/DISCRIMINATION AND CONSTITUTIONAL RIGHTS

Former Community College Employee Claims Deprivation of Constitutional Rights

A former community college employee filed suit under § 1983 against the college and several individual officers and employees of the college alleging that the college had infringed on her constitutional rights by engaging in conduct that she claimed resulted in her constructive discharge. The federal district court granted the Defendants' motion for summary judgment with respect to the § 1983 claim, finding that the Plaintiff was employed at-will and thus had no constitutionally-protected interest in continued employment with the college. The court further found that even if it accepted the Plaintiff's version of the facts as true, the complained-of conduct (which included moving her office to what she perceived to be a less-desirable location, requiring her to post her office hours on her door, and directing her to proofread her communications before sending them out to the college community) simply did not rise to the level of outrageous, conscious-shocking behavior required to sustain her claim. In the same decision, the federal court denied the Plaintiff's cross motion for summary judgment in its entirety. ♦

DEFENSE COUNSEL: **Miriam Van Heukelem and Katherine Beenken**

FIRM: **Ahlers & Cooney, PC**

HEADQUARTERS: **Des Moines, IA**

EDUCATION/DISABILITY

Parent Complaint Alleges Numerous Violations Of Federal Law

A parent filed a 137-paragraph administrative complaint before the Iowa Department of Education alleging myriad claims under the Individuals with Disabilities Education Act, a federal law providing substantive and procedural protections to students with disabilities. Among other remedies, the parent sought to establish a \$250,000 compensatory education fund to benefit her student. Following a ten-day evidentiary hearing on the merits of the parent's complaint, the administrative law judge rendered a decision in favor of the school district and area education agency on all issues raised in the complaint. ♦

INSURANCE BAD FAITH

Insurance Company Sued for Bad Faith

An international property and casualty insurer was sued for bad faith by a restaurant that allegedly incurred a water loss. The restaurant obtained a judgment against the insurer for breach of contract and then sued the insurer for bad faith. Keller Landsberg was first hired to defend the bad faith suit and discovered that the insurance proceeds at issue were procured through fraud. Insurer moved for the judgment in the coverage action to be set aside based on fraud, the Court granted the Motion, and then awarded the insurer a judgment exceeding \$600,000 for return of policy proceeds and for attorney's fees. The restaurant appealed the Court's decision to the Eleventh Circuit which upheld the judgment. Without a judgment in the insured's favor, and since the insurance policy was voided based on the fraud, the U. S. District Court in the bad faith action entered summary judgment for the insurer. ♦



MORTGAGE FORECLOSURE

Mortgagor Prevails against Mortgagee on Frivolous Technical Defense in Foreclosure Suit, Loses Appeal

A mortgage lender sued the mortgagors for foreclosure on a property based on their default, one of whom was not on the Note and who signed the mortgage with the notation “for limited purpose.” The mortgagee/lender lost at trial and appealed on the basis that the mortgagor’s undivided one-half interest of the property was also encumbered by the mortgage instrument even though that mortgagor had not signed the Note. After a national firm declined representation due to the unlikely reversal of the judgment, Keller Landsberg undertook the engagement and handled the appeal. The Lender argued that despite the absence of a trial record for review by the appellate court, interpretation of the mortgage should be a matter of law, and that an individual cannot escape contractual obligations under an instrument by adding the words “for limited purpose.” The First District Court of Appeal agreed and reversed and remanded the case back to the trial court, allowing the mortgage foreclosure to proceed. ♦

COUNSEL: **John G.H. Davis, Michael Williams, and Mark Clemer**

FIRM: **Brown Sims**

HEADQUARTERS: **Houston, TX**

COMMERCIAL DISPUTE

Manufacturer Hides Troubled History of Equipment

A corporate client purchased new equipment from the manufacturer. Manufacturer's management branch handled inspection and delivery of the equipment on behalf of the purchaser through a power of attorney. Shortly after withdrawing the equipment from the manufacturer's exclusive management, it was discovered that some of the critical components were used, had been previously damaged, and had been previously installed on other equipment. Discovery documents revealed that this information was intentionally not disclosed to the client prior to purchase and conscious effort to prevent the client from disclosing after the purchase. The case was tried over five weeks and the jury deliberated just three hours before returning a verdict in favor of the corporate client for actual damages of \$2.7 million. The jury found fraud by nondisclosure and arguments were then held on the issue of punitive damages. The jury awarded and the jury returned a verdict of \$5.4 million for a total in awarded damages of \$8.3 million with prejudgment interest. The manufacturer has filed its notice of appeal. ♦

LIABILITY/CONTRACT/WARRANTY/ EXTRA-CONTRACTUAL

Plaintiff Sues for \$3.4 Million in Marina Slip and Fall Injury

Plaintiff leased a boat slip at Defendant's marina. Plaintiff injured his shoulder when the decking at his slip broke and gave way as he was stepping onto his boat. Plaintiff claimed that he grabbed the mooring line in an effort to prevent himself from falling into the water and onto the running prop of the boat. The decking had been installed by the prior tenant. Medical treatment resulted in over four shoulder surgeries performed by a conservative orthopedic surgeon who is frequently used by insurance companies as an independent expert witness. The treatment was paid by Plaintiff's group health insurance. The extent of the injury and need for medical treatment/surgery was not a significant dispute in the case. Plaintiff was a long-term employee with an oil company and had moved up in compensation over the years to where he was earning well over \$100,000 per year at the time of the incident. He later became unable to work during the course of the proceeding after the multiple surgeries and lost his job shortly before trial. Plaintiff also alleged he suffered from PTSD which further limited his work opportunities. The parties disputed responsibility under the slip rental agreement for care and maintenance of the deck area. Plaintiff also filed contractual and extra-contractual claims for warranty and deceptive trade practices. Shortly before trial, the Court granted Defendants' partial summary judgment on all tort-based claims for personal injury on the basis that the boat slip was leased "as is where is" and the boat slip was not a common area maintained by the marina. The remainder of the case was then continued due to Plaintiff having just recently undergone his fourth shoulder surgery. During the trial continuance, an additional summary judgment on the remaining causes of action was filed and was granted within weeks of the new trial setting. The case was unsuccessfully mediated twice and Plaintiff had claimed damages of over \$3.4 million. ♦

RETAIL/RESTAURANT/HOSPITALITY AND PRODUCTS LIABILITY

Three Million Demanded in Dangerously Flammable Clothes Burn Case

A burn victim alleged strict products liability and other causes of action against the manufacturing division of a national retail chain when the shirt she was wearing caught fire after contact with a small flame. She claimed the shirt was dangerously flammable. In the Motion for Summary Judgment, defense demonstrated that the shirt was not defective as it was tested as required by federal law and possessed normal flammability characteristics as permitted under federal law. Plaintiff's opposition was based almost exclusively on an expert declaration, the entirety of which was stricken by the court. Plaintiff's settlement demand was \$3,000,000. ♦

DEFENSE COUNSEL: **Al De La Cruz, Michael Weismantel,
Rebeca Valenzuela**

FIRM: **Manning & Kass, Ellrod, Ramirez, Trester, LLP**

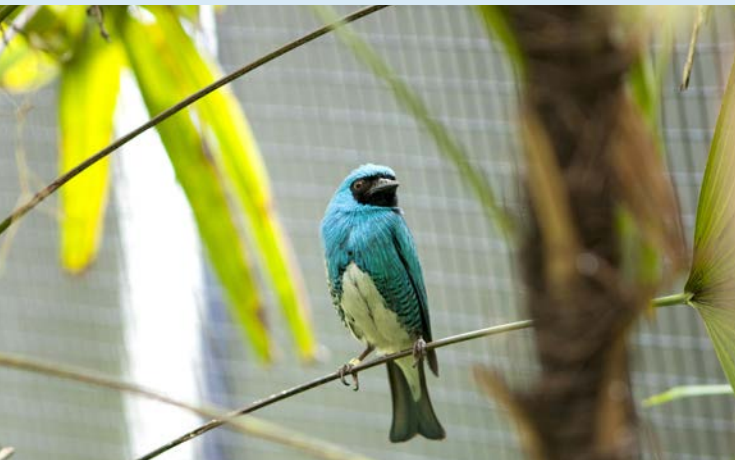
HEADQUARTERS: **Los Angeles, CA**

PREMISES LIABILITY

Zoo Visitor Blames Two Total Knee Replacements on Slippery Surface at Zoo

Plaintiff, a visitor to the San Diego Zoo, fell and sustained a fractured kneecap while walking on a path to the hummingbird aviary. Plaintiff suffered from severe pre-existing arthritis, and underwent two total knee replacement surgeries. Plaintiff sought compensatory damages in excess of \$1.6 million and rejected settlement offers at mediation and on the eve of trial. The Zoo argued against liability due to the lack of any dangerous condition and asserted that Plaintiff's inattention was far more likely the cause of her fall.

During trial, Manning & Kass attorneys discovered that a paramedic who arrived on the scene had testimony beneficial to the defense involving inconsistencies in the Plaintiff's testimony. With less than twenty-four hours' notice, associate attorney Rebeca Valenzuela located and persuaded this witness, who lived forty-five miles away, to appear and testify. After six days of trial testimony, the jury deliberated for less than an hour before absolving the Zoological Society of all liability in regard to the incident. ♦



LAW ENFORCEMENT EXCESSIVE FORCE WRONGFUL DEATH

Sheriff's Department Sued in Fatal Encounter

Two sheriff's deputies were at a 7-11 store and were approached by several unidentified witnesses who told them there was a man holding a large pipe in the middle of traffic a few blocks away, wearing only underwear. When the deputies arrived, the suspect was holding a silver-colored metal pipe or spear-like object approximately four to five feet in length. One end of the object appeared to have a pointed end like a harpoon. The suspect began yelling "Kill me, kill me!" and then pointed the metal object towards the deputies. The suspect charged at the deputies as soon as they arrived at the intersection. Just as abruptly, the suspect turned away from the deputies and struck the window of a PT Cruiser with such force that it could have been fatal to the occupants. Then the suspect charged at the deputies with the spear-like object in a manner that put them in fear of great bodily harm or death.

The deputies sought less lethal options both when they requested a beanbag loaded shotgun and when one deputy deployed his Taser. However, the suspect's quick movements made the attempted use of the Taser ineffective. The suspect's potentially lethal attacks on the occupants of the PT Cruiser and the deputies made it impossible to wait for the stun-bag loaded shotgun. The very limited period of time (30 to 90 seconds) between the deputies' arrival on-scene and the suspect's assault upon those in the PT Cruiser was insufficient for the deputies to evaluate whether the suspect was suffering from a disability or, as the deputies thought, the influence of drugs, or both. In fear for their lives and the lives of innocent bystanders (motorists and pedestrians), the deputies fired their weapons at the suspect. The suspect fell to the ground but continued to move. The suspect had a knife in his hand as the deputies approached and waited for backup units. The suspect subsequently died of his injuries. The toxicology report revealed methamphetamine in the suspect's blood.

Defense filed a summary judgment motion on the federal causes of action and prevailed, leaving only the state negligence cause of action, which does not carry an attorney's fee provision. This was a hard-fought motion during a very difficult period in the midst of extensive media scrutiny. ♦

DEFENSE COUNSEL: **Michael D. Hutchens, Brent A. Fischer,
and Julia J. Nierengarten**
FIRM: **Meagher & Geer P.L.L.P.**
HEADQUARTERS: **Minneapolis, MN**

PRODUCT LIABILITY/ PERSONAL INJURY

Multimillion Product Liability Personal Injury Case Filed Against Regional Forklift Distributor

Court dismissed a case that the injured Plaintiff brought against a regional forklift distributor based on the theory that a forklift owned by his employer was defective by design because it did not have a door. The Plaintiff suffered a lower leg amputation while operating a forklift in the normal course of his job for a large corporation that had purchased the forklift directly from the manufacturer. After determining that the forklift manufacturer was not reachable due to bankruptcy and restructuring, the Plaintiff brought several claims against the regional distributor of the manufacturer's forklifts, including a strict-liability claim based on the state's pass-through liability statute. Plaintiff also alleged negligent failure to warn, design defect, and breach of express and implied warranties. The distributor moved for summary judgment on the grounds that the pass-through statute only imposes liability on sellers in the chain of distribution and, even though the distributor delivered the forklift to the Plaintiff's employer, it was not in the chain of distribution because the employer purchased the forklift directly from the manufacturer. The court agreed, reasoning that a party that provides a service incidental to the sale of a product is not "in the chain of distribution" for purposes of applying the pass-through statute. The court entered judgment in favor of the distributor on all claims. ♦

DEFENSE COUNSEL: **TJ Jarzyniecki, Jr.**

FIRM: **Kightlinger & Gray, LLP**

HEADQUARTERS: **Indianapolis, IN**

CONSTRUCTION/ PROPERTY DAMAGE

Muncie Mission Sued for \$2.4 Million Alleging Gas Line Caused Fire

At the end of the first week of trial after Plaintiffs rested, all Defendants were granted a directed verdict when Plaintiffs failed to establish liability on any Defendant for the spread of a fire believed to have started accidentally in a mulch bed. Plaintiffs were unable to elicit adequate expert testimony that an improperly installed and supported gas line, which eventually failed during the fire, contributed in any significant way to the spread of the fire. While the Court had denied pretrial motions for summary judgment and the exclusion of one of Plaintiffs' experts, the motion practice "set the table" for the directed verdict. The jury was polled after the decision and all agreed that Plaintiffs had failed to show any fault on the Defendants. ♦

PRODUCT LIABILITY/ PERSONAL INJURY

Manufacturer of Table Saw Sued for \$2 Million in Finger Loss Case

At his home, Plaintiff used a benchtop table saw that was manufactured in September 2009, with guards in place, to cut a 1" strip from a 4' x 8' sheet of flakeboard. A kickback allegedly occurred and caused Plaintiff's left hand to slip into the blade and amputate four fingers. Plaintiff sued the manufacturer on claims of negligence and strict liability. Plaintiff's expert opined that the table saw was defective due to its lack of an adequate guarding system and its lack of flesh-detection technology. Plaintiff asserted that in 2002 a competitor offered the Defendant a licensing agreement for flesh-detection technology but Defendant refused and instead embarked upon a project to develop its own flesh detection, thereby delaying the availability of that technology in the marketplace.

Defendant's expert confirmed that the table saw was not defective or unreasonably dangerous in design and that it accorded to industry standards. The expert maintained that a new guarding system introduced in January 2010 would not have prevented Plaintiff's hand from coming into contact with the saw blade. Defendant also offered testimony to demonstrate that flesh detection technology was not feasible on a benchtop table saw in 2009. The defense also maintained that Plaintiff was comparatively negligent due to the manner by which he attempted to perform the cut. Plaintiff asked the jury for "not a penny less than \$2,000,000." Judgement was entered for \$40,000. ♦

DEFENSE COUNSEL: **Kerin Stackpole, Kristina Brines
and Emily Chamberlain**

FIRM: **Paul Frank + Collins P.C.**

HEADQUARTERS: **Burlington, VT**

WORKERS' COMPENSATION RETALIATION CLAIM

Employee Sues in Workers' Compensation Retaliation Claim

Employer terminated Plaintiff based on excessive internet use. Based on low productivity in the department, the employer requested a “Websense” report, which provides detailed information about internet usage associated with a particular employee’s computer log-in credentials. The report indicated internet usage at levels that more than double what the company normally considered to be excessive usage. Between the time that the HR Generalist at the company requested the report and the time it was compiled, the Plaintiff sustained a work injury and filed a workers’ compensation claim, and he later underwent surgery for his injury. The company delayed taking disciplinary action in connection with the internet usage. Upon his return from his workers’ compensation leave, the company met with the Plaintiff and discussed his internet usage with him. The Plaintiff denied it, and the company then placed him on administrative leave while it investigated the report further. The HR department consulted with the IT department and determined that the report appeared to be valid. The Plaintiff was thereafter terminated based on his internet usage. Plaintiff argued that the Websense report was invalid, and attempted to submit an expert opinion to that effect. The court adopted the “honest belief” doctrine and held that “an employer need only honestly believe in its proffered legitimate, non-discriminatory reason” for termination in order to prevail on a motion for summary judgment, even if the reason may be foolish or incorrect. This was significant in that there is a split in the Circuit Courts of Appeal on this doctrine, and this was the first time the issue was considered by the Vermont Supreme Court. ♦

DEFENSE COUNSEL: **Michael D. Hutchens, Elizabeth S. Poeschl,
and Katherine A. McBride**
FIRM: **Meagher & Geer P.L.L.P.**
HEADQUARTERS: **Minneapolis, MN**

CONSTRUCTION DEFECT/ PROFESSIONAL LIABILITY

\$26-Million Construction Defect Case Filed against Architect

District court dismissed a case that the state's science museum brought against an architectural firm and others alleging multiple construction defects. The museum, which was substantially complete in 1999, waited for more than 13 years to commence its action. After settling for an undisclosed sum with the general contractor pursuant to a Pierringer agreement, the science museum took a purported assignment of the general's third-party contribution and indemnity claims. The architect and others moved for summary judgment on the grounds that the settlement agreement extinguished any contribution and indemnity claim that general had against the non-settling parties, leaving it nothing to assign. The architect also alleged that the museum's claims were barred by the statute of limitations and the statute of repose. The court agreed and entered judgment in favor of the architect. ♦

DEFENSE COUNSEL: **Mandy Good and Traci Lacock**

FIRM: **Hirst Applegate, LLP**

HEADQUARTERS: **Cheyenne, WY**

PERSONAL INJURY

Employer Sued, “Artful” Pleadings Demand Punitive Damages

A food delivery service obtained a very favorable settlement after defense counsel prevailed on summary judgment on all of the numerous direct negligence claims and punitive damages claims against it. Plaintiffs, a father, mother, and daughter, sued client/driver for failing to yield at a stop sign and driving into an intersection where he collided with Plaintiffs’ vehicle. They sued the client/employer for negligent hiring, training, supervision, retention and entrustment, and Plaintiffs claimed punitive damages against both the employer and driver. The Court agreed with the Defendants that direct negligence claims are redundant and improper in the face of an employer’s admission of respondeat superior liability; however, it pointed out that the Federal Court in Wyoming has recognized somewhat of an exception to this rule if punitive damages are alleged. Defense counsel argued that an “allegation” that punitive damages are warranted is not adequate; instead, there must be a “valid” punitive damages claim for the direct negligence claims to possibly survive. The Court agreed that “artful” pleading of punitive damages was inadequate to allow direct negligence claims to go forward in the face of an admission of respondeat superior and dismissed the punitive damages claims against the driver and employer, as well as the direct negligence claims against the employer. On the heels of the Court’s decisions, the parties mediated the case and Defendants obtained a very favorable settlement. ♦

DEFENSE COUNSEL: **Robert C. Jarosh**

FIRM: **Hirst Applegate, LLP**

HEADQUARTERS: **Cheyenne, WY**

WRONGFUL DEATH/ WORK COMP

\$1 Million Mesothelioma Wrongful Death Case Filed against Employer

The operator of a mineral plant and its parent companies obtained summary judgment in a wrongful death case brought by the widow of an employee who died due to mesothelioma allegedly from exposure to asbestos-related products and hazards at the mine during his employment. Plaintiff sued the operator on the theory that it was liable based upon premises liability, and also asserted that the operator's parents were liable due to their alleged direct control over operations at the plant. The Federal District Court agreed with the Defendants that the operator was entitled to summary judgment based upon workers' compensation immunity, and that the parent companies were entitled to summary judgment because there was no evidence that they assumed a legal duty that would permit them to be held liable as parent companies. Prior to the summary judgment order, the Plaintiff's last settlement demand to the Defendants was in excess of \$1,000,000. ♦

PERSONAL INJURY

Firefighters Sue Alleging Toxic Exposure at Pool Supply Warehouse Fire

As a result of a large fire at a pool supply warehouse involving toxic chemicals, 14 City of Buffalo firefighters commenced an action alleging toxic fume exposure and long-term lung and respiratory damage. The City of Buffalo joined in the action to recoup workers' compensation and other benefits paid by the City to these firefighters. The defense argued that the sprinkler contractor had no duty in tort to this class of Plaintiffs and as such the firefighters had no cause of action against a third-party contractor. The defense further argued that the sprinkler company, in any event, was not negligent. On summary judgment, the Court dismissed all claims against the sprinkler contractor. ♦



UNREASONABLE SEIZURE/ EXCESSIVE FORCE

Plaintiff Sues Following Police Detaining Him in Response to a Man-with-a-Gun Call

Plaintiff sued police officers for six-minute seizure in response to a Man-With-A-Gun call. A passerby observed the Plaintiff take a shotgun from his trunk and “march” into a home and then called 911. The parties disputed what happened when the officers arrived. The Plaintiff testified that the officers pointed their guns at him, threw him off a porch, and jumped on his back with their knees. The officers, by contrast, testified that the Plaintiff refused to show his hands, they laid him on the ground and handcuffed him for six minutes while investigating and ultimately learning that Plaintiff was merely returning from a hunt. The officers denied kneeing the Plaintiff in the back. The court ruled that the officers did not have a basis under the Fourth Amendment to detain the Plaintiff, but left it to the jury to decide whether the violation caused any injury. The jury ruled that it did not, awarding \$0 damages. The court granted Plaintiff’s post-trial motion to amend judgment to award \$1 in nominal damages, and the officers have appealed this ruling. ♦

PREMISES LIABILITY/ PERSONAL INJURY

Plaintiff Demands Millions in Ice Slip and Fall

Plaintiff, a 43 year old bank employee, slipped and fell on an ice covered sidewalk. Defendant, a snow plow contractor, contracted with adjacent mall owner to plow the entire lot and salt/sand in certain limited areas. However, it did not include where Plaintiff fell. Plaintiff and mall owner claimed contractor had placed snow piles such that the freeze/thaw cycles would repeatedly cause a dangerous ice condition where Plaintiff fell. Plaintiff sustained a fractured olecranon and wrist TFCC tear in dominant right arm. Arm was casted and Plaintiff underwent two subsequent contracture release surgeries on elbow and TFCC release surgery on wrist, all with very poor results. Plaintiff was completely unemployable because of a total loss of use of right arm, the emergence of carpal tunnel syndrome in opposite wrist and chronic pain.

At trial, two verdicts: \$1.44 million in economic damages, and \$2 million in pain and suffering, was awarded by the jury against the mall owner, and a finding of “no cause of action” against the Defendant snow plow contractor. ♦



MEDICAL MALPRACTICE/ PERSONAL INJURY

Plaintiff Litigates for Nearly 6 Years in Bypass Surgery Case

Plaintiff sought treatment for obesity related diseases and underwent roux-en-y gastric bypass surgery. After failing to lose a significant amount of weight, Plaintiff sought out the Defendant surgeon for a “band over bypass” procedure. After a thorough evaluation, Defendant performed the second procedure in which a “lap band” was placed at the gastro-jejunal anastomosis created in the roux-en-y procedure. Plaintiff did well following surgery and was discharged. Approximately two months post-op, Plaintiff began having issues with swallowing and was evaluated. Defendant returned Plaintiff to surgery once in September and once in October to evaluate the lap band and possible obstruction. Following the October surgery, Plaintiff had a perforation near the lap band, was again returned to surgery, and the lap band was removed. Plaintiff thereafter had a lengthy hospitalization and was treated for sepsis and other morbid conditions. Plaintiff was ultimately discharged from rehabilitation and died approximately five years after the initial lap band surgery.

Plaintiff alleged that Defendant was negligent in the placement of the lap band, and alleged that the lap band placement at the gastro-jejunal anastomosis, as opposed to the gastric fundus, was the cause of the later perforation and ultimately led to Plaintiff's death. Defendant asserted that Plaintiff's non-compliance with post op dietary instructions, and smoking, led to Plaintiff's post op complications and the perforation of a marginal ulcer. Both Plaintiff and Defendant called bariatric surgeons to testify as expert witnesses, and Plaintiff called an economist to testify as to Plaintiff's damages. After a five day trial, the jury returned a unanimous defense verdict in favor of the Defendant. ♦

DEFENSE COUNSEL: **Pam Kohli Jacobson**
FIRM: **Betts, Patterson & Mines, P.S.**
HEADQUARTERS: **Seattle, WA**

PATENT INFRINGEMENT/ TRADEMARK INFRINGEMENT/ TRADE DRESS INFRINGEMENT

\$800,000 Attorney Fee Award for Insured

A national garden wholesale supply company initiated a patent, trademark, and trade dress suit against the insured Defendant competitor, a small family owned business. Plaintiff sought to enjoin the sale of competing products, disgorgement of profits, and treble and punitive damages. We represented the Insured Defendant and counterclaimed that the asserted patent was invalid and unenforceable because, among other things, Plaintiff lied to the Patent Office when it filed its applications for the asserted patents. Specifically, it was discovered that with its patent application, Plaintiff attested under penalty of perjury that it had not previously used these inventions, when it had already attested to the Trademark Office that it had used the disclosed inventions. In fact, Plaintiff submitted examples of its prior use to the Trademark Office. In the face of incontrovertible evidence of perjury and likely patent invalidation, Plaintiff settled the case for \$800K in attorney fees to the insured and as reimbursement to the defense carriers. ♦



MOTOR VEHICLE/ PERSONAL INJURY

Harmonie Defense Firm Inserted on Eve of Trial Following Summary Judgement Loss

Plaintiff, a 67 year old woman, sought to recover damages for personal injuries purportedly sustained as a result of a motor vehicle accident that occurred on October 31, 2012. Plaintiff was a passenger in a car that was rear-ended by the Defendant's tow truck. Plaintiff claimed she sustained a herniated disc at L4-5 requiring fusion surgery, along with a post-surgical incisional abdominal herniation that also required surgery. In July 2012, the Plaintiff underwent a lumbar laminectomy and micro-discectomy at level L4-5. An MRI taken in December 2012 demonstrated a new herniation at the same level. X-rays of the lumbar spine also showed spinal instability.

Harmonie defense firm was retained to represent the Defendant on the eve of trial after summary judgment on liability had previously been awarded to the Plaintiff. The Defendant's Answer also was stricken after prior counsel failed to appear in court to answer the trial calendar call. The default resulted in the case being set down for an Inquest on damages.

Harmonie defense firm was able to have the Defendant's default vacated and the Answer restored. After securing a two week adjournment of the trial, the new Harmonie defense firm was able to obtain expert reports from a bio-mechanical expert, a radiologist, and the doctor who had previously conducted an independent medical examination of the Plaintiff, and exchanged the reports with the Plaintiff. Although an independent medical examination of the Plaintiff had previously been conducted, prior counsel failed to exchange the report of the examination.

At trial, the Court precluded the Defendant's expert witnesses from testifying due to the late exchanges. Despite this, the defense was able to convince the jury that the need for the fusion surgery and subsequent incisional abdominal surgery was unrelated to the accident. Physical evidence was introduced showing that the collision was minor, and testimony was elicited on cross-examination from the Plaintiff's treating physiatrist and neurosurgeon supporting the defense's contention that the need for the lumbar fusion was indicated at the time of the July 2012 laminectomy and micro-discectomy. The jury deliberated for 45 minutes and returned a unanimous verdict in favor of the Defendant. ♦

DEFENSE COUNSEL: **Marcy Sonneborn and Alice Spitz**
FIRM: **Molod Spitz & DeSantis, P.C.**
HEADQUARTERS: **New York, NY**

PREMISES LIABILITY

\$650,000 Verdict in Luxury Building Appealed

Plaintiff was injured in a trip and fall accident in a luxury Trump building in Manhattan (owned by Equity Residential.) Plaintiff claimed that the recessed carpet well in the lobby was defectively designed. The case was tried by another firm before a Judge without a jury, and the Plaintiff received an award of \$650,000. After the award was entered, the case was transferred to this defense firm to handle the appeal. Defense won a reversal and the complaint was dismissed. Thereafter, the Plaintiff moved to appeal and the motion was granted. Upon appeal, a unanimous four-judge panel affirmed dismissal of the complaint and agreed there was nothing wrong with the carpet or the well it rested in. Further, that the Plaintiff's expert's opinion was not probative because it did not rely upon accepted industry standards and did not cite to a violation of a specific safety statute. The complaint remains dismissed. ♦

AUTOMOTIVE LIABILITY/ PROPERTY DAMAGE

Moving Truck and Double Decker Tour Bus Collide, Unusual Negligence Arguments Asserted

This property damage claim arose from a two-vehicle collision between a moving truck and a double decker tour bus. Defendant owned the moving truck. There was no dispute that Defendant's driver rear ended the tour bus. The unique legal question presented by this otherwise simple negligence claim is that Defendant maintained that the driver operated the vehicle without consent and outside the scope of his employment. The jury found that the driver did have Defendant's permission to use the moving truck and that the driver was negligent in causing the accident. However, it found that the driver's negligence was not a substantial factor in causing the accident. Since there was no finding of 'substantial factor' (proximate cause), this is a defense verdict and the jury did not consider the amount of damages. The Plaintiff tour bus moved to set aside the verdict, arguing that the jury should never have been permitted to consider the driver's negligence and therefore should also not have had a proximate cause question asked as the moving truck's rear-end collision with the bus created a presumption that the driver was negligent. The Court in denying Plaintiff's motion to set aside the verdict adopted defense argument that it was well within the province of the jury to conclude that the driver's drinking before the accident was not a proximate cause of the accident since defense had also presented a non-negligent explanation for the collision: the moving truck's unexpected brake failure after its faultless operation for over three miles. ♦

PERSONAL INJURY

Crane Manufacturer Sued in Platform Collapse

Out of state manufacturer was sued for products liability claims in connection with crane platform collapse causing two personal injuries. Crane manufacturer filed a motion to dismiss the MD action for lack of personal jurisdiction. Defendant was able to show lack of specific jurisdiction in that the crane involved had been sold 12 years before to a non-party in another state, and only after two other purchases arrived in MD. The crane manufacturer also prevailed on general jurisdiction. Although there were sales in MD, there was no purposeful availment or agents' activities in the state. All sales were through independent dealers located elsewhere and all deliveries were made ex-factory in the home state of the manufacturer. Motion to dismiss was granted. ♦

DEFENSE COUNSEL: **John E. Gormley and Michael Federico**
FIRM: **Olson, Cannon, Gormley, Angulo & Stoberski**
HEADQUARTERS: **Las Vegas, NV**

PREMISES LIABILITY/ PERSONAL INJURY

\$1 Million Demanded in Forklift Case

Defense represented Paris Las Vegas in defending against a personal injury claim arising out of the Plaintiff's use of a forklift at the property. The Plaintiff blamed Paris Las Vegas for his alleged injuries and was seeking over one million dollars in damages. After a week in trial, counsel was able to convince the jury that the resort was not responsible for the incident, and the jury returned a defense verdict in favor of Paris Las Vegas. ♦



DEFENSE COUNSEL: **Jim Olson and Stephanie Zinna**
FIRM: **Olson, Cannon, Gormley, Angulo & Stoberski**
HEADQUARTERS: **Las Vegas, NV**

DENTAL BOARD COMPLAINT

Complaints Filed Against Dentist for Mistreatment of Patients

Counsel defended a dentist against claims alleging improper care and mistreatment of patients. Based on the defense presented, the Nevada State Board of Dental Examiners completely exonerated the doctor of all complaints. ♦

DEFENSE COUNSEL: **Mike Stoberski and Emily Montgomery**
FIRM: **Olson, Cannon, Gormley, Angulo & Stoberski**
HEADQUARTERS: **Las Vegas, NV**

REAL ESTATE MALPRACTICE

Agent and Brokers Sued when Title Insurance Company Goes Out of Business

Defense obtained a defense verdict for their real estate agent and broker clients who were sued over Plaintiff's funds that were taken by a title company that shut its doors in 2011. The jury determined the clients were not responsible for the loss of the funds. ♦

DEFENSE COUNSEL: **Michael E. Stoberski**
FIRM: **Olson, Cannon, Gormley, Angulo & Stoberski**
HEADQUARTERS: **Las Vegas, NV**

REAL ESTATE MALPRACTICE

Plaintiff Sues Real Estate Agents Claiming Penthouse Price Too High

Defense obtained a defense verdict after a two week jury trial in a real estate matter where the Plaintiffs were suing their real estate agent and broker alleging that they purchased a top floor penthouse unit in 2009 and paid too much money for the unit. The jury determined that the unit was worth what the Plaintiffs paid for it in 2009 and suffered no damages as a result of any of the conduct of their agent and broker. ♦



PREMISES LIABILITY/ PERSONAL INJURY

Plaintiff Falls off Church Roof, Sues Following Leg Amputation

Plaintiff was asked by a friend whether he would assist in repairing a leak on the roof of a local church. Plaintiff agreed. At the church, Plaintiff climbed a ladder; climbed onto the roof; and reached out to grab and remove a tree limb. In the process he fell from the roof, to the ground, fracturing his leg. The wound later developed an infection. The infection became so severe that Plaintiff's leg was ultimately amputated below the knee.

Plaintiff filed suit against the church alleging the roof presented an unreasonable risk of harm. Defense counsel filed a Motion for Summary Judgment on the issue of liability arguing Plaintiff had no evidence that the church breached a duty owed to Plaintiff especially considering Plaintiff's sole purpose for being on the premises that day was to repair a problem with the roof.

At the hearing, Plaintiff was present and accompanied by two attorneys. Counsel for Plaintiff asserted a theory of liability not previously pled in the Petition. They alleged the church should not have allowed Plaintiff to climb on the roof because Plaintiff was not a skilled roofer. The Judge ended this argument by stating that Plaintiff himself was in the best position to know whether he possessed the skills necessary to safely climb on the roof.

The Judge afforded much leeway to Plaintiff's attorneys during oral argument, likely because Plaintiff was present. Ultimately, though, summary judgment on liability was entered in favor of the church with the suit dismissed in full, with prejudice, and with costs assessed against the Plaintiff.

Had the church not prevailed on summary judgment, the potential award to Plaintiff could have been significant considering the amputation. ♦

MARITAL STATUS DISCRIMINATION/BREACH OF CONTRACT/RETALIATION

Plaintiff Sues Church For Discrimination

The Plaintiff originally filed a discrimination claim against a local church claiming he was dismissed as a youth pastor because his status changed from married to single. The Plaintiff also claimed breach of oral contract on a severance package and retaliation. The original claims were dismissed through administrative proceedings and the case was then re-filed in federal district court. Plaintiff's discrimination claims were based not only on federal law but on certain unique provisions of the Nebraska Labor and Employment Act. The insured church and the carrier determined that the ministerial exception was such an important principle that the case needed to be tried rather than settled. After significant discovery, Defendant's summary judgment motion was denied. Defendant sought and was granted an evidentiary rehearing in order to present live testimony on certain evidentiary issues. The motion for rehearing was granted. Following the evidentiary hearing, the court entered an order dismissing all of the Plaintiff's claims. The case has received national attention for the application of the ministerial exception to these types of claims. ♦

CONSTRUCTION DEFECT/ PERSONAL INJURY

Plaintiff Sues for Negligent Installation/Workmanship Case and Property Damages

Husband/wife homeowners sued a regional builder and a number of subcontractors for claims of improper installation of the drainage systems on an extravagant home. The Homeowners claimed in excess of eight-hundred thousand dollars in property damage from water intrusion and subsistence of the home's foundations. The Homeowners also claimed two million dollars in damages for personal injury arising from exposure to mold, where one of the homeowners had significant respiratory problems. During a seven-day hearing, the Homeowners made certain admissions regarding changes to the home's drainage systems that resulted in an award for the Contractors/Subcontractors. The three-arbitrator Panel also found no significant deviations from the applicable building codes. ♦



CONSTRUCTION/ PROFESSIONAL LIABILITY

Geotechnical Engineer Sued for \$1.1 Million When Building Settles

A design-build contractor sued a geotechnical engineer over a \$10 million limestone grinding facility they were constructing for a local power generating utility company for use in its coal burning operations. The contractor and owner of the facility selected a site at a southeastern limestone quarry where the facility was to be built, then hired the geotechnical engineer to do a geotechnical study. The engineer encountered difficulties in the exploration, which was made difficult by the make-up of the site, consisting of old quarry waste as much as 40 feet thick. In their geotechnical report, the engineer warned that there would be risk of settlement with developing the site, and provided recommendations for reducing the bearing pressures of the equipment and foundation loads. The developer proceeded with constructing at the site, based in part on some recommendations on “estimated settlements” that were issued by the engineer after the geotechnical report, based on assumptions made about the compactability of the soil. The structures at the site settled, and the contractor sued the geotechnical engineer on the theory that the engineer should have told them the site was unsuitable, claiming \$1.1 million in damages. The jury deliberated for 20 minutes before rendering its verdict, assessing 100% fault to the Plaintiff. ♦

PREMISES LIABILITY/ PERSONAL INJURY

Basketball Player Alleging Serious ACL Injury

A large sports facility won a defense verdict in New Hampshire superior court after a player alleged a severe ACL injury sustained while playing a basketball game. He brought suit against the facility for negligence and negligent design. The Plaintiff, an experienced basketball player participating in a competitive men's league, had been to the facility for games and tournaments before. He claimed to have been injured after landing on a piece of metal stripping that secured the flooring located several feet away from the playing surface. He alleged an ACL injury, with permanent impairment and significant lost wages. The jury deliberated less than an hour before returning a verdict in favor of the Defendant. ♦



DEFENSE COUNSEL: **Catherine S. Nietzel and John W. Cannavino, Jr.**

FIRM: **Ryan Ryan Deluca**

HEADQUARTERS: **Stamford, CT**

TITLE IX, SUBSTANTIVE DUE PROCESS ARISING OUT OF SEXUAL ASSAULT OF STUDENT

School District Sued in Sexual Assault Case

A 12 year old special needs child with severe cognitive and communicative limitations claimed his paraprofessional sexually assaulted him over a several month period when they were alone together. The child was frequently with the aide in a “chill room” dedicated to his exclusive use as a result of an individualized education plan developed and endorsed by independent educational consultants hired by the child’s parents. The plan called for him to be allowed to go there when the regular education classroom became overwhelming for him. The Plaintiff claims the child told two staff of the ongoing abuse, but they ignored him, thus violating his substantive due process rights to bodily integrity. The child gave authorities and his psychiatrist contradictory accounts about whether he had told a teacher and a special education administrator about the alleged abuse. After a successful summary judgment motion on qualified immunity grounds for negligent training, supervision and hiring claims, only the substantive due process and Title IX claims remained, both of which require the Plaintiff to prove the District had actual knowledge of the abuse and were deliberately indifferent to it. The jury found that the Plaintiff had not proven the child told the two staff members and thus returned a verdict in the favor of Defendant and the District. ♦

PROFESSIONAL LIABILITY

\$3 Million Case Filed Against Design Engineer

A case against a storm water management and site grading engineer was summarily dismissed following a one day hearing in the Court of Queen's Bench. A condominium owner sued a number of professionals and contractors for improper design and construction that resulted in building envelope issues requiring \$3 million of remediation expense. On summary application, the Court dismissed the claim against the design engineer on the basis that the Plaintiff had failed to put forth sufficient evidence that ground water flow and drainage design were at all responsible for the loss. ♦

PERSONAL INJURY

Heroic Rescue by Plaintiff Does Not Translate to Legal Liability of Defendant

Defendant homeowner employed Plaintiff in his home as a full-time caretaker for the homeowner's 94-year-old mother. A fire started in the office of the homeowner on the first floor of the home. The homeowner tried to extinguish the fire, but it rapidly spread. On the second floor of the home, the Plaintiff and the mother became trapped by the flames. Plaintiff broke a window and climbed out onto the roof while carrying homeowner's mother. From there, the Plaintiff lowered the mother to the homeowner and then jumped from the second story to the ground.

Plaintiff sued the homeowner, alleging that he started the fire by careless smoking, that he failed to properly train caretaker on fire safety and escape, that he did not have proper fire safety equipment such as extinguishers and alarms, and that he failed to properly maintain the property windows to make sure they were operable.

Plaintiff claimed burns to her feet, legs, and arms and injuries from jumping to the ground from the second floor. In addition, she sought mental and emotional distress from the "near-death experience." The Plaintiff demanded \$500,000 pre-suit and requested \$417,000 from the jury. The defense showed by expert testimony that the alleged cause of the fire, homeowner's cigarette smoking, did not cause the fire. Even with the Plaintiff's heroism in saving the life of homeowner's mother and herself, the defense convinced the jury of the absence of legal liability. The jury awarded less than \$2,000, as some jurors thought the Plaintiff should have received something for her "initial medical treatment." ♦

DEFENSE COUNSEL: **John L. Tate**

FIRM: **Stites & Harbison PLLC**

HEADQUARTERS: **Louisville, KY**

PERSONAL INJURY

Plaintiffs Sue Safety Equipment Manufacturer in Paralyzed Teen Case

The manufacturer and seller of a motocross neck brace won a defense verdict following a two-week trial in federal court over allegations of defective product design and failure to warn. A teenaged boy and his parents sued after the boy broke his thoracic spine and was permanently paralyzed when he crashed and went over the handlebars of his 250 cc dirt bike. The accident occurred during a practice ride at an indoor motocross track. The boy struck the track head first at a relatively low speed, and the suit blamed the neck brace for reducing or eliminating the rider's so-called "tuck and roll" reflex. Plaintiff's "blackboard" compensatory damages exceeded \$25 million. The jury deliberated for two hours before deciding that the neck brace was not defective and did not cause the boy's injury. ♦

FRAUD CLASS ACTION

Class Action Case Filed on Coverage Language Change

Defense obtained a dismissal of an insurance class action from the Alabama Supreme Court when it reversed the trial court and rendered judgment in defense favor effectively terminating the litigation. At issue was whether the trial court properly certified a class action against the carrier based on an exclusion in its policy that had previously been held invalid by the Court.

The class representative argued that when the exclusion was added to the policy, it effectively reduced coverage without a corresponding drop in premiums, resulting in a windfall to the carrier. After the class was certified by the trial court, defense appealed to the Alabama Supreme Court. Defense argued that under the “filed-rate” doctrine, the Department of Insurance, and not the Circuit Court of had original jurisdiction as to any complaints. Under the “filed-rate” doctrine, once the appropriate regulatory agency approves a rate or form, it is deemed per se reasonable and cannot be attacked in judicial proceedings. Rather, a Plaintiff must exhaust its administrative remedies before filing a complaint in circuit court.

The jurisdictional defect not only did away with the class action, but the entire lawsuit as well, resulting in a complete defense victory for the insurance carrier. ♦

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