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# Significant Cases



2017



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**Construction**

## CONSTRUCTION

### Contractor Sues Subcontractor for \$699,200

General contractor (General) was building a seven-building apartment complex. Subcontractor fire-sprinkler installer made several mistakes in two of the seven buildings, then fixed the mistakes, but General would not pay subcontractor. Subcontractor sued General for \$130,604 for services and materials provided. General counterclaimed for \$699,200 for delay damages, repair costs, design fees, and other related claims. Erickson Sederstrom defended subcontractor on the Counterclaim as the subcontractor had separate counsel on its suit for \$130,604.

After a five day trial to the bench, the court found in favor of subcontractor on its claim of \$130,604, and found in favor of the General for \$132,169 of its Counterclaim, for a net of \$1,565 to the General. The trial court found that the General had failed to prove the great majority of its damages claim against the subcontractor with “reasonable certainty.”

The General appealed to the Nebraska Court of Appeals, asking the court to reverse the trial court and “award its full requested damages against” the subcontractor.

The Nebraska Court of Appeals affirmed the trial court’s decision on October 3, 2017, finding that the trial court was correct in finding that the General had failed to prove its damages with reasonable certainty and by the greater weight of evidence. ♦

**Result: Subcontractor Wins on Counterclaim; Contractor’s Claim for \$699,200 Nets Only \$1,564**

## CONSTRUCTION

### Construction Contractors Claim over \$1.1 Million in Damages

Window manufacturer was sued in a construction project involving 1,760 windows. The prime contractor and window installer blamed defendant manufacturer for failed water tests claiming that the window joinery was constructed improperly and that the window design was lacking given that it could not withstand certain test pressures during various spray tests. Defendant disputed these allegations and established that window installation was lacking in various respects: certain key wet seals were missed altogether either due to faulty installation or because the job was accelerated due to schedule delays and other project management issues.

Defendant was blamed for the majority of the window leaks and both contractors claimed over \$1.1 million in delay damages, change orders, extra work, attorney's fees and costs. After a five-day arbitration, Defendant prevailed on all claims and was also awarded attorney fees and costs amounting to \$125,000. ♦

**Result: Defense Verdict Plus Award for Attorney's Fees/Costs for Five-Day Arbitration**



COUNSEL: **Gary Snodgrass and Josh Breithaupt**

FIRM: **Pitzer Snodgrass, P.C.**

HEADQUARTERS: **St. Louis, MO**

## CONSTRUCTION AND PROFESSIONAL LIABILITY – CATASTROPHIC PERSONAL INJURY

### Millions Demanded after Catastrophic Injuries in Stairwell Collapse

Plaintiff asserted a personal injury claim arising from injuries sustained at a construction site. After a five-alarm fire at an apartment complex that caused extensive fire damage, various contractors were involved in the rehabilitation and remediation. Plaintiff was an employee of the general contractor.

Plaintiff was in a stairwell on the fourth floor of the apartment complex when the stairwell collapsed and he sustained catastrophic injuries including broken facial bones, several broken ribs, a broken pelvis, and a severe brain injury which included a screw that had lodged itself more than an inch into the back of Plaintiff's head. Plaintiff sued several entities involved with the work at the premises including Defendant Huneke Engineering, Inc.

Defendant had been retained by Plaintiff's employer and entered into an oral agreement to examine and address the structural integrity of all of the apartments units to be refurbished in the apartment complex. Plaintiff argued that Defendant had a duty to examine the stairwell where the collapse occurred while conducting its structural examination of the immediately adjacent apartment units because it knew that various individuals at the construction site were routinely using the stairwell at issue.

Defendant filed a Motion for Summary Judgment based on the Missouri case which looked at the question of whether an architect can be held responsible for failing to perform services that are outside the scope of his work. In that case the Court held that an architect cannot be found responsible for failing to perform services that are clearly outside the scope of his work based on an oral agreement, and that a professional does not become responsible for the safety of the entire project when he does not undertake overall responsibilities for the project.

After oral argument on the Motion, the Court determined that there was simply no dispute that Defendant Huneke was not retained to inspect the stairwell involved in the collapse and was never asked to inspect that stairwell. The Court determined that a defendant cannot be negligent in failing to do more than its contract obligates it to do. Additionally, the

Court cited the earlier case for the proposition that a professional does not become responsible for the safety of the entire project when he or she does not undertake professional responsibilities for the entire project. Therefore, the Court determined that Defendant Huneke had no duty to inspect or warn about the stairwell where the accident occurred and entered Summary Judgment in favor of Defendant. It should be noted that while the Motion for Summary Judgment was pending Plaintiff's counsel issued a one-time, take it or leave it settlement demand of \$1 million which was rejected outright by Defendant Huneke Engineering. ♦

**Result: Summary Judgment Entered in Favor of Defendant**

COUNSEL: **Mark Gerth, Michael Wroblewski and Louis Britton**

FIRM: **Kightlinger & Gray, LLP**

HEADQUARTERS: **Indianapolis, IN**

## CONSTRUCTION - BODILY INJURY

### Plaintiff Sues for \$15 Million for Construction Accident (Quadriplegic)

Plaintiff was a construction worker who was injured at a construction site when a piece of concrete formwork that was being wrecked by his co-workers struck him on the head. Plaintiff's injuries rendered him a quadriplegic. Plaintiff brought suit against our client, the construction manager as well as the manufacturer of the formwork. Plaintiff alleged that the construction manager was liable because it assumed a duty to Plaintiff through performing numerous safety activities at the site. We moved for summary judgment on the basis that while the construction manager was contractually obligated to perform significant safety duties that it only owed those duties to the Owner, with whom it contracted and that performance of those contractual obligations owed only to the Owner could not create a duty to Plaintiff. Moreover, we established that the construction manager's actions did not exceed the safety obligations authorized or required by the contract. Summary judgment was granted in our favor by the trial court, affirmed by the Court of Appeals and the Indiana Supreme Court denied transfer. ♦

**Result: Summary Judgment, Affirmed by Court of Appeals and Transfer Denied by Indiana Supreme Court**





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**Employment /  
Discrimination /  
Disability**

COUNSEL: **Patrick Mincey & Benton Toups**

FIRM: **Cranfill Sumner & Hartzog LLP**

HEADQUARTERS: **Raleigh, NC**

## **EMPLOYMENT & WHITE COLLAR CRIMINAL INVESTIGATION**

### **Employee Sues Prominent Business Magnate for Sexual Molestation of His Minor Son at NASCAR Race**

Plaintiff brought suit against prominent business community executive leading to months-long community protests outside client's businesses. Daily negative headlines throughout regional media. Civil action followed arrest and criminal prosecution of executive client alleging sexual assault of plaintiff-employee's minor male son in an RV at a NASCAR race event. RV was property of executive-client's business and being used throughout Race Weekend for corporate business development functions. ♦

**Result: Favorable Settlement**

## CIVIL RIGHTS CLASS ACTION

### **Discrimination: “Down the Rabbit Hole”**

This was a putative class action in which plaintiffs alleged extensive and pervasive race discrimination in an entertainment venue under Title II of the Civil Rights Act (public accommodation claims.) Security company as one of several defendants. Allegations included the defendants’ use of a “rabbit scheme” in which a Caucasian man (the rabbit) was used to start fights with African Americans in order to provide an excuse to remove the African Americans. Plaintiffs alleged the rabbit was then let back into the venue through a back door so he could do it again. Defense successfully motioned the Court to dismiss the public accommodations claim due to plaintiffs’ lack of pre-suit notice to the appropriate state/local authority. The Court later denied plaintiffs’ motion to certify the class and plaintiffs proceeded on their individual claims under the Section 1981 claim. After extensive discovery, all defendants filed motions for summary judgment. The trial court granted all defense motions. The appellate court then affirmed summary judgment as to our client. ♦

### **Result: Summary Judgment Upheld on Appeal**

## **EMPLOYMENT - WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY AND “WHISTLEBLOWING”**

### **Million Dollar Demand in Wrongful Discharge Claim**

Plaintiff was the Executive Director of the Kilo Diabetes and Vascular Research Foundation but was terminated for cause. Plaintiff asserted that the President of the Foundation wrongfully terminated her in violation of public policy. Specifically, Plaintiff claimed that she was wrongfully discharged for refusing to fill prescriptions for controlled medications that were written by the President but were for his own personal consumption. Plaintiff also claimed the President routinely prescribed medication to his patients without the requisite doctor's office visit, freely gave out samples of prescription medication to his friends and donors to the Foundation, occasionally gave out prescription medications that were expired, and various other improprieties related to prescription medication. Plaintiff also claimed the President violated his probation on a stipulated agreement with the State of Missouri to follow all the rules regarding prescription medication and that she thereafter blew the whistle on him. Plaintiff also asserted that Defendant Foundation failed and refused to return various items of personal property she left in her office after her termination.

Defendant Foundation and the President strongly disputed these allegations. The Defendants argued that Plaintiff was fired for cause as she had not only taken complete control over the Foundation but had also obtained undue influence over the President's in his personal affairs. Plaintiff also failed to follow the auditor's recommendations on segregation of responsibilities and generally failed to act in the best interest of the Foundation.

After a three-week jury trial, the Jury issued a Complete Defense Verdict on the Wrongful Discharge in Violation of Public Policy claim.

Plaintiff's Verdict of \$1,000.00 on personal property claim was granted but Plaintiff was ultimately required to reimburse Defendant Foundation for a portion of its litigation costs which exceeded her \$1,000.00 Judgment several times over.” ♦

### **Result: Complete Defendant's Verdict**

## CHURCH LIABILITY

### Pastoral Sexual Misconduct

Summary judgment granted in a pastoral sexual misconduct case, where it was alleged that the pastor used intimate sexual information learned during marriage counseling to lure the wife into a sexual relationship. The husband brought suit against multiple parties for breach of fiduciary duty, negligent/intentional infliction of emotional distress, negligent supervision, negligent hiring, and false light/defamation. Summary judgment was based and granted upon, among other reasons, Pennsylvania's prohibition against alienation of affections claims, under 23 Pa. Cons. Stat. Section 1901, and the separation of church and state guaranteed by the United States and Pennsylvania Constitutions. ♦

### Result: Summary Judgment



## EMPLOYMENT

### **Plaintiff Claims Sex Discrimination, Hostile Work Environment, Race Discrimination, and Retaliation**

Summary judgment granted as to alleged violations of Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act. Court dismissed Plaintiff's Complaint in full, alleging claims of sex discrimination, hostile work environment, race discrimination, and retaliation, finding that Plaintiff had failed to administratively exhaust the two former claims and dismissing the latter claims on the merits. The defense verdict was rendered following a lengthy oral argument and a scathing 26-page opinion, recognizing the diligent work put forward by defense counsel and contrasting it with Plaintiff's "laissez-faire approach" to this case. ♦

#### **Result: Summary Judgment**

COUNSEL: **Catherine Straggas**  
FIRM: **Margolis Edelstein**  
HEADQUARTERS: **Philadelphia, PA**

## EMPLOYMENT

### **Civil Rights Case Filed against Housing Authority**

Defense files Motion to Dismiss claims alleging violations of the Fifth and Fourteenth Amendments which led to the dismissal of Plaintiff's Complaint against Philadelphia Housing Authority following oral argument in civil rights matter in the United States District Court for the Eastern District of Pennsylvania. Motion to Dismiss granted. ♦

### **Result: Summary Judgment**

## EMPLOYMENT

### **Plaintiff Claims Wrongful Termination, Defamation, Discrimination by Sexual Orientation, Sexual Harassment, and Intentional Infliction of Emotional Distress**

Preliminary objections granted, complaint dismissed in its entirety, and judgment entered for Defendant on case involving allegations of wrongful termination, defamation of character, discrimination by sexual orientation by Reform Act of 1978, unlawful sexual harassment, and intentional infliction of emotional distress. ♦

#### **Result: Summary Judgment**





## **GENERAL LIABILITY – PLANT ACCIDENT**

### **Workers' Comp Exclusive Remedy in Death Case**

A maintenance worker employed by a subcontractor of International Paper Company ("IP") was building a scaffold next to a paper machine, when the lanyard on his body harness became entangled in the drive shaft of the paper machine. He was pulled into the machine, which continued to rotate. This resulted in his death. His widow sued IP and the mill manager. The case was successfully removed to Federal Court upon proof that the mill manager was improperly (fraudulently) joined. Thereafter, the case was dismissed on a motion for summary judgment upon proof that the maintenance worker was the statutory employee of IP and, therefore, limited to a claim for workers' compensation. ♦

### **Result: Summary Judgment**

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# Insurance / Coverage

## INSURANCE BAD FAITH

### **Dismissal of Claims for Bad Faith and Claims under the Unfair Insurance Practices Act against Carrier**

Claims for breach of contract, bad faith and Unfair Insurance Practices were asserted against Defendant Insurance Carrier arising out of property damage and adjustment thereof to Plaintiff's commercial property and for failure to pay amounts allegedly due and owing under a policy of insurance.

After the filing of multiple Complaints, completion of discovery and production of expert reports, Defendant Insurance Carrier was dismissed by the court finding no breach of duty under the policy or any bad faith on the part of Defendant Carrier. ♦

### **Result: Dismissal of All Claims as to Defendant Carrier**

## INSURANCE/COMMERCIAL CRIME

### Computer Fraud Coverage Demanded in Commercial Crime Policy

Firm obtained Summary Judgment on behalf of insurer client with regard to Computer Fraud coverage in commercial crime policy wherein insured sought coverage for Social Engineering Fraud claim. This is a bellweather case involving a closely-watched developing issue within crime coverage. During briefing, there was only one case that had dealt with the issues and scheme, and just before the decision, another federal court ruled in favor of the insured. The matter is currently pending in the 6th Circuit, and is one of three cases, nationally, addressing coverage for Social Engineering Fraud claims that are currently before a federal appellate court, and is the only one that found in favor of the insurer. ♦

### Result: Summary Judgment



# INSURANCE/COMMERCIAL CRIME

## Social Engineering Fraud with \$15 million exposure

Firm achieved a very favorable settlement on a \$15 million exposure involving an overseas Social Engineering Fraud claim wherein insured sought Funds Transfer Fraud and Computer Fraud coverage under commercial crime policy. ♦

### Result: Settlement



## APPEALS/INSURANCE

### Appeal on Summary Judgment in Seven-Month Notice Delay Case

Confirming that notice as soon as practicable is a condition precedent to coverage under claims made policy, notice during policy period is not enough, and the issue, while normally a fact question, can be resolved on summary judgment. In this case, the insured did not give any explanation for its seven-month delay in notifying insurer, during which it hired counsel, litigated the underlying case, and negotiated with the plaintiff in the underlying case. ♦

### **Result: Affirming Summary Judgment**

## INSURANCE COVERAGE (LIABILITY)

### T-Mobile Sues Insurer for \$2 Million for Coverage and Bad Faith

Purported additional insured sued insurer for failure to defend it at trial seeking damages of over \$2,000,000 in indemnity, defense costs, trebled damages, and attorney fees. After successfully having New Jersey law applied to the extra-contractual claims, summary judgment was granted to the insurer on the basis that (1) T-Mobile was not an additional insured, (2) the certificates of liability insurance stating that T-Mobile was an additional insured did not confer coverage in absence of endorsement in policy; (3) T-Mobile was not prejudiced by insurer's late assertion (two years after claim but before filing of lawsuit) that T-Mobile was not an additional insured, (4) T-Mobile did not have standing to sue for coverage and bad faith on behalf of its subsidiary, and (5) insurer did not act in bad faith in denying coverage. ♦

**Result: Summary Judgment Granted to Insurer on All Claims**



## INSURANCE COVERAGE – FIRST PARTY COVERAGE DEFENSE

### **\$2.5 Million Demanded in Property Damage, Business Interruption, and Bad Faith**

Restaurant corporate owner sued carrier for \$2.5 million in property damage, business interruption, and bad faith damages as a result of a fire. Manager of the restaurant was charged with arson and entered an Alford guilty plea to setting the fire. Once the guilty plea was entered, counsel filed a motion for summary judgment contending coverage was voided by the employee dishonesty exclusion. Plaintiff relied upon an endorsement which diluted the employee dishonesty exclusion. State Farm successfully argued the endorsement affected only Coverage Part B, not the Dishonesty Exclusion. Moreover, once the manager pled guilty to the fire, the burden shifted to the insured/owner to prove the manager did not receive financial gain for the fire, which could not be satisfied because of the Alford plea of guilty. The trial court granted summary judgment which was affirmed by the Fifth Circuit Court of Appeals. ♦

**Result: Summary Judgment, Affirmed by U.S. Fifth Circuit Court of Appeals**



## INSURANCE COVERAGE / PROPERTY

### Plaintiff Spends Repair Money on Unrelated Items

Insured sued insurer for failure to pay for cost of repair of certain items. The total damages claimed, including attorney fees was over \$200K. After agreeing to a scope of repairs, including the replacement of a large rafter beam, the insured unilaterally deviated from the repair scope by only repairing the rafter beam. The insured then used the “left over” money allocated for the beam replacement on unrelated items, including a substantially upgraded kitchen. Relying on policy language limiting coverage to the amount actually spend that was necessary to repair or replace the lost or damaged property, the insurer denied coverage. The court agreed with the analysis of the insurer and granted summary judgment in its favor. ♦

**Result: Summary Judgment Granted to Insurer on All Claims**



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# Legal Malpractice

## LEGAL MALPRACTICE

### Attorney Sued for \$4.25 Million

Plaintiff sued her former personal injury attorney alleging negligence in the handling of her personal injury case. The underlying case was a premises liability case in which the plaintiff claimed to have been exposed to a banned, toxic organophosphate, Merphos, at her office building. She sued the owner of the building and the pest control company. The underlying case was litigated in federal court and summary judgment was entered in favor of the building owner and pest control company. In the legal malpractice case, Plaintiff claimed that her attorney should have preserved the carpet from the office building, so that it could have been re-tested after the lab that originally found a hit for Merphos deemed that hit a false positive. She further alleged that her attorney should have hired a second expert to address the lab's repudiation. Plaintiff and her designated medical toxicologist claimed that she suffered from toxic encephalopathy, peripheral neuropathy and exacerbation of multiple chemical sensitivity as a result of the exposure that was the subject of the underlying case. She sought \$4.25 million in damages. After a seven-day trial involving twenty-three witnesses, six of whom qualified as experts, the jury returned a verdict in favor of the defendant-attorney. ♦

### Result: Defense Verdict

## PROFESSIONAL LIABILITY/ LEGAL MALPRACTICE

### Plaintiff Fails to Timely Identify an Expert Witness in a Legal Malpractice Case

Plaintiff brought a legal malpractice action for services rendered relating to a real estate transaction. Plaintiff's counsel did not submit an affidavit of expert review with the complaint pursuant to Minnesota Statutes. Defense demanded that Plaintiff provide the affidavit of expert within sixty days of the demand. Plaintiff failed to provide the affidavit of expert review in sixty days, defense moved to dismiss the case with prejudice as allowed by Statute. Plaintiff's counsel argued that expert testimony was not needed and that she believed counsel for all the parties had an implied agreement to stay the sixty-day deadline. The court granted Defendants' motion to dismiss. ♦

#### **Result: Summary Judgment**



## APPEALS/LEGAL MALPRACTICE

### Expert Opinion of Causation Required in Legal Malpractice Claims

Client sued attorney and law firm, alleging that they committed legal malpractice in representing both her and her husband in estate planning matters after she filed for, and then withdrew the petition for divorce. Appellant alleged that lawyers breached their fiduciary duties by having her sign estate planning documents that were allegedly not in her interest and that they were negligent in allowing her to sign the estate planning documents when the plan allegedly resulted in her taking less than her “fair” share. In accordance with state statute, Appellant submitted an affidavit of expert disclosure providing detailed opinions regarding the Respondents’ duty and alleged breach thereof but stated no more than that the breach “caused [Appellant’s] injury.” The district court granted lawyers’ motion to dismiss based on recently restated Minnesota Supreme Court case law requiring that expert affidavits provide “meaningful information” summarizing the expert’s opinion on how the defendant’s actions were the proximate cause of a plaintiff’s alleged injuries, and stating that a fatal flaw – such as the failure to provide detailed opinions regarding causation – rendered Appellant ineligible for the statute’s safe harbor provision. The court of appeals affirmed the dismissal, determining that district court properly applied the relevant case law when it determined that the expert affidavit’s statement of causation was not sufficient to meet the standard established by the Minnesota Supreme Court in *Brown-Wilbert, Inc. v. Copeland Buhl & Co. P.L.L.P.* and *Guzick v. Kimball*. ♦

### Result: Legal Malpractice Case Dismissed

## LEGAL MALPRACTICE

### **\$2 Million Legal Malpractice Case**

After the co-personal representative named in a will failed to qualify as personal representative, suit was against the lawyer who drafted the will alleging malpractice in failing to advise the potential personal representative and decedent of the qualification requirements for serving as personal representative. The primary issue was that the plaintiff was not a FL resident or a relative of the decedent, but claimed that they would have become a resident if they had known of the statutory requirement. Plaintiff alleged damages in excess of \$2 million, based on the Estate's value at almost \$200 million. The Court granted a motion to dismiss with prejudice after the defense argued that the plaintiff was not a third-party beneficiary to the attorney-client relationship between the attorney and the decedent and thus plaintiff could not state a claim for legal malpractice. ♦

**Result: Motion to Dismiss with Prejudice Granted**

COUNSEL: **Charles A. Deluca and Gina M. Von Oehsen**

FIRM: **Ryan Ryan Deluca LLP**

HEADQUARTERS: **Stamford, CT**

## LEGAL MALPRACTICE/ VEXATIOUS LITIGATION

### Developer Sues Law Firm and Clients for \$33.5 Million

This case involved defendants law firm and their clients' participation in proceedings relating to 14+ acres of prime real property owned by the developer, located in what the firm and their clients believed to be an environmentally sensitive area in Connecticut. The firm's clients intervened in various pending actions and filed appeals of various decisions relating to the land use proceedings on the advice of their attorney. The plaintiff real estate developer claimed the litigation was brought maliciously and without probable cause causing it to lose a multi-million-dollar deal with a major big box retailer that had contracted to lease the real estate for 30 years.

After over four weeks of a hybrid jury/bench trial, the jury ruled in the defendants' favor finding that the underlining proceedings by the defendants did not cause real estate deal to fall through, and that the firm and their clients did not act with malice. The jury rejected the developer's claim for treble damages. Additionally, the jury rejected the developer's claim that it was also entitled to recover a recoupment of the developer's attorney's fees and disbursements which exceeded \$500,000.

The court thereafter issued a 50-page ruling addressing the probable cause issue holding that although the developer had proved its statutory vexatious claim (which permitted recovery of double damages), the defendants were not liable for any damages since they proved their special defense asserting the Noerr-Pennington doctrine. The Noerr-Pennington doctrine provided immunity and shielded the defendants from any liability for engaging in litigation aimed at influencing decision-making by the government which were protected by the First Amendment. ♦

### **Result: Defense Verdict**

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**Medical**



## MEDICAL MALPRACTICE

### **\$1.5 Million Sought in Med Malpractice**

The plaintiff sued the defendant hospital alleging defendant nursing staff were negligent in the provision of care resulting in plaintiff's fall, which plaintiff alleged caused a compression fracture of the lumbar spine. Plaintiff sought damages in excess of \$1.5 million. After a five-day trial, the jury returned a defense verdict finding no negligence. ♦

### **Result: Defense Verdict**



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# Motor Vehicle / Transportation

COUNSEL: **Jerald L. Rauterkus; Nicholas F. Sullivan**  
FIRM: **Erickson & Sederstrom, P.C., L.L.O.**  
HEADQUARTERS: **Omaha, NE**

## COMMERCIAL LITIGATION REGARDING SALE OF TRACTOR TRAILERS

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### Liquidated Damage Provision Upheld

This case involved a commercial trucking transaction between two large national trucking companies. The transaction involved the sale of 332 used tractor units under two separate purchase agreements. Plaintiff claimed a breach of the purchase agreements and sought damages in excess of \$10 million. Defendants took the position that the liquidated damage provision in each purchase agreement capped the damages available to plaintiff at approximately \$166,000. After extensive discovery, the chief judge of the federal district court in Nebraska granted summary judgment to the defendants on the damage issues. ♦

### **Result: Granted Motion for Summary Judgment**

## COMMERCIAL TRUCKING NEGLIGENCE

### Car Strikes Truck Tire Debris

Commercial trucking company and truck driver were sued for injuries and property damage following single vehicle accident on I-15 in Idaho that occurred when Plaintiff attempted to avoid debris from a truck tire that blew out as Plaintiff was passing truck. The Court determined *res ipsa loquitur* doctrine did not apply because the failure of the truck tire alone did not justify an inference of negligence. The Court dismissed the case based on the Plaintiff's failure to provide any evidence concerning the cause of the tire failure or other evidence establishing that a reasonable person upon proper inspection of the tire would have discerned a failure of the tire was imminent. ♦

### **Result: Final Summary Judgment Granted**

## AUTO NEGLIGENCE

### Plaintiff Sues for \$340,000 in MVA Case

Defense received a favorable verdict after trial of a lawsuit arising from a motor vehicle accident where liability was admitted and the issue for the jury was the extent of injuries caused by the accident. At trial, the Plaintiff claimed a multitude of injuries were caused by the accident and she required lifetime care as a result. Conversely, the defense argued, and persuaded the jury, that most of the Plaintiff's claimed damages were related to a pre-existing spinal condition and not any trauma caused by the accident. The damages claimed at trial exceeded \$340,000. However, the jury ultimately awarded the Plaintiff only \$20,550 in economic damages and \$5,000 in general damages. ♦

### Result: Favorable Trial Verdict



## AUTOMOBILE NEGLIGENCE

### **MVA Due to Fracking Dirt, Mud, Gravel, Oil, Grease on Road**

Plaintiff's decedent filed an action against Defendant Trucking Company alleging the Defendant driver had tracked and deposited dirt, mud, gravel, oil, grease and other slippery substances on a roadway while delivering materials to a fracking well. Due to such substances being on the roadway, Plaintiff's decedent lost control of his vehicle, slid into a tree and was killed.

A significant economic claim along with a claim for conscious pain and suffering was asserted as to the Defendant. A dismissal of the Defendant Trucking Company was obtained finding no breach of any duty that was owed to the Plaintiff's decedent. ♦

**Result: Dismissal of Defending Trucking Company**

## TRUCKING ACCIDENT

### **Catastrophic Injuries in Head-On Semi Collision**

The plaintiff, the driver of a van, within which her two granddaughters were passengers, was struck head-on by the driver of defendant's tractor trailer. The plaintiff was catastrophically injured and has been hospitalized and/or confined to a nursing home since the date of accident. Her two grandchildren were also seriously injured. Defense successfully argued that the defendant's driver was faced with a sudden emergency and therefore was entitled to a judgment as a matter of law. The summary judgment order was affirmed by the Appellate Court. ♦

**Result: Summary Judgment Granted to Defense**

## VICARIOUS LIABILITY FOR AUTO NEGLIGENCE OF EMPLOYEE

### MVA Results in Leg Amputation and Demand in Excess of \$10 Million

Plaintiff brought this action against employee driver for injuries suffered in a head-on motor vehicle collision. In addition to employee, plaintiff named the owners of the vehicle driven by the employee and his retail employer. The defendant driver employee was coming home from work on the day of the collision when he veered into the other lane, slamming into the plaintiff's vehicle. Plaintiff was air-lifted and ultimately had his right lower leg amputated. There was no dispute that the accident occurred when the employee was driving home after work.

Although California has a general rule that an employer cannot be vicariously liable for the acts of its employees when they are "going and coming" from work, plaintiff alleged that the retailer was still liable for the negligent driving of its employee under two exceptions to the general rule: the "personal vehicle-use" exception; and the "special risk" exception. Plaintiff relied on testimony from the employee that on four separate occasions the retailer's manager asked the employee to pick up breakfast for him on the way to work and also relied on a declaration from an expert witness that the employee's "irregular shiftwork schedule, combined with his extended work hours, interacted to make it unsafe for him to drive home from work." The retailer submitted evidence in support of the motion that the location where the employee allegedly obtained breakfast for the manager was in the same shopping center as the retailer's store. The retailer argued that even if the employee's breakfast errands for the manager benefited the retailer, it was a trivial and incidental benefit that was not sufficient enough to justify making the retailer responsible for the risks inherent in the travel.

The court invited a wide-ranging oral argument at the hearing on the motion that thoroughly explored the various exceptions to the "going and coming rule." After the matter was taken under submission, the court reviewed the relevant legal authorities and conducted its own additional research. Court granted the motion dismissal the case against the retailer.



The matter was heard by and ruled on by Judge Charles Crandall of San Luis Obispo County Superior Court who has a well-known reputation of denying almost all MSJs as he is reluctant to want to take any matter away from the jury. In fact, at our initial Case Management Conference when we advised Judge Crandall that we intended to file a MSJ, he specifically told us that we should anticipate that he will deny it. Significantly, none of the other named defendants had any insurance and so the retailer was the only potential tortfeasor that had liability insurance. Judge Crandall mentioned this fact in his ruling. The parties attended a mediation after the MSJ was filed. Although the initial demand was for multiple millions of dollars, the retailer offered 100K at the mediation, and the plaintiff responded with a final demand of 599K at the end of the mediation. Further settlement discussions occurred after the formal mediation was concluded and the retailer ultimately withdrew its offer of 100K prior to the hearing on the MSJ. ♦

**Result: Motion for Summary Judgment Granted in Full**



## UNINSURED MOTORIST CLAIM

### Jury Fails to Return Verdict against UM Carrier in \$1.5 Million Case

Strategic planning enabled defense counsel to take advantage of a weakness in plaintiff's case resulting in a directed verdict. This uninsured motorist claim arose out of a rear-end car accident with an uninsured motorist. Plaintiff sued her insurer for uninsured motorist benefits. Liability for the accident was admitted. The plaintiff, who suffered from pre-existing post-craniotomy headaches, alleged that the accident aggravated her headaches, as well as causing a cervical disc protrusion with resultant neck pain. MRIs predating the accident showed no bulge, while post-accident MRIs did show a bulge. Plaintiff's treating physician related the conditions to the accident and testified that the plaintiff's pain was permanent. Prior to trial, plaintiff's counsel's pretrial submissions indicated an intention to try the case in the form of a third-party claim against the tortfeasor driver, but no stipulation to that effect was made by the defendant's counsel who represented the insurer. The tortfeasor driver did not appear for trial and was defaulted. When the plaintiff rested, defendant's counsel moved for a directed verdict on the grounds that the plaintiff had failed to sustain his burden of proof on essential elements of her uninsured motorist claim, including whether the tortfeasor driver was uninsured. The court took the matter under advisement and sent the case to the jury. During closing arguments, plaintiff's counsel asked the jury to award the plaintiff \$1.5 million. The jury returned a verdict form against the tortfeasor driver in the sum of \$170,000, but failed to return the verdict forms for or against the insurer. Following the verdict, the judge granted defendant's motion for judgment on the evidence in favor of the insurer. ♦

### **Result: Defense Verdict**

## AUTO NEGLIGENCE

### Plaintiff Sues for \$1.5 Million, Rejects \$300,000 Offer, Left with \$12,591

In a case arising from a T-bone collision at an intersection in which the defendant admitted liability, a jury in Hall County, Georgia, awarded the plaintiff \$12,591.63 after hearing her claim for damages in excess of \$1.5 million. Plaintiff's claim included over \$365,000 in verified past medical expenses. The jury award combined \$6,500 for her past pain and suffering and \$6,091.63 for medical damages, but omitted any damages for future pain and suffering and other past or future medical bills. The jury foreperson explained after the trial that the jurors did not believe the plaintiff's testimony after she lied about stealing from former employers and suspected that the plaintiff was abusing or selling narcotics. Plaintiff rejected a \$300,000 offer of settlement prior to the trial. ♦

#### Result: Nominal Damages



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# Municipal Liability

## MUNICIPAL LIABILITY

### **Municipality Sued for \$25 million**

Plaintiff sued rural municipality for \$25 million dollars for alleged failure to grant road allowances and development permits. Plaintiff was unable to develop a residential subdivision as planned, forcing the sale of the property and subsequent claim for loss of profits. Following a three-day summary judgment application, the Court found for the defence and dismissed the claim, finding that the municipality had a statutory defense which granted immunity from suit. Further, Canadian common law doctrine of immunity for policy decisions was also applicable. Final summary judgment granted. ♦

### **Result: Summary Judgment Granted**

## **POLICE LIABILITY, CONSTITUTIONAL TORTS, 42 U.S.C. § 1983**

### **Street Preacher Arrested at Local Festival**

Street preacher was arrested at a local festival for shouting at female attendees that some of them were dressed like tramps, whores and prostitutes. Officer first warned street preacher not to repeat the epithets. Preacher continued to do so and was arrested for disorderly conduct. Plaintiff asserted three Constitutional violations against officers: (1) First Amendment Freedom of Speech; (2) First Amendment Free Exercise of Religion Clause; and (3) False Arrest in Violation of the Fourth Amendment. On cross-motions for summary judgment, defendants were awarded summary judgment as to all claims, and Plaintiff's motion for summary judgment denied. ♦

**Result: Summary Judgment for Defendant-Officers**

## **NEGLIGENCE, ASSAULT AND BATTERY, FALSE ARREST, FALSE IMPRISONMENT AND MALICIOUS PROSECUTION**

### **Cops Sued in DUI Arrest**

Plaintiffs alleged claims for negligence, assault and battery, false arrest, false imprisonment and malicious prosecution against the City and its officers stemming from arrests for DUI and disorderly conduct.

Plaintiffs' claims were dismissed via summary judgment on the grounds that the officers had sufficient probable cause to arrest Plaintiffs, thus entitled to qualified immunity for their actions which precluded Plaintiffs' claims for false arrest, false imprisonment and malicious prosecution. The Court held that there was no duty to continue to investigate a crime once probable cause was established so Plaintiffs' negligence claims failed as a matter of law. The Court also held that the officers acted reasonably and arrested Plaintiffs based on sufficient probable cause and the minimal force used to arrest them was privileged, so their claims for assault and battery for excessive force were dismissed. ♦

**Result: Summary Judgment for the Defense**



## CIVIL RIGHTS - 42 U.S.C. § 1983

### Plaintiff Sues for \$130,000 in a Violation of Civil Rights / Excessive Force K9 Cop Case

Plaintiff sued a Deputy with the Broward County Sheriff's Office alleging violations of his Fourth Amendment constitutional right to be free from excessive force during an arrest. The Defendant Deputy responded to the scene after dispatch advised of a suspect, the Plaintiff, had committed theft from a CVS, committed a battery on a law enforcement officer, and fled the scene. Plaintiff conceded the arrest was lawful and Defendant conceded he is solely responsible for ordering his K9 to engage a suspect and release a suspect. The sole issue for the jury was whether Defendant intentionally allowed his K9 partner to remain on the Plaintiff for an excessive amount of time, which plaintiff alleged could have been up to thirty-five minutes. At trial, Plaintiff argued the computer aided dispatch proved the Defendant's K9 partner "attacked" Plaintiff for two minutes and thirty-five seconds. The defense argued the K9 was not on the Plaintiff for any longer than ten to fifteen seconds. The accuracy of the computer aided dispatch was disputed. The defense presented Plaintiff's inconsistencies regarding the length of time the K9 remained on him to the jury. The defense argued Plaintiff's allegation that the K9 remained on him for up to thirty-five minutes was unsupported by the medical records. Plaintiff claimed significant physical and psychological injuries from the underlying incident. The Jury returned a defense verdict finding Defendant did not intentionally commit any acts that violated Plaintiff's civil rights. After the conclusion of trial, the jury foreman was interviewed and said the eight-member jury treated Plaintiff's allegations as if they were made by the Pope, but the jury was convinced the evidence was lacking. ♦

### Result: Defense Verdict



## **CIVIL RIGHTS - 42 U.S.C. § 1983 AND FLORIDA TORT CLAIMS FOR ASSAULT & BATTERY**

### **Plaintiff Sues Deputy Seeking Approximately \$1.9 Million**

Plaintiff sued a Deputy and the Broward County Sheriff's Office alleging violations of his Fourth Amendment Constitutional right to be free from excessive force during an arrest and brought pendent claims under the laws of the state of Florida. Plaintiff alleged the Deputy, without provocation, pushed him into his vehicle three times, the third push allegedly causing Plaintiff to strike his neck on the doorjamb. At trial, Plaintiff sought damages for a lipoma on his neck which he had surgically removed, a left shoulder partial tendon tear, cervical disc herniations, and an inability to use his right hand. Plaintiff argued his injuries prevented him from being able to work as a mechanic and sought damages for lost wages and future earning capacity. The defense presented inconsistencies regarding Plaintiff's testimony related to the incident to that of the eye witness. An expert witness for the defense testified a lipoma cannot be caused by blunt force trauma, to which Plaintiff's expert agreed. The defense presented and outlined Plaintiff's lack of any real physical complaints and lull in medical treatment until subsequent and unrelated motor vehicle accidents. Plaintiff had no evidence to corroborate his wage loss claim. The Plaintiff dropped his assault claim during trial due to a lack of corroborating evidence. After closing arguments, the jury deliberated for approximately fifty-five minutes and returned a defense verdict finding Defendants did not intentionally commit any acts that violated Plaintiff's civil rights and did not intentionally commit a battery against Plaintiff. ♦

### **Result: Defense Verdict**

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# Personal Injury

## PREMISES LIABILITY

### Plaintiff Sues for Millions after Trip and Fall at Retail Store

Plaintiff asserted a personal injury claim arising from injuries sustained at a retail store after claiming she tripped and fell over a stocking cart. Plaintiff was walking through a retail store while on her cell phone and did not see the 5 x 5 ½ foot cart loaded with boxes. The cart was pushed up against a kiosk in a main aisle as a store employee was actively stocking shelves from the cart. She fell over the ledge in the middle of the cart that stood at 1 foot off the ground, and sustained various injuries that she claimed resulted in a cervical spine fusion and ongoing pain and suffering. Plaintiff argued that Defendant's use of the stocking cart constituted an unreasonably dangerous condition, and Plaintiff was distracted by store signage while walking. However, Plaintiff's expert's rebuttal report was stricken for untimeliness, thus she had no expert opinion regarding the placement of the cart itself. Defendant's expert opined the use of the cart and the placement was reasonable.

Defendant argued that the cart was open and obvious and not unreasonably dangerous, and that the medical treatment was unrelated to the fall. Plaintiff sought over \$2 million in damages, including future care.

After a six-day jury trial, the jury issued a unanimous complete defense verdict on all claims. ♦

### **Result: Jury Defense Verdict**

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# Product Liability

COUNSEL: **Richard Boyette and Laura Dean**  
FIRM: **Cranfill Sumner & Hartzog L.L.P.**  
HEADQUARTERS: **Raleigh, NC**

## ASBESTOS PRODUCT LIABILITY

### Plaintiff Denied Jurisdiction over Manufacturer

In a wrongful death action, plaintiff sued, among others, manufacturer of alleged asbestos-containing product. Manufacturer sold product to various distributors, none of whom were located in North Carolina. However, plaintiff contended that decedent purchased product in North Carolina. After allowing jurisdictional discovery, Court granted motion to dismiss for lack of personal jurisdiction finding that the evidence showed that manufacturer's contacts with North Carolina were, at best, attenuated, and failed to satisfy the purposeful availment prong of the specific jurisdiction inquiry. ♦

**Result: Granted Motion to Dismiss**

## NEGLIGENCE, STRICT LIABILITY AND BREACH OF WARRANTY

### Serious Eye Injury in Helmet's Face Cage Case

Plaintiff alleged claims for negligence, strict liability and breach of warranty against a helmet manufacturer and the component supplier, when Plaintiff sustained a serious eye injury due to the failure of the helmet's face cage. The helmet mask was subject to recall due to a defect that caused facial and eye injuries similar to the injuries suffered by the Plaintiff.

Plaintiffs' claims were dismissed via summary judgment on the grounds that there was no admissible evidence or testimony that the Plaintiff's injuries and damages were caused by a product manufactured, distributed, and/or sold by the component supplier, or that the component supplier had supplied the manufacturer with the face cage used in the helmet. The Court found that there was not sufficient evidence for a jury to find that component supplier manufactured the face cage worn by the Plaintiff when he was injured. ♦

### Result: Summary Judgment for the Defense



## PRODUCT LIABILITY

### **Polyurethane Insulation Medical and Property Claims**

Plaintiffs brought this product liability case alleging that they suffered various medical conditions as the result of defective spray polyurethane insulation installed in their home. In a case of first impression, the court dismissed the claims of injury after precluding the plaintiffs' experts under Daubert. The case proceeded to trial on the plaintiffs' claims of property damage and loss of use of the property. The verdict was \$89k, after a demand of the \$1 million policy limits. The case was then settled for a lesser amount to avoid an appeal. It is believed that this was the first SPF case to go to trial in the country and the Daubert ruling may curtail the value of currently pending cases. ♦

**Result: Verdict for Fraction of Demand**

## PRODUCT LIABILITY

### **Neck Broken while Attempting a Double Flip into a Giant Airbag**

The plaintiff had a severe broken neck from jumping into a giant “stuntman” airbag at a country music festival. He was in a halo for two months and then underwent a five-level fusion surgery in his upper neck with a significant amount of hardware. His neck injury was described as a “hangman’s” fracture. He also developed a surgical low back condition. His lawyers would never accept anything less than \$2 million. The jury returned a verdict which put all of the fault on the plaintiff and no fault on the airbag manufacturer or the country music festival promoters.

The case was tried to a jury for two weeks. The jury heard substantial evidence about the plaintiff’s level of intoxication. His attempt to do a double flip off of a three-story high platform was captured on videotape and played to the jury over and over again. The plaintiff was a small business owner who was claiming a future loss of earnings because of his disability. However, there was substantial evidence to the contrary. His ex-wife testified that he was exaggerating his injuries and that he could do a lot more than he claimed that he could do. His creditability was further undermined because he was underestimating the amount of alcohol he drank. The judge would not allow us to put a waiver into evidence for any reason. The waiver did contain specific warnings including a warning that the participant could break his neck. ♦

### **Result: Jury Defense Verdict**



COUNSEL: **John W. Zotter and Samantha Quinn Stewart**

FIRM: **Zimmer Kunz, PLLC**

HEADQUARTERS: **Pittsburgh, PA**

## BREACH OF CONTRACT

### **\$2 Million Consequential Damages Claim Denied Due to Contract Clause**

Plaintiff purchased a crop protector manufactured by Defendant. The structure, when erected, covered approximately three acres of farmland. After portions of the structure collapsed during a rainstorm, Plaintiff sued for the cost of the structure and consequential damages of \$2 million for lost crop production. The Court granted Defendant's Motion for Partial Summary Judgment and struck Plaintiff's consequential damages claim as a result of a contractual limitation of damages provision. ♦

### **Result: Partial Summary Judgment**



## PRODUCT LIABILITY

### Paralyzed Plaintiff Sues Safety Equipment Manufacturer

Federal court excluded both of plaintiff's expert witnesses and granted defendant company summary judgment in a product liability claim. Plaintiff sued safety equipment maker after he suffered permanent paraplegia in 2014. During motocross practice, plaintiff lost control of his 450cc dirt bike at an estimated speed of 40 mph as he went over a man-made jump. He was thrown over the handlebars and landed head first, fracturing his thoracic spine at T5-T6. The suit alleged that the company's neck protection device, which plaintiff had worn for seven years, either caused injury to his lower spine or failed to protect him from that injury.

The court found that testing by plaintiff's consultant contradicted his criticism of the neck brace and rendered his opinions unreliable. Consultant's tests showed no increase in the transfer of forces to the thoracic spine while wearing the neck device. Equally important was consultant's failure to address obvious alternative explanations for plaintiff's injuries. A second witness for plaintiff, a former motocross champion, was deemed unqualified to testify. After excluding both consultant and motocross champion, the court analyzed plaintiff's account of the accident to determine whether he could proceed without admissible opinion testimony. Finding that plaintiff could not meet his burden of proof without a qualified expert, the court granted summary judgment. ♦

### **Result: Exclusion of Plaintiff's Expert Witnesses and Summary Judgment for Defendant**

## NEGLIGENCE, BREACH OF WARRANTY AND CONSUMER PROTECTION CLAIM

### Fingers Cut Off in Lawnmower Case

Plaintiff alleged that the manufacturer was negligent and breached its warranty as the lawnmower, which had a “kill switch” that would stop the engine and blades when the operator was not in the mower’s seat, was defective in that the blades continued to spin after the operator got off of the machine. As a result of the alleged defect, the plaintiff lost several fingers while reaching his hand into the spinning engine compartment. The defendant denied the plaintiff’s claims and noted that, even under the plaintiff’s proposed safety upgrades, an operator could still override the mower’s safety features. After a week and a half long trial, the jury found that the manufacturer was negligent and breached its warranty; however, the jury found that the Plaintiff did not prove that any alleged defect actually caused his injuries and returned a verdict in favor of the manufacturer against the plaintiff. Following trial, court subsequently denied the plaintiff’s request to enter judgment on his consumer protection claim and also denied plaintiff’s motion seeking a new trial. ♦

### **Result: Defense Verdict**

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# Professional Liability

## CONSTRUCTIVE FRAUD

### Plaintiff Sued Realtor/Owner over Sale of High-end Home

Defendant is a realtor. She and her husband sold their golf-course home to plaintiff in 2006. Defendant acted as a dual agent in the transaction. Plaintiff sued for constructive fraud contending that the sales price was inflated. Suit was filed just before the running of the ten year statute of limitations applicable to constructive fraud. Plaintiff sought compensatory damages in excess of \$200,000 plus punitive damages. Defendant had no insurance coverage. After six-day trial, jury returned a defense verdict. The case was won on causation. The jury accepted the defense arguments that plaintiff's decision to purchase the property was not based upon any act or representation by defendant. ♦

### Result: Defense Verdict



## CONSUMER FRAUD CLAIM

### **Dissatisfied Homebuyer and Mortgage Holder Sues Non-Profit**

Plaintiff was assisted by a national non-profit which helps low and moderate income persons with poor credit qualify for mortgages on properties needing renovation, and also assists the buyer through the process. Plaintiff had significant problems with her renovation contractor and faulted the non-profit for listing the contractor's name on a list of available vendors and not managing the process, and also claimed that her mortgage fees and costs were different than promised. Over strong opposition, defense counsel forced the breach and consumer fraud case into AAA arbitration. After a 12-day arbitration, the arbitrator rejected all of Plaintiff's several claims. ♦

### **Result: Defense Verdict in AAA Arbitration**

## DIRECTORS & OFFICERS LIABILITY

### Consumer Protection Act Violations Charges Against Non-Profit Corporation

Suit against current and former directors of Whistler Vacation Clubs, in which they alleged that the directors authorized improper loans to a third-party vacation club. When the third-party club defaulted on the loans, plaintiffs, on behalf of a putative class of Whistler Vacation Club members, sued the directors for violating the Consumer Protection Act for authorizing the loans without the members' knowledge and for engaging in self-dealing. Defense moved to dismiss for failure of the Plaintiff to state a claim on which relief can be granted. Plaintiffs appealed, the Court affirmed on the bases that: (1) the public does not have an interest in a private dispute regarding internal corporate decision making; and (2) plaintiffs' claims, which were directed at the competence of and strategies employed by the directors, were beyond the scope of the Consumer Protection Act. ♦

### **Result: Court Upholds Lower Court Dismissal of Plaintiffs' Consumer Protection Act Claim**

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**Property**



## PREMISES LIABILITY

### Plaintiff Falls from Horse, Sues Stable

Plaintiff alleged various orthopedic injuries including lumbar fractures and multiple rib fractures after falling from a horse at Defendant's stable due to the saddle girths coming loose during a ride. The Plaintiff contended that the stable and its employees had been negligent with regard to saddling of the horse and inspecting the saddle girths once Plaintiff had mounted the horse. Status post fall, Plaintiff required a lengthy hospital and inpatient rehabilitation stay because of his injuries. Following completion of all discovery and production of expert reports, summary judgment was granted in favor of the Defendant as Plaintiff had failed to show a breach of any duty. ♦

**Result: Summary Judgment in Favor of Defendant**



COUNSEL: **James M. Campbell, David M. Rogers and  
Trevor Keenan**

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

HEADQUARTERS: **Boston, MA**

## **MULTI-PARTY PREMISES NEGLIGENCE**

### **Murder Leads to Claims against Property Manager**

Wrongful death multi-party premises negligence case brought by the estate of the decedent who was murdered in her apartment by the acquaintance of another tenant. The assailant was convicted of rape and murder. The Plaintiffs alleged that the property manager was liable for the death of decedent because it failed to take the necessary steps to ban the individual from the complex despite the fact that he had allegedly assaulted the mother of his child who lived at the complex prior to the subject incident. The Plaintiffs also alleged that the complex should have utilized uniform security and surveillance cameras. The property manager denied that it was negligent in any manner and that the actions of the assailant were the sole cause of the death. After a two-week trial a confidential agreement was reached on the second day of jury deliberations. ♦

### **Result: Agreement Reached on the Second Day of Jury Deliberations**

## PREMISES LIABILITY

### **\$80 Million Claimed in Severe Burn and Leg Amputation Case**

Plaintiff entered railroad property and climbed a tower adjoining the tracks. He suffered severe burns and the amputation of both legs after coming into contact with high voltage wires. Plaintiff alleged that the site of the accident was routinely used by minors and young adults for various recreational activities and that the RR was on notice of people using the property. Plaintiff called seven expert witnesses, including a neuropsychologist who attempted to portray the plaintiff as having the maturity of a teenage boy due to meningitis suffered as an infant. Plaintiffs' counsel asked for a total of between \$80 and \$90 million for the injured party and his wife, who stated a loss of consortium claim. The jury returned a defense verdict. ♦

### **Result: Defense Verdict**

## PREMISES LIABILITY / FIRE

### **\$1 Million Demand in Fire Damage to Pizza Restaurant Following Arson**

A retail store was completely destroyed by an intentional fire that was lit by burglars who had stolen money and committed the arson to hide the theft. The fire destroyed the retail store and also resulted in fire damage to the neighboring liquor store in the strip mall and smoke and water damage to the pizza restaurant next to the liquor store. Plaintiff, the owner of the pizza restaurant business, sued both the retail store and the landlord. Plaintiff alleged that the retailer was negligent for failing to have a monitored alarm system that would have alerted the authorities to the fire before a passerby did, thereby allowing the fire department to control and suppress the fire and prevent the smoke and water damage to the pizza restaurant. Plaintiff also alleged that the retailer was negligent and vicariously liable as the evidence supported the conclusion that it possibly employees or former employees that stole the money from the safe and lit the fire. Plaintiff alleged that the retailer should have reasonably foreseen the actions of its employees. The retailer argued that there was no evidence that it was the standard of care within the retail industry to have a monitored fire alarm system. The retailer further argued that even if it had a monitored alarm system, it would not have made a difference given that the fire was seen by a passerby soon after it was started and given that an accelerant was used to intentionally start the fire. Further, the evidence from the fire origin and cause expert witnesses was that the smoke and water damage to the restaurant was caused by the way the fire was fought to essentially sacrifice the retail store where the fire started to try and save the adjacent liquor store and pizza restaurant from fire damage. Finally, the retailer called evidence from a former ATF agent who testified about its investigation into the fire and who confirmed that they concluded it was an arson and a crime and that approximately 14 months after the fire, they called a press conference to offer a monetary award for information leading to an arrest as they had exhausted all investigative leads. Notwithstanding that the subject fire occurred in December 2013, plaintiff was allowed to introduce evidence at trial, over vigorous objections, of the retailer's CA Fire Code violations back as far as 2008 as well as in 2016 after the fire. Plaintiff served a pre-trial

statutory demand on the retailer of \$250,000. The retailer served a pre-trial statutory offer to the plaintiff of \$2501. Plaintiff's counsel asked the jury to award economic and non-economic damages in excess of \$1 million. Defense counsel asked the jury to return a defense verdict. After a day of deliberation, the jury returned a full defense verdict as to all causes of action, including the claim for punitive damages. The jury determined that the unknown arsonist was 100% responsible for the plaintiff's harm and claimed damages. ♦

**Result: Defense Verdict**



## PREMISES LIABILITY

### **Court Enforced Contractual Indemnity, Despite Jury's Apportionment of Negligence to Client**

Plaintiff slipped and fell on ice coming from melting snow improperly piled on a traffic island while on his way to work at a supermarket. Plaintiff sued the shopping center property owner, property manager and snow removal contractor. Plaintiff claimed serious and permanent injuries, as well as significant past and future wage loss. The workers compensation lien exceeded \$115,000. Plaintiff had undergone back surgery and still needed shoulder surgery causally related to the incident. The lowest demand before trial was \$450,000. Following a four-day trial in March 2017, the jury found in favor of plaintiff, but assigned him 15% negligence. The remaining liability was apportioned 25% against the client/property manager and 60% against the snow removal contractor. The total damages award was \$300,000 before reduction for plaintiff's negligence. Subsequent to the trial, a hearing before the trial judge was held on the property manager's crossclaim for contractual indemnity, based on both a breach of contract theory and the property manager's additional insured status. The trial judge found in favor of client and against the snow removal contractor, resulting in full payment of the verdict by the co-defendant snow removal company, including client's \$75,000 share. ♦

**Result: Verdict Fully Funded by Co-Defendants without Contribution from Client**

COUNSEL: **James R. Kahn and Elit R. Felix, II**  
FIRM: **Margolis Edelstein**  
HEADQUARTERS: **Philadelphia, PA**

## **TORTIOUS INTERFERENCE WITH CONTRACT CLAIM AGAINST ATTORNEYS**

### **Seller of Large Parcel of Land Sues Attorneys for Allegedly Delaying Sale**

Plaintiff sold a large parcel of land for a mixed-use development. Before the sale closed, Defendant attorneys represented homeowners who challenged the zoning which permitted the development. After the challenges were rejected, the seller sued the attorneys for tortious interference and claimed their actions delayed the sale. Using the pleadings alone, including specifically crafted affirmative defenses and Plaintiff's responses to those defenses, counsel for the attorneys filed a motion for judgment on the pleadings and were able to have the claims dismissed on statute of limitations grounds despite Plaintiff's multiple creative theories as to later discovery of the damages. ♦

### **Result: Dismissal on Limitations Grounds on Motion for Judgment on the Pleadings**

## PREMISES LIABILITY

### Closed Head Injury in Ice Slip and Fall Case

Plaintiff filed suit against the owner of commercial property and the tenant, a worldwide restaurant chain. Plaintiff alleged that she sustained a closed head injury when she slipped on ice and struck her head on the sidewalk outside of the restaurant. At trial, the Defendants argued that the property was properly maintained and disputed the existence of ice. Because the Plaintiff claimed that she fell as the result of an isolated patch of ice, the Court refused to charge the jury on the Pennsylvania “Hills and Ridges” doctrine. Following a fifteen-minute deliberation, the jury returned a unanimous verdict in favor of the Defendants finding that the Defendants were not negligent. ♦

### **Result: Defense Verdict**





COUNSEL: **Salvatore DeSantis and Marcy Sonneborn**

FIRM: **Molod Spitz & DeSantis, P.C.**

HEADQUARTERS: **New York, NY**

## **TOXIC TORT-LEAD PAINT, PREMISES LIABILITY**

### **Lead Paint Case**

The Appellate Court reversed the Trial Court's denial of the defendants' Motion for Summary Judgment where the records showed that the infant plaintiff had minimal blood lead levels of 2-4 micrograms per deciliter between March 1999 and March 2000. He had a single elevated blood lead level of 13 ug/dl in February 2002. Defendants relocated the family and within three months of the elevated level abated the lead condition. The defendants showed and it was undisputed that the infant had speech and language deficits from infancy, well before his first known exposure to lead paint. The infant plaintiff continued to receive speech and language therapy and individualized education programs into high school where he achieved a strong academic report including two years of honors classes. In reversing the Trial Court's denial of summary judgment, the Appellate Court noted that plaintiff's pediatric neurologist failed to utilize any baseline IQ; or identify any scientific studies that specifically supported his opinion; and the plaintiff's neuropsychologist failed to show that any of the continuing deficits are attributable to the infant's brief exposure to lead as compared to his pre-existing condition. ♦

### **Result: Dismissal of a Lead Paint Case Affirmed**

## PREMISES LIABILITY

### Constructive Notice Not Established in Fall at Retail Store

Plaintiff claimed that she slipped and fell in a Bronx County retail store. The incident report reflected she fell over her own feet and that there was nothing on the floor. Plaintiff produced four other witnesses, each of whom described the alleged dirty sticky and wet condition. Judge dismissed the case on Motion for Summary Judgment because plaintiff could not prove that the store had actual or constructive notice of the alleged condition, holding that plaintiff's descriptions of the alleged substance alone were not sufficient to establish defendant's constructive notice. ♦



## TOXIC TORT - LEAD PAINT

### Landlord Not Liable for Injuries to Child as a Result of Lead Paint Exposure

This was a lead poisoning case involving a plaintiff who resided in the 2nd floor apartment of a two-family home from 1993-1996 when the child was between 3 and 6 years of age. Routine blood testing reflected a very high blood lead level of 38.7 ug/dl during this tenancy. The Department of Health inspected the premises and issued lead paint violations to the landlord. Plaintiff maintained that landlord knew or should have known about the lead paint hazard, and that the abatement was not completed timely and effectively. A second violation was issued during plaintiff's tenancy approximately one year after the initial violation. The plaintiff contended that the child suffered very significant cognitive deficits, a reduced IQ and ADHD as a result of the exposure. The defendant asserted that he did not have prior notice of a lead paint hazard, and he timely and properly abated the lead hazard upon obtaining notice. The defendant further contended that plaintiff had a complex history of family abuse and diagnosed psychiatric disorders unrelated to lead exposure that were the cause of her academic difficulties. The jury found the defendant was not negligent. ♦

### Result: Defense Verdict

## PREMISES LIABILITY

### **\$6 Million Demanded in Death of Electrician**

In a case arising from an accident in which an electrician fell to his death where a light pole he was working on collapsed, the trial court granted summary judgment to both the apartment complex owner and property management company and held that the electrician, a stipulated independent contractor, had the duty to inspect the workplace and had equal knowledge of any potential hazardous condition. ♦

### **Result: Summary Judgment Granted**

## PREMISES LIABILITY

### Plaintiff Sues for over \$12 Million in Economic and Non-Economic Damages

Plaintiff claimed he suffered injuries to his shoulder, low back, neck and a mild traumatic brain injury (mTBI) after a slip and fall at a store in CA. The case was tried in 2 phases - liability and damages. The jury deliberated for three days on liability, finding Plaintiff 60% at fault and Defendant 40% at fault. Following another 10 days of evidence, the jury then deliberated for one and a half days on the issues of damages, ultimately rendering a total verdict under \$1 million. Applying the calculations from the liability phase, final judgment was awarded for just over \$367,000. ♦

**Result: Favorable Result for Defense**



## NEGLIGENCE / PRIVATE UTILITY

### Motion to Dismiss Homeowner's Claim against Utility Granted

Aggressive use of discovery and discovery sanctions resulted in the pretrial dismissal of a case likely to result in significant plaintiff's verdict. This suit arose out of the flooding of the plaintiff's home with raw sewage due to the failure of a lift station owned and operated by the defendant, a private utility company. This was the second such flooding for these homeowners. The first instance, several years earlier, had resulted in a settlement with the utility. No remedial measures had been taken in the intervening years, by either the utility or the homeowners, to prevent a recurrence. Following the second flood, the homeowners obtained a damning video of defendant's employee admitting liability and making disparaging comments about the company's lack of diligence. Plaintiffs alleged that the damage had caused a reduction in the value of the property, since the flood would need to be disclosed to potential buyers. Plaintiffs also sought to recover the costs of remediation, emotional distress damages, and punitive damages. Defendant's counsel pursued discovery on the plaintiff's claimed damages and eventually filed a motion to dismiss arguing that plaintiffs had failed to respond sufficiently to discovery. Plaintiff's argued that he had responded to the discovery sufficiently. The court initially denied defendant's motion, but upon the filing of a second motion, the court dismissed the case with prejudice. ♦

### Result: Dismissal

## PREMISES LIABILITY – SNOW AND ICE

### Double Win for the Defense

Plaintiff claimed he slipped and fell on ice while leaving his west side luxury apartment. He claimed the ice was invisible although left over from an earlier storm. His injuries included a fractured patella with open reduction and internal fixation and C3-4 laminectomy. The motion for summary judgment by counsel based primarily on a storm-in-progress defense was denied by the lower court. An appeal was filed and while the appeal was pending, the lower court set the case for trial. Counsel tried the case and the jury agreed that the luxury apartment building's staff did not proximately cause the accident.

Following the defense verdict, the Appellate Division heard oral argument on the earlier motion for summary judgment and reversed the lower court, dismissing the case, holding that the defense provided ample evidentiary support that there was a storm in progress at the time of the accident. Case dismissed twice in one month. ♦

### **Result: Defendant's Verdict and Appellate Division Dismissal**

## PREMISES LIABILITY – CATASTROPHIC PERSONAL INJURY

### Plaintiffs Sue for \$29 Million in Ladder Fall at Bowling Tournament

Plaintiffs, father and daughter, asserted negligence claims and negligent infliction of emotional distress claims stemming from the father's fall from a 6-foot ladder while working at a bowling tournament.

Plaintiff was employed by a vendor booth at the tournament. He obtained a previously damaged ladder from a back administrative office at the tournament, and used the 6-foot ladder to attempt to reach the top of a 12 ft. wall to plug in equipment. Multiple witnesses saw him standing on the top cap, and Plaintiff admitted he fell while he was on the 5th rung of the ladder. Plaintiff's daughter saw him fall, and claimed emotional damages in connection with the incident.

Plaintiff sustained a mild traumatic brain injury. He was entitled to workers' compensation benefits through his employer and declared permanently disabled. There were multiple discrepancies in the medical records as to his true mental state and the extent of his injuries. Plaintiffs argued that the ladder, which was taken out of service and placed in an administrative office, was not properly stored and allowed Plaintiff to gain access. Plaintiff further argued it was the damage to the ladder that caused him to fall. Defendant argued that Plaintiff's own misuse of the ladder was the cause of the fall and that the ladder was so damaged that it would have been readily apparent to any user.

Plaintiffs sought over \$29 million in damages. After a six-week jury trial, the jury issued a unanimous defense verdict on all claims. ♦

### **Result: Jury Defense Verdict**



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# Wrongful Death

## WRONGFUL DEATH / PREMISES SECURITY

### **Armored Car Robbery and Murder of Guard at Bank Location**

Deceased was an employee of an armored car company who was murdered when three masked assailants, wearing full body armor and armed with assault rifles, shot and killed him after he exited the bank with the daily pickup from the bank. The bank was a tenant on the ground floor of defendant's building. The guard's family brought a multi-million-dollar wrongful death and punitive damages lawsuit against the building owner and the bank for failure to provide proper security in light of the large number of armored car robberies occurring in the area before the incident. After filing dispositive motions on liability and the recoverability of punitive damages, the building owner was dismissed by the Court from the lawsuit. Despite involvement of the FBI, local authorities and a \$100,000 reward, the robbers have not been apprehended. ♦

**Result: Building Owner Case Dismissed**



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# Additional Important Cases

COUNSEL: **Benton Toups and Elizabeth King**

FIRM: **Cranfill Sumner & Hartzog L.L.P.**

HEADQUARTERS: **Wilmington, NC**

## NC NON-PROFIT CORPORATIONS ACT

### **Ousted Country Club Member's Bid for Reinstatement Denied**

Defendant Country Club was organized as a North Carolina non-profit corporation. NC's Non-Profit Corporations Act provides that a membership in a non-profit corporation can only be terminated in a manner that is "fair, reasonable and carried out in good faith." After an incident, the Plaintiff's membership in Defendant Country Club was terminated by vote of the Board of Directors. He sued, arguing that the Non-Profit Corporation Act required he be provided with notice and hearing prior to termination of his membership (which he was not). After extensive discovery, the trial court granted summary judgment for the Defendant Country Club. ♦

### **Result: Summary Judgment for Defendant**

COUNSEL: **Melody Jolly and Elizabeth King**  
FIRM: **Cranfill Sumner & Hartzog L.L.P.**  
HEADQUARTERS: **Wilmington, NC**

## TELECOMMUNICATIONS LAND USE, BREACH OF CONTRACT, TRESPASS

### Plaintiff Sues for Over \$1 million in Public Right-of-Way Case

Defense received directed verdict at close of plaintiff's evidence on breach of contract and related trespass claims. After close of liability phase of jury trial, defense received a defense verdict on remaining claims flowing from entitlement to place cable in right-of-way along highway. Although case was brought by private landowner, the outcome was critical to telecommunications company's ability to continue to provide service coastal residents of major barrier island. ♦

### **Result: Defense Verdict**

## APPEALS / APPEALS

### **Failure to State a Claim (Rule 12 dismissal)**

Appellate court affirmed Rule 12 dismissal for insured's failure to state a claim against its agent under the Federal Crop Insurance Act and its accompanying regulations. Court found, as argued, that insured had failed to follow procedure required in the Act and regulations, and preemption doctrine precluded reliance on state court law to assert cause of action. This issue is heavily contested nationally, and is currently being addressed by the Texas Supreme Court in another matter. ♦

### **Result: Affirming Rule 12 Dismissal**

## SEXUAL ASSAULT

### 90-year old Man Sued for Sexual Assault

Defense verdict in a civil sexual assault claim brought against a 90-year-old man by a 62-year-old woman who claimed that the defendant sexually assaulted her at a dinner party. The plaintiff claimed that her left arm was torn from her shoulder and she was bitten on the lip during the alleged event. She claimed permanent shoulder injury, nerve damage in her lip and extreme emotional distress that left her a shell of her former self.

Weighing 187 pounds at the time of the dinner party, the plaintiff appeared at trial in a wheel chair, unable to get out of the chair without assistance, and weighing only 110 pounds. Her doctor testified that her appearance in the court was how she had appeared to him three weeks after the incident and attempted to attribute all of her ailments to the alleged assault.

This was the second trial of the case. The first trial ended in a hung jury. Discussions with jurors after the trial indicated that eight of nine jurors had voted for a defense verdict (unanimity was required). Between the two trials, the plaintiff filed a lawsuit in Kansas, alleging much of the same damages, arising out of a trip and fall in a clothing store. The defense's independent investigation uncovered this other lawsuit, as plaintiff had not disclosed this information in supplementation of discovery. The plaintiff and her treating physician assumed the defendant was unaware of the other lawsuit. During the trial, both were impeached by the treating physician's expert report rendered in the other case.

The second trial commenced two days after the January 21, 2017, Women's March and seven of the either jurors in the second trial were women. The jury again deadlocked in the second trial, even after receiving an "Allen charge." In an effort to break the deadlock, the court granted the defense's motion to allow each party to present 10 additional minutes of "reclosing" argument so that the parties could attempt to help the jurors work through the deadlock. The court agreed, and two hours after the re-closings, the jury returned its verdict. ♦

### **Result: Defense Verdict**

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