CARLOCK COPELAND
CIVIL LITIGATION

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Preparing and Defending the Claim Representative's Deposition

By: Erica L. Parsons

For many insurance claim representatives, the claims process and the litigation process go hand-in-hand. In fact, some representatives are only assigned claims that have evolved (or devolved, depending on your perspective) into litigation. In a bad faith case, the most crucial and compelling witness is often the claim representative who handled (or supervised the handling) of the underlying injury or damage claim. A claim representative may be familiar with the litigation process based on their claims-handling experience, but it is not until they are called to testify that they truly begin to appreciate the importance of their role in the company. At that point, claim representatives become the face of the insurance company, and often it is their performance in a deposition that determines the ultimate value and outcome of a case.

When the success of a bad faith case hinges on a claim representative's deposition performance, there is no substitute for thorough preparation. At a minimum, the preparation session should include a lengthy discussion between the representative and counsel for the insurance company. Whether this discussion should be conducted in person or can be accomplished remotely will depend on many factors, including the claim representative's degree of experience in the insurance field, the level of comfort with the deposition process, and who the opposing counsel is. If the representative is new to the job or field, has rarely or never been deposed, or does not perform well under the pressure of the deposition hot-seat, then the discussion should be in-person and in a setting that mimics the actual deposition. *Continued on page 2.*

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This will likely mean going through the claims notes and other documents in the claims file with a fine-tooth comb, pointing out areas where the opposing counsel is likely to take issue with the file handling. Efforts should be made to question the representative in a tone and to a degree that he or she is likely to be questioned in deposition. It is essential that the representative is prepared to handle questions that are factually inaccurate, suggestive of the answer that opposing counsel is seeking, or that are aggressive or accusatory without becoming flustered, defensive, or emotional.

A claim representative who is well prepared for deposition can atone for a multitude of sins that may have occurred in the course of the file handling.

In order to adequately prepare the adjuster, counsel for the insurance company should understand the theme of the plaintiff's case and the significance of the particular representative's role. For example, is the plaintiff trying to prove that the insurer had decided to deny the claim before fully investigating the facts? This theme frequently appears in bad faith cases arising from denials of coverage arising out of possible fraud in the presentment of the claim or material misrepresentation in the insurance application. Is the plaintiff attempting to prove that the representative was poorly trained and, as a result, mishandled the claim? This is a central theme in cases involving missed time limit demands. Identifying the theme of the plaintiff's case is essential to anticipating the questions that the representative will face and helping him or her understand how to best respond.

A claim representative who is well prepared for deposition can atone for a multitude of sins that may have occurred in the course of the file handling. Poise and confidence in answering difficult questions may compensate (to some degree) for a missed entry in the claim notes or a day-late response to a time limit demand.

Join us at our Insurance Coverage and Bad Faith Seminar on September 11, 2014, when we will discuss thoroughly how to prepare for deposition, how to avoid common pitfalls, and other issues related to the claim representative's deposition.

For more information on the seminar or for any questions about defending the deposition of a claims representative, contact the author.

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Carlock Copeland In the Community

As part of an iCivics local Charleston area schools event, Robin Graham and Tyler Winton presented "The Importance of Democracy" to students at two local Charleston, SC elementary schools. Tyler presented to first grade students at Sanders Clyde Elementary, and Robin presented to fifth grade students at Stiles Point Elementary.

Pictured:
Tyler Winton co-presented to excited first graders at Sanders Clyde Elementary in Charleston, SC.

iCivics is a non-profit organization dedicated to reinvigorating civic learning through interactive and engaging learning resources. iCivics educational resources empower teachers and prepare the next generation of students to become knowledgeable and engaged citizens.

Founded and led by Justice Sandra Day O'Connor, iCivics provides students with the tools they need for active participation and democratic action, and teachers with the materials and support to achieve this. Their free resources include print-and-go lesson plans, award-winning games, and digital interactives.

iCivics envisions a nation where all young Americans are prepared for active and intelligent citizenship, and Carlock Copeland is honored to play a role in their mission.

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Maximizing Success and Minimizing Cost on Appeal

By: John L. Bunyan and Michael B. McCall

It can be difficult to persuade an appellate court to even hear your appeal, much less to reverse the decision of the trial court. The caseload statistics published by Georgia's appellate courts show the high burden that attorneys and their clients pursuing an appeal face. In 2013, the Georgia Court of Appeals granted only 36 percent of discretionary and interlocutory applications filed by parties asking the court to hear their appeal and reversed the trial court's decision in only 23 percent of appeals decided on the merits. And the Georgia Supreme Court granted only nine percent of the petitions filed asking for certiorari review.

With the odds stacked against the party appealing, it is important to have a strategy in place early to maximize your chance of success. Asking yourself and answering the following five questions is essential for any party considering whether to file an appeal.

Can we appeal?

Different states have different rules about what rulings can be appealed and how. For example, a judgment entered after a jury verdict or an order granting summary judgment can be automatically appealed as a matter of right. But a party must obtain permission from the appellate court before pursuing other types of appeals, such as an appeal of an order denying summary judgment or a decision by the state court of appeals to the state supreme court. Before deciding whether to appeal, you must first decide whether you can appeal and what you need to do to pursue the appeal. Failure to prepare and file the correct documents at the correct time for your type of appeal can result in a dismissal before your appeal is even heard.

Should we appeal?

The fact that you can appeal does not always mean that you should. An unfavorable decision on appeal can have an impact on the client in both the current case and in future cases. Before filing, you should assess your chances of success by reviewing factors such as whether the issues to be appealed are preserved, what standard of review the appellate court will apply, and what the existing law is. Then weigh your chances of success against the costs of losing.

How long will it take?

The trial process is only the first step of the long litigation process. In Georgia, it can take a few months before you learn if the appellate court will hear your appeal then another eight months to a year before you receive a decision. In South Carolina, the appellate process generally takes between six and 30 months in the Court of Appeals, and another 12 to 24 months if certiorari is granted. Time is money for everyone involved. Before deciding to file an appeal, you should decide whether it is worth the long-term expense to wait for an appeal to make its way through the appellate courts.

How much will it cost?

While much of the battle is fought in the trial court, it still can be costly to prepare an appeal with a likelihood of success. The costs for an appeal typically will include:

- Formulating a strategy for appeal
- Reviewing the record for issues to appeal
- Researching the law applicable to the issues to be appealed
- Drafting an application for permission to appeal
- Drafting the initial and reply appellate briefs
- Preparing for and presenting oral argument
- Discussing settlement alternatives

The cost of pursuing an appeal can vary depending on the complexity of the issues involved and the skill of the attorney handling the appeal.

Do you need appellate counsel?

While any attorney can file an appeal, you should not hire just any attorney. Attorneys who generally handle cases in the trial courts may not be familiar with the strict deadlines and procedures of the appellate courts or be accustomed to presenting arguments to a panel of judges instead of a jury of laypersons. Attorneys who routinely prepare cases for appeal are better equipped to avoid the procedural traps that often result in appeals being dismissed and to formulate a strategy for selecting and framing the issues for appeal. Consider retaining an appellate specialist who will give you the best chance of having your appeal heard and decided in your favor.

For a South Carolina or Georgia Appellate Law Tip Sheet, please contact the authors.

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What is the Statute of Limitations for a Construction Claim?

By: Gregory H. Wheeler and Brent A. Meyer

We are often asked the seemingly simple question: what is the statute of limitations in Georgia for a claim against a design professional? While that may seem like a question that would have a simple answer, in Georgia, the answer is far from simple. The only short answer that can be given is that it depends. The longer answer is what we have outlined below.

The statute of limitations establishes the time within which a party must file suit. If suit is not filed within the prescribed period, it will be time-barred. There are several purposes for these statutes. They require parties to pursue claims diligently, which in turn, leads to decisions based on better, fresher evidence, and they provide certainty and predictability as to when a party's potential liability is extinguished.[1] While the concepts and underlying policies are relatively straightforward, determining when a statute of limitations begins to run and when it expires on a potential claim can be complex.

Here, we look at the different types of claims that typically arise against design professionals in Georgia. For such claims, the applicable statute and the dates of accrual and expiration will depend largely on the type of damage or claim.

Generally, courts will look at the nature of the injury when determining which statute of limitations applies to a tort claim. For example, a claim for a physical injury has a two year statute of limitations from the date of the injury.[2] For a claim resulting in damage to personal property (often including economic losses), the statute of limitations is four years.[3] Similarly, a claim for damage to real property or for trespass must be filed within four years, but the accrual dates are often different for a claim for damage to real property as compared to damage to personal property.[4]

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A key issue is determining when a claim has "accrued." Accrual is the starting point for counting when the statute starts and ends. To determine the starting point, courts often look to when the injured party could first pursue a claim against the defendant. When the claim is complete, such that it can be pursued against the defendant, it is said to have accrued.

The accrual of most personal injury claims is often relatively straightforward. A claim for personal injury accrues when the person is injured. The statute begins to run on the date of injury and expires two years later. There are some exceptions for injuries that develop over time or manifest themselves after the initial event, but the general rule applies to most personal injury cases. If the claim is for defamation, libel, or slander, the claim must be brought within one year from when the alleged damage occurred.[5]

With respect to damage to personal property, the statute also starts to run on the date of injury. Thus, if personal property is damaged through a storm event, the four year statute would begin to run on that date and would expire four years later. By the same respect, claims for purely economic losses often fall within this statute and determining the date of injury can be very complicated.

For a claim involving damage to real property, and especially those involving the design or construction of a project or building, the claim generally accrues upon "substantial completion" of the project. Substantial completion, as defined by Georgia law, means "the date when construction is sufficiently completed in accordance with the contract . . . so that the owner could occupy the project for the use for which it was intended."[6] Determining the date of substantial completion is often easy, but there are cases where it becomes more difficult.

Claims for breach of contract are governed by two statutes. The applicable statute depends on whether the agreement is in writing or is verbal. A four year statute of limitations applies to a claim for breach of a verbal or oral agreement,[7] while claims for breach of a written contract

fall under a six year statute.[8] Claims for indemnity and contribution are governed by other statutes that are equally unclear in their application.

All of these claims, to the extent they relate to improvements to real property, are also governed by a statute of repose. The statute of repose sets an outside time for the expiration of all claims. The statute of repose often comes into play for injuries that develop over time, for third-party claims involving contribution or indemnification and other situations where the point of injury extends beyond the statute of limitations. In Georgia, the relevant statute of repose applies to all claims that relate to "any deficiency in the survey, plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property."[9] This statute of repose bars those claims if they are not filed within eight years after substantial completion of the project. There is an exception for personal injury or property damage that occurs in the seventh or eighth year after substantial completion. Those claims can be filed within two years of the date of the injury.

A claim of a defective survey or plat has its own independent statute of repose. Those claims must be filed within six years from the date of the surveying services as shown on the survey or plat.[10]

The application of the statute of limitations can be complicated, but when you work with them all the time you come to understand the intricacies involved. It is important to have counsel who understands these issues when you are faced with a claim that may be barred by the statute of limitations.

Resources

1. Black's Law Dictionary (9th ed. 2009).
2. O.C.G.A. § 9-3-33 (2013).
3. O.C.G.A. § 9-3-31 (2013).
4. O.C.G.A. § 9-3-30(a) (2013).
5. O.C.G.A. § 9-3-33 (2013).
6. O.C.G.A. § 9-3-50(2) (2013).
7. O.C.G.A. § 9-3-26 (2013).
8. O.C.G.A. § 9-3-24 (2013).
9. O.C.G.A. § 9-3-51(a) (2013).
10. O.C.G.A. § 9-3-30.2(b) (2013).

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Publications & Presentations

Did you know that Carlock Copeland attorneys frequently write and present on topics for a variety of clients, organizations and publications? To request a presentation or article for your organization, contact Michelle Fry at mfry@carlockcopeland.com.

- Kent Stair and Paul Sperry hosted the Firm's annual **Risk Management for Design Professionals** seminar. This year was titled "The Devil is in the Details," and they took each primary clause from an owner's "contract from hell" and "negotiated" it from each side, in search of a deal which everyone could live with.

- Cheryl Shaw presented **"Understanding and Allocating Negligence Damages"** to a panel of claims representatives handling various third-party claims.

- Joe Kingma presented a **mock cross examination** to 130 accountants from a Top 100 firm. Joe crossed an audit engagement partner complete with mock exhibits including: financial statements, fraud assessment workpapers, passed adjusting journal entries and engagement letters.

- John Bunyan and Tyler Wetzel wrote an article for the American Bar Association's June Appellate Practice newsletter on the Eighth Circuit's decision in Arnold Crossroads, L.L.C. v. Gander Mountain Co. entitled **"Order Remanding Claim by Intervenor on Procedural Ground Not Reviewable."**

- Eric Frisch wrote **"Why Is It So Hard to Find Quality Medical Malpractice Verdict Data? A Call for a Meta-Analysis"** for the ALM Law Journal Newsletter on Medical Malpractice Law and Strategy.

- Melissa L. Bailey co-presented "**Apportionment Update Post-Polite"** at the Georgia Defense Lawyers Association 47th Annual Meeting.

- Mike Ethridge and Hanover's Anthony Carolei co-presented **"Managing Risks Through Contract Language"** at the SC Engineering Conference.

- Carlock Copeland hosted their annual June **General Liability and Workers' Compensation seminar** which featured numerous speakers on topics including: Getting Specific in General Liability: Quick Briefs on Product, Premises, Auto and Appellate Law; Fighting Demands for the Limits of Property Damage; Coverage in Catastrophic Auto Cases; Stemming the Tide of Rising Verdicts; Defending the Empty Chair; Pain Management & MSA's; Legislative and Case Law Update: Workers' Compensation; Psychiatric Evaluations in Claims Involving Post-Traumatic Stress Disorder; and A Defense Trial Lawyer's Perspective on the 'Reptile Revolution'.

Fire Protection and International Building Code 2012

By: Laura Paris Paton, Tyler Winton and Lauren Patterson

Residents of South Carolina and Georgia familiar with the Charleston Sofa Super Store tragedy of June 2007 may identify with those Chicago city fathers involved in the adoption of the National Building Code (NBC) in the late 1800s. In 1871, a massive fire swept through Chicago destroying several square miles, killing hundreds and leaving thousands homeless. As a direct result of the fire, and to placate the National Board of Fire Underwriters, who threatened to cut off commercial insurance for business, Chicago adopted the National Building Code.

The National Building Code is a building code designed to protect the *building* rather than the *people* in the building.[1] Over time, multiple model building codes were developed and adopted by local and state government agencies as legally enforceable regulations. These early regulations took into consideration the protection of building inhabitants and formed the foundation for the modern International Building Code (IBC).[2] However, in spite of the NBC and the IBC, in 2007, Charleston's Sofa Super Store was alleged to have had multiple changes and additions made to the building without adhering to national fire and electrical codes, leading to the rapid spread of fire through the store and the death of nine firefighters.

Today, some version of the IBC is now in use in all 50 states.[3] The IBC has most recently promulgated its 5th edition, the IBC 2012, which has already been adopted in many jurisdictions including Charleston, Horry, and Beaufort counties in South Carolina and by the State of Georgia (with amendments).

Negligence Per Se and the IBC 2012

As state and local governments adopt building codes into their ordinances, many courts have found that a violation of a municipal ordinance may give rise to negligence per se based on statutory effect.[4] Likewise, in Georgia, OCGA §51–1–6 provides "[w]hen the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby." If a violation of a statute or mandatory regulation has occurred, before negligence per se can be determined, a trial court must consider (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm the statute was intended to guard against.[5]

However, proving negligence per se does not end the inquiry. In South Carolina, "The finding of a statutory (building code) violation ... does not end the inquiry. The causation of the injury must also be evaluated." Thus, a violation of the building code does not support recovery of damages if the violation is not the proximate cause of the injury.[6] In general, "the determination of whether a statute

Upcoming Events

September 11

Insurance Coverage & Bad Faith
Seminar for Claims Professionals

Earn five hours of continuing education in the area of Insurance Coverage and Bad Faith. Topics will include: Preparing for Bad Faith Depositions; Emerging Bad Faith Traps and Trends; Fraud; Cyber and Coverage; the Tripartite Relationship and the Duty to Defend; and a deeper dive into homeowners' policies, CGL policy, and auto/UM.

Registration includes lunch, a private reception following the seminar, full access to explore the gardens, and an Atlanta Botanical Garden signature event, Cocktails in the Garden. Register at www.ccsrsvp.com.

September 12

Seminar: Title Standards

Shannon Sprinkle will present "Title Standards and Lawyer Liability" at the ICLE/Real Property Law Section, State Bar of Georgia Title Standards Seminar. The full seminar will offer 6 CLE Hours. Register at www.iclega.org.

September 17-19

Professional Liability Defense Federation's (PLDF) Annual Meeting

Carlock Copeland's Andrew Countryman and Poling Law's Doug Holthus will co-present "Survey of Specific LPL Claim Defenses" at the PLDF Annual Meeting in Washington D.C. The discussion-provoking presentation will answer questions that pertain to the defense of legal malpractice claims. To register, visit www.pldf.org.

has been violated, and if so, that violation is the proximate cause of the injury, are questions of fact for the jury."[7]

Significant Fire Protection Changes in the IBC 2012

After 200 years of building code evolution, fire protection is still a significant consideration to building code authors. The 2012 IBC has expanded requirements for sprinklers throughout buildings selling or displaying upholstered furniture and mattresses in Group M occupancies (mercantile stores) of greater than 5000 square feet. Sprinklers are also now required for Group S-1 (storage) and F-1 (factory) occupancies over 2500 square feet (350 m^2) that store or manufacture upholstered furniture or mattresses.

There have also been several modifications to educational facilities. For example, manual fire alarm systems that initiate the occupant notification signal utilizing an emergency voice/alarm communication system are required in Group E occupancies (educational facilities) with occupant loads of more than 30. Group R-2 college and university (dormitory type) buildings are now required to have an automatic smoke detection system with an occupant notification system. Further, the IBC 2012 requires that mass notification fire alarm signals in stadiums, arenas, and grandstands with more than 15,000 fixed seats must have captioned messages.

In conclusion, for 200 years, building code promulgators have sought to protect not just the property, but the occupants of the building. Seemingly small changes to codes, once adopted by the jurisdiction, have major consequences not only to those whom the code is intended to protect but to construction defects attorneys, insurance adjusters, design professionals and contractors. It is essential for contractors and design professionals, as well as their insurer, and their attorneys to understand not just the underlying building code requirements, but the legal effect of a violation.

Resources

1. Gregory J. McFann, The History of Building Codes, TPREIA (June 24, 2014), http://www.tpreia.com/historyofcodes.html.

2. FRANCIS D.K. CHING & STEVEN R. WINKEL, FAIA, BUILDING CODES ILLUSTRATED 1 (John Wiley & Sons, Inc., 2d ed. 2007), available at http://books.google.com/books?hl=en&lr=&id=2yNzfr8NcDkC&oi=fnd&pg=PR9&dq=history+of+the+%22international+building+code%22&ots=6lfNQ3Qz8n&sig=gRkJh_XMKX6wP-UNAgazmaW0VSU#v=onepage&q=history%20of%20the%20%22international%20building%20code%22&f=false.

3. International Code Adoptions, INTERNATIONAL CODE COUNCIL, (June 24, 2014), http://www.icc-safe.org/gr/Pages/adoptions.aspx.

4. Id.

5. Norman v. Jones Lang Lasalle Americas, Inc., 277 Ga. App. 621, 627 S.E.2d 382 (2006) citing West's Ga.Code Ann. § 51–1–6.

6. Whitlaw v. Kroger Co., 306 S.C. 51, 53-54, 410 S.E.2d 251, 252-53 (1991)

7. Nguyen v. Uniflex Corp., 312 S.C. 417, 421, 440 S.E.2d 887, 889 (Ct. App. 1994) citing Cooper v. County of Florence, 306 S.C. 408, 412 S.E.2d 417 (1991). See also Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct.App.1984).

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October 22-24

22nd Annual Trucking Industry Defense Association (TIDA) Educational Conference

Gary Lovell - Carlock, Copeland & Stair, Guy D. Perrier - Perrier & Lacoste, and Joe Loya - Fairmont Specialty Insurance Group will present "Experts: When & Why to Hire and Do We Really Need One?" at the TIDA Annual Industry Seminar to be held in Las Vegas. Register at www.tida.org.

October 30-31

American Conference Institute's National Advanced Forum on Medical Professional Liability

Eric Frisch will serve on the "Electronic Medical Records, Patient Portals and Audit Trails: The Benefits and Risks of a Paperless System, and Overcoming the Challenges of Implementing an Electronic Platform" panel at the American Conference Institute's National Advanced Forum on Medical Professional Liability to be held in New York. The Conference will offer 14 hours of CE covering a variety of topics. Register at www.americanconference.com.

November 5-7

Joe Kingma Speaks on Professional Risk In Vegas!

Joe Kingma will moderate a panel on Accountant and Lawyer Risk at the 2014 PLUS International Conference to be held November 5-7 in Las Vegas. PLUS has over 7000 members and the conference typically draws 1500 attendees. Other speakers include Jay Leno and luminaries from across the country and around the globe. Register at www.plusweb.org.

Firm News & Notes

45 YEARS. 50,000 MATTERS. 2 NEW LEADERS.

This past July was a month to celebrate at Carlock, Copeland & Stair. The Firm marked its 50,000th matter opened using matter tracking systems and elected two new members to its leadership team.

In 2015, the Firm will mark 45 years of providing legal services to clients throughout the Southeast. In preparation for this anniversary, Firm leadership has been looking back at inspirational roots and looking forward to establishing new and improved strategic and project management processes to increase efficiency and productivity both for clients and the Firm. To guide this initiative, the Firm has revised its leadership structure to add the strategically focused position of Chairman of the Executive Committee. Attorney **Dan McGrew** of the Atlanta office will hold this position.

"In August, I will have served the Firm for 30 years," said McGrew. "I am proud of how we have evolved, and I am really excited to be involved with leading Carlock Copeland into the future. We want to continue to adapt and grow the Firm in ways that maximize what we can do for our clients, attorneys and employees."

Mike Ethridge of the Charleston office will also join the Committee. Attorneys J**oe Kingma**, **David Root**, Managing Partner **Greg Wheeler** and Executive Director **Brian Gedeon** will continue to serve on the Committee.

THE "ACADEMY" AWARD GOES TO...

William Newcomb for being selected to participate in the *2014-2015 American Bar Association Tort Trial and Insurance Practice Section (TIPS) Leadership Academy*. Academy participation is limited to a select group of only 25 attorneys nationwide with five to fifteen years of experience who have been identified through a highly competitive selection process as actively committed and personally responsible leaders.

The TIPS Leadership Academy is designed to increase the diversity of leaders in the legal profession, nurture effective leadership, build relationships among leaders from across the country and from disciplines, and raise the level of awareness among lawyers regarding a broad range of issues facing the profession.

Laura Paton for graduating from the *2014 Leadership Academy of the South Carolina Bar*. The academy is a highly selective program that is designed to equip young lawyers (in practice from three to 10 years) with networking opportunities, professionalism training, community awareness and other skills necessary to give back to the profession and position themselves as leaders in the community as well as the Bar.

ReShea Balams for graduating from the *2014 Young Lawyers Division Leadership Academy of the State Bar of Georgia*. The academy is a highly selective program that is designed to equip young lawyers with leadership skills, as well as provide opportunities to learn more about their profession, their communities, and their state to position themselves as leaders in the community as well as the Bar.

TWO ATTORNEYS TWICE AS HONORED FOR LEGAL, CIVIC AND COMMUNITY ENGAGEMENT

Carlock Copeland is well known for our attorneys being honored for their commitment in the courtroom, but two of our lawyers recently brought to light double the commitment to legal, civic and community engagement.

Atlanta's **Heather Miller** was recently elected as Chair of the Board for the Women in the Profession Section of the Atlanta Bar Association. The Women in the Profession Section of the Atlanta Bar is dedicated to furthering the practice and perception of law with a focus on issues unique to women in the practice. As chair, Heather and the WIP Board will continue the section's work with Atlanta Legal Aid's Cancer Legal Initiative, its support of Foreverfamily, and will continue to provide programs and social events for section members and non-members.

In addition, Heather has been selected as an inaugural member of the Atlanta Beltline 100, 100 leading young professionals who have an interest in serving as advocates for the Atlanta Beltline in support of the mission of the Atlanta Beltline Partnership. Members are a diverse group of individuals interested in the success of the Beltline, a mixed-use transportation oriented project in metro-Atlanta.

Out of the Charleston office, **Robert Hawk** was recently elected to serve on the Executive Committee of the Charleston County Bar Association. He has also been selected as a Fellow for the Roper St. Francis Foundation. Our Firm is proud of Robert's accomplishments and passion to serve both within the law industry and the Charleston community.

DAVID OVERSTREET APPOINTED TO SC JUDICIAL QUALIFICATIONS COMMITTEE

David Overstreet was recently appointed to serve on the Judicial Qualifications Committee of the South Carolina Bar. The committee is comprised of bar members who evaluate all of the candidates for selection to the South Carolina Supreme Court, Court of Appeals, Circuit Court, Family Court, and ALJ.

BOMAR AND WILHELM JOIN CLAIMS AND LITIGATION MANAGEMENT ALLIANCE

Spencer Bomar and **Ryan Wilhelm** have accepted nominations to join the prestigious Claims and Litigation Management Alliance (CLM). CLM is an alliance of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. CLM's goal is to promote the highest standards of litigation management in pursuit of client defense. Attorneys and law firms are extended membership by invitation only as nominations from CLM Fellows, in-house claims professionals.

WELCOME TO NEW ATLANTA ASSOCIATES

Samantha Gunnison has joined the Firm as an associate and will focus primarily on health care and commercial litigation.

Prior to Carlock Copeland, Sam worked at an Atlanta-based litigation firm where she practiced in the areas of real estate litigation, commercial litigation, and property tax matters.

Sam received her J.D. in 2011 from Georgia State University College of Law. She completed her undergraduate studies in 2008 at the University of Georgia majoring in Philosophy.

New associate **Melissa Bailey's** practice will be concentrated in general liability defense, including premises liability, automobile liability, insurance coverage issues, and trucking and transportation litigation.

Melissa previously worked with a litigation firm in Savannah, where she practiced in the areas of municipal and county liability defense, commercial litigation, and legal malpractice defense.

Melissa earned her undergraduate degree *summa cum laude* from Georgia Southern University, and her J.D. *cum laude* from the University of Georgia School of Law.

from the Blogs

INSURANCE *Coverage Corner*

Allocation of Underlying Settlement and UM Coverage Set-Off

by: Erica Parsons

Long standing Georgia law requires a claimant to exhaust the tortfeasor's underlying liability insurance limits before looking to uninsured motorist insurance for coverage. Additionally, Georgia public policy prohibits the recovery of punitive damages from an uninsured motorist insurer.

So what is the effect on UM coverage when a claimant allocates the liability settlement payment between punitive damages and compensatory damages? According to the Georgia Supreme Court, in *Carter v. Progressive Mountain Insurance Company*, while allocation is not prohibited, any allocation will not increase the UM carrier's coverages...

Read more at www.InsuranceCoverageCorner.com.

Citations for content available online.

Your EPL Lawyer FOR GEORGIA AND SOUTH CAROLINA

Telecommuting as a Reasonable Accommodation

By: Amanda Dudgeon

The Sixth Circuit Court of Appeals' decision in *EEOC v. Ford Motor Company* in April has spurred the discussion of whether telecommuting as a reasonable accommodation in ADA cases is about to become the norm rather than the exception. While the concept is not a new one, the opinion seems to open the door for employees to cite advances of technology as a reason telecommuting is a reasonable alternative to physical presence in the workplace.

Under the Americans With Disabilities Act, an employer's failure to make "reasonable accommodations" for an employee's known disability can be considered discrimination. The EEOC has said that allowing an individual with a disability to work at home is a form of reasonable accommodation if (1) essential functions of the position can be performed at home, and (2) the accommodation does not cause an undue hardship for the employer...

Read more at www.YourEPLlawyercom. To subscribe to the digest, email mfry@carlockcopeland.com.

Citations for content available online.

We're in this to win.

$24 Million in Damages Deflected in Construction Defect Case

Kent Stair, **Paul Sperry** and **Patrick Norris** obtained summary judgment for their client days before the start of a multi-week complex construction defect trial. The plaintiff Property Owners Association (POA) was seeking over $24 million in damages. The judge granted the motion on statute of limitations grounds, holding that the POA, despite being controlled by the Developer and not yet being turned over to the homeowners, had notice of potential claims against the Defendant more than three years before the "owner-controlled" POA sued.

Motion for Summary Judgment Granted for Civil Engineering Firm in Catastrophic Physical Injury Lawsuit

Greg Wheeler and **Brent Meyer** successfully obtained summary judgment for a civil engineering firm in a case involving an explosion. The plaintiff incurred severe burns and physical pain when his house exploded from a gas leak. The plaintiff claimed that the engineering firm was negligent in failing to perform its contractual duties and obligations and claimed millions of dollars in damages. Greg and Brent effectively argued that: (1) The engineering firm properly performed its contractual duties; (2) That no act by the firm caused the plaintiff's injuries; and (3) That the firm did not have supervisory control over the other parties to the construction project and could not, therefore, be liable for their alleged negligence. The trial court agreed and granted summary judgment with respect to all of the plaintiff's claims against the engineering firm.

Real Estate Investors' Claims Against CPA Firm Shot Down on a Motion To Dismiss and the Court of Appeals Affirms

Joe Hoffman, **Billy Newcomb**, and **Joe Kingma** represented a large Atlanta accounting firm that was sued by a real estate investor and his wife. The plaintiffs had sold several million dollars of real estate and needed to find substitute property to complete their tax free exchange. It was uncontroverted that the accountant, who was a social acquaintance of the plaintiffs, suggested they invest in a development in which the accountant had already invested. The plaintiffs alleged they lost their life savings when the development failed, and they brought claims against the accounting firm for malpractice, breach of fiduciary duty, and fraud. CCS won a motion to dismiss on Oct 4, 2013, and the Georgia Court of Appeals affirmed the dismissal on July 3, 2014.

Summary Judgment for UM Carrier Where Selection Form Was Unambiguous

Fred Valz and **Erica Parsons** obtained summary judgment in favor of an insurance company that provided uninsured motorist coverage stemming from a 2011 automobile accident. The plaintiffs settled with the at-fault driver for the limits of his policy and then sought to recover uninsured motorist benefits under their own policy, despite the fact that the plaintiffs had selected "reduced by" coverage in an amount equal to the liability limits. Plaintiffs attempted to argue that the selection form they signed, which reflected their affirmative selection of "reduced by" coverage in the amount of $25,000 per person and $50,000 per accident, was ambiguous. The State Court of Chatham County rejected Plaintiffs argument, holding that the form was clear and unambiguous, and granted summary judgment in favor of the UM carrier.

Court of Appeals Affirms the Defeat of Plaintiff's Claims Against Employment Lawyer

Tyler Wetzel and **Joe Kingma** represented a lawyer who allegedly gave faulty employment law advice to a manager of a large company based in Japan. The manager claimed he was discriminated against based on his ethnicity and had to quit his job. Our original summary judgment motion was granted in large part, dismissing most of the plaintiff's claims. The Court of Appeals of Georgia affirmed, and CCS then filed a second motion for summary judgment, arguing that the remaining claims were or could have been brought by the plaintiff in his lawsuit against his former employer. Thus the plaintiff could not show any damages proximately caused by the defendant lawyer's advice. The state court granted the second motion, striking the plaintiff's remaining claims, and the Court of Appeals affirmed on July 7, 2014.

Summary Judgment in Defamation Case

Eric Frisch and **Harrison Spires** successfully argued summary judgment for a law firm in a defamation of title action. Harrison Spires argued the motion in the Superior Court of Cherokee County. The law firm was accused of defaming a debtor during foreclosure proceedings.

Summary Judgment for Real Estate Brokerage and Agent in Stephens County Superior Court

Joe Hoffman and **Billy Newcomb** were retained to represent a well-known real estate brokerage in North Georgia and one of its agents against a lawsuit filed against them by the former owner of almost 60 acres of farmland. The plaintiff claimed that the brokers converted farm equipment and

other personal property worth around $100,000, trespassed on his land, wrongfully interfered with his property, and tortiously interfered with a lease agreement when the brokers secured the real estate and prepared it for resale following the lender's foreclosure. In their Motion for Summary Judgment, Joe and Billy argued that the lender had a non-delegable duty to initiate dispossessory procedures, and the brokers were therefore not required to obtain a writ of possession prior to performing their post-foreclosure duties to the lender. Joe and Billy also argued that their contract with the lender and Georgia law allowed them to lawfully enter and secure the property, and even if they did wrongfully enter the premises, their actions were protected by the innocent trespasser rule because they were taken in good faith.

The same day it heard oral argument, the trial court entered an order granting the brokers' Motion for Summary Judgment in its entirety and dismissing all of the plaintiff's claims against them.

Case against Family Physician Dismissed Without Payment

Partners **Gary Lovell** and **Lee Weatherly** secured a dismissal with prejudice for a family practice physician, in a medical malpractice case. The Plaintiff was the husband of woman who died of lung cancer in 2009. Plaintiff claimed that the physician was negligent in reading a 2007 chest x-ray performed as part of routine physical examination. Plaintiff claimed that if the doctor had properly read the deceased's chest x-ray, or sent the x-ray to a radiologist to be over-read, the deceased's lung cancer would have been diagnosed in 2007 instead of in 2009 and that she would have survived. After aggressively establishing a solid defense for the family physician, Plaintiff agreed to dismiss the case, with prejudice, without payment.

Settlement in Car Wreck Case a Mere Tenth of Plaintiff's Demand

Andy Countryman and **Jeff Crudup** obtained an excellent result in a recent car wreck case that went to trial in the Charleston County Court of Common Pleas. Liability was disputed, and Plaintiff refused to come down from her initial $25,000 demand. Defendant offered $8,000 and renewed that offer the morning of trial. After openings and two witnesses, Plaintiff settled for $2,500.

Summary Judgment in Premises Liability Defense Survives Appeal

The Georgia Supreme Court has upheld summary judgment in a premises liability action filed by **Heather Miller** on behalf of a Georgia mall. Plaintiff had alleged that she tripped and fell while walking her dog in a grassy area near a parking lot. Defendants argued that Plaintiff voluntarily ventured from a designated route of travel, thereby assuming the risk of her fall. Plaintiff appealed to the Court of Appeals, then to the Supreme Court, with Defendant being successful in both Courts.

Summary Judgment Ends $2.5 Million Failed Development Claim Against Law Firm

Joe Hoffman, **Billy Newcomb**, and **Joe Kingma** successfully defended a law firm sued after a Chatham County waterfront development failed. There was no question that the legal description drafted by the law firm prior to the pouring of the foundation did not accurately reflect the final boundary lines for the development. The lender claimed it could not foreclose on the condos in the development because of the description issue, and the borrower claimed it could not sell the property because it did not have good title. Claims against the law firm were brought by the title insurer and the borrower. The lender had been put into involuntary bankruptcy, and its successor in interest, which had purchased the loan out of bankruptcy, was a party defendant as well.

CCS filed a motion for summary judgment against the title insurer. It argued that the insurer had no duty to defend or indemnify its insured (the purchaser of the loan that it was already defending under the policy) because the potential for a discrepancy was made known to the failed lender by the law firm and thus the title insurer had no claim against the law firm that issued the policy. In the face of a strong brief, the title insurer settled its claim against the law firm rather than file a response.

On summary judgment, CCS argued that the borrower's claims failed because: 1) there was no attorney-client relationship; 2) the borrower could not show the law firm made a false representation on which the borrower was entitled to rely; and 3) the borrower, who had also declared bankruptcy, could not show damages proximately caused by the law firm's alleged error. At oral argument Joe Kingma hammered the facts that the borrower had received 100% financing on her investment, her husband's employer had received a loan commission on her $2.5 million loan, and the lender that funded the loan had engaged in a complex lapping scheme. The Court granted summary judgment to the law firm on May 30, 2014.

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Carlock Copeland In the Community

Led by Atlanta attorney Heather Miller, Carlock, Copeland & Stair attorneys and staff gathered school supplies to support students through Foreverfamily. Foreverfamily provides services to children with incarcerated parents and their families. They work to ensure that, no matter what the circumstances, all children have the opportunity to be surrounded by the love of family.