

# Litigation Review

## Welcome to MG&C's first issue of *Litigation Review*!

As the summer of 2011 draws to a close, we thought it might be helpful to send our general liability clients an in-depth case law and statute update. Our goal is to provide with you excellent service, and we believe that includes keeping you informed of any case law or statutory changes; our clients can achieve their best results only by making informed decisions. We hope you find this newsletter informative and helpful.

So far, 2011 has been an interesting year at the North Carolina legislature. New statutes have been passed that will impact the way claimants and liability insurers proceed in our civil courts. Little more than two years ago, North Carolina's plaintiff's personal injury lobby came very close to eliminating the doctrine of contributory negligence. We all began trying to determine the impact that change would create. Now, the political climate has changed. North Carolina's legislature not only abandoned plans to eliminate contributory negligence, it passed significant tort reform legislation, making North Carolina even more conservative. The collateral source rule and attorneys fee statute have both taken serious hits, among other changes.

Perhaps the most interesting new legislation is the new statute allowing a bifurcated trial in any tort case where a party seeks damages of \$150,000 or more. Under this new statute, the trial court must order separate trials on the issues of liability and damages, meaning that evidence relating solely to damages may not be introduced until after the jury finds the defendant liable. This is a significant change to North Carolina law and trial procedure. As any claims handler knows, in some cases, significant damages can help a claimant overcome a meritorious liability defense. This new rule allowing bifurcated trials in any tort action applies to any civil action filed on or after October 1, 2011.

In light of these changes, we asked ourselves what effect a bifurcated trial might have in a case we defended and tried to verdict. We decided to check our recent trial results. Since January 1, 2011, MG&C's North Carolina liability lawyers tried more than 20 jury trials to verdict. Of the more than \$6.5 million demanded in those 20 trials, our opponents recovered less than 2.5% of that sum. With these new rules, we anticipate even greater success and even better results for our clients in the future. We are always here to serve you. For more a detailed discussion of these changes, please see the additional articles inside or contact any of our attorneys with questions about how these new changes may impact any tort claim. We hope you enjoy and find MG&C's Litigation Review newsletter to be both relevant and informative.

- Eric Fosmire and John Spainhour, Editors



**Eric Fosmire**  
Columbia Office  
803.227.2219  
eric.fosmire@mgclaw.com



**John Spainhour**  
Charlotte Office  
704.405.4592  
jspainhour@mgclaw.com

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## Age of Visitor Impacts Duty of Due Care

NORTH CAROLINA — In *Cobb v. Town of Blowing Rock* (713 S.E. 2d 732, July 5, 2011), a 12-year-old girl became severely injured when she slipped and fell over a waterfall while trying to cross a stream bed above the falls. The girl, Chelsea Cobb, a resident of Blowing Rock, and a friend visited a nature trail owned and maintained by Blowing Rock, containing trails, riverbeds and multiple small waterfalls. Chelsea and her friend were attempting to cross from one side of the stream to the other when Chelsea fell and was severely injured after going over the falls. The law of North Carolina calls Chelsea an “invitee” to the public land and imposes duties on the landowner, Blowing Rock. The plaintiff sued the town, claiming a higher duty was owed to a minor plaintiff than would be owed to an adult. After a two week trial in the Watauga Superior Court, the jury found the town of Blowing Rock was not negligent.

During deliberation the jury asked how the age of the plaintiff should be taken into account. The trial judge explained landowner liability and the charge and reminded the jury of the statement of the law at that time—a duty of reasonable care is owed to all lawful visitors. The plaintiff requested the court charge the jury with an instruction that a higher duty of care is owed to children. After the jury found for the defendant, the plaintiff appealed. A divided N.C. Court of

Appeals held that a

landowner must take into the account the expected age and experience of visitors legally on the land. A strongly worded dissenting opinion found no such standard in the law and therefore would not allow a new trial for the plaintiff. The Appellate majority sent the case back to the trial court for a retrial.

This divided and unpublished opinion is on appeal to the N.C. Supreme Court. The majority holding appears to create a duty that had not previously existed.

## Landlord May Be Liable for Injuries Inflicted by Tenant’s Dog in Common Area of Apartment Complex

SOUTH CAROLINA — The landlord in this case, *Clea v. Odom* (Op No. 27029, August 22, 2011), owned a two building apartment complex. One of the tenants kept a dog chained to a tree in the common area of the property. The dog lived in the common area for nearly 10 years prior to the incident. The landlord occasionally gave the dog some food or would play with him, but never otherwise provided any care for the dog. Another tenant’s sister and her children came to visit at the apartments. One of the children, a two-year-old, ran toward the dog. The dog ran to the end of its chain and attacked the two-year-old, causing \$17,000 in injuries. The visiting sister, on behalf of her child, sued the landlord and dog owner tenant on theories of strict liability, common law negligence, and attractive nuisance.

The landlord moved for summary judgment and the Circuit Court granted the landlord’s

motion. The South Carolina Supreme Court reversed on the strict liability and common law negligence grounds, but affirmed summary judgment on the grounds of attractive nuisance. Under S.C. Code Ann 47-3-110, a dog owner is strictly liable for damages to a person bitten or attacked by the animal. The landlord contended he was entitled to summary judgment since he was not the owner. The court found an issue of material fact since the landlord knew the dog was chained to the tree in the common area. There was a material question as to whether there is evidence of the landlord providing “care or keeping” for the dog under the strict liability statute.

Under South Carolina common law, a landlord is not liable to a tenant’s invitees for injuries inflicted by an animal kept by the tenant on the leased property (*Gilbert v Miller*, 356 SC 25, 586 S.E.2d 861 (Ct. App 2003)). However, because the South Carolina Landlord Tenant Act requires landlords to keep the premises in reasonably safe condition (S.C. Code Ann 27-40-440(a)(3)), the landlord could be liable for an attack when the animal is kept in the common area of the complex. The court reversed summary judgment on common law negligence grounds. The court did affirm summary judgment on the attractive nuisance cause of action on the grounds that an animal is not an “artificial condition” created by the property owner. Since the definition of attractive nuisance could not be met under the facts, the court affirmed summary judgment on the

attractive nuisance cause of action.

This case should cause insurers and landlords to carefully examine the status of pets upon leased premises. Insurers of leased property may want to require the landlord to certify that there are no tenants' animals kept in the common area of the property. Landlords may want to reduce their risk by requiring that tenants keep their animals within the confines of the leasehold and not allowing tenants to keep a pet in the common area.

### UIM Coverage: Primary, Excess or Pro Rata?

NORTH CAROLINA—In *Integon v. Phillips* (712 S.E. 2d 381, June 21, 2011), two underinsured motorist insurers disputed which policy provided primary or excess coverage for personal injury claims arising out of a motor vehicle accident. The case resulted in a finding that both policies were on equal footing. Integon National Insurance Company issued a policy to Kelly Phillips. N.C. Farm Bureau Mutual Insurance Company issued a policy to Tammy Phillips. Tarrah Jones, the daughter of Tammy Phillips and the step-daughter of Kelly Phillips, was operating a 2006 Chevrolet at the time of the accident, which was a rental vehicle being used as a temporary replacement vehicle for Tammy Phillips' 2005 Honda while being repaired. The 2006 Chevrolet was not owned by either Kelly or Tammy Phillips. It was owned by Hertz Vehicles, Inc.

Both the Integon and Farm Bureau policies contained an identical 'other insurance' clause: "however, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance."

Integon claimed that because the 2006 Chevrolet was a temporary replacement vehicle for the 2005 Honda owned by Tammy Phillips that was listed on the Farm Bureau policy, it should qualify as an owned vehicle for the purposes of interpreting the "other insurance" clause. Integon argued that the Farm Bureau policy provided primary coverage, and the Integon policy provided excess coverage. The trial court granted summary judgment in favor of Integon. Farm Bureau appealed.

On appeal, the court noted its duty to construe an insurance policy as it is written. It determined the 2006 Chevrolet did not qualify as an "owned" vehicle under either the Integon policy or Farm Bureau policy. The Court reasoned that in construing each policy as written, and applying the "other insurance" clause in each, the policies had identical meanings, and were mutually repugnant. In a 3-0 decision, the court reversed summary judgment for Integon, and granted summary judgment for Farm Bureau. The court held that the coverage should be shared pro rata between the carriers. Congratulations to MG&C's own JD McAlister and John Jeffries for winning this case at the Court of Appeals on behalf of Farm Bureau.

### S.C. Supreme Court Finds USAA Met Burden in Proving Meaningful UIM Offer where Identity of Person who Filled in Selection Was in Dispute

SOUTH CAROLINA — In *Wiegand v*

*USAA* (Op. No. 2619, January 31, 2011), the S.C. Supreme Court found that because it is undisputed that the decedent signed the UIM declination form, it does not matter who actually filled in the boxes declining UIM coverage. The decedent, Vincent Wiegand, died in a 2004 auto accident. He had continuous coverage with USAA from 1990 to 2004. The coverage provided liability limits of \$25,000 per person and \$50,000 per accident. When Wiegand made his UIM coverage selection in 1990, the declination of UIM coverage box was checked and Wiegand signed the form. USAA's UIM selection form met the requirements of S.C. Code Ann. 38-77-350(A).

Wiegand's wife sued USAA seeking reformation of the UIM coverage to the liability limits. She contended USAA could not actually prove that Mr. Wiegand checked the boxes in question. She argued that since no USAA employee could say Mr. Wiegand made the check mark in the "no" box, there was no meaningful offer. Although the circuit court found there was no meaningful offer, the S.C. Supreme Court found USAA met the burden of proving a meaningful offer since Wiegand signed the bottom of the form. The court also noted that in the intervening years between 1990 and 2004, when USAA sent the coverage declaration to Wiegand, he never claimed there was an error in the declaration that there was no UIM coverage.

## Commercial General Liability Policies for Construction Professionals

SOUTH CAROLINA — In response to the S.C. Supreme Court's Jan 7, 2011 decision in *Crossmann Communities v. Harleysville*, the S.C. Legislature enacted S.C. Code 38-71-70 relating to commercial general liability (CGL) coverage for construction professionals.

The January 7, 2011, *Crossmann* decision essentially found that CGL policies did not provide coverage for defective construction because defective construction lacked the "fortuity" or "accident" element needed to meet the definition of an "occurrence." The S.C. Supreme Court re-heard the *Crossmann* appeal and filed a second opinion on August 22, 2011, in which it reversed course and found that CGL policies may provide coverage for resulting damage to otherwise non-defective components.

Between the first and second *Crossmann* decisions, the legislature enacted 38-71-70, which requires that every CGL for a construction professional be deemed to contain a definition of "occurrence" that includes:

1. an accident, including continuous or repeated exposure to substantially the same general harmful condition; and
2. property damage or bodily injury resulting from

faulty workmanship, exclusive of the faulty workmanship itself.

The legislative response was an effort to undo the result of the January 7, 2011, *Crossmann* decision. The legislature's new code section became effective May 17, 2011. After a May 23, 2011, rehearing of the *Crossmann* appeal, the S.C. Supreme Court issued its re-filed opinion on August 22, 2011. The re-filed opinion clarified that defective or negligent construction resulting in damage to non-defective components may constitute property damage. The facts in *Crossmann* therefore triggered coverage.

It is important to note that the court did not address any CGL policy exclusions or exceptions under the facts of *Crossmann*. Therefore, coverage restored by the *Crossmann* August 22, 2011 decision may be further eroded or restored depending upon applicable policy exclusions or exceptions.

The *Crossmann* court gave further guidance by adopting the "time on risk" approach to coverage for allocating loss among successive insurers. The court held that "the proper method for allocating damages in a progressive property damage case is to assign to each triggered insurer a pro rata portion of the loss based on that insurer's time on the risk."

While the ideal situation would be for the fact finder to determine the exact amount of injury-in-fact during each policy period, it is difficult to do so in most construction defect cases.

The court provided a default rule for time on risk calculations by a formula wherein the numerator represents the number of years an insurer provided coverage and the denominator represents the number of years in which the damage progressed. The preceding fraction is then multiplied by the total damages the policyholder is liable to pay as damages for the progressive injury.

## Appraisal Provisions Cannot Determine Coverage Disputes

NORTH CAROLINA — In September 2005 the insured, Sadler, made a homeowners claim for mold damage. While the insurance company, Farm Bureau, confirmed the presence of mold, it stated the cause of the mold was not from a named peril under the applicable policy. Sadler objected and pointed out the existence of high winds a few months prior to the notice and posited that the wind, a named peril, caused the mold infestation. Unable to change Farm Bureau's mind, Sadler invoked the appraisal provision in the policy. Importantly, the appraisal provision stated "in no event will an appraisal be used for the purpose of interpreting any policy provision, determining causation or determine whether any item or loss is covered under this policy. If there is an appraisal, we will retain the right to deny the claim."

Sadler's designated appraiser and the umpire certified an appraisal award in an amount

greater than the policy limits as the actual cash value of the damages as the result of wind. Farm Bureau filed a declaratory judgment action on the basis that the appraisal award purported to determine the cause of loss. Sadler filed counterclaims for, among other things, breach of the insurance policy. Sadler moved for partial summary judgment on his breach of contract counterclaim, which the trial court granted. The N.C. Court of Appeals affirmed the trial court's decision. The N.C. Supreme Court reversed.

The Supreme Court examined the unambiguous language in the appraisal provision and held "the policy's appraisal process is limited to a determination of the amount of loss and is not intended to interpret the amount of coverage or resolve a coverage dispute." Thus, the Supreme Court remanded the case to factually determine which damages were directly caused by wind, if any. Thus, the parties were left to litigate the question of whether and to what extent wind caused the mold damage (NC Farm Bureau v. Sadler, 365 N.C. 179, 2011).

## **Automobile Insurance Carriers Must Release Coverage Information upon Written Request by Claimant's Attorney**

SOUTH CAROLINA — The South Carolina Legislature enacted S.C. Code Ann 38-77-250, effective January 1, 2012, requiring

automobile insurers to release coverage information upon written request of a claimant's attorney. If the claimant's attorney makes a proper written request, the insurer must, within 30 days, provide either the declarations page for each policy or a statement under oath from a corporate officer or claims manager. The statement must include the name of the insurer, name of each insured and limits of coverage for each policy for each of its insureds in the claim in question. The policy information produced is deemed confidential and may not be disclosed to any outside party. In addition the disclosure requirement does not apply to fleet policy limits, umbrella coverages, or excess coverages.

## **Automobile Insurers Not Required to Write Coverage for Existing Policyholder**

SOUTH CAROLINA — Effective April 11, 2011, the S.C. Legislature amended S.C. Code Ann 38-77-112 by stating an automobile insurer in South Carolina is not required to write coverage for an applicant or existing policyholder. Insurers must retain, for three years, records of refusals of coverage and must provide those records to the insurance director upon request.

## **NC Attorney's Fee Statute § 6-21.1 Significantly Changed**

NORTH CAROLINA — Over the past few decades, under N.C.G.S. § 6-21.1, a plaintiff's attorney could recover his or her fees, taxable as costs, against a defendant in smaller cases. Many personal injury or property damages cases were tried over the attorneys' fees. For instance, in Phillips v. Warren, 152 N.C. App. 619 (2002), the plaintiff's attorney sought \$18,000 in fees after a jury awarded the plaintiff \$6,000.00 in damages arising from a motor vehicle accident.

The N.C. legislature amended § 6-21.1 this past summer. Now, the statute:

- applies where the amount of personal injury or property damages recovered is \$20,000.00 or less;
- establishes a maximum amount of \$10,000.00 in attorney's fees to be awarded; and
- mandates that attorneys fees can only be awarded if the amount of damages recovered exceeds the highest offer made by the defendant no later than 90 days before trial.

The new changes apply to accidents occurring after September 30, 2011.

## **SC Courts Must Consider the Number of Separate Occurrences, Not Just the Resulting Injury, to Determine How to Apply the Tort Claims Cap**

SOUTH CAROLINA — In *Boiter v. SCDOT and SCDPS* (Op No 26981, June 6, 2011), Larry and Jeannie Boiter sued the S.C. Department of Transportation and the S.C. Dept of Public Safety as a result of severe injuries sustained at an intersection. A jury awarded the Boiters \$1.875 million in damages. The trial court, pursuant to the tort claims cap of \$300,000 in S.C. Code Ann 15-78-120, reduced the verdict to \$300,000 for each Larry and Jeannie Boiter for a total recovery of \$600,000. The Boiters argue that because separate allegations of negligent occurrences were alleged as to each governmental entity, they should recover \$600,000 each, for a total recovery of \$1.2 million. The S.C. Supreme Court agreed, finding more than one occurrence, and awarded capped damages as to each state entity involved.

In *Boiter*, the court found that SCDOT was negligent because it did not have an adequate re-lamping policy. SCDPS was separately negligent by not following its own policy to notify a technician when a traffic lamp has

burned out. One department's acts did not "fold over" into the other department's acts to cause a singular occurrence. In prior cases the court found a singular governmental entity's acts, though committed by various personnel, were essentially a singular occurrence string that caused damages (*Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010)). In the *Boiter* case, since there were separate unconnected acts by two different state agencies, the court found two occurrences and thus the tort claims cap applied separately as to each agency, not collectively as to both.

## **SC Supreme Court Declines to Recognize a Separate Tort for Spoliation of Evidence**

SOUTH CAROLINA — In *Cole Vision, et al v. Hobbs* (Op No 26988, June 20, 2011), the S.C. Supreme Court declined to create a common law tort for spoliation of evidence. Hobbs was an optometrist who leased space from Cole Vision and Sears. The lease contained an indemnity agreement whereby Hobbs was to defend Cole and Sears for liability arising from Hobbs' optometry practice. Cole Vision was supposed to maintain Hobbs' records. One of Hobbs' patients sued Cole and Sears for Hobbs' alleged malpractice in failing to detect glaucoma. Cole Vision and

Sears demanded that Hobbs and his insurer defend and indemnify them. Hobbs and his insurer refused to do so. Cole Vision and Sears then brought a separate declaratory judgment action against Hobbs and his insurer. Hobbs and the insurer counterclaimed alleging spoliation of evidence as a cause of action. The counterclaim was based on an allegation that Cole Vision was supposed to keep the patient's profile sheet. Cole Vision apparently lost the patient profile sheet, a critical piece of evidence needed to defend the malpractice claim.

The S.C. Supreme Court declined to create a "negligent spoliation" tort. The court found that Hobbs can argue spoliation as a viable defense, but could not bring it as a tort counterclaim. Therefore the counterclaim was properly dismissed by the circuit court. The Supreme Court also noted that damages for spoliation were likely too speculative. In addition, public policy concerns are already met, since the courts have the inherent authority to issue sanctions or give adverse inference jury instructions where a party loses or destroys evidence.

## NC Legislature Amends Rules to Allow Bifurcated Trials in any Tort Action where Damages Exceed \$150,000

NORTH CAROLINA — The adage ‘high damages can get you liability’ may fall out of use in North Carolina.

Under North Carolina’s new tort reform effort, in any civil tort action filed after September 30, 2011, where the plaintiff seeks damages exceeding \$150,000.00, upon motion of any party, the court shall order separate trials on the issues of liability and damages unless there is good cause for a single trial. This new rule further states that evidence relating solely to compensatory damages is not admissible until the trier of fact has determined that the defendant is liable. Additionally, the same trier of fact determines both liability and damages. Thus, during jury selection, the prospective jurors can likely be asked questions regarding their position on awarding damages. However, note that the trial judge still has the power to deny the request for “good cause shown.”

This amendment to Rule 42 makes securing a plaintiff’s Rule 8(a)(2) response and documentation of settlement demands all the more important. Interestingly, this new law, found in Rule 42, was enacted via veto override.

## NC Legislature Tweaks Collateral Source Rule

NORTH CAROLINA — As any defendant or insurer may know, the Collateral Source Rule has been in effect in North Carolina for many years. The Collateral

Source Rule prevents a defendant from introducing any evidence that a collateral source, such as Medicare or private health insurance, actually paid the plaintiff’s medical bills in whole or in part. Additionally, the Collateral Source Rule prevents a defendant from seeking a reduction for any payments from any collateral sources. By way of House Bill 542, N.C.G.S. § 8-58.1, and creating N.C. Rule of Evidence 414, past medical expenses must be proven with evidence of amounts actually paid to satisfy such bills or are necessary to satisfy unpaid bills, regardless of the source of the payment. Plaintiffs may no longer introduce into evidence, or seek compensation, for medical or other pharmacy bills if the bills are reduced by medical providers or pharmacies based on Medicaid, Medicare or contracts with private insurers. Thus, only “approved charges” may be introduced into evidence and recovered by the plaintiff.

It should be noted that the injured party may testify regarding the amount paid or required to be paid in full satisfaction of such charges, provided that records or copies of the charges showing the amount paid or required to be paid accompany the witness’s testimony.

That testimony establishes a rebuttal presumption of the reasonableness of the amount paid or required to be paid in full satisfaction of the charges. However, in the event that the health care provider gives sworn testimony that the charge for that provider’s service either was or could be satisfied by payment of an amount less than the amount charged, then with respect to that provider’s charge only, the presumption of the reasonableness of the

amount charged is rebutted, and a rebuttal presumption is established that the lesser satisfaction amount is the reasonable amount of the charges for the testifying provider’s services.

The statute is effective October 1, 2011, and applies to accidents on or after that date.

## The S.C. Fairness in Civil Justice Act of 2011

SOUTH CAROLINA — For all actions accruing on or after January 1, 2012, South Carolina has enacted specific limits on punitive damages. The new law, found in S.C. Code Ann 15-32-510, et seq., requires a bifurcated proceeding for punitive damages. Punitive damages may not exceed the greater of three times compensatory damages or \$500,000. However, if a jury returns a punitive verdict in excess of the specified maximum, then:

1. the trial court must determine if the wrongful conduct was motivated by unreasonable financial gain or
2. that the unreasonably dangerous conduct was known to or approved by a person responsible for making policy or
3. if the conduct could subject the defendant to felony conviction.

If the court finds the preceding factors exist, then the limit is raised to, but may not exceed, four times compensatory damages or two million dollars. The new punitive damages cap shall not apply if the defendant had an intent to cause harm, pled guilty to a felony arising out of the same conduct, or acted while under the influence of alcohol or drugs.

## Appeals Court Upholds Contract Award for Former Fire Chief

On July 5, 2011, the N.C. Court of Appeals issued an opinion about the enforceability of an employment law contract in *Elliott v. Enka-Candler Fire and Rescue Department, Inc.* Mr. Elliott had been an at-will employee of the Fire and Rescue Department but later signed an employment contract for a specific term. Under the contract, if the department terminated Mr. Elliott's employment before the end of the term, it was obligated to continue paying him his salary and benefits for the balance of the term as if he was still working. The department did terminate Mr. Elliott, without cause, prior to the end of the term, and it refused to pay the remaining

wages and benefits. Mr. Elliott sued to enforce the contract. The department argued that the contract was not enforceable. It said that there was no consideration for the contract flowing from Mr. Elliott to the department and that the contract violated public policy. The trial court found the contract to be enforceable, granted summary judgment in favor of Mr. Elliott, and awarded him \$310,885.76 plus pre-judgment interest and costs. The department appealed.

The Court of Appeals found that when Mr. Elliott relinquished his right to resign from his at-will employment by signing a contract with a specific term, valid consideration had been

given by him for the contract. In other words, by signing the contract, Mr. Elliot lost the flexibility to leave the job at any point to accept other, more lucrative job offers. The Court also found that the contract served a valid public purpose by securing Mr. Elliott, a qualified fire chief, for a specified period of time for the benefit of a municipality. The Court considered various public policy challenges to the contract, including the fact that the municipality was paying for wages without receiving services in return, but it ultimately concluded that the contract did not violate public policy. The Court upheld summary judgment and damages in favor of Mr. Elliott.

*Questions? Contact Amy Jenkins at 843.576.2900 or [amy.jenkins@mgclaw.com](mailto:amy.jenkins@mgclaw.com).*



**Columbia**

PO Box 12519  
Columbia, SC 29211  
803-779-2300

**Charlotte**

PO Box 30307  
Charlotte, NC 28230  
704-643-6303

**Charleston**

PO Box 877  
Charleston, SC 29402  
843-576-2900

**Greenville**

PO Box 2980  
Greenville, SC 29602  
864-239-4000

**Raleigh**

PO Box 30516  
Raleigh, NC 27622  
919-719-8200

**Myrtle Beach**

PO Box 1349  
Myrtle Beach, SC 29578  
843-848-6000

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