Georgia Defense Lawyer©

Advancing the Civil Defense Bar©

Spring 2010

Chinese Drywall: Determining the Facts

By Michael L. Cannon, CIH
Forcon International

Background

The United States began importing drywall from China in 2003. As a result of the housing boom from 2004-2007 and the natural disasters that occurred in the Gulf Coast region of the United States during this time frame, the demand for imported Chinese drywall (CDW) increased dramatically, resulting in an estimated 100,000 homes being constructed with CDW. The use of CDW has resulted in numerous homeowner complaints including a rotten egg odor, corrosion of electrical systems, oxides on electronics, corrosion and failure of HVAC cooling coils, and health effects such as headaches, sore throats and sinus problems.

In 2008, the Consumer Product Safety Commission (CPSC) began to receive numerous complaints regarding CDW, and it launched an investigation of four Tampa, Florida homes with the Florida Department of Health (FLDOH) in March 2009. This investigation led to a meeting in April 2009 that included the CPSC, the EPA, and the Centers for Disease Control/Agency for Toxic Substances and Disease Registry (CDC/ATSDR), in which it was determined that the CPSC would take the lead on the investigation of CDW in the United States.

The EPA conducted elemental analyses of two known CDW samples supplied by the FLDOH, plus samples of drywall manufactured in the US for comparison purposes. The results of this limited analysis found that sulfur was detected at 83 parts per million (ppm) and 119 ppm in the CDW samples and was not detected in the US-manufactured drywall samples. Strontium was detected at 2,570 ppm and 2,670 ppm in the CDW and 244 ppm to 1,130 ppm in the US samples. It was noted that no total acid soluble sulfides were detected in any samples. Iron concentrations found in CDW ranged from 1,390 ppm to 1,630 ppm, as compared to 841 ppm to 3,210 ppm in the US-manufactured drywall. Additional FLDOH analysis surmised that the Strontium contained in the CDW was in the form of a sulfide, rather than sulfate or oxide. Strontium sulfide is a fireworks additive that creates a red flame when burned.

The FLDOH analysis also found that the CDW had a higher organic matter content— 5% as compared to 1% in US-manufactured drywall. Testing determined that when the CDW was exposed to 95% relative humidity, hydrogen sulfide, carbonyl sulfide, and carbon disulfide gases were released at

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Inside This Issue

GDLA Hosts Receptions Honoring Judiciary

GDLA honored judges in the Atlanta area at the seventh annual fête held February 4, 2010, at the One Ninety One Club.

More recently, GDLA held another reception on April 23 honoring judges in the southern region at the rooftop lounge of The Bohemian Hotel overlooking the Savannah riverfront.

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GDLA President Staten Bitting (right) talks with (l-r) Fulton Superior Court Judge Kimberly M. Esmond Adams, Past President Warner Fox and Secretary-Treasurer Mel Haas at the Atlanta reception.

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President's Message

We are fast approaching the Annual Meeting in Ponte Vedra. I recall my first GDLA Annual Meeting. I was asked to attend by two partners in my firm.

At the meeting, members of my firm made it a point to invite my wife Cindy and me to join them for meals and activities.

We were introduced to GDLA members, their spouses and families. Our new friends, in turn, invited Cindy and me to join them for a meal, a drink or an activity.

We were made to feel welcome as soon as we arrived. We continue to enjoy the friendship of many of these people over 20 years later.

GDLA is a strong organization. It provides many benefits to its members. Opportunities for service and fellowship are abundant. For this to continue, we must invite new members to join us. We need to make our new members feel welcome and to provide opportunities for them to get involved in GDLA activities. The first step is to ask them to join us for a meeting.

GDLA is a strong organization. For this to continue, we must invite new members to join us.

If you plan to attend the GDLA Annual Meeting, give some thought to inviting a younger lawyer to attend.

If you are not planning on attending, we would be delighted for you to reconsider. We have a great venue in the Ponte Vedra Inn & Club. Bubba Hughes has put together an excellent program.

We look forward to seeing our long-time friends and to meeting the younger lawyers you invite.

Yours for the defense,
Staten Bitting
GDLA President

Richardson Award Presented

Karl P. Broder (right) is the recipient of the 2010 Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award is sponsored by GDLA. It was presented April 9 by Dean Rebecca White at the annual Awards Day Ceremony. Broder has been selected to serve as Law Clerk to the Honorable Julie E. Carnes, U.S. District Court for the Northern District of Georgia. After the clerkship, he plans to enter private practice with Troutman Sanders in Atlanta. Broder also received several other awards at the ceremony. President Staten Bitting (left) was present at the ceremony to wish Karl the best on behalf of the members of GDLA.

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Member & Legal News

Member News

C. Wade McGuffey, Edward H. Lindsey, and **Charles R. Beans**, of the Atlanta office of *Goodman McGuffey Lindsey & Johnson*, and **Peter D. Muller** of the Savannah office have been selected as 2010 Georgia Super Lawyers. **Robert A. Luskin** has been selected as a 2010 Rising Star.

Carrie L. Christie of *Rutherford & Christie* announces the firm has been certified as a Women's Business Enterprise for the seventh consecutive year. The firm was also honored to be the only law firm named by DiversityBusiness.com to its 10th annual ranking of "Top 50 Women Owned Businesses in Georgia" and "Top 100 Diversity Owned Businesses in Georgia."

Thompson, Slagle & Hannan is pleased to announce that the firm and **Michael Hannan** were recently recognized in the nationwide Corporate Counsel Edition of Super Lawyers in the field of Employee Benefits/ERISA.

Taylor Odachowski Schmidt & Crossland is pleased to announce that **Philip R. Taylor** has resumed his mediation practice. Phil is a registered mediator with the Georgia Office of Dispute Resolution. He can be contacted at ptaylor@tosclaw.com. The firm also announces the opening of offices in Atlanta and Tifton.

Bob Persons of *Smith Moore Leatherwood* has joined the panel of neutrals at *BAY Mediation*. Bob was an Adjunct Professor of Insurance Law at the University of Georgia School of Law in 2008 and 2009, and remains a co-author of West's nationally distributed two volume treatise entitled Excess Liability (*4th ed. 1999*). He has been a GDLA member for over 30 years.

Gregory T. Presmanes, partner with *Bovis Kyle & Burch*, has been inducted as a fellow of the College of Workers' Compensation Lawyers, is Chair of the Atlanta Claims Association's Workers' Compensation Section, and vice president and incoming president of the Atlanta Bar Association's Workers' Compensation Section. He hosted the annual Atlanta Claims Association's Workers' Compensation seminar on February 4, speaking on settlement evaluations, and the Atlanta Bar's annual advanced workers' comp seminar on February 19. He was a speaker on intoxication defense at the March 2010 American Bar Association convention in Phoenix. He was also selected as a 2010 Georgia Super Lawyer.

Hawkins, Parnell & Thackston announces the opening of two new offices in St. Louis, Missouri, and Austin, Texas. The firm's St. Louis office will continue to defend its clients in a wide range of litigation, with a focus on asbestos-related product liability and toxic tort cases. Six lawyers, formerly with the toxic tort group of Brown McCarroll, opened the Austin office.

Cases of Note

During the first quarter of 2010, GDLA board member **Matthew G. Moffett** of *Gray, Rust, St. Amand, Moffett & Brieske* successfully tried four cases to defense verdict. Two involved wrongful death actions based on negligent security where each plaintiff's attorney asked the jury to award damages between $4 and $5 million. Another involved an MVA wrongful death in a crosswalk where the plaintiff's attorney asked the jury to award damages of almost $5 million. And, another involved an alleged sexual assault and continuing seduction of a minor by a church youth minister where the plaintiff's attorney asked the jury to award $1 million. Moffett's associate **Wayne Melnick** assisted at trial on three of these cases.

R. Scott Masterson of *Lewis Brisbois Bisgaard & Smith* and a colleague successfully defended an alleged toxic tort exposure before a Camden County jury, receiving a unanimous verdict after less than an hour of deliberation. The plaintiff had sought $3 million alleging permanent disability after suffering irreparable pulmonary injuries due to a chlorine dioxide exposure while working as an independent contractor for Durango Georgia Paper Company. The defense focused on the plaintiff's significant smoking history, the plaintiff's comparative fault in failing to utilize his escape respirator, and the lack of objective findings of exposure during diagnostic medical examinations following the alleged event.

In Memoriam

GDLA mourns the passing of **Ferdinand C. Buckley,** age 84, who served as GDLA's third President from 1970-71.

Ferdinand was born and grew up in Charleston, South Carolina, attended the College of Charleston and obtained his law degree from the University of Michigan Law School. He settled in Atlanta and practiced law for 35 years. He went to work for Neely, Marshall & Greene which became Greene, Buckley, Jones & McQueen. He finished his career as of counsel at Buckley & Klein.

He was a veteran of World War II, serving as a sergeant and tail gunner on B-25s and B-26s, flying missions over Germany and Italy. He flew under the cover of the Tuskegee Airmen, which forever affected his views on the need for equality among the races.

On May 1, 1954 he married Marianne Gillen. They had five children, and remained married and inseparable until his death.

Ferd was on the Board of Directors of the Northside Hospital Authority. He was also involved in the formation of the North Fulton Child Development Center. He ran for the state house of representatives and lost, allowing him to focus his attention on his family and his passion, human rights issues.

He was the guardian ad litem to

Continued on next page

Continued from prior page

the unborn child in *Doe v. Bolton*. He represented and helped free Cuban detainees in Atlanta. He represented death row inmates, believing the death penalty was immoral. He marched in Forsyth County to protest housing discrimination and the presence of the Ku Klux Klan.

Even after his retirement, he and his wife were arrested together for marching in protest of the School of the Americas because of their concern for human rights.

As a lawyer he represented the very wealthy and the very poor. He believed that no person should be denied legal representation because they lacked financial resource. He believed in working to change the law when he felt it was wrong. He resigned from the Atlanta Lawyers Club when it denied two African-American applicants, Maynard Jackson and William Alexander. Shortly thereafter, Lawyers Club changed its membership rules.

Buckley was eloquent, compassionate and humble. He was an advocate for the voiceless, the disenfranchised and the weak; a man who "walked with kings but never lost the common touch." ❖

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OSHA Multi-Employer Policy

By Eugenia Kennedy
Exponent, Inc.

The Occupation Safety and Health Administration (OSHA) has a policy, applicable to all industries, which allows multiple employers on a worksite to be cited for a hazardous condition that violates an OSHA standard. The policy can be applied to all worksites where two or more entities are performing tasks that will contribute to the completion of a common project, including commercial and residential construction, manufacturing, and other sites. The policy, which can be found on the OSHA website, www.osha.gov, is referenced as CPL 02-00-124, *Multi-Employer Citation Policy*. The most recent version is dated December 10, 1999. According to this policy, an employer may be cited by OSHA if it satisfies the policy's definitions of the Creating, Exposing, Correcting and/or Controlling Employer, and if it did not take the proper steps to address the hazardous condition.

In general, the OSHA regulations require that an employer provide a safe work place for its own employees. In accordance with Section 5(a)(1) of the Occupational Safety and Health Act, employers are required to furnish its employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . ."

However, OSHA's policy CPL-02-00-124 extends that responsibility to not only the company's own employees but also to the employees of other employers. The policy allows OSHA to cite other employers on the worksite *even when the employees of those other employers were not exposed* to the hazard that violates an OSHA standard. An example is provided below in which three employers are all working on the same demolition worksite.

> ***Employer A*** places a piece of plywood over a floor opening on the third floor of a demolition worksite. The plywood is not in compliance with OSHA standards found in 29 C.F.R. 1926.502(i) regarding strength, displacement prevention, or labeling. The general contractor of the site, ***Employer B***, performs regular inspections of the area and notices the plywood covering the floor opening. However, he takes no action to provide a proper cover to the floor opening. Similarly, the foreman of ***Employer C*** recognizes that the unsecured plywood is covering a floor opening and takes no actions. Employer C's forklift operator does not realize that the plywood is covering a floor opening, and he drives the forklift over the opening. The plywood breaks, and the forklift operator falls into the opening and is injured.
>
> Under the Multi-Employer Citation Policy, Employer A is cited as the Creating Employer; Employer C is cited as the Exposing Employer, and Employer B is cited as the Controlling Employer.

This policy, although revised throughout the years, has been in place since the early 1970's. The current policy describes the procedure as a two-step process. The OSHA Compliance Officer must first determine whether the employer has responsibilities with respects to OSHA requirements. This is based on the employer's role at the worksite. According to OSHA, possible roles can be categorized as Creating, Exposing, Correcting and/or Controlling. If the employer satisfied the definition given in the Policy, the second step is to determine whether the employer took adequate steps to address the hazard.

The following provides a description of the policy and information regarding a challenge and recent decision associated with the policy.

Policy Description

The Multi-Employer Citation Policy is referenced in the OSHA Field Operation Manual. The current version was reaffirmed in the January 9, 2009 Manual. As stated in the directive, on multi-employer worksites in all industry sectors, more than the one employer may be cited for a hazardous condition that violates an OSHA standard. The instruction to the Compliance Officer follows a two-step process as defined below.

- **Step One – Definition.** The first step is to determine whether the employer is a Creating, Exposing, Correcting, or Controlling employer as defined by the directive. An employer may have more than one role. Once the role is determined, Step Two determines whether a citation is appropriate.
- **Step Two – Actions Taken**. If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two is to determine if the employer's actions were sufficient to meet these obligations. The extent of the actions required of employers varies based on the applicable category.

Note, however, that multi-employers cannot be cited under the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act. OSHA citations under this clause occur when a hazardous condition exists and there is no specific OSHA standard that addresses that condition.

The following provides a description and examples of the various categories.

The Creating Employer

OSHA defines the Creating Employer as, "The employer that caused a hazardous condition that violates an OSHA standard." Because OSHA states simply that an Employer must not allow violative conditions to exist on a worksite, an employer is cited for creating such conditions even if the only persons exposed to the hazard

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Mass Torts Case Law Update

Offers of Judgment Statute Held Constitutional

By Jennifer M. Techman
Evert Weathersby Houff, Atlanta
Mass Torts SLC Co-chairperson

Smith v. Salon Baptiste
S09A1543, March 15, 2010

In a landmark case addressing one of the cornerstones of the Tort Reform Act of 2005, a divided Georgia Supreme Court upheld the validity of O.C.G.A. §9-11-68, the statute which creates offers of judgment and settlement, against constitutional attacks under the theories of "right of access" and uniformity of laws. However, the court did not rule upon the propriety of applying the current version of the statute in suits which were filed while the former version was in existence.

In *Smith*, the plaintiffs had filed a defamation claim based on statements by the defendant broadcasters. The defendants offered to settle for $5,000, and the offer was deemed rejected under §9-11-68(c) when the plaintiffs did not respond. After the trial court granted the defendants' motion for summary judgment as to all claims, the defendants moved for attorney's fees under §9-11-68(b)(1). The trial court denied the motion and found the statute unconstitutional on the grounds that it impeded access to the courts and also violated the uniformity clause of the Georgia Constitution. The Georgia Supreme Court reversed, finding that §9-11-68 does not impede court access and is not a special law in violation of the uniformity clause.

1. Right of Access

"'[T]here is no express constitutional "right of access to the courts" under the Georgia Constitution.'" (citing *Couch v. Parker*, 280 Ga. 580 (2006)). Instead, the Georgia Constitution guarantees a right to choose between self-representation and representation by counsel: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." Ga. Const. of 1983 Art. I. Sec. I. Par XII.

As the court noted, "[T]he history of the current version of the constitutional provision . . . 'indicate[s] that the sole purpose underlying the revision and adoption of Art. I., Sec. I. Par. XII was to define and protect the right of an individual to represent himself in the court of this state.'" (citing *Nelms v. Georgian Manor Condominium Assn.*, 253 Ga. 410 (1984)) . "*Nelms* compared the Georgia constitutional provision to the access to court provisions of other states, which, unlike the Georgia provision, expressly 'provide that all courts shall be open to every person for the redress of an injury done him[.]'" "Moreover, §9-11-68(b)(1) does not deny litigants access to the courts, but simply sets forth certain circumstances under which attorney's fees may be recoverable."

The trial court also had deemed §9-11-68 unconstitutional in violation of Art. I. Sec. I. Par XII, because the statute allows recovery of attorney's fees without the prerequisites required in O.C.G.A. §§9-15-14 and 13-6-11. "However there is nothing in Art I. Sec. I Par XII or any other provision of the Georgia Constitution, which mandates that attorney's fees can only be awarded pursuant to those two code sections. Rather, in Georgia, '[a]ttorney's fees are recoverable . . . where authorized by some statutory provision or by contract.'"

2. Uniformity clause

"The trial court further [had] ruled that O.C.G.A. §9-11-68 is a special law that violates the uniformity clause of the Georgia Constitution, because it applies only to tort claims, not all civil cases." Georgia's uniformity clause states, "Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law . . . ." Ga. Const. of 1983, Art. III, Sec. VI. Par. IV(a).

Reversing the trial court, the Georgia Supreme Court held that "O.C.G.A. §9-11-68 is not a special law affecting only a limited activity in a specific industry during a limited time frame." Because the statute applies uniformly to all tort cases statewide, it is a general law. "The clear purpose of this general law is to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation. . . . This is certainly a legitimate legislative purpose, consistent with this State's 'strong public policy of encouraging negotiations and settlements.'" (citing *Edelkind v. Boudreaux*, 271 Ga. 314, 317 (1999)).

At the time that the plaintiff filed the suit, the old version of O.C.G.A. §9-11-68 was in effect, and the new version had been implemented by the time that the defendants filed their motion for fees. Although the Georgia Supreme Court had previously held in *Fowler Properties, Inc. v. Dowland*, 282 Ga. 76 (2007) that the statute cannot be applied retroactively, the *Smith* court refused to hold that it would be unconstitutional to apply the new version, because the plaintiff had not raised that ground in the trial court and had not obtained a distinct ruling upon it. ❖

Product Liability Case Law Update

By Jeffrey S. Bazinet
Peters & Monyak, Atlanta
Product Liability SLC Chairperson

Ford Motor Co. v. Reese
300 Ga. App. 82
Sept. 16, 2009

Reese involved a wrongful death claim arising from a read-end collision in which a dump truck struck a 1994 Ford Tempo. The plaintiffs contended that the decedent's seatback collapsed due to a defective design, thereby increasing the severity of the decedent's injuries, and that Ford negligently failed to recall the vehicle. The trial court charged the jury that Georgia law required auto manufacturers to recall products when the manufacturer knows, or reasonably should know, of a danger arising from the product, even if the product is not defective.

The court of appeals reversed, holding that, absent special circumstances, a manufacturer does not have a common law duty to recall a product after the product has left the manufacturer's control. The court reasoned that "a manufacturer's duty to implement alternative safer designs is limited to the time the product is manufactured, not months or years later when technology or knowledge may have changed," and found that "[a]ny other rule would render a manufacturer a perpetual insurer of the safety of its products, contrary to established Georgia law." The court also reasoned that, because the General Assembly had imposed on manufacturers a continuing duty to warn under O.C.G.A. § 51-1-11(c), the General Assembly knew how to impose such a duty, and the General Assembly's declination to impose a continuing duty to recall was evidence that the General Assembly did not intend to the duty to exist.

Bagnell v. Ford Motor Company
297 Ga. App. 835
April 16, 2009

Bagnell arose out of a one-vehicle incident that occurred in July 2001 Texas. The driver was a Georgia resident who was driving several persons from Houston, Texas to Atlanta. The subject vehicle was a 1991 Ford Aerostar van. The trial court applied Georgia's ten-year products liability statute of repose to some of the plaintiffs' claims.

After a defense verdict, the plaintiffs appealed, contending that the trial court erred by failing to apply Texas' fifteen-year statute of repose. The court of appeals found Georgia's products liability statute of repose to be procedural and applied Georgia's choice of law

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Construction Case Law Update

By Kenneth Sisco
Hawkins & Parnell, Atlanta
Construction SLC Chairperson

Cendent Mobility Financial Corp. v. Asuamah
285 Ga. 818 (2009)

The Georgia Supreme Court refused to extend the rule that the defense of *caveat emptor* does not apply to a purchaser's claim of negligent construction against the builder/seller of a home regarding latent construction defects of which the purchaser/homeowner did not know and in the exercise of ordinary care would not have discovered, if the defects either were known to the builder/seller or in the exercise of ordinary care would have been discovered by the builder/seller.

In *Asuamah*, a purchaser had attempted to extend this exception for claims against a seller who was not the builder of the home, alleging that the seller had negligently performed repairs. The court held that because the defendant was the seller of a previously-owned home and not the builder/seller of the home, *caveat emptor* applied, and the trial court had not erred in granting it summary judgment.

Rosenberg v. Falling Water, Inc.
302 Ga. App. 78 (2009)

In *Rosenberg*, the court of appeals clarified that Georgia's statute of repose, O.C.G.A. § 9-3-51, is not tolled by fraud.

The case involved a claim by a homeowner against a deck builder. The homeowner's deck collapsed 11 years after it had been constructed. The homeowner argued that the original builder should be equitably estopped from asserting the statute of repose to bar his claims, due to the builder's alleged fraud in covering up its alleged negligence when the deck was constructed. The court of appeals held that, by definition, a statute of ultimate repose cannot be tolled to permit actions to be brought for injuries which occur after the statutory period expired. Therefore, the court held that the homeowner's claims against the builder were barred by the statute of repose.

America's Home Place, Inc. v. Cassidy
301 Ga. App. 233 (2009)

This matter once again illustrated the difficult standard that must be met in order to vacate an arbitration award. A homeowner moved to vacate an arbitration award in favor of a homebuilder on the grounds of manifest disregard of the law, under O.C.G.A. § 9-9-13(b)(5). The court of appeals reiterated that for manifest disregard of the law to apply, the disregard must be both evident and intentional. An arbitrator who incorrectly interprets the law has not manifestly disregarded it and has, instead, simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and completely ignore it.

In *Cassidy*, the homeowners challenged the arbitrator's finding that the builder had substantially completed the home, pointing out that no occupancy permit had been issued, and arguing that the arbitrator had ignored the contract language which required an occupancy permit for substantial completion and for their occupying the home.

The court found that, although an arbitrator cannot ignore the plain language of the contract, " 'courts must not decide the rightness or wrongness of the arbitrator's contract interpretation, only whether the decision draws its essence from the contract.' "

The court found that the contract required payment to be made upon the earliest of substantial completion or the date of certificate of occupancy. Accordingly, it found that under the terms of the contract, substantial completion did not depend upon the issuance of the certificate of occupancy and could be considered to have occurred before the certificate of occupancy was issued. The court further noted that the contract did not define "beneficial use and occupancy of the home" as a requirement for substantial completion, which made that phrase subject to interpretation by the arbitrator. Therefor, the court found that the homeowners failed to establish any grounds for vacating the arbitration award.

Bailey v. Annistown Road Baptist Church, Inc.
301 Ga. App. 677 (2009)

This is a storm water nuisance and trespass case. The plaintiff property owners filed suit against a neighboring church and the county for trespass and nuisance. The court of appeals clarified Georgia law on several issues regarding storm water cases.

The defendant church argued on appeal that the trial court had erred in failing to grant it a directed verdict or a judgment notwithstanding the verdict, because the evidence had shown that the church was an innocent trespasser as a matter of law and that the court should have charged on that defense.

The court of appeals held that an innocent trespass occurs when there is an unintentional and non-negligent entry into another's land, even if it causes harm to the possessor, and that the innocent trespasser defense protects individuals who enter the land under the mistaken belief that it is permissible to do so. Here, however, the court found that there was no evidence that the church had thought it had the right to let excess storm water run onto the plaintiff's property, and therefore the trial court had properly denied the motion for directed verdict.

The church contended that it should have received a JNOV because there was no evidence of negligence or proximate cause linking it to the plaintiff's injuries.

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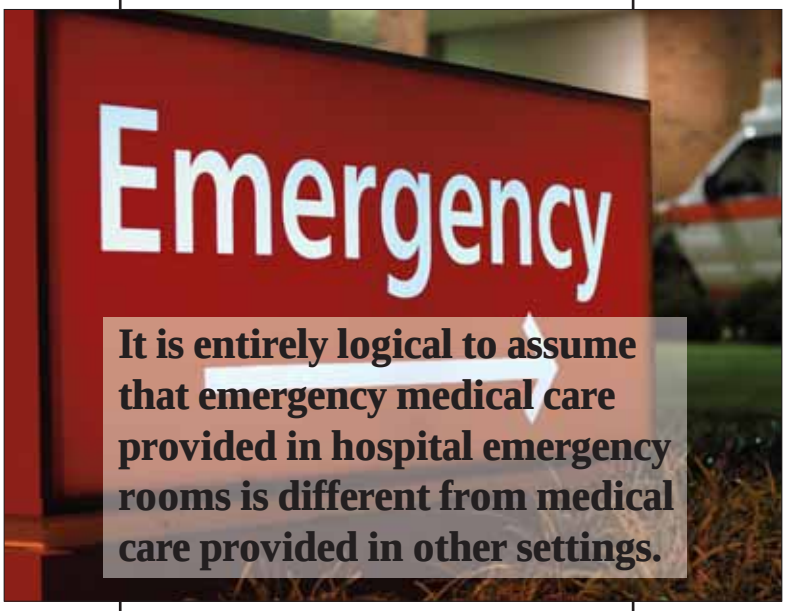
Professional Liability Case Law Update

By Andrew M. Wilkes
Oliver Maner, Savannah
Professional Liability SLC Chair

Gliemmo v. Cousineau
S09A1807, 2010 Ga. LEXIS 218 (March 15, 2010).

In *Gliemmo*, a divided Georgia Supreme Court rejected a constitutional challenge to that portion of Senate Bill 3 that elevated the burden of proof and lowered the standard of care required by physicians and medical providers who administer emergency medical care.

Justice Carley, writing for a four-person majority, upheld the constitutionality of O.C.G.A. § 51-1-29.5(c) against several challenges to the statute. The majority first held that O.C.G.A. § 51-1-29.5(c) "is not a special law affecting only a limited activity in a specific industry during a limited time frame. Rather . . . it is a general law because it operates uniformly upon all health care liability claims arising from emergency medical care as provided in the statute, and . . . that classification of the designated class is neither arbitrary nor unreasonable."



In response to a challenge that the statute violated the Georgia equal protection guarantee, the majority held, "Since the code section 'does not disadvantage a suspect class or interfere with the exercise of a fundamental right . . . it need only bear a reasonable relationship to a legitimate state purpose.'" The majority cited the enacting legislation within the Tort Reform Act of 2005 and held, "Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are certainly legitimate legislative purposes.

Furthermore, it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings, and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will achieve those legitimate legislative goals." The majority noted that "the equal protection argument made by Appellants 'boils down to nothing more than [a] claim that the General Assembly has made a bad policy judgment . . . and [such a claim] should be directed to the General Assembly and the Governor rather than this Court.'"

Finally, the majority held that the term "gross negligence" has a commonly understood meaning as defined by O.C.G.A. § 51-1-4, is not unconstitutionally vague, and therefore is not violative of due process.

The majority declined to consider the constitutional vagueness challenge to the definition of "emergency medical care" set forth in O.C.G.A. § 51-1-29.5(a)(5), because this issue was not properly raised in the trial court or addressed by the trial judge. Only time will tell whether the court's silence as to this narrow issue leaves open the possibility of the statute being found unconstitutional in the future. Certainly not all medical care dispensed by health care providers in a hospital emergency department, obstetrical unit, or surgical suite could be deemed "emergency medical care." However, the majority does not seem to allow for this reasoning based upon its conclusion that "it is entirely logical to assume that emergency medical care provided in a hospital emergency room is different from medical care provided in other settings, and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals."

Justice Benham, along with C.J. Hunstein and J.J. Thompson, authored the dissent and argued that the statute was unconstitutional on two separate grounds.

The dissent concluded that O.C.G.A. § 51-1-29.5(c) is a special law that regulates subject matter already addressed by a general law: "Here, the General Assembly has already enacted O.C.G.A. § 51-1-27, a general law which states the standard of care in medical malpractice cases to be 'reasonable care.' Because O.C.G.A. § 51-1-29.5(c) is a special law that regulates the same subject matter as O.C.G.A. § 51-1-27, it is unconstitutional under the Georgia Constitution of 1983."

The dissent further opined that the statute failed to pass constitutional muster because the statute is a special law, and its application results in an arbitrary and unreasonable classification. The dissent noted that "all healthcare providers," not merely those who dispense emergency medical care in a hospital emergency room, are incurring difficulty in locating affordable liability insurance. As written, the statute is arbitrary because it applies only to emer-

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Young Lawyers Column

Get Out There! Young Lawyers and Business Development

By Eric Jenniges and Kathy So
Bovis, Kyle & Burch, Atlanta

The one question that many young lawyers have is, "How do I get clients?" Most of us don't have any personal relationships with insurance adjusters, in-house counsel, or those in a position to bring us repeat business at the outset of our careers.

Then there is the struggle of keeping up with billable hours while maintaining some semblance of a social life. It seems almost impossible to add the daunting task of developing business.

While finding the time can be difficult, we've gathered from our experienced lawyers the top "to do's" and "not to do's" in getting clients.

Overwhelmingly, the most repeated advice from the "big dogs" is to "Get Out There!" Top recommendations include:

- **Join organizations like GDLA** or State Bar organizations and — more importantly—participate in those organizations!
- **Always say "yes" to speaking and writing** engagements. In fact, make a special effort to seek out speaking and writing engagements.
- **Follow up with contacts** you meet through social or business engagements. Call, travel to see in person, or have lunch with them.
- **Volunteer** your time. Take on a pro bono case. Join a non-profit organization that is associated with your practice.
- **Produce quality work** for your current clients.

While getting out there is essential to developing business, most experienced lawyers advise not to waste your time with mass emails or cold calling potential clients.

Do more than giving gifts or tickets to clients. As most of us have already heard, building a personal relationship with each client is the key to maintaining repeat business.

Now, all we have to do is find the time to get out there!

As always, if you have any comments, questions, or article ideas, please email Eric Jenniges emj@boviskyle.com or Kathy So kcs@boviskyle.com.

Winter Board Meeting Highlights

The GDLA Board of Directors convened at the offices of Hawkins & Parnell in Atlanta on February 5, 2010, for its Winter Meeting. Following are highlights:

In attendance were President Staten Bitting of Fulcher Hagler; Executive Vice President Bubba Hughes of Callaway, Braun, Riddle & Hughes; Secretary-Treasurer Mel Haas of Constangy Brooks & Smith; Past Presidents and Directors Sally Akins of Ellis Painter Ratterree & Adams, Joe Chambless, Evelyn Fletcher Davis of Hawkins & Parnell, Ted Freeman of Freeman Mathis & Gary, Jo Jagor of Hall Booth Smith & Slover, Kirby Mason of Hunter Maclean, Walter McClelland of Mabry & McClelland, Matt Moffett of Gray Rust St. Amand Moffett & Brieske, Hall McKinley of Drew Eckl & Farnham, Peter Muller of Goodman McGuffey Lindsey & Johnson, Chris Parker of Miller & Martin, Lynn Roberson of Swift Currie McGhee & Hiers, Jimmy Singer of Bovis Kyle & Burch, Bob Travis of Bryan Cave, Jeff Ward of Gilbert Harrell Sumerford & Martin, Jamie Weston of Hull, Towill Norman Barrett & Salley, Bruce Welch of Hawkins & Parnell; and Executive Director Jennifer Davis.

Jennifer Davis reported GDLA currently has 551 members. The Board approved the applications of 37 new members, 20 of whom received a free membership through Trial Academy.

The Board discussed considering a dues discount for additional members from the same firm. Membership Recruitment and Retention chair Chris Parker will explore what other states do.

Educational Committee chair Matt Moffett said we are exploring webinar vendors. One suggested topic was a legislative overview when the session concludes.

Young Lawyers co-chair Jo Jagor discussed plans to hold a happy hour for young lawyers. The Board discussed formally establishing a Young Lawyers Section similar to Alabama's model, and will address it again at the Spring Meeting after reviewing our bylaws.

Trial Academy chair Lynn Roberson reported the 2010 edition was a great success with 42 students, the most ever, and 10 faculty members. The position of vice chair was discussed to formalize the transition in leadership of this important program.

The Board discussed the need to invigorate the Substantive Law Committees (SLC) and what their role should be; it was noted many do not have a vice chair. Suggestions included asking SLCs to issue monthly blast e-mail case updates and to plan at least one webinar.

Website co-chairs Kirby Mason

Continued on page 19

Trial Academy Attracts Record Number

A record number of lawyers from across the state attended the Melburne D. "Mac" McLendon Trial Academy at Callaway Gardens, January 21-23, 2010.

The 42 students were guided through the two-and-a-half day experience by a distinguished faculty, led by Trial Academy Chair Lynn M. Roberson of Swift Currie McGhee & Hiers. The 2010 faculty included: R. Wayne Bond, Womble Carlyle; Jerry A. Buchanan, Buchanan & Land; William T. Casey, Jr., Hicks Casey & Foster; Robert R. "Rusty" Gunn II, Martin Snow; William D. Harrison, Mozley Finlayson & Loggins; James S. "Sandy" Owens, Jr., Nall & Miller; W. Ray Persons, King & Spalding; Jane C. Taylor, Scrudder Bass Quillian Horlock Taylor & Lazarus; Richard H. Willis, Bowman and Brooke.

Trial Academy employs a modified mock trial format, covering topics including: cross-examining fact witnesses and expert witnesses, conducting a direct examination of your client and expert witnesses, using rules of evidence at trial, basic elements of an opening statement, conducting proper voir dire, effectively using demonstrative evidence, dynamics of a closing argument for the defense, and handling ethical dilemmas. Students were divided into defense and plaintiff's teams; each received a case to study beforehand to prepare aspects of the trial. Following faculty demonstrations, students dispersed into breakout groups to work on their skills.

Faculty and students also had time to network during meals, breaks, and a cocktail reception and group dinner on Thursday evening.

PHOTOS: 1. Sandy Owens and Bill Casey; 2. Trial Academy students served as jurors during a mock voir dire; 3. (front) Adam Nelson, Kayla Cooper, (back) Quentin Marlin and Stephen Delk; 4. Whitfield Caughman, Xavier Balderas, Yoon Ettinger and Ariel Denbo Zion; 5. Sally Bright, Lynn Roberson, Billy Harrison, Brett Miller, Molly O'Connor; 6. Jerry Buchanan and Jane Taylor; 7. Ray Persons; 8. Amanda Rodman Smith; 9. Rusty Gunn and Moses Kim.

Product Liability Case Law Update

Continued from page 11

rules to uphold the trial court on this issue (the court of appeals then reversed on an evidentiary issue involving Texas law).

In deciding whether Georgia's products liability statute of repose is substantive or procedural, the court of appeals relied on cases involving the retrospective application of statutes of repose. The court reasoned that because the courts deciding those cases had found that "statutes of repose look only to remedy and not to substantive rights," the same reasoning should apply to choice of law cases. Applying the lex loci delecti principle (under which the law of the forum controls procedure), the court of appeals held that Georgia's statute of repose should apply. ❖

Winter Board Meeting Highlights

Continued from page 17

and Dave Nelson were congratulated on the newly redesigned website and anyone with additional information or links to be considered should refer those to Jennifer Davis. We are exploring taking credit cards online as payment for dues, meeting registrations, etc. The Board confirmed the blast e-mail system should not be used for employment or personal matters.

Judicial Relations Committee chair Bob Travis solicited suggestions for improving how we help the Judicial Nominating Commission vet candidates for judgeships. The Board identified members who may be able to help in specific circuits.

Law Journal editor Ted Freeman announced we will have 10 to 12 articles in this edition.

Newsletter editor Peter Muller shared the excellent reviews received for the most recent edition. The Board determined it was important to preserve providing hard copies vs. online only.

Sponsorship chair Sally Akins announced we had secured the largest number of sponsors – and therefore income – in our history.

DRI Southeastern Regional Director Evelyn Fletcher Davis announced the DRI Annual Meeting is October 20 - 23, 2010 in San Diego. CLE programming will focus on generational differences, alternative billing arrangements and woman attorneys programs.

Amicus Brief chair Jamie Weston discussed our brief on apportionment without contributory fault of the plaintiff. There were several additional briefs requested on issues including hospitalization liens and ex parte communications with physicians.

President Bitting reported the Long Range Planning Committee is still in its development stages and the Board is considering various service projects.

Secretary-Treasurer Mel Haas reviewed the balance sheet and profit and loss statement for year ending 2009. ❖

GDLA Hits the Slopes for Joint FDLA/ADLA CLE

GDLA teamed up with the Alabama and Florida Defense Lawyers for a joint Winter Seminar in Big Sky, Montana over MLK weekend, January 13-18, 2010. Pictured above with George Major, are (l-r) his wife Laura, Lynn Roberson and Evelyn Fletcher Davis. Roberson (pictured right) was a featured CLE speaker on ethics at trial. The DRI Southeast Regional Meeting was also held in conjunction with the seminar. After the CLE seminar, some attendees hit the slopes while others took a snowmobile tour of Yellowstone to see its abundant wildlife and Old Faithful. GDLA, ADLA and FDLA enjoyed a group dinner on Friday evening, and a wine and cheese reception on Saturday. ❖

Board Convenes in Savannah for Spring Meeting

In conjunction with the judicial reception held the evening before, the GDLA Board of Directors convened at the offices of Ellis Painter Ratterree & Adams in Savannah on April 23, 2010, for its Spring Meeting. Following are highlights:

In attendance were President Staten Bitting of Fulcher Hagler; Executive Vice President Bubba Hughes of Callaway, Braun, Riddle & Hughes; Secretary-Treasurer Mel Haas of Constangy Brooks & Smith; Past Presidents and Directors Sally Akins of Ellis Painter Ratterree & Adams, Evelyn Fletcher Davis of Hawkins & Parnell, George Duncan of Duncan & Adair, Salty Forbes of Forbes Foster & Pool, Warner Fox of Hawkins & Parnell, Ted Freeman of Freeman Mathis & Gary, Jo Jagor of Hall Booth Smith & Slover, Kirby Mason of Hunter Maclean, Hall McKinley of Drew Eckl & Farnham, Matt Moffett of Gray Rust St. Amand Moffett & Brieske, Peter Muller of Goodman McGuffey Lindsey & Johnson, Paul Painter of Ellis Painter Ratterree & Adams, Chris Parker of Miller & Martin, Lynn Roberson of Swift Currie McGhee & Hiers, Jeff Ward of Gilbert Harrell Sumerford & Martin, Jamie Weston of Hull, Towill Norman Barrett & Salley, Jason Willcox of Moore Clarke DuVall & Rodgers; and Executive Director Jennifer Davis.

Special guest Don James, who has served as GDLA's CPA for many years, addressed the group and expressed that GDLA's shift to QuickBooks has improved our tax reporting process.

Jennifer Davis reported GDLA currently has 589 members. The Board approved the applications of eight new members.

Membership Recruitment and Retention chair Chris Parker presented his research on dues structures in Alabama, Florida, South Carolina and Tennessee. At the upcoming Fall Meeting, he will make recommendations about possible changes to our model to allow discounts for multiple members from the same firm.

Education Committee chair Matt Moffett mentioned the upcoming FORCON sponsored CLE seminar, Advances in Accident Reconstruction, set for May 5 at Maggiano's Buckhead. We will approach FORCON to see if they would like to mold that program into our first webinar to reach a broader, statewide audience.

Young Lawyers co-chair Jo Jagor announced we will host our first mixer at TAP in Atlanta on May 13. President Bitting discussed the possibility of formalizing a Young Lawyers Section with officers and bylaws; but the Board decided to first start it as a committee to gauge interest. Jason Willcox, who will chair the next Depo Boot Camp, is exploring dates and possibly changing the fact pattern.

Trial Academy chair Lynn Roberson reported we are set for January 19-21, 2011 at Callaway.

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GDLA Honors Judiciary in Atlanta and Savannah

Through the years, GDLA has hosted receptions honoring the judiciary in Atlanta, Savannah, Macon and Augusta to give lawyers and judges an opportunity to interact outside the courtroom setting.

Pictured at the Atlanta event are:
1. Fulton State Court Judge Susan Edlein and Fulton Superior Court Judge Wendy Shoob; 2. Peter Muller and Supreme Court Justice David Nahmias; 3. Doug Wilde and Court of Appeals Judge Sara Doyle; 4. Past President Bruce Welch and Lara Percifield; 5. Amanda Matthews and Laura Eschleman; 6. Fulton Superior Court Judge Mel Westmoreland and Jimmy Scarbrough; 7. Fulton Superior Court Judge John Goger and Steve Mooney; 8. Mike Goldman, DeKalb State Court Judge Al Wong and Chris Parker; 9. Shane Keith, Robin Hein and 11th Circuit Court of Appeals Judge Stanley Birch.

See opposite page for photos from the Savannah reception.

Enjoying the Bohemian Hotel's rooftop view of Savannah at the judicial reception on April 23 are: 1. Lynn Roberson with Past Presidents Salty Forbes and George Duncan; 2. Tracie Smith and Eastern Circuit Superior Court Judge Penny Haas Freesemann; 3. Eastern Circuit Superior Court Judge Michael Karpf and Sally Akins. 4. Past President Paul Painter and Eastern Circuit Superior Court Judge John Morse; 5. President Staten Bitting and State Board of Workers' Compensation Judge Leesa Bohler; 6. Ben Perkins and Joe Brennan. 7. Chatham Probate Court Judge Harris Lewis and Chatham State Court Judge Ronald Ginsberg.

Board Convenes in Savannah for Spring Meeting

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Board members were encouraged by Website co-chair Kirby Mason to continue giving feedback and content ideas.

The Board discussed GDLA's role in assisting the Judicial Nominating Commission and identified members statewide who will be asked to help Judicial Relations chair Bob Travis vet candidates.

The Board discussed the frequency of judicial receptions, and decided the next one should be in Augusta.

Law Journal editor Ted Freeman shared a prototype of the new design. All articles have been received and we are on track to send it to members and judges at the end of May. We are working with Westlaw to have them index the *Law Journal*, and will draft a copyright transference for authors. FDLA does this and has earned some revenue from it.

Sponsorships chair Sally Akins reported we had gained two new sponsors since the last report, making this our most profitable year yet.

Amicus Committee chair Jamie Weston and President Staten Bitting discussed the challenges associated with finding members to draft amicus briefs when they are requested. Evelyn Fletcher Davis volunteered an associate to draft one on *State Farm v. Adams*.

The Board discussed setting up a PayPal account to take credit cards and offer online processing of dues. Jennifer Davis will explore its feasibility in time for this dues cycle. The Board also voted to offer the option to donate to the Dick Richardson scholarship fund on the dues notice.

Salty Forbes noted, and the Board approved, changing the membership application to clarify applicants will be voted on by the Board. ❖

detectable concentrations of less than 1 ppm. Hydrogen sulfide and carbonyl sulfide can produce a rotten egg odor, and in the presence of wet air, both can cause corrosion of copper and other metals. The release of hydrogen sulfide and carbonyl sulfide from CDW may explain the reports of visible dark corrosion of copper HVAC condenser coil components and corrosion of other copper materials where micro-condensation takes place, *e.g.*, cold water copper plumbing lines, refrigerator compressor lines, exposed copper wiring. These early studies have not been able to confirm that the presence of CDW caused the health effects which were reported by some homeowners.

As of February 17, 2010, the CPSC had received 2,941 reports from residents in 39 states, Puerto Rico, and the District of Columbia who believe their health symptoms or the corrosion of certain metal components in their homes is related to the presence of CDW. The CPSC reported that more than 90% of the complaints have been from six states and include homeowners from Florida (59%), Louisiana (21%), Mississippi (6%), Alabama (5%) and Virginia (4%).

On December 2, 2009 Congress approved Concurrent Resolution 197, "encouraging banks and mortgage servicers to work with families affected by contaminated drywall and to consider adjustments to payment schedules on their home mortgages that take into account the financial burdens of responding to the presence of such drywall." The resolution encourages temporary forbearance on mortgage payments to help families afford the costs of additional residency during periods of repair. As of February 23, 2010, the first case in the multi-district litigation (MDL), involving seven Virginia plaintiffs whose homes had CDW, was heard by US District Court Judge Eldon Fallon in the Eastern District of Louisiana. It is considered a test case and is expected to set a minimum threshold for fixing homes where defective drywall was installed. According to reports, responsibility for the defective drywall is not at issue in this case, because a default judgment has already been issued against the manufacturer for failing to respond to lawsuits.

Investigating CDW Claims

Investigations into the presence of CDW in houses, condominiums, townhouses, hotels, and other related buildings are just beginning to emerge. How do you approach a CDW investigation? Does an investigation begin and end with the determination that CDW was used in the construction of a dwelling? Taking a narrow view of the cause and effect in CDW cases may not provide the needed data and/or facts to support claims decisions, provide guidance for legal claims, and/or to understand potential subrogation of third parties. Forcon believes that a multi-disciplined team of professionals is necessary for conducting a CDW investigation.

The team should consist of:

- A structural engineer to determine the integrity of the building envelope relative to water intrusion and elevated relative humidity within the space;
- A mechanical/materials engineer to evaluate the condition of building components relative to corrosion and performance of the HVAC system; and
- A Certified Industrial Hygienist (CIH) to evaluate airborne concentrations of potential gases emitted by CDW and to collect other relevant samples to determine the if conditions reported by the building occupants are related to the CDW.

This team can provide the needed data and insight into the cause and effect issues claimed to be the result of the use of CDW.

Some basic elements of a CDW building inspection conducted by this team would include:

Structural Inspection:

- Inspects for evidence of CDW in construction of building, *e.g.*, stamps, labels, endtapes. Borescope will be used to inspect interior wall cavities.
- Investigates whether the construction of the house contributes to the available indoor moisture content and creates a favorable environment for the release of sulfur based gases. Includes insulation issues, attic space, crawl space, etc.
- Inspects for other sources of hydrogen sulfide in the house, such as improperly installed plumbing vents.
- Investigates whether a building constructed on slab has a vapor barrier, and does the floor covering show signs of damage from potential chemical reaction with moisture and sulfur based gases.
- Checks the foundation for water infiltration into basements/crawlspaces.
- Checks the crawl space for a vapor barrier.
- Checks for plumbing leaks from toilets, water lines, and hot water heater.
- Determines what type of water source is supplied to the building, *e.g.*, deep well or municipal water.
- Investigates repair/remodeling history of the building.

Mechanical/Materials Inspection:

- Inspects the electrical/electronic systems for evidence of corrosion and collects surface samples for verification. Evaluates electrical systems for fire risks and possible damage to electronic equipment.
- Inspects the HVAC system/cooling coil for evidence of corrosion and collects surface samples for verification and determination of potential for system failure.
- Evaluates the design of HVAC system for providing proper conditioning of house/interior space. Is it sized properly for controlling relative humidity in the summer cooling season?

Is there a humidifier being used for the heating season? Is an outside air source being incorporated into the HVAC system?

- Evaluates gas versus electrical HVAC heating systems and hot water heaters. Performance of gas performance may contribute to odor issue such as mercaptans, and/or to health issues, *e.g.*, carbon monoxide. An electric hot water heater may produce hydrogen sulfide from the sacrificial anode.
- Inspects contents of house to determine if there are signs of damage/corrosion from sulfur based gases to mirrors, jewelry, and other metal surfaces.

Certified Industrial Hygienist Inspection:

- Documents conditions/ sources inside and outside the house that may contribute hydrogen sulfide and other sulfur compound exposures, such as automobile traffic patterns, surrounding industrial/retail facilities, landfills, waste water treatment plants, compost piles, or farming.
- Conducts a chemical inventory of the building to determine potential sources of hydrogen sulfide, other sulfur compounds, and chemical use in general.
- Investigates temporal relationships regarding detection of odor and possible health symptoms, *e.g.*, time of day, certain types of weather, heating/cooling, upon entry into the building, etc.
- Evaluates the house for hydrogen sulfide concentrations using proper methods and instrumentation to ensure integrity of the data. Data points include both indoor and outdoor sampling for hydrogen sulfide and corresponding temperature/relative humidity measurements.
- Conducts source testing for hydrogen sulfide other than drywall, such as plumbing vent lines, drain traps, basement floor drains, and heating oil storage/spills.
- Confers with structural and mechanical/materials engineers to collect representative samples of suspect drywall for documentation and analysis where required. Samples would be analyzed for both elemental content and off-gassing potential. Minimally invasive/destructive techniques used when possible.
- Evaluates condition of household contents for odor possibly related to hydrogen sulfide or from other sulfur compounds.
- Notes whether water damage and mold contamination is present. Mold and bacteria from water damage or from excessive relative humidity can produce potential odors that are similar to hydrogen sulfide.
- Uses qualified accredited labs for analysis of sample collected.

Testing Results

The CPSC has reported, "When investigators tested homes, some findings surprised them. Researchers were looking for hydrogen sulfide, carbon disulfide and carbonyl sulfide, which have been suspected of being related to the contaminated drywall due to reports of 'rotten egg' smells and sulfur-like corrosion of copper and other metals in the homes. These gasses were only found occasionally when outdoor air levels were elevated as well." The CPSC continues to conduct air quality studies to evaluate the potential health risk. The CPSC also found "elevated levels of two elements in some Chinese-made drywall: sulfur and strontium" and is "conducting additional scientific tests to find the connection between these elevated levels and any reported health symptoms or corrosion effects." Forcon has found the CPSC results for both bulk drywall analysis and air contaminant analysis to be consistent with those found in our investigations.

Conclusions

Upon completion of the investigation, the observations, the air monitoring results, and the CDW drywall elemental and off-gassing analyses are reviewed to develop the conclusions of the investigation. The report is designed to address whether CDW was used in the construction of the building; whether there are structural issues that are contributing to the release of hydrogen sulfide and other sulfur gases; whether the electrical systems and related electronics/ appliances have been adversely impacted by corrosion; whether the HVAC system has been adversely impacted by corrosion, and whether it is at risk of failure; whether the plumbing system has been adversely impacted by corrosion; and whether any airborne sulfur gases such as hydrogen sulfide in the building are a result of the CDW, and whether they present a health risk. Recommendations would be developed based on whether CDW is present in the building. Where CDW is present in the building, controlled removal of all CDW would be recommended (sledge hammer demolition would not be suitable), along with repair of electrical systems, repair or replacement of affected HVAC systems or appliances, cleaning of porous household contents if needed, and repair of other sources of sulfur gases if identified, such as a leaking plumbing vent line or dry plumbing trap.

A team approach using the right professionals will provide the detailed information needed to assist the claims professional, legal professional, or building owner in making an informed decision with regards to Chinese drywall. ❖

Michael L. Cannon, CIH, of Forcon International, has over 30 years of comprehensive industrial hygiene experience including asbestos contamination & abatement; mold contamination assessment and remediation, risk assessment of major corporations including asbestos abatement contractors, petroleum refineries, chemical manufacturers, chemical distributors, hazardous waste processors, TSDR's, transportation firms, and lead-based paint abatement contractors. He has provided industrial hygiene services for investigations of possible exposures to hydrogen sulfur/ sulfide compounds, inorganic arsenic, respirable crystalline silica, benzene, hydrogen fluoride, radon, methylene chloride, formaldehyde, fungi, welding fumes, lead, phenols, metal fumes, carbon monoxide, elemental carbon, CTPV's, benzidene - based dyes, aromatic and chlorinated hydrocarbons, rosin core pyrolysis products, and many other sources of possible toxic exposure. Forcon is a GDLA Platinum Sponsor.

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are employees of *other* employers. Two specific examples are given in the Policy – one in which the employer took adequate measures, *i.e.*, took immediate and effective steps to keep employees away from the hazards and notified the proper employer to correct the hazards. The other example given is where the employer did not take adequate steps – the employer did not introduce simple engineering controls that would have prevented the hazard.

The Exposing Employer

The Exposing Employer is the simplest category to identify - it is the employer whose own employees were exposed to the hazard. Regarding Step Two discussed above:

> If the exposing employer created the hazard, it is citable for the violation as a creating employer.
> If the violation was created by another employer on the worksite, the exposing employer is citable if it knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition and failed to take steps consistent with its authority to protect its employees.
> If the exposing employer does not have the authority on the worksite to correct the hazard, it is citable if it fails to do each of the following: (1) request that the creating and/or controlling employer correct the hazard, (2) inform its employees of the hazard and (3) take reasonable alternative protective measures.
> In extreme circumstances, the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

The Correcting Employer

The Correcting Employer is defined by OSHA as, "An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility for installing and/or maintaining particular safety/health equipment or devices." The associated Step Two requires that the employer take "reasonable care" in discovering violations and correcting the hazard. In the example given, reasonable care includes periodic inspections of the worksite, frequent inspections of key hazardous areas, and addressing violations immediately after discovery or notification.

The Controlling Employer

An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or to require others to correct them is the Controlling Employer. Control of a worksite can be established by contract or, in the absence of explicit contractual provisions, by the practice of exercising control. Therefore even when there is no explicit contract provision regarding overall worksite safety or where the contract explicitly states that the employer does not have such a right, an employer might still be classified as the controlling employer. Factors such as authority to resolve disputes between subcontractors, set schedules, and determine construction sequencing are taken into account when there is no explicit contractual requirement for worksite safety. On a construction site, the controlling employer is often associated with the general contractor.

The policy requires "reasonable care" for a controlling employer. Factors that affect how often and closely a controlling employer must inspect the worksite are:

a. The scale of the project.
b. The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses.
c. How much the controlling employer knows both about the safety history and safety practices of the employer which it controls and about that employer's level of expertise.
d. Knowledge about the other employer's compliance history. Usually, more frequent inspections are needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may be needed, in particular at the beginning of the project, if the controlling employer has never before worked with this employer and does not know its compliance history.
e. Existence of safety efforts by other employer. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts.

The Policy instructs the OSHA Compliance Officer to evaluate whether a controlling employer has exercised reasonable care. Areas of evaluation considered by the Compliance Officer include the frequency of periodic inspections, implementation of a system for promptly correcting hazards, and enforcement of the other employer's compliance with safety and health requirements.

Recent Rulings

Last year, the Eight Circuit Court of Appeals issued a ruling regarding the Multi-Employer Citation Policy. *Solis v. Summit Contractors, Inc.,* 558 F.3d 815 (8th Cir. 2009) The ruling stems from a citation which was given to Summit Contractors, Inc. in 2003 when it was the general contractor on a construction worksite in Little Rock, Arkansas. Summit was cited as the "controlling employer" when an OSHA Compliance Officer observed employees of the masonry subcontractor working on scaffolding in excess of 12 feet above the ground without a guardrail, in violation of 29 C.F.R. 1926.451(g)(1)(vii). This regulation requires that employees on a self-contained, adjustable scaffold be protected from falling by a guardrail when the

platform is supported by a frame structure. On the days the Compliance Officer made the observations, Summit supervisors were reportedly on site, and some of the scaffolding was in clear view of the Summit trailer. Further, a Summit supervisor stated that he previously observed the masonry contractor on scaffolding without a guardrail. On those occasions, he instructed them to install a guardrail, which the masonry contractor did. In addition to issuing citations to Summit as the controlling employer, OSHA cited the masonry employer as the creating and exposing employer. Summit was not cited as a creating and exposing employer because it did not create the hazard or have any of its employees exposed to the hazard.

Summit challenged this citation primarily on the basis of the OSH Act and specifically 29 C.F.R. 1910.12(a), which states in part, "[E]ach employer shall protect the employment and places of employment of each of *his employees* engaged in construction work by complying with the appropriate standards . . . ." (emphasis added). This OSHA regulation had been in place since the original issuance of the OSHA regulations in 1971 and has never been amended.

The Occupational Safety and Health Review Commission (OSHRC) ALJ upheld the Summit citation against Summit. The ALJ showed that the Commission on numerous prior occasions had considered the general contractor's ability to address and abate hazardous conditions on a worksite and that, in this case, Summit fit OSHA's definition as the controlling employer.

Summit continued its appeal to the OSHA Review Commission. The Commission ruled in a vote of two to one to vacate the decision of the ALJ. The majority ruled that the OSHA Multi-Employer Citation Policy is invalid in the construction context when used to sanction a controlling employer who neither created nor exposed its employees to the hazard. In particular, the majority held that the Policy was in conflict with 29 C.F.R. 1910.12(a).

OSHA appealed the decision to the court of appeals, which ruled that the Department of Labor's regulations allow OSHA to issue citations to employers who have the ability to prevent or abate hazardous conditions created by subcontractors, regardless of whether their employees were exposed or created the hazardous condition. Consequently, the original decision to issue the Summit citation was upheld. *Solis*, 558 F.3d 815.

Summary

In general, OSHA citations regarding workplace safety are issued to the employer of the employees exposed to a hazard that violates an OSHA regulation. In addition, on multiple-employer worksites, OSHA can cite multiple employers who are considered to have created the hazard or to have the power to correct or control the hazard. These citations can be issued independent of whether the employer's own employees were exposed to the hazardous conditions. The Multi-Employer Citation Policy has been in place for almost 40 years and continues to be applied today. ❖

References

"Multi-Employer Citation Policy," OSHA Directive CPL-02-00-124, December 10, 1999.
"OSHA's Field Operations Manual (FOM)," OSHA Directive CPL-02-00-148, January 9, 2009.
"Advisory Committee on Construction Safety & Health (ACCSH) Multi-Employer Citation Policy, Work Group," June 10, 1999.
Secretary of Labor v. Summit Contractors, Inc., OSHRC Docket No. 03-1622.

Eugenia Kennedy is a Senior Manager with Exponent, Inc., where she works for the company's mechanical engineering practice in Natick, Massachusetts. She has over 20 years of experience in the analyses of industrial and occupational accidents including such topics as fall protection, aerial lifts, scaffolding, machine guarding and control of hazard energy. She has received the Safety and Health Specialist Certificates in Construction Industry and General Industry from OSHA Training Institute Education Center at Keene State College and is authorized to teach the 10- and 30-hour Outreach Courses in OSHA's Construction Safety and Health Standards. She is also a Certified Safety Professional and holds the Certificate in Safety Management from American Society of Safety Engineers. Exponent is a GDLA Platinum Sponsor.

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The court found that there was some evidence that there was an initial leak on church property which had been caused by underground voids that continued to divert water onto the plaintiff's property.

There also was evidence that the church and the county had been alerted to the problem and yet had failed to remedy the problem in order to stop the excess water from flowing onto the plaintiff's property. The court found that even though the church may not have caused the initial leak, may not have owned the water that leaked, and may not have had any responsibility for the original compaction of the soil around the underground utility lines which had resulted in the voids, there was evidence that later excessive flooding had been caused by a condition on the Church's property which had resulted from the initial leak.

Citing O.C.G.A. § 41-1-1, the court noted that a "nuisance is anything that causes hurt, inconvenience or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance." Under Georgia law, liability for nuisance arises out of responsibility for the continuance or maintenance of the nuisance in addition to the creation of one, and it is the control, not ownership, of the relevant property that is at issue. "'In order to be held liable for nuisance, ownership by the tortfeasor is not an element, but control is; the essential element of nuisance is control over the cause of harm. The tortfeasor must be either the cause or concurrent cause of the creation, continuance, or maintenance of the nuisance.'" Therefore, the court found that because there was evidence that the church had exercised control over the property from which the storm water was flowing, there was sufficient evidence to overcome a motion for JNOV.

The church further contended it was entitled to JNOV because O.C.G.A. § 41-1-5(b) required the plaintiff to give it notice to abate the nuisance. The court of appeals found that this argument was without merit because the statute applies "only in cases where 'the alienee of the property injured' makes the claim against 'the alienee of property causing the nuisance.'" The court found that the homeowner did not fall into this category, and therefore this statute did not apply.

Finally, the church contended that it was entitled to JNOV because any water that initially leaked from the sprinkler vault was the legal responsibility of the county because it owned the water and the utility easement. The court found that this argument failed to address the law of continuing nuisance as explained earlier in its opinion.

RSN Properties, Inc. v. Engineering Consulting Services
301 Ga. App. 52 (2009)

This case involved a claim by a real estate developer against an engineering firm for breach of contract and negligence. The developer sought to recover more than $100,000 in the law suit. The engineers moved for partial summary judgment, arguing that the parties' contract contained a limitation of liability provision, which limited the firm's liability to the developer for engineering errors to the value of the engineering services or the sum of $50,000, which ever was greater.

The court found that the limitation of liability provision was not barred by public policy and was enforceable. The court noted that, as a general rule, a party may contract away liability to the other party for the consequences of his own negligence without contravening public policy, except when such an agreement is prohibited by statute. The court found no statute which would prohibit the engineer firm from limiting its liability to the real estate developer. The court found that, although professional engineers are subject to statutory regulations which require adherence to rules of professional conduct and practices designed to protect the safety, health and welfare of the public, the public policy expressed in these regulations was not violated by limiting liability in the contract.

The court noted that both parties to the contract were in relatively equal bargaining positions and were in a commercial setting. Generally, the inclusion of a limitation of liability provision in a contract of this nature recognizes that the fee for services is relatively small compared to the substantial liability that could arise from an error in providing services, and therefore, in exchange for the services for an agreed upon fee, the liability can be capped.

The court noted that this limitation of liability provision did not release the engineering firm from liability for its engineering errors, and that it remained liable to developer for up to $50,000. It also noted that nothing in the contract exculpated, held harmless, or otherwise limited the engineer's liability to third parties. Under these circumstances, the court found that the limitation of liability provision of the contract represented a reasonable allocation of risk in an arm's length business transaction and did not violate public policy.

Torres v. Piedmont Builders, Inc.
300 Ga. App. 872 (2009)

Torres is arbitration case between homeowners and their builder. The homeowners had filed a motion with the superior court to appoint arbitrators pursuant to O.C.G.A. § 9-9-7(b)(1). The superior court dismissed the owner's action and ordered that an arbitration be administered by Construction Arbitration Associates, Inc. ("CAA") as required in the arbitration agreement. The owners appealed the order.

The owner's first enumeration of errors was that the construction contract did not provide a method for appointing the arbitrator.

However, the court of appeals pointed out that the contract stated, "The Contractor and the Owner agree that any disputes or claims arising out of the contract or breach thereof shall be decided by arbitration in accordance with the Official Code of Georgia Annotated § 9-1-1, *et seq*. and with the rules and procedures of Construction Arbitration Associates, Ltd. and shall be made within a reasonable time but not less than 30 days after the dispute has arisen."

The rules and procedures of CAA provided that, to initiate an arbitration, "two copies of the contract including the arbitration provision shall be submitted with a demand. Upon receipt, CAA shall appoint an arbitrator from the construction arbitration panel. After that selection, CAA shall give notice of such appointment to both parties." The court of appeals found that, based upon the plain language of the construction contract, the trial court did not err in sending the arbitration to CAA for resolution.

The owners also contended that the superior court had erred in failing to disqualify CAA because CAA allegedly demonstrated bias. The appellate court disagreed, noting that the question of whether or not to disqualify an arbitrator on grounds of partiality addresses itself to the sound discretion of the trial court, and that the trial court will be upheld absent an abuse of discretion.

The builder, prior to responding to the owners' application in superior court, had written a letter to CAA with a copy to the owners' attorney, seeking clarification as to whether CAA allows other companies to use its rules of arbitration, whether CAA had experience with cases involving similar contract language, and how CAA rules determine who the arbitrator will be. The court of appeals held that, because the builder's letter requested a response to both parties, there was no issue of *ex parte* contact.

Because the owners did not present any allegations that CAA had any special relationship to the builder or any interest in the outcome of the arbitration, and the CAA had provided little or no analysis of the issues other than to quote its procedures for initiating an arbitration proceeding, the trial court did not abuse its discretion in failing to disqualify CAA. ❖

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gency medical care dispensed at certain locations identified by statute. The statute is unreasonable in that it differentiates between the standards of liability physicians providing the same medical care in different locations.

Atlanta Oculoplastic Surgery v. Nestlehutt
S09A1432, 2010 Ga. LEXIS 272 (March 22, 2010).

Within a week of issuing the *Gliemmo* opinion, a previously-divided Georgia Supreme Court issued a unanimous opinion in the long-awaited *Nestlehutt* case and held unconstitutional the limitation imposed by O.C.G.A. § 51-13-1 on noneconomic damages in medical malpractice cases

Chief Justice Hunstein authored the opinion for the court, with Justice Nahmias concurring specially along with P.J. Carley and J. Hines. The majority held that the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the constitutional right to trial by jury. The scholarly nature of the opinion underscores the importance that the supreme court placed on its ruling. The majority opinion goes to great lengths to cite the constitutional, statutory, and common law bases addressing the right to a jury trial to recover damages in medical malpractice cases.

The majority's opinion is anchored in the provision of the Georgia Constitution providing that "the right to trial by jury shall remain inviolate." Ga. Const. of 1983, Art. I, Sec. I, Par. XI (a). The opinion cites the origins of the State's common law right to a jury trial as it existed at the time of the adoption of the Georgia Constitution in 1798. The majority concludes that the right to a jury trial in a medical malpractice claim is clearly encompassed within the Georgia Constitution of 1798 and in Georgia's earliest reported case law.

The majority then confirmed the that the determination of damages rests "peculiarly within the province of the jury." Likewise, "the right to a jury trial includes the right to have a jury determine the amount of . . . damages, if any, awarded to the [plaintiff]." Extending this analysis further, the court held that "noneconomic damages have long been recognized as an element of total damages in tort cases, including those involving medical negligence." In summing up its analysis, the majority states, "Based on the foregoing, we conclude that at the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury."

Requiring a court to reduce noneconomic damages as calculated by a jury would clearly nullify and undermine the jury's basic function, as guaranteed by the Georgia Constitution.

Requiring a court to reduce noneconomic damages as calculated by a jury would clearly nullify and undermine the jury's basic function, as guaranteed by the Georgia Constitution. "The very existence of caps, in any amount, is violative of the right to trial by jury." The constitutional analysis which is applicable to caps on noneconomic damages is distinguishable from the analysis of punitive damages or treble damages, because those types of damages do not address protections afforded by the Constitution. Likewise, a trial court's authority to issue a remittitur "is a corollary of the courts' constitutionally derived authority to grant new trials."

In footnote 8, the majority confirms its consideration of authority from other jurisdictions and concludes that jurisdictions which have upheld similar statutes are governed by constitutional jury trial provisions which are less comprehensive than Georgia's.

After analyzing the constitutionality of the statute, the court next addressed whether striking the cap on noneconomic damages would be an improper retroactive application as to the appellant. The court noted that "the general rule is that an unconstitutional statute is wholly void and of no force from the date it was enacted." Although exceptions may be made to this general rule, the applicable analysis does not "militate in favor of deviation from the general rule of retroactivity." Interestingly, the court noted that the appellant could not have concluded that the "caps' validity was assured," given the political environment which was attendant to, and after, the enactment of the Tort Reform bill. The court found to be insufficient the appellant's contention that its litigation strategy would have been different if it had known that the caps were invalid. The court also held that there was no basis for granting the appellant a new trial.

Justice Nahmias, joined by P.J. Carley and J. Hines, concurred specially. Importantly, the concurrence agreed with the majority's finding that the caps violate the State's constitutional guarantee of the right to trial by jury. The concurrence also agreed that this decision should apply to all pending cases, not just cases filed following this opinion. However, the concurrence differed in the analysis which the majority had used in reaching its conclusion that the ruling should apply retroactively. ❖

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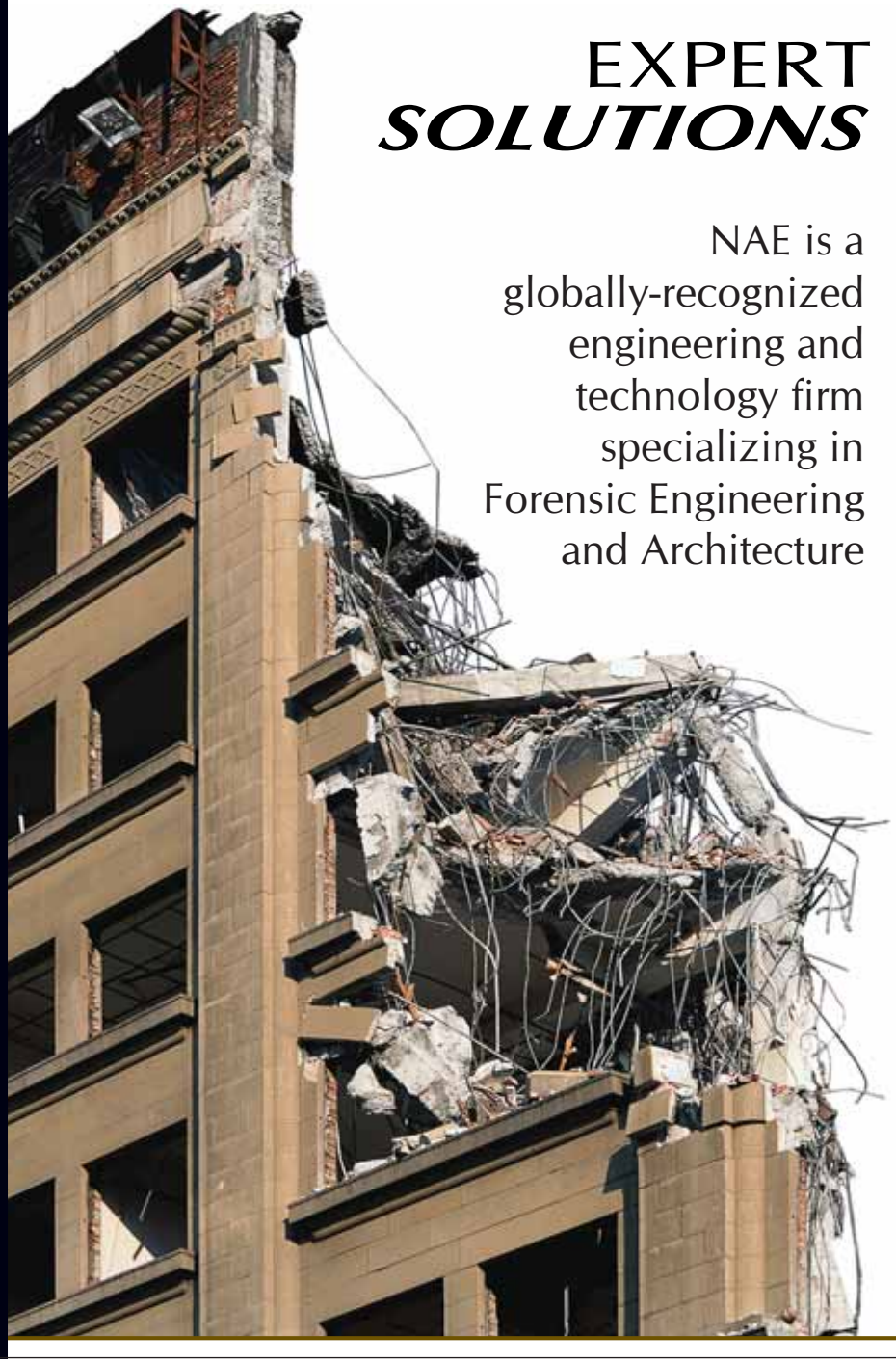

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