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# WEBB SANDERS & WILLIAMS

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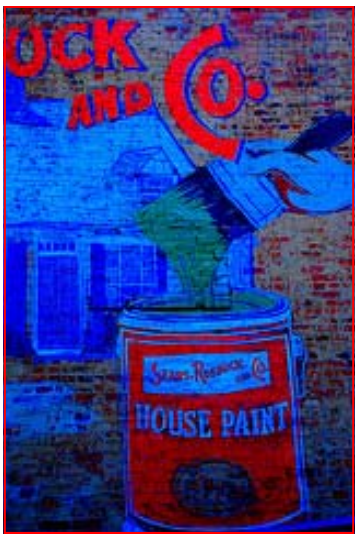
## Damages Caps

On June 14, 2011, the Mississippi Supreme Court heard oral arguments on a challenge to the constitutionality of the state's statutory cap on non-economic damages. *Sears Roebuck & Co. v. Learmonth*, No. 2011-FC-00143-SCT. The case originates from the United States Court of Appeal for the Fifth Circuit, which certified the following question to the Mississippi Supreme Court: "[I]s Section 11-1-60(2) of the Mississippi Code, which generally limits non-economic damages to $1 million in civil cases, constitutional?" *Learmonth v. Sears Roebuck & Co.*, 631 F.3d 724, 740 (5th Cir. 2011). Amicus briefs were filed in support of both sides and the collective challenges to the non-economic damages cap set forth in §11-1-60 were on three separate grounds: (1) the caps violate the right to a jury trial granted by both the Mississippi and United States constitutions; (2) the caps violate the separation of powers; and (3) the caps violate the open courts provisions of the Mississippi Constitution. All three arguments have served as constitutional grounds for challenging caps on non-economic damages in other states as well. Winning a constitutional challenge in Mississippi is not easy, as all statutes are presumed to be constitutional. *Wells ex rel. Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883, 888 (Miss. 1994). The challenging party bears the burden of proving that the statute is unconstitutional and the statute cannot be struck down unless "it appears beyond all reasonable doubt that such statute violates the constitution." *Id.* On June 16, 2011, Tennessee's governor signed into law legislation providing a cap on non-economic damages and on June 22, 2011, the West Virginia Supreme Court upheld its cap on non-economic damages in a medical malpractice case.




## No Coverage for Chinese Drywall

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A recent case in the Southern District found no coverage under a homeowner's policy for loss caused by Chinese drywall. *Lopez v. Shelter Ins. Co.,* 2011 WL 2457872 (S.D. Miss. 2011). Plaintiffs purchased a newly constructed home in 2007 and two years later began noticing noxious odors corrosion of wiring and exposed metals. They learned that their home had been built using drywall manufactured in China, now commonly known as Chinese drywall. As a result of the damage to their home, the plaintiffs sought coverage under their homeowner's policy with Shelter. Shelter denied their claim and plaintiffs filed suit. Shelter argued in its summary judgment motion that there was no "accidental direct physical loss" and, therefore, no coverage under Coverage A-Dwelling. The policy further defined the term "accident" to mean "an action or occurrence or a series of actions or occurrences that: (a) started abruptly, (b) during the policy period, and (c) directly resulted in bodily injury or property damage." The policy also defined the phrase "accidental direct physical loss" to mean "loss of possession of, or actual physical damage to, a part of the covered property which is caused by an accident." Shelter argued that plaintiffs could not prove any abrupt act or occurrence to qualify as an accident as that term is defined in the policy. Plaintiffs argued that the court was free to disregard the policy definition and apply the definition of "accident" from *Allstate v. Moulton,* as "anything that happens or is the result of that which is unanticipated..." (internal citations omitted). Plaintiffs contended that, when examined under the *Moulton* standard of an "accident," the damage qualified as an "accident" because it was unexpected and unanticipated and not the result of any intentional act.

The Court found that the plaintiffs' assertion that the policy language could be ignored was incorrect, and that the definition of "accident" set forth in the Shelter policy was clear and unambiguous. When applied, it was clear that the plaintiffs' loss was not caused by an "accident," therefore, there could be no coverage for the claimed losses under the policy. The Court went on to evaluate whether exclusions in Shelter's policy would apply to preclude coverage. The Court found that there was insufficient information to determine the applicability of the "latent defect" exclusion, and denied summary judgment on that ground. With regard to the "faulty materials" exclusion, the court determined there was sufficient evidence to apply this exclusion as all of the plaintiffs' allegations revolve around defects in the drywall. In so doing, the Court noted that there were no Mississippi cases defining defect or fault in the context of this exclusionary language. Thus, the Court relied upon cases from other jurisdictions, which examined this exclusion in the context of drywall cases, and which found the exclusionary language applicable. Finally, the Court examined the exclusion in the Shelter policy for "contamination." Again, the Court noted that there were no Mississippi cases addressing this exclusion in this context, however, because this contamination exclusion is not found within the framework of the traditional pollution exclusion, it may have applicability beyond environmental pollution. The Court agreed, and found that the contamination exclusion here had broader applicability, and that the emission of gas as a result of the chemical processes in the drywall and the chemical interaction between the drywall and electrical/metal components in the home qualified as "contamination" so that the exclusion would apply to preclude coverage.


# Converted funds not "property damage"

In June, Dan Webb and Roechelle Morgan successfully obtained summary judgment for State Farm on a bad faith claim. The plaintiffs alleged State Farm's failure to conduct an appropriate investigation into whether coverage existed for two suits filed against one of the plaintiffs, and denial of coverage under a homeowners policy and a personal liability umbrella policy for claims of fraud, indemnity, dissolution, accounting, and liability under a Note and Guaranty agreement was incorrect and in bad faith. In a novel argument under Mississippi law, plaintiff argued that the definition of "property damage" contained within the State Farm policies, physical injury to tangible property or loss of use of that property, should allow coverage for claims of "loss of use" of monies that the plaintiffs allegedly misappropriated, converted, or failed to repay pursuant to a guaranty agreement where there was no attendant physical damage allegations in the underlying suits. The Court disagreed with plaintiffs, and followed the majority of other jurisdictions addressing similar arguments, and determined that the construction of the policy language clearly precluded coverage. As a result, the court found that there was no coverage afforded under either policy, that the investigation conducted by State Farm was appropriate and no other investigation could have yielded a different result on the coverage issues, and that there was no basis for any punitive or extra-contractual claims. *Roger Mitchell and Billie Ann Mitchell v. State Farm Fire and Casualty Co.,* United States District Court for the Northern District of Mississippi, Eastern Division, Civil Action No. 1:10CV0116 SA-JAD.

# Proceed with Caution

A recent decision by the Mississippi Court of Appeals shows that serving notice to all defendants on default proceedings is a wise choice, even where the defendants may not have formally made an appearance in the suit. Because no entry of appearance had been entered by counsel for defendants after the complaint was filed, counsel for plaintiff did not provide any notice of a hearing on the motion for default judgment and judgment was entered. Defendants learned of the default judgment by accident and moved to set it aside. The lower court denied the defendants' motion to vacate the judgment and defendants appealed. On appeal, counsel for defendants argued that the communications between counsel for plaintiff and the attorney representing the defendants, at that time, was sufficient to show defendants intent to defend against the claims being made by plaintiff, even though litigation had not begun at that time, such that notice of the hearing on the default judgment was required. The appellate court examined the record and determined that the communications that took place prior to the filing of the complaint was detailed and sufficient enough to evidence the defendants intent to defend against the suit, and that counsel for plaintiff should have provided notice of the hearing on the motion for default judgment. The lesson here: pre-suit communications which deny liability may be sufficient to require notice before default judgment can be obtained under Rule 55(b).*Kumar v. Loper,* 2011 WL 2185588 (Miss. Ct. App. June 7, 2011).

# The Dog Days of Summer

Welcome to Sophie's Voice: dedicated to the vindication of the pup who uttered, "ARF!". In one of the doggone shortest opinions written so far this year, the Mississippi Court of Appeals reversed and rendered a $130,000 judgment in favor of a plaintiff who claimed that a 4 pound 1 ounce dachshund puppy was a "dangerous condition" in a premises liability case. *Penny Pinchers v. Outlaw*, 61 So. 3d 245 (Miss. Ct. App. 2011). Evaluation of the duty to maintain a convenience store when the claimed dangerous condition was the puppy that barked and allegedly chased a patron required analysis of the rules of law applicable to "dog bite" cases. Here, there was no proof, nor could there have been, that the pup, named Sophie, who was kept in the store daily, had ever escaped from her enclosure, run after any customer or gone "arf" while any customer was in the store. In other words, there was no prior knowledge of any dangerous propensity by Sophie. Sophie, who is seen in the adjacent photograph, is believed to be doing well and is quite pleased, along with her mistress and the folks at Penny Pinchers Convenience Store. The $130,000 verdict for the plaintiff resulted when the trial court refused to allow the jury to consider the argument that the dog bite analysis was a necessary first step to determining if there was any duty that was violated by Sophie and her friends. Paul Jenkins tried the case and along with Wayne Williams handled the appeal. Both Paul and Wayne are in our Tupelo office.

# 5th Circuit News

***Maddox v. Townsend and Sons, Inc.*, 639 F.3d 214 (5th Cir. (Miss.) 2011).**

Make sure you check the S-hooks holding up that hammock in your yard! This cautionary tale comes from the Fifth Circuit, which reversed and remanded a grant of summary judgment to a business premises owner being sued by a deliveryman who was injured when the chain he was sitting on gave way causing him to fall off of an elevated loading dock. The Court found there were questions of fact precluding a proper grant of summary judgment concerning whether either the elevated loading dock and/or the S-hook supporting the chain which failed presented a dangerous condition that was foreseeable, giving rise to a duty to warn on the part of the owner. The Plaintiff was making a delivery on Defendant's elevated loading dock which had a 30 inch high chain attached to posts with S-hooks to prevent someone from walking off the edge. While waiting, Plaintiff sat on the chain causing an S-hook to straighten and release the chain. Plaintiff fell off the dock and was injured. Plaintiff asserted that defendant failed to inspect and replace the S-hook and failed to warn Plaintiff of the dangerous S-hook. The trial court granted summary judgment to the defendant finding that it was the raised loading dock not the S-hook that presented the danger but the dock was clearly visible and the chain was a "warning sign" directing all to use caution near the edge. The lower court also reasoned that it was not foreseeable that a deliveryman would sit on the chain. The Fifth Circuit disagreed, found that there was sufficient evidence to create fact questions on whether the condition of the chain created an unreasonable risk of harm, and on whether the premises owner had a duty to warn.

***The Estate of Mable Dean Bradley vs. Royal Surplus Lines Insurance Company, Inc.; Lumbermens Mutual Casualty Company*, No. 10-60650 (5th Cir. (Miss.) July 19, 2011).**

The Fifth Circuit affirmed the lower court's grant of summary judgment to two excess carriers in a bad faith case brought by the assignee of their insured. The assignee was the estate of a patient who already died from neglect while in the insured nursing home. The estate had been successful in obtaining a state court jury award of $1.5 million in compensatory damages and $10.5 million in punitive damages against the nursing home. The nursing home had a $1 million self-insured retention plan and three tiers of excess coverage. When the nursing home decided to appeal the jury award, it asked its excess carriers to contribute to the cost of the appellate bond. The first tier excess, Lexington Insurance Company agreed to post a portion of the bond. Royal, the second tier excess carrier and Lumbermens, the third tier excess carrier both refused to help pay for the bond. Lexington and the nursing home settled with the estate for $10.5 million, paid a combined $2.3 million and the nursing home assigned its claim against Royal and Lumbermens to the estate. The estate then brought suit in the United States District Court for the Northern District of Mississippi against Royal and Lumbermens for bad faith breach of their duty to defend and indemnify the insured. There were two Royal policies and three Lumbermens policies providing coverage during the course of the decedent's stay at the nursing home,. The estate elected to sue under the one policy from each carrier that had the highest policy limits arguing that the decedent's injuries were continuing in nature. The estate moved for summary judgment and the district court found as a matter of law that no duty to defend or indemnify the nursing home arose under either of the excess policies sued upon. On appeal to the Fifth Circuit, the Court found that Royal had no duty to defend because under its policy the duty to defend arose only after "actual payment" of a judgment or settlement exhausted any underlying insurance. The estate did not appeal the finding that Lumbermens had no duty to defend. The Court also agreed with the lower court that neither carrier had a duty to indemnify the nursing home. In reaching its decision, the Court looked at the state court trial record and discovered that the trial court had limited the testimony of the estate's medical expert on causation, as well as its fact witness, the attending nurse, to those injuries which occurred between April and May of 2002. As a result, the Court determined that there was no evidence upon which the jury could base its award of damages except injuries occurring during that specific time period. In rejecting the continuing damage argument, the Court stated that "[t]his is because the trial court charged the jury with finding that for medical liability to attach, there had to be a causal relationship between [the nursing home]'s wrongful conduct and [the decedent]'s injuries. And the only evidence providing a nexus between [the nursing home]'s wrongful conduct and actual harm to [the decedent] related to conduct that occurred in April and May 2002. … Because the actual facts giving rise to liability in the underlying suit occurred outside of Royal's and Lumbermens' policies, neither excess insurer had a duty to indemnify [the nursing home] for the judgment or settlement in the underlying state suit." *Id.* at 11-12.

# "We all fall down"

Absolute Foundation Solutions was sued for negligence in failing to use approved engineering techniques and methods, breach of contract, and fraud by the Peerbooms, owners of a house substantially damaged when it fell from lifts being used to elevate the structure 24 inches above the flood zone. Absolute tendered defense to Lafayette which denied coverage and filed a declaratory judgment action. The Court determined there was "property damage" to the house, and that there was a possibility that the "property damage" was caused by an "occurrence" (accident). In so deciding, the Court found that the plaintiffs had failed to identify any specific cause of the fall and that the evidence before the Court left open the possibility that the "property damage" was caused by an accident. The Court next considered the following exclusions: "(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or (6) That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The Court began its analysis by stating that it must first identify "the particular part" of the defendant's property on which Absolute was working. The Court reached the conclusion that Absolute had been hired to raise the entire home and, therefore, its actions fell within both of the identified business risk exclusions. As a result, there was no coverage for the alleged acts of Absolute and summary judgment was awarded to Lafayette. ***Lafayette Insurance Co. v. Peerboom*, 2011 WL 2194037 (S.D. Miss).**

# Watch your step

The Mississippi Court of Appeals recently addressed the distinction between the duty to provide a safe work place and the duty to furnish safe instruments to perform the work in *Montedonico v. Mt. Gillion Baptist Church,* 2011 WL 880068 (Miss. Ct. App. March 15, 2011). Mt. Gillion Baptist Church contracted with ADT to have a security system installed and monitored. ADT subcontracted with Eagle Security Systems to install the alarm, and Jefferies, an employee of Eagle, was sent to perform the installation. The facts indicate that Jefferies did not have a ladder of sufficient height to install the alarm, but that when Eagle contacted the church to discuss the problematic installation, a deacon of the church advised Eagle Security that an extension ladder could be borrowed and would be waiting for Jefferies. The ladder was borrowed and, in fact, waiting for Jefferies when he arrived to install the alarm system. Testimony indicated that both Jefferies and a church deacon inspected the ladder and found nothing wrong with it prior to Jefferies use of the ladder. Jefferies used the ladder without incident and installed most of the alarm system wiring. Toward the end of his installation, the ladder fell while Jefferies was on it causing Jefferies severe injuries to his wrist and elbow. Subsequent inspection of the ladder showed that the ladder was missing a rubber grip on one of the legs. Jefferies bankruptcy trustee filed suit against the church to recover for Jefferies injuries. The lower court granted summary judgment to the church and Jefferies appealed arguing that the court erred in finding that the danger was inherent to Jefferies work and that Jefferies assumed the risk. Agreeing with the plaintiff, the Court of Appeals reversed and remanded the case.

In granting summary judgment, the lower court relied on *Vu v. Clayton,* 765 So.2d 1253 (Miss. 2000). In *Vu,* the injured party alleged that he was not provided a safe working environment, and that as a result he fell through the attic floor while attempting to fix the air conditioner located in the attic. The *Vu* court found that the risk of falling through an attic while fixing an air conditioning unit was a danger inherent to the work of an air conditioning repairman, and the repairman could not recover against the property owner for his injuries.

In support of its reversal, the Court noted that the duty to furnish a safe place of work is distinguishable from the duty to furnish safe appliances and instrumentalities for the purpose of performing the agreed upon work, and where an employer undertakes to furnish an independent contractor with any instrumentalities for carrying on the work, the employer owes the contractor a duty of reasonable care with respect to such instrumentalities. *Id.* (citing 31 ALR 2d 1375 (1953); 41 Am.Jur.2d, *Independent Contractors,* §42 (2005). Here, the Court noted that it was not the danger of falling from a ladder which needed to be analyzed, but the danger in being provided a defective product for use that needed to be analyzed. When so viewed, the Court determined that the danger of being provided a defective ladder was not inherent in Jefferies work, thus, reliance on *Vu* was misplaced and summary judgment should not have been granted.

With regard to the defense of assumption of the risk, the Court noted that, while this doctrine has largely been subsumed, it does still have applicability in certain circumstances. Specifically, the Court noted that this defense is available to property owners/ employers in suits by their hired independent contractors, where the allegations are that the owner/ employer is liable for the death or injury of the contractor or the contractor's employee resulting from dangers which the contractor, as an expert, has known or as to which he has assumed the risk. *Id.* (citing *Nofsinger v. Irby,* 961 so.2d 778, 781 (Miss. Ct. App. 2007)). In order to succeed on such a defense, the defendant must show: (1) knowledge on the part of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger in the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition. *Id.* (citing *Elias v. new Laurel Radio Station, Inc.,* 245 Miss. 170 (1962)).

The Court distinguished the facts in *Nofsinger,* upon which the lower court relied, in that the plaintiff in *Nofsinger* intentionally used a table saw which he knew did not contain a guard, and did not use protective eye wear, both of which directly resulted in the injuries he suffered. In this case, there was no evidence of any problem with the ladder until after the accident, there could be no knowledgeable assumption of a risk.

# Mississippi's Host Liquor Law

Until recently, there was no Mississippi statute imposing liability on a social host who serves beer or liquor to an intoxicated guest. However, in June Governor Haley Barbour signed into law MISS. CODE ANN. §67-3-70, a statute providing: that it is a misdemeanor for an adult to "knowingly" allow a party to be held or to continue on the adult's private property where minors are in possession or consuming alcohol. Under the new statute: (1) "Party" is defined as two or more persons assembled for a social occasion at a private residence or a private premises; (2) "Private premises" is defined as privately owned land, including appurtenances or improvements; and (3) "Private residence" is defined as a place where a person actually lives or has her home.

While the stated purpose of the amendment is to prevent parents from holding or allowing underage drinking parties on their private property, the legal implications range far beyond the stated intent.

# Techno Gadget Lovers Beware . . .

Personal smart phones (blackberries, iphones, etc.), pda's, tablet computers, home computers, ipads, and personal laptops used to view, send or receive any work related email or other work related information are subject to search, review, and litigation hold requirements for electronic data. So be sure that if you use a personal computing device (of any kind) or a company issued cell phone, pda, laptop, or smart phone, that in the event of litigation you advise your counsel of the existence of the device, turn off any automatic deletion or archiving of emails, and notify your IT department of the ongoing suit so that they can take appropriate steps to secure any electronic data that may be subject to the litigation hold and/or necessary for defense of the suit. Failure to do so may result in sanctions including fines, inability to utilize certain evidence, adverse inference jury instructions, and in worst cases dismissal of suit. *See e.g. United Sates v. Kramer,* 631 F.3d 900 (8th Cir. 2011), *cert. denied*, 2011 WL 1740708 (U.S. 2011); *Southeastern Mechanical Services Inc. v. Brody,* 657 F. Supp. 2d 1293 (M.D. Fla. 2009).

# Waiting and waiting and waiting on Medicare . . . not bad faith

At least one federal court has realized the absolutely impossible quagmire created by the delays inherent in the current scheme under the Medicare Secondary Payor Act. *Wilson v. State Farm,* 2011 WL 2378190 (W.D. Ky). In *Wilson,* State Farm was faced with a claim for bad faith when it waited for Medicare to make a determination as to the value of its lien before paying policy limits. State Farm had knowledge that Medicare paid medical expenses related to the accident at issue. Although State Farm agreed that policy limits were owed, there was no indication as to the amount of the Medicare lien. State Farm requested authority to communicate directly with Medicare concerning the lien and Plaintiff refused the request. Plaintiff requested State Farm deposit policy limits in an escrow account from which the Medicare lien would be paid in return for a hold harmless agreement. Because Medicare was not a party to the agreement, State Farm declined but suggested that it issue the check for policy limits payable to both Medicare and Plaintiff. Plaintiff declined and State Farm opted to await Medicare's formal determination of its lien amount, and made separate payments to Plaintiff and Medicare the day following receipt of notification of Medicare's lien. Plaintiff argued that State Farm should have made payment without full knowledge of the amount of the Medicare lien and that its failure to do so was in bad faith. The Court held that State Farm's acts were not in violation of any duty owed to the Plaintiff, and that they were, in fact, made responsibly, given that State Farm is absolutely obligated to pay the amount of the Medicare lien, even if Plaintiff agreed to undertake that responsibility and failed to do so. The Court further held that State Farm's attempt to include Medicare as a payee on a single settlement check prior to Medicare determining the amount of its lien was "certainly reasonable."

# Lessons learned: document, document, document . . . diary, diary, diary, . . . a-a-a-and follow-up

Those are the rules to live by as illustrated in *James v. State Farm Mut. Auto. Ins. Co.,* 2011 WL 1743421 (S.D. Miss. 2011). This case arises out of an automobile accident which occurred on February 3, 2006, resulting in physical injuries to the plaintiff and her passenger. At the time of the accident, the plaintiff had four automobiles insured by State Farm. The plaintiff's coverage under the State Farm policies provided a UM limit of $10,000 per person, with a stacked limit of $40,000 per person. The State Farm policies also provided for collision coverage with a $100,000 limit, and Medical Payments coverage with a $5,000 limit. On October 23, 2007, plaintiff filed suit against State Farm, which was later amended, claiming that State Farm had wrongfully failed to pay UM benefits. On August 29, 2008, after the amendment of the complaint, State Farm made four payments on behalf of plaintiff totaling $40,000, and thereafter sought summary judgment as to the plaintiff's claims.


The Court agreed that State Farm was entitled to summary judgment on the UM claim as it had paid the per person limit of UM coverage, $40,000. Thus, the only remaining issue was whether State Farm's delay in payment constituted bad faith so as to allow the issue of punitive damages to go forward. State Farm argued that the delay was due to the ongoing investigation of the UM claim due to issues related to medical causation and evaluation of the claim. The record before the Court appears to have been extensive and included detailed activity log notes which showed multiple attempts to obtain medical records, follow up concerning those records, review of the records and analysis of the value of the claim based on the records, communications with counsel for plaintiff concerning additional information needed and follow up concerning the information necessary for State Farm's evaluation of the claims. In determining that State Farm had an arguable basis for delay in payment of the UM benefits, the court commented that the delay was, in part, due to the failure of plaintiff's counsel to timely provide information requested.

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# SUMMER FUN

It's always fun to win and WSW has had some fun recently. In addition to the wins discussed on page 2, in June, Wayne Williams and Norma Ruff successfully defended an automotive manufacturer in a wrongful death case. The parts manufacturer had been a supplier for Chrysler at the time of the original manufacture of the vehicle involved in the death of a 14 year old, when the car mechanism disengaged and rolled over the boy. Using the deposition testimony of the plaintiffs' causation expert, the claim was limited to a single cause, "defective design." After fully briefing summary judgment arguments, the plaintiffs were ultimately convinced that they could not prove their case against the parts manufacturer and consented to the grant of summary judgment in favor of this defendant. The case is still pending against the remaining defendants.

As a result of a fire loss which occurred to property located in Tippah County, Mississippi, the insured filed a claim under her homeowners policy for proceeds claimed payable as a result of the fire. The fire was ruled to be incendiary in nature and the claim was ultimately denied, in part, due to misrepresentations and concealments of material information by the insured. As a result of the denial, the insured filed suit against State Farm demanding payment under the contract and also alleging bad faith.. Dan Webb was retained to assist State Farm during the claim investigation, which included an EUO of the insured and was also involved in defending the company against the claims of the insured, including bad faith. After the deposition of the insured, the case was settled for a nominal amount and release of the assignment of note held on the Tippah County property.

In another fire claim, Dan Webb was retained to assist a carrier during its investigation of a claim for payment following a second fire loss [in two weeks] to property insured under a homeowners policy. Following the investigation, including EUO's of the insureds, the claim was resolved for less than a third of the policy limits which included payment to the listed mortgagee for a first and second mortgage held on the property at the time of the fires.

Roechelle Morgan was admitted to practice law in Tennessee on June 8, 2011.

In July, Wayne Doss spoke at a seminar held in Tupelo and Gulfport entitled: Estate Administration Procedures: Why Each Step Is Important.

Dan Webb co-authored an article appearing in the "Ounce of Prevention" section of the current edition of *Litigation Management*, a quarterly publication by The Council on Litigation Management. Robert Horst, Dan W. Webb, and David Rioux, "Fighting Back: How Detection and Prevention Can Avoid the High Cost of Insurance Fraud." *Litigation Management* Summer 2011, at 137. The article discusses the efforts, cooperation and technology needed to effectively prevent, identify and investigate fraudulent claims advising that a "holistic approach" combining all levels works best. Also covered is the important role played by outside counsel in helping to reach claim determinations and defending claim denials. The Council on Litigation Management is offering a seminar on this topic during 2011. For more information or to host a seminar, visit litmgmt.org/training.

Addendum

VOLUME 22
SUMMER 2011

# WEBB SANDERS & WILLIAMS

## Extra! Extra! This Just In– Summary Judgment Granted for Defendants on Wrongful Termination Claims

*Sandi Hathcote Vaughn v. Carlock Nissan of Tupelo, Inc., and Corbett Hill,* United States District Court for the Northern District of Mississippi, 1:09cv293, 2011 WL 3651271.

On Thursday, Judge Sharion Aycock granted Defendants' Motions for Summary Judgment in this employment discrimination case. Plaintiff, a telemarketer for Carlock Nissan from December 2007 through June 2009, brought suit seeking damages from alleged violations and wrongful termination pursuant to the Fair Labor Standards Act ("FLSA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), state law wrongful termination under *McArn* for alleged reporting of illegal activities, and tortious interference with employment contract against the individual Defendant Mr. Hill.

Defendants filed three motions for summary judgment. Plaintiff confessed the Title VII Motion conceding that Plaintiff had no viable claim under Title VII.

Plaintiff defended the motion related to the FLSA claims and the motion related to the state law claims. Judge Aycock in a thirteen page opinion found that Plaintiff was unable to meet her burden of proof under FLSA wrongful discharge that her complaints in September 2008 regarding overtime had any causal connection to her termination in June 2009. She further agreed with Defendants' assessment that Plaintiff's claim for unpaid commissions should not be included under FLSA, but would be more appropriately brought as a state law breach of contact claim. However, because Plaintiff failed to include such a claim in her Complaint, Judge Aycock refused to allow the pleadings to be amended under FED.R.CIV.P. 15(a)(2), striking Plaintiff's allegation of breach of contract from her Response, and finding the only available claim for trial was whether Plaintiff had been paid an appropriate amount of overtime compensation under the FLSA.

With regard to the state law claims, Judge Aycock held that in order for Plaintiff to succeed on her claim that she was wrongfully terminated for reporting alleged "illegal" conduct of Carlock Nissan to Nissan corporate, Plaintiff must show that the conduct which she reported was "actually criminal in nature." Examining each alleged crime, Judge Aycock found that Plaintiff was unable to put forth any evidence which would show that the conduct about which Plaintiff complained was actually illegal. Finding that there was no basis to conclude that the reported conduct was actually illegal, Judge Aycock found that the Plaintiff had not satisfied the requirements for a wrongful termination claim under the *McArn* exception to Mississippi's employment at will doctrine.

Judge Aycock then focused on the claims against he individual defendant, Hill. Plaintiff complained that Hill acted in ad faith in terminating her employment because he allegedly knew of the "illegal activity" and her complaints of same to corporate headquarters. Judge Aycock found that a review of the undisputed facts showed that the reporting to Nissan corporate headquarters contained no mention of Hill, and that there was no evidence of malice in Hill's actions in terminating Plaintiff. As a result, there can be no liability under this claim.

Congratulations to Roechelle Morgan and Zach Bonner in our Tupelo Office! Plaintiff was represented by Jim Waide and Shane McLaughlin from Tupelo.