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Featured Articles:

- Excerpts taken from Annual Update: Significant Decisions Potentially Impacting Your Clients

By Matthew D. Gumaer, Esquire

Professional Liability Contacts:

Hugh Holley:

Holleyh@PLbrokers.com

Ph: 770-250-0192

Dara Sutton:

Dara.sutton@ioausa.com

Ph: 770-250-0163

Lisa Frady:

Lisa.frady@ioausa.com

Ph: 770-250-0161

Sharon Schulze:

Sharon.schulze@ioausa.com

Ph: 770-250-0179

Professional Liability Brokers, Inc.

2839 Paces Ferry Road
Ste. 1200
Atlanta, GA 30339

Annual Update: Significant Decisions Potentially Impacting Your Clients

-Matthew D. Gumaer, Esquire

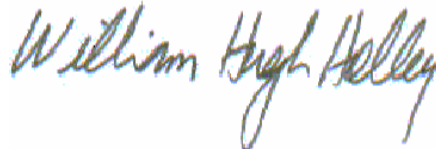
For 49 years CNA/Schinnerer has hosted an annual meeting of Invited Attorneys. Each year more than 200 panel attorneys who specialize in the defense of architects, engineers and surveying firms along with select professional liability brokers meet to review legal cases that impact professional practice. Each year I select a presentation that I feel will provide the greatest insight for your firm. This year I selected cases presented in the Annual Update of Significant Decisions. The cases in this year's summary deal with the following legal theories that impact practice:

- 1) Economic Loss Doctrine
- 2) Third Party Tort Cases
- 3) Expert Opinion Evidence
- 4) Statue of Limitations/Statute of Repose
- 5) Insurance Coverage

The cases presented below are selected cases from Mr. Gumaer's presentation. To review the entire article and the other cases presented, please visit www.schinnerer.com or www.planetriskmanagement.com. Under the risk management tab select "proceedings from Annual Meetings of Invited Attorneys".

If you have questions or if I can be of assistance, please contact me at Holleyh@plbrokers.com.

Regards,



Wm. Hugh Holley, CPCU, MI, MBA
Professional Liability Specialist
Vice President

ANNUAL UPDATE: SIGNIFICANT DECISIONS POTENTIALLY IMPACTING YOUR CLIENTS

by Matthew D. Gumaer, Esquire

2009 BROUGHT A NUMBER OF INTERESTING CASES IMPACTING DESIGN PROFESSIONALS, PARTICULARLY IN THE AREA OF THE ECONOMIC LOSS DOCTRINE AND DETERMINING THE BOUNDS OF POTENTIAL LIABILITY TO THIRD PARTIES. COURTS CONTINUE TO WEIGH IN ON WHETHER DESIGN PROFESSIONALS' DUTIES CAN BE CHARACTERIZED AS TORT DUTIES ARISING FROM THE PROFESSIONAL STANDARD OF CARE OR WHETHER THE BOUNDS OF LIABILITY SHOULD BE CIRCUMSCRIBED BY THE PROFESSIONAL'S CONTRACTUAL AGREEMENT.

Matthew D. Gumaer is a partner with the Sugarman Law Firm, LLP and has been with the firm since his admission to the New York State Bar in 1996. Mr. Gumaer obtained his Bachelor of Science degree from Colgate University and his Juris Doctor from Boston University. Mr. Gumaer's practice focuses on construction related matters ranging from contract negotiation through post project litigation. Mr. Gumaer is a member of the New York State Bar, the Onondaga County Bar Association and is admitted to practice before all New York Courts, State and Federal. Mr. Gumaer is actively involved in Sugarman's American Institute of Architect's (AIA) accredited continuing education program.

ECONOMIC LOSS DOCTRINE

Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C., 900 N.E.2d 801 (Ind. App. Ct. 2009)

Indiana's Court of Appeals reaffirmed the applicability of the economic loss doctrine to owners' out of privity claims against design professionals when they are not in privity.

In the *Indianapolis-Marion County Public Library* case, the owner hired an architect, Woolen Molzan & Partners, Inc. who, in turn, hired consultants including Thornton Tomasetti Engineers for structural work and Charlier Clark & Linard to provide construction phase services, including site visits. During the course of construction, the owner discovered "major voids in concrete beams and columns in the garage," which was one of several components of the project.¹ The owner suspended construction and allegedly sustained damages totaling approximately \$50,000,000 for the cost of repairs, the settlement of contractor delay claims, design fees, and cost of expert analysis.

The owner settled its case against the architect and brought a direct action against the architect's consultants. As a part of its settlement with the owner, the architect assigned its rights to potential claims against its consultants to the owner. The owner's causes of action arising from this assignment were not at issue on this appeal.

The majority identified the purposes of the economic loss doctrine as follows: "(1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk."²

The majority distinguished tort law as follows:

The law of torts, on the other hand, rests on obligations imposed by law. Tort law is rooted in the concept of protecting society as a whole from physical harm to person or property. . . . It is society's interest in human life, health, and safety that demands protection against defective products, and imposes a duty.³

The owner argued that the garage's structural defects created an imminent risk of harm barring the application of the economic loss doctrine. The majority concluded that because there was no damage to tangible property other than to the project itself, the owner's direct claims against the architect's consultants were barred. The court concluded: "Thus, in response to the [owner's] question as to whether it 'should . . . have waited until a catastrophic failure occurred and someone was seriously injured' prior to suing the [architect's consultants] in *negligence*, . . . the answer is 'yes.'"⁴

In addition to arguing that the claimed imminent risk of garage collapse fell within an exception to the economic loss doctrine, the owner relied on the notion that "its negligence claims should be allowed to proceed because a structural engineer owes professional duties that are akin to those owed by other professionals, including attorneys, accountants, physicians, construction managers, and real estate agents."⁵ The majority declined to discuss the professional standard of care, relying instead on the character of the damages.

The single dissenting judge argued that the owner's allegation of a significant risk of collapse was sufficient to create a question of fact with respect to the issue of imminent harm and therefore the applicability of the economic loss doctrine.

The majority declined to address directly whether or not a negligent misrepresentation claim may have been appropriate as the owner had failed to plead the theory as a separate cause of action in its complaint.

***Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance Inc.*, 212 P.3d 125 (Ariz. Ct. App. 2009)**

In March 2009, the Court of Appeals of Arizona rejected the economic loss doctrine as a bar to an owner's suit against its architect for claimed economic loss allegedly arising from the failure of the architect's design to meet the Fair Housing Design Construction requirements of 24 C.F.R.100.205.

The plaintiff contracted with the defendant architect to prepare plans and specifications for a number of apartments. Construction of the apartments began in 1995 and was finished in 1996.

In August 2004, HUD filed a complaint against the owner for housing discrimination, claiming a violation of the relevant Fair Housing Design Construction requirements. The owner expended significant sums to remedy the alleged defects.

In 2006, the owner commenced an action against the architect alleging both a breach of contract and professional negligence, and seeking the cost of remediation. The architect moved to dismiss, arguing that the statute of repose barred the owner's breach of contract claim and the economic loss doctrine precluded the professional negligence claim.

The court defined the economic loss doctrine as follows: "The economic loss doctrine precludes an aggrieved party from recovering economic damages in tort unless accompanied by physical harm—either in the form of personal injury or property damage."⁶

The court identified the purpose of the economic loss doctrine to maintain the distinction between contract theories and tort principles. The court further noted that the rule serves to distinguish between the two and "clarifies that economic losses cannot be recovered under a tort theory."⁷

The court noted that while the Arizona courts had previously applied the economic loss doctrine to construction defect cases, the owner's claim in *Flagstaff* was distinguishable because it related to allegedly defective design rather than construction. The court concluded that the case presented an issue of first impression in Arizona.

The court observed that the architect, as a professional, was obligated to meet a professional standard of care (to act with the ordinary skill, care, and diligence of other design professionals in the architectural field), and had professional duties independent of its contract with the owner. The court concluded that the purpose of the economic loss doctrine was not implicated and allowed the action to proceed.⁸

It is noteworthy that the court did not apply the Arizona statute of repose which, provides, in part: “[N]o action . . . based in contract may be instituted or maintained against a person who . . . performs or furnishes the design . . . [or] construction . . . of an improvement to real property more than eight years after substantial completion of the improvement to real property.”⁹

The architect argued that the court's decision would “eviscerate the statute of repose.”¹⁰ In dismissing the argument, the court noted that the statute expressly applies to only contract claims.

Terracon Consultants Western, Inc. v. Mandalay Resort Group, 206 P.3d 81 (Nev. 2009)

The court in *Terracon* considered the following question certified by the United States District Court for the District of Nevada: “Does the economic loss doctrine apply in construction defect cases to design professionals, such as engineers and architects, who solely provide services, regardless of whether the services are rendered before or during construction?”¹¹

The Nevada Supreme Court rewrote the question to confine its ruling to “commercial property” disputes and answered that question as follows: “[W]e conclude that the economic loss doctrine bars professional negligence claims against design professionals who provided services in the process of developing or improving *commercial property* when the plaintiffs' damages are purely financial.”¹²

In *Terracon*, Mandalay hired an engineer to provide geotechnical engineering services. The engineer reported that a certain amount of settling under the foundation of the proposed building could be expected. Mandalay claimed that it was forced to repair and reinforce the foundation before proceeding with the construction of the building because the ultimate amount of settling exceeded the engineer's projections and the county required Mandalay to perform additional foundation work.

The court admitted that its previous case law on the subject of the economic loss doctrine contained “nuanced ambiguities.”¹³ The court noted generally that the economic loss doctrine bars unintentional tort actions where plaintiff seeks recovery of “purely economic losses”¹⁴ and there were certain exceptions to that doctrine. The court relied heavily on the notion that there should not be potentially unbounded liability for the economic consequences of a negligent act in the context of a commercial or professional setting.¹⁵ The court did identify several jurisdictions that do not apply the economic loss doctrine to design professionals because of their “independent duty” to perform their professional services. The decision appeared to acknowledge that this was a “factor” which weighed against the applicability of the doctrine. However, in a commercial setting, the court concluded that the parties' contract was a better means of allocating risk and defining the limits of the parties' exposure.¹⁶

THIRD PARTY TORT CASES

***Thompson v. Gordon*, 2009 Ill. App. LEXIS 1119 (Ill. App. Ct. Nov. 19, 2009)**

In *Thompson*, the majority of the court held that the estate of two deceased motorists could state a viable tort claim against an engineer who was hired to provide a structural design for a bridge deck replacement where the plaintiffs' estate alleged the engineer failed to consider whether the existing bridge median was unsafe.

The engineer, pursuant to a contract with the owner, designed a roadway interchange and the replacement of an associated bridge deck in connection with a larger project. The driver and passenger were killed when the driver lost control of his vehicle, hitting the median separating the eastbound and westbound traffic on the bridge, vaulting in the air, and striking another vehicle. The original bridge deck median was approximately four feet wide and six inches tall. The replacement median was approximately four feet wide and seven inches tall.

The engineer's contract required, in addition to the redesign of certain portions of the interchange and preparation of structural design plans for the replacement of the bridge deck, that "[t]he standard of care for [engineer's] services will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services."²⁸

The plaintiff offered the "expert" opinion of a non-licensed civil engineer that an engineer using reasonable care would have identified the original median as defective and designed a safer median that "more probably than not" would have prevented the accident.²⁹

The engineer argued that the contract clearly distinguished where it was obligated to "redesign" or "improve" various aspects of the project from the bridge deck, which was only to be a "replacement."³⁰ Therefore, the engineer argued it had no responsibility to review the existing design or redesign the median at issue.

The majority found that while the contractual agreement defined the bounds of the defendant's duties, the incorporation of the general standard of care language, coupled with the plaintiff's expert affidavit, created a question of fact regarding the adequacy of the engineer's services.

In dissent, Judge Hutchinson argued that the standard of care language incorporated within the contract simply defined the standard of care to be applied to the scope of work outlined in the contract and agreed to by the parties. She concluded that the inclusion of such language should not expand the scope of the engineer's services, which included only providing structural design plans for the deck replacement.

***Sykes v. RFD Third Avenue 1 Associates*, 884 N.Y.S.2d 745 (N.Y.App. Div. 2009)**

In *Sykes*, a majority of the court held that a condominium owner could not maintain a negligent misrepresentation claim against the HVAC engineer with whom the owner lacked privity because the engineer was only aware in "the most general way" that a buyer would rely on information supplied by the engineer for inclusion in the condominium offering plan.

Plaintiffs, the Sykes, were the purchasers of a luxury penthouse apartment in New York City. The owners alleged that they were unable to maintain a comfortable temperature in their apartment in either the summer or winter. The defendants included the engineer responsible for mechanical design of the HVAC system. The engineer had not provided construction phase services. The engineer was identified in the offering plan but had no involvement in the preparation or distribution of the offering

plan, certifications, or marketing materials. However, the engineer conceded that it did supply information for use by the sponsor in the offering plan.

While the owners brought multiple causes of action in multiple actions against the engineer, the decision considered only the plaintiffs' negligent misrepresentation case against the engineer.

Specifically, the court considered the circumstances under which a party may recover under a negligent misrepresentation theory in the absence of privity, citing the following requirements:

(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.³¹

The majority held that the “[engineer] would only have been aware in the most general way that some buyer would rely on that information to purchase a particular unit.”³² In dismissing the claim, the majority also relied on the fact that there was no direct contact between the engineer and the plaintiffs.

The dissenting justices argued that the engineer had conceded it provided a description of the building's mechanical systems to the architect and sponsor for use in the offering plan and that it was not only foreseeable, but expected, that the condominium purchasers would rely on that information. Therefore, the dissent concluded, there was a relationship between the parties “so close as to approach that of privity.”³³

EXPERT OPINION EVIDENCE

***Hamilton-King v. HNTB Georgia, Inc.*, 676 S.E.2d 287 (Ga. Ct.App. 2009)**

In *Hamilton-King*, the appellate court reversed the trial court's decision to preclude the plaintiff's proffered expert testimony because the plaintiff's expert could not identify specific claimed violations of the Manual of Uniform Traffic Control Devices (MUTCD).

In *Hamilton-King*, the plaintiffs' vehicle became disabled on a bridge which was undergoing renovations. The plaintiffs exited their vehicle and were ultimately struck by an oncoming vehicle. The plaintiffs alleged that the traffic control plan for the construction site was inadequate, suing the contractor and the engineer.

The plaintiffs sought to offer expert testimony from a qualified expert who opined, among other things, that the collision occurred because there were no shoulders provided on the 900-foot bridge to allow for safe refuge in the event of an emergency and there was inadequate lighting, reflectors, and signage.

The trial court excluded the opinion under GA. CODE ANN. § 24-9-67.1. The trial court found that the plaintiffs' expert had failed to identify any specific violations of the MUTCD and that there was no history of similar accidents on the bridge at issue. The trial court concluded that the plaintiffs' expert's opinion lacked sufficient foundation.

The appellate court reversed, finding that in some cases the expert's qualifications, including relevant experience, when coupled with his engineering judgment, are sufficient to allow opinion evidence. The appellate court cited the MUTCD itself, which indicates “while this Manual provides standards for design and application of traffic control devices, the Manual is not a

substitute for engineering judgment.”³⁶ The court concluded that “the MUTCD is not ‘the exclusive source of engineering and design standards.’”³⁷

STATUTES OF LIMITATIONS/STATUTES OF REPOSE

Sendar Development Co., LLC v. CMA Design Studio, P.C., 890 N.Y.S.2d 534 (N.Y. App. Div. 2009)

In *Sendar*, the court held that while New York recognizes the continuous representation doctrine, this doctrine did not apply where a structural engineer, who had earlier provided design services, was later hired to inspect the cracking and leaking two years after completion of the project, which the engineer determined was not related to any structural issue.

The plaintiff developer hired several design professionals to design a five floor condominium addition to the top of an existing building. One of the design professionals, Breger, proposed the use of an “EZ Wall” system. Sweeney, the moving defendant, originally provided structural engineering services for the light gauged steel framing.

The moving defendant, Sweeney, a structural engineer, sought dismissal based on New York State’s three-year statute of limitations. The structural engineer argued that services were complete in October 2002 and, in any event, its scope of work was confined to structural engineering services for the light gauged steel framing. Two years after the completion of construction, hallway tiles began to crack and water leaked in around the apartment windows in the expansion area. In July 2004, the plaintiff hired the structural engineer to inspect the cracking and leaks. The structural engineer determined that there was no structural cause for the problem.

The developer sued Sweeney in June 2007. The most significant question in the case was whether, pursuant to New York’s “continuous representation doctrine,” the developer’s claim accrued in October 2002 when the construction and the engineer’s original services were complete or in July 2004 when the engineer performed its inspection of the cracking and leaks.

The court noted that the continuous representation doctrine “applies when a plaintiff shows that he or she relied upon an uninterrupted course of services related to the particular duty breached and . . . [t]he mere recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services.”⁴⁰ The court concluded that Sweeney’s spring 2004 inspection “was for an incidental matter not related to Sweeney’s contractual duty of providing structural engineering for the light gauge steel framing” and affirmed dismissal of plaintiff’s complaint.⁴¹

The court also dismissed the codefendant’s cross claims for contribution “since contribution is unavailable where a plaintiff’s direct claims against a codefendant seek only a contractual benefit of the bargain recovery, tort language notwithstanding.”⁴²

Bryan v. City of Cotter, 2009 Ark. 457 (Ark. 2009)

In *Bryan* the court held that the statute of limitations for a contractor’s claims against an engineer began to run when the engineer issued its report, rather than when the contractor contracted with the city for its work or when the alleged problem was discovered.

The engineer, a subconsultant who conducted soils testing, prepared a report dated September 30, 2001. The plaintiff/contractor contracted with the city on June 7, 2002. The contractor allegedly discovered differing site conditions during

construction and filed suit against the engineer on May 24, 2005, within three years of signing its contract with the city, but more than three years after the engineer issued its report.

The engineer claimed that the statute of limitations began to run on the date it issued its report, September 30, 2001. The court noted that generally, in the absence of concealment of the wrong, the statutory period begins when the negligent act occurs, not when it is discovered.⁴⁵

The contractor argued that at the earliest, the statute should have begun to run on June 7, 2002, when it entered its contract with the owner since before that time it could not have sustained damages and did not have a viable, complete cause of action against the engineer. The contractor also argued in favor of a discovery rule.

The court rejected both arguments and affirmed dismissal of the plaintiff's complaint against the engineer.

***Boor v. Spectrum Homes, Inc.*, 675 S.E.2d 712 (N.C. Ct. App. 2009)**

In *Boor*, the court, applying North Carolina's statute of repose, held that the homeowner's claim was untimely because their action was commenced more than six years after substantial completion of their home.

The homeowners sued the builder for the negligent design and construction of a home which allegedly allowed water infiltration into the home, causing structural damage.

A certificate of occupancy was issued for the home in May 2000. The original homeowners purchased the home on June 12, 2001 and sold it to the plaintiffs on October 20, 2006. In December 2006, the plaintiffs requested the defendant conduct warranty work. The defendant declined, indicating that the problems were non-structural, rendering the limited warranty inapplicable. On June 11, 2007, the plaintiffs sued the defendant, alleging breach of implied warranty, express warranty, negligence *per se*, and violations of the North Carolina Unfair and Deceptive Trade Practices Act.

The court recited the difference between a statute of limitations and statute of repose:

[T]he period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. . . . Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.⁴⁷

The court considered the application of North Carolina Statute of Repose under N.C. GEN. STAT. § 1-50(a)(5). North Carolina statute of repose provides in part:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.⁴⁸

While the statute has an exception for fraud or willful or wanton negligence, the plaintiffs made no allegations in this regard. The court found that substantial completion for the purposes of the statute occurred when a certificate of occupancy was issued in May 2000. Therefore, the plaintiffs' complaint was dismissed.

INSURANCE COVERAGE

***Auto Owner's Insurance Co., Inc. v. Newman*, 684 S.E.2d 541 (S.C. 2009)**

In the *Auto Owner's Insurance* case, the majority of the court held that the homebuilder's carrier was obligated to provide coverage for the homeowner's claim that a subcontractor negligently installed stucco, causing water damage to the home.

The homeowner arbitrated its claim against the homebuilder, seeking damages allegedly caused by the negligence of the stucco subcontractor. The homeowner claimed damage not only to the stucco itself, but also to the home's framing and exterior sheathing due to water infiltration. The homeowner recovered in its arbitration against the homebuilder.

The carrier brought a declaratory judgment action seeking a declaration that it was not obligated to indemnify the homebuilder. The court found the homeowner's claim was covered and that the carrier must indemnify the homebuilder for the damages for which it was liable to the homeowner.

The majority found both that the claim involved "property damage" to which the policy applied and that there was an "accident," which was defined as "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt."⁴⁹

The majority concluded that because the defective stucco damaged the home's exterior sheathing and framing, "there was 'property damage' beyond that of the defective work product itself."⁵⁰

The majority also determined that while the negligent application of the stucco itself did not constitute an occurrence, "the continuous moisture intrusion resulting from the subcontractor's negligence is an 'occurrence' as defined by the CGL policy."⁵¹

The majority noted that the policy contained an exclusion for "your work," but, in finding coverage, relied on a change by the insurance industry to standard policy language in 1986. The revised language provided that the "your work" exclusion did not apply "if the damaged work or work out of which the damage arises was performed on your behalf by a subcontractor."⁵²

Finally, the majority acknowledged that the cost of repair/replacement of the stucco itself was not covered. However, it held that the carrier should pay the entire amount of damages since it was impossible to discern which portion of the arbitration award was for the repair/replacement of the stucco.

A single justice dissented, arguing that this claim did not arise from an accident and the homebuilder's work product was the entire home and therefore, "there is no occurrence, rather only faulty workmanship."⁵³

Endnotes

¹*Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C.*, 900 N.E.2d 801, 806 (Ind. App. Ct. 2009).

²*Id.* at 810 (quotation marks omitted).

³*Id.* at 810 (quotation marks omitted).

⁴*Id.* at 815 (citation omitted).

⁵*Id.* at 813.

⁶*Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance Inc.*, 212 P.3d 125, 128 (Ariz. Ct. App. 2009) (citing *Carstens v. City of Phoenix*, 1081, 1083-84 (Ariz. Ct. App. 2003)).

⁷*Id.* at 128 (citing *Carstens*, 75 P.3d at 1084).

⁸*Id.* at 129.

⁹ARIZ. REV. STAT. §12-552(A).

¹⁰*Id.* at 132.

¹¹*Terracon Consultants W. Inc. v. Mandalay Resort Group*, 206 P.3d 81, 83 (Nev. 2009).

¹²*Id.* at 83 (emphasis added).

¹³*Id.* at 85.

¹⁴*Id.* at 86 (quotation marks omitted).

¹⁵*Id.* at 98.

¹⁶With respect to residential claims, please see NEV. REV. STAT CHAPTER 40.

¹⁷See Colorado Governmental Immunity Act. (CGIA), COLO. REV. STAT. §§#24-10-101 to -120.

²⁸*Thompson v. Gordon*, 2009 Ill. App. LEXIS 1119, * 3 (Ill. app. Ct. Nov. 19, 2009).

²⁹*Id.* at * 5.

³⁰*Id.* at * 2-3.

³¹*Sykes v. RFD Third Ave. 1 Assocs.*, 884 N.Y.S.2d 745, 747-48 (N.Y. App. Div. 2009) (citing *Parrott v. Coopers & Lybrand, LLP*, 741 N.E.2d 506 (N.Y. 2000)).

³²*Id.* at 749.

³³*Id.* at 753 (quoting *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318 (1992)).

³⁶*Hamilton-King v. HNTB Ga., Inc.*, 676 S.E.2d 287, 290 (Ga. Ct. App. 2009) (citing §1 A04 of the MUTCD).

³⁷*Id.* at 290 (citing *Department of Trans. v. Brown*, 471 S.E.2d 849 (Ga. 1996)).

³⁸*C-P Integrated Servs., Inc. v. Muskogee City-County Port Auth.*, 215 P.3d 835,

838 (Okla. Civ. App. 2009).

³⁹*Id.* at 889.

⁴⁰*Sendar Dev. Co., LLC v. CMA Design Studio, P.C.*, 890 N.Y.S.2d 534, 537 (N.Y.

App. Div. 2009) (citing *Hall & Co. v. Steiner & Mondore*, 543 N.Y.S.2d 190

(N.Y. App. Div. 1980)).

⁴¹*Id.* at 537.

⁴²*Id.* at 538.

⁴⁵*Bryan v. City of Cotter*, 2009 Ark. 457, * 4-5 (Ark. 2009).

⁴⁶*Caldwell v. PBM Props.*, 2009 Tenn. App. LEXIS 654 * 17 (TENN. APP. CT.

Sept. 29, 2009).

⁴⁹*Auto Owner's Ins. Co., Inc. v. Newman*, 684 S.E.2d 541, 543 (S.C. 2009)

(quoting *Green v. U. Ins. Co. of Am.*, 174 S.E.2d 400, 402 (S.C. 1970)).

⁵⁰*Id.* at 544.

⁵¹*Id.* at 544.

⁵²*Id.* at 545.

⁵³*Id.* at 547.

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