Albany Office
P. O. Drawer 71788
Albany, Georgia 31708
Telephone: (229) 883-2441
Facsimile: (229) 888-8148
www.gwsh-law.com

Atlanta Office
1201 Peachtree St., N.E.
400 Colony Square
Atlanta, Georgia 30361
Telephone: (404) 874-9588

GARDNER WILLIS SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

March 14, 2012

CONSTRUCTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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Examples of seminars:

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- **Workers' Comp Overview**
- **Return to Work in Workers' Comp**
- **Sexual Harassment**
- **Americans with Disabilities Act**
- **Family and Medical Leave Act**
- **Negligent Hiring**
- **Estate Planning**

Recent Georgia Supreme Court Decision Gives Additional Insurance Protection to Contractors

For a contractor facing a claim of personal injury or property damage connected to their work, a Commercial General Liability ("CGL") policy initially seems like a certain lifesaver. Until recently, however, a contractor could not feel confident that damage caused by their work was, in fact, covered by their CGL policy. The Supreme Court of Georgia's recent decision in *American Empire Surplus Lines Insurance Company v. Hathaway Development Company*, gives contractors in Georgia the peace of mind that they will be protected by their CGL policy when negligently performed work causes personal injury or property damage.

Most CGL policies cover property damage or personal injuries that were caused by an "*occurrence*" during the policy period. "Occurrence" is defined by most CGL policies as "an *accident*, including continuous or repeated exposure to the same general harmful conditions." While the term "accident" is generally not defined in CGL policies, the Georgia Legislature has defined accident as "an *event* which takes place without one's foresight or expectation or design." Each of these definitions - occurrence, accident, and event - are very broad and subject to the court's interpretation.

Until the *Hathaway* ruling, Georgia courts interpreted "accident" to only require CGL policies to cover property damage or personal injuries resulting from *accidental acts*, but not for property damage or personal injuries that were accidentally caused by *intentional acts.* This distinction may seem minuscule at first glance. Once this distinction was applied, however, the ramification was devastating for contractors.

The best way to explain these ramifications is to look at how the Supreme Court of Georgia applied this definition of accident. In *Owners Insurance Company v. James*, a homeowner brought suit against the builder for damage allegedly caused by negligent installation of stucco at a residence. The Supreme Court of Georgia held that, because the stucco was intentionally installed, there was no

occurrence, and, therefore, no CGL coverage. Essentially, the Supreme Court of Georgia held that a contractor's CGL policy would not cover any property damage or personal injury claims caused by any work intentionally performed. To put it another way, if a subcontractor tripped over a bucket and hit a board causing the entire house to collapse, that would be covered under the subcontractor's CGL policy. However, if the subcontractor negligently installed the foundation and caused the same damage- the collapse of the house- the CGL would not cover the damages and the subcontractor would be on the hook.

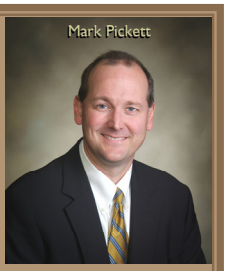
In *Hathaway*, the Supreme Court of Georgia was presented with a case where the plumbing subcontractor damaged three separate projects through negligently performing its work. On one project, the subcontractor installed a four-inch pipe under the slab when the contract specified six-inch pipe. On another, it negligently installed a dishwasher line. Finally, the plumbing subcontractor improperly installed a pipe that separated under hydrostatic pressure. On each project, the plumbing subcontractor's work damaged neighboring properties being built by the general contractor.

Prior to *Hathaway*, the subcontractor would have no coverage for the damage to the neighboring properties under its CGL policy because in each case, the plumbing subcontractor intentionally installed the pipe. In *Hathaway*, however, the Supreme Court of Georgia reversed itself and held the definition of accident includes unexpected injuries or damages caused by intentional acts, stating "A deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly." In short, if a contractor negligently performs work, but does not intend to cause property damage or personal injury, then it has coverage under the CGL policy.

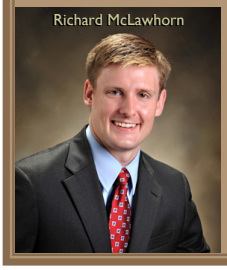
It is important to note that CGL coverage is limited to property damage to *other work* as most CGL policies specifically exclude covering damage to the contractor's own work. For example, if a subcontractor negligently installs pipes in a house causing that house to flood, the CGL policy would cover the flood damage but not the cost to replace the pipes. Taking another example from above, if a subcontractor negligently installed the foundation of the house and caused the house to collapse, the subcontractor's CGL policy would not cover the cost to re-install the foundation, but would cover the rest of the property damage caused by the negligent foundation installation.

While any contractor will shudder at the thought of being faced with a claim of negligently performed work causing property damage or a personal injury, *Hathaway's* interpretation of "accident" gives contractors in Georgia peace of mind that their CGL policy will cover these claims and provide contractors the coverage they need to be protected from disastrous damage awards.

This newsletter was prepared by Mark Pickett and Richard McLawhorn. Mark and Richard represent clients in the construction and trucking industries.


Mark Pickett

Mark embraces a hands-on approach that includes offering immediate on site investigation of catastrophic accidents. He has a thorough understanding of trucking and construction trade practices, which has contributed to his success in jury trials.


Richard McLawhorn

Contact Mark or Richard at 229-883-2441 or e-mail mark.pickett@gwsh-law.com or richard.mclawhorn@gwsh-law.com.

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