LEGAL UPDATE

CLIENT NEWSLETTER OF

CARR, MORRIS & GRAEFF, P.C.

8300 BOONE BLVD
SUITE 250
TYSONS CORNER
VIENNA, VIRGINIA
22182
(703)288-2900

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NEGLIGENCE
PREMISES LIABILITY NOT EASILY PROVEN

A shopper slips on produce in the aisle of a grocery store. A passerby trips on the uneven sidewalk at the entrance to an office building. A commuter stumbles on a subway escalator. These are fairly common occurrences—all situations where the injured party might reasonably consider making a claim, even filing suit to recover money *damages* for injuries he or she has sustained. Despite a surprisingly general misconception that a commercial enterprise is presumptively liable for every mishap on its property, such claims in fact require the claimant to prove *negligence*. Two recent District of Columbia court decisions underscore the evidentiary challenges confronting claimants in bringing such a suit.

As a starting point, bear in mind that the four necessary elements of a claim of negligence are duty, breach, causation and damages. The *duty* element is at the core of the two cases to be discussed.

District of Columbia Superior Court Judge Neal J. Kravitz confronted a classic snow removal/fall scenario and personal injury claim in *Despertt v. Greensmiths, Inc., et al.*, D.C. Sup. Ct. No. 08-CA-7312 (Aug. 7, 2009). Plaintiff, a minor

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ESTATE PLANNING
HOLOGRAPHIC WILL CONTEST BETWEEN SIBLINGS

Virginia resident Shirley J. K. ("Mother") passed away on May 7, 2008. She was survived by her three adult children: Linda S. K. ("Plaintiff"), Deborah L. K. ("Defendant") and Thomas A. K. ("Brother"). Following Mother's passing Plaintiff was appointed administrator of Mother's decedent estate. At the time Mother's children believed their mother to have passed away *intestate*, meaning "without a will." In such instances, pursuant to Virginia intestacy statutes, Mother's estate would most likely have been distributed to her surviving children in equal shares. However, Plaintiff, while searching through Mother's possessions, found a writing ("the Writing") dated February 12, 2002. The Writing consists of a typewritten form with blanks for information required for the will. Plaintiff contends that the second article of the form is a *holographic* will. Article Two of the Writing, hand-written, reads as follows:

> I give all monies that I may have to my daughter Linda S. K. also with all my properties & personal properties. And whatever properties or money that may come to me in any & every form….. I leeve [sic] my entire estate to Linda K. to do so with as she desires, not to be broken by any other person, these are my last wishes. (signed) Shirley J. K.

Plaintiff filed suit in Fairfax County Circuit Court. In her complaint Plaintiff requests that the Court admit the Writing as Mother's Last Will and Testament. Defendant, Plaintiff's sister, contests the Writing as a will because it was not witnessed or signed by a notary, blanks for which appear on the printed form.

A "holographic will" is a will and testament that has been entirely handwritten and signed by the testator. Under Virginia law holographic wills are not invalid so long as they survive judicial scrutiny. In the United States unwitnessed holographic wills are valid in about half the 50 states. Plaintiff filed a Motion for Summary Judgment to admit Article Two of the Writing (the aforequoted excerpt) as a holographic will. Summary judgment is a drastic and disfavored remedy by which a party can preemptively prevail prior to trial. Pursuant to Virginia Code §64.1-49, a decedent's holographic will may be admitted for probate "if the will be wholly in the handwriting of the testator and that fact shall be proved by at least two disinterested witnesses." The Supreme Court of Virginia has explained that "these statutory requirements are not intended to limit the power of the testator, but to protect the testator's exercise of that power." *Berry v. Trible*, 271 Va. 289, 297 (2006). First, it must be determined whether the writing is "wholly in the handwriting of the testator," and then whether that fact was attested to by two disinterested witnesses.

Remembering that the Writing was a printed form will with blanks for users to pen wishes and bequests, the first issue is whether writing on a typewritten form can be deemed *wholly* in the handwriting of the testator. The Supreme Court of Virginia has addressed this question and indicated that the General Assembly did not intend the word "wholly" to apply in an absolute sense. *Bell v. Timmins,* 190 Va. 648, 654 (1950). Further, the Supreme Court of Virginia held in *Moon v. Norvell* that "the presence of typewritten material on paper used to draft a holographic

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The articles in this publication are designed to give general information on the matters covered. Space limitations prevent exhaustive treatment or analysis of any topic. The articles are not intended to substitute for advice on specific legal problems.

ASK A LAWYER, Q&A

Q. I run a small IT business. I am well aware of the need to confirm the employment eligibility of our new hires by completing the I-9 form. We own our own building, and I recently hired a landscaper for a modest project. The landscaper's work was fine, but he made some comments that led me to suspect that his crew is comprised of undocumented workers. Unrelated, he also asked that I pay him in cash—about $5,000. All this has left me a little uneasy. Am I responsible for policing the employment status of vendors? And is there any prohibition on paying cash?

Queasy in Aquia

A. Queasy, rest easy. You are not required to obtain an I-9 form for properly classified independent contractors and are not responsible for ascertaining the employment eligibility of the individuals engaged by the independent contractor. However, if you engage a worker as an independent contractor (and not as an employee) in order to avoid the I-9 issue, that is a different story. Moving on to the request for cash payment, generally speaking, the IRS requires that a form 1099 be issued to any individual or unincorporated entity if you pay the individual or entity $600 or more in any calendar year. The 1099 requirement is the same whether the payment is in cash or check. However, good business practice dictates that business expenses be paid by check or other traceable means (i.e., credit card). If you are subject to an IRS audit, you will have a tough time explaining why the $5,000 cash withdrawal was for a legitimate business expense.

Q. Yesterday was the first day of school in our area. Of our 45 local employees, four didn't show up for work. One left a late night phone message that she needed to accompany her youngest to her first day at school. Another sent a 6:30AM email with a similar excuse. We learned today that the other two also elected to skip work to deal with first-day issues. We have policies for taking days off; clearly, none of these employees satisfied those policies. My boss wants to hammer two of the offenders with written reprimands—these two are repeat offenders and marginal performers. He wants me to counsel the other two but take no formal action. Don't we have to treat them all the same, since they all made the same mistake?

H.R. in Herndon

A. H.R., I'll bet you have the same problem on the first day of deer hunting season. The first premise of successful employee relations is to treat all similarly situated employees in a similar fashion. Thus, people violating the same work rule must receive the same punishment. Failing to follow this premise may result in a discrimination claim which will be hard to defend. So, yes, you should treat all employees the same for this transgression. However, since two of the employees have prior disciplinary problems, this issue could result in further action if the employer follows a progressive disciplinary program.

Q. Our firm sponsors a softball team. One of our male managers—a calm and dignified professional at work—is a different person on the softball team. He's rude, profane and incredibly sexist and offensive to our female players. Believe me, this is "the fleet just got in" behavior. He's the most senior employee on the team, and he's also the coach. I am in management, too, but a rung beneath him. Am I obligated to speak up? To report him? Does the company itself risk anything by tolerating this behavior?

Conflicted (but batting .400)

A. Well, Slugger, unfortunately, this is one of those situations where the office quite probably extends to the softball field. Since the team is sponsored by the firm, a reasonable argument can be made that workplace discrimination rules apply in this "firm sanctioned" after-work activity. The conduct noted should be reported to human resources or another firm supervisor. A timely investigation and appropriate remedial action (if warranted) must be made. Failure to investigate the allegations and take action to stop inappropriate conduct may result in greater liability to the firm.

PHILIP SCHWARTZ

ESTATE PLANNING

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instrument does not destroy the effect of the holographic instrument as a will, provided that the typewritten material is not part of the handwritten instrument and is not referenced directly or indirectly in the handwritten instrument." *Moon v. Norvell,* 184 Va. 842, 850-51 (1946). Here, Article Two of the Writing is handwritten and self-contained and can be understood without reference to the typewritten text. Therefore, Mother's holographic will is Article Two of the Writing (quoted above) and nothing more. But, can Mother's handwriting in the Writing be attested to by two disinterested witnesses? Who is a "disinterested witness?"

Although "disinterested witness" is not defined in the Virginia Code, it is clear that Plaintiff herself cannot qualify because she stands to benefit financially as sole heir if Article Two should be honored. At the hearing on the Motion for Summary Judgment, Defendant and Brother testified that the handwritten portions of the Writing were in fact Mother's handwriting. They did so contrary to their interests as potential beneficiaries under Mother's intestate estate – had the Writing failed. Therefore, Defendant's and Brother's interests were exactly contrary to that of Plaintiff, and, as such, their testimony that the Writing was in their mother's handwriting, giving her estate to Plaintiff, was persuasive. In this instance it can be said that Defendant and Brother were not disinterested, but *counter*-interested.

The judge granted Plaintiff's Motion for Summary Judgment.

JUSTIN BANFORD

TAX

REIMBURSEMENT OF PAYMENTS BY PARENTS OF DISABLED CHILDREN

On January 1, 2008, the Office of Chief Counsel of the Internal Revenue Service (IRS) issued an information letter (INFO 2009-0014) discussing whether parents of disabled children must include in gross income reimbursement payments received from a school board in accordance with the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) for the cost of educational services provided by a non-public school. The IRS concluded such reimbursement is not includible in gross income.

Although legal advice memoranda, private letter rulings, technical advice memoranda and other similar IRS pronouncements are not binding precedent, they are quite useful to become familiar with the thinking of the IRS on particular issues and are regularly used by tax practitioners for planning and advice purposes.

The IDEA ensures all children with disabilities have available a free appropriate public education. It allows parents who are unsatisfied with their child's school placement to challenge that placement in a hearing before an impartial officer. Under judicial precedent a board of education may be required to pay for non-public education services obtained by a parent for his or her child if the services offered by the board are inadequate or inappropriate, the services obtained by the parent are appropriate, and equitable considerations support the parent's claim.

If a parent prevails under these three standards the school board must pay for the cost of the non-public education in order to satisfy its legal obligation to provide a free appropriate education. The reimbursement by the school board to the parent merely requires the board to belatedly pay expenses it should have paid all along and would have been borne in the first instance by the board had it developed a proper plan.

Section 61(a) of the Internal Revenue Code provides, except as otherwise provided by law, "gross income" means all income from whatever source derived; and, it is a well-settled principle that reimbursement for personal expenses of the taxpayer are includible in gross income. It is also settled, however, in a non-employment context, that reimbursement for expenses incurred by a taxpayer on behalf of another are not includible in taxpayer's gross income. For example the IRS has considered on numerous occasions the situation of a parent not engaged in the business of transporting children who received payments from a school board to drive children to school when no bus service was available. In those cases the IRS held such reimbursement payments were not includible in the parent's income since they were expenses incurred on behalf of a school board which was obligated to furnish transportation for the children. Reasoning by analogy, the IRS concluded that in the IDEA context parents had received reimbursement for expenses incurred on behalf of the school board and, therefore, were not includible in recipient's gross income or subject to information reporting to the IRS.

This IRS letter is excellent from the standpoint of both tax logic and plain common sense. Its holding is good news to parents in the Washington metropolitan area who are usually quite proactive in the education of their children and frequently request a non-public school from local school boards when such boards cannot provide their disabled children with an optimal public education.

NÉSTOR CRUZ

NEGLIGENCE

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child, was badly injured when she slipped and fell on a patch of snow and ice on a public sidewalk. She sued the owner of the property abutted by the sidewalk and a contractor hired to remove the snow and ice. The District has an express statute imposing on landowners a duty to promptly clear abutting walkways of snow and ice; but, courts have explicitly ruled that the statute does not create a private right of action for personal injury due to the landowner's failure to comply with the snow removal statute. Defendants moved for summary judgment, asserting that they had no recognized *duty*. The motion was denied, the court agreeing with Plaintiff's counter-argument that there is an exception to the no-duty rule and "that a property owner may be found liable if it acts in any manner to increase the hazard created by the snow or ice...." There had been fact and expert testimony in the case that the snow removal contractor's efforts had permitted melting, run-off and re-freezing, thereby actually enhancing the risk to pedestrians. (Ironically, the landowner may have escaped liability if he had chosen to violate the snow removal statute.)

In a second recent case, *WMATA v. Ferguson*, D.C.C.A. No. 08-CV-668 (Aug. 8, 2009), the landowner fared better before the D.C. Court of Appeals. Ms. Ferguson had sued WMATA for negligence, claiming she fell on a defective tree grate at a Metro station. The jury found in favor of Ferguson, and the trial court denied WMATA's post-trial motion for judgment. The Court of Appeals reversed, however, citing the lack of proof that WMATA had "actual or constructive notice" of the defective grate at issue. There was no evidence WMATA *actually* knew of the defective grate, and it would be pure speculation to conclude a WMATA employee must have created the problem. To prove *constructive* notice, Ferguson had to show that the defect existed for such a duration of time that WMATA, exercising reasonable care, should have identified and addressed the problem. Again, there was no evidence supporting such a conclusion. Ultimately, Ferguson's case failed because she could not prove WMATA's duty to repair the grate. Merely proving the existence of a defect—and proving the defect caused harm—is not sufficient. Any *duty* on WMATA's part to repair the defect would have to be triggered by actual or constructive notice, and Ferguson could not prove WMATA had notice.

LAWRENCE CARR

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial litigation; Employment/Labor; Discrimination and Wage-Hour; Criminal; and Alternative Dispute Resolution.

The firm maintains its office in Tysons Corner, Virginia—the business hub of the metropolitan region. It has attorneys admitted to all of the local judicial jurisdictions.

STAFF NOTES

Roy Morris and his wife completed their previously reported 2-week cycling tour of Costa Azul, Portugal. Although Roy's wheeled ventures now trend toward motor sports, he has decades of man-powered cycling experience and still pedals to work every day. *Nonetheless, claims that "50 or so miles a day is nothing" are questioned by some naysayers among us.*

* * *

Justin Banford has signed up for Roy's driving program at Summit Point. *If Justin trades his aging Honda for a BMW M Class, there will be cause for concern.*

CARR, MORRIS & GRAEFF, P.C.
8300 BOONE BLVD, SUITE 250
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