the ProfessionalLine

Volume 11 • Issue 1 • January 2011

A Hinshaw & Culbertson LLP publication devoted to professional liability issues

The Right to Privacy and the Right to Bear Arms – Two United States Supreme Court Decisions That Impact Local Units of Government

Corinne C. Heggie and **Steven M. Puiszis**
Chicago

The U.S. Supreme Court decided two cases in 2010 that substantially impact local units of government. In *City of Ontario, California, et al. v. Quon*, 130 S. Ct. 2619 (2010), the Court considered the legality of a police chief's search and of the Fourth Amendment. In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court addressed state and local government gun control regulation and the Second Amendment. Risk managers and those active in municipal professional liability loss control should be mindful of these decisions because of their impact on daily operations for governmental entities.

...the task of determining just how restrictive state and local gun-control measures can be without violating the Second Amendment will be left to the lower courts to resolve. For the time being, the firing line will be shifted back to the lower courts to address challenges that will be made to state and local laws limiting and regulating the sale and possession of handguns.

City of Ontario, California, et al. v. Quon

In *Quon*, the U.S. Supreme Court reversed a decision of the U.S. Court of Appeals for the Ninth Circuit, finding that a search of transcripts of a police officer's text messages on a work-issued pager was reasonable. The City of Ontario, California, issued pagers to its law enforcement officers. The pagers had a monthly limit on the number of text messages that might be sent. Mr. Quon, an officer, exceeded that limit and his police chief obtained transcripts of the text messages that the officer had sent so as to determine if late fees were paid for sending work-related or personal messages. In his search, the police chief learned that Mr. Quon's messages were unrelated to work and sexually explicit. That led to disciplinary action being taken against the officer. Mr. Quon sued the city, alleging that his employer violated both his Fourth Amendment rights and the Stored Communications Act (SCA) because it obtained and reviewed transcripts of his text messages.

The Supreme Court recognized that "[i]ndividuals do not lose [their] Fourth Amendment rights merely because they work for the government instead of a private employer." It further concluded that the Fourth Amendment's "warrant and probable cause requirement[s] [are] impracticable for government employers." However, the Court has yet to agree "on the proper analytical framework" to judge Fourth Amendment claims brought against government employers.

To better understand the Supreme Court's opinion in *Quon*, one needs to review *O'Conner v. Ortega*, 480 U.S. 708 (1987). In that case, a plurality of the Court concluded that "the operational realities of the workplace" must be considered in determining whether an employee had any reasonable expectation of privacy. This determination is addressed "on a case-by-case basis." If the employee can establish a reasonable expectation of privacy, under the plurality's approach in *O'Connor,* a warrantless search will be upheld if it was "'justified at its inception' and if 'the measures adopted [were] reasonably related to the objectives of the search and not excessively intrusive in light of' the circumstances giving rise to the search." U.S. Supreme Court Justice Antonin Scalia, who concurred in the judgment in *O'Connor,* saw no need to consider the first step in the plurality's approach. His analysis would simply ask if the search was the type "that are regarded as reasonable and normal in the private employer context." If so, the search would not violate the Fourth Amendment.

In *Quon,* the Supreme Court chose not to address the issue of whether the approach advanced by either the plurality or Justice Scalia in *O'Connor* was controlling. The Court was also reluctant to address the issue of whether the plaintiff/employee had a reasonable expectation of privacy in the text messages he had sent over government-issued pagers. The Court explained: "[T]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Therefore, the Court assumed that Mr. Quon had a reasonable expectation of privacy in those text messages, which rendered the need to pick the controlling approach in *O'Connor* a moot point.

Ultimately, the Court in *Quon* held that the city's review of the employee's text messages met both the plurality's and Justice Scalia's tests in *O'Connor*. The search was justified at its inception because it was ordered initially to determine whether the numerical limit on the number of text messages imposed by the city's contract was sufficient to meet its operational needs. Additionally, the city had a legitimate interest in preventing extensive personal use of the pagers by its employees for which the city would have to pay. For these same reasons, "the search would be regarded as reasonable and normal in the private-employer context," satisfying Justice Scalia's approach in *O'Connor.*

Quon is also significant because the Court called for prudence and caution when addressing "the concept of privacy expectations in communications made on electronic equipment." The Court pointed to "rapid changes" in both the "dynamics of communication and information transmission" as well as "what society accepts as proper behavior." It also expressed uncertainty as to "how workplace norms, and the law's treatment of them, will evolve." Thus, rather than conclusively evaluating whether an employee enjoyed a reasonable expectation of privacy in connection with his or her text messages on a company provided pager, the Court assumed such an expectation existed. However, the Court also concluded that a review of text messages on an employee-issued pager "was not nearly intrusive as a search of [an employee's] personal email account, or a wiretap on his home phone line, would have been."

In light of *Quon*, it seems clear that overly intrusive searches of electronic communications could run afoul of the Fourth Amendment, assuming that an employee can establish a reasonable expectation of privacy, even when the employer has a legitimate purpose in reviewing those communications under the plurality's test in *O'Connor.*

As for the issue of whether the SCA was violated by the delivery of the transcripts to the city, it was not before the Court. However, the Court did hold that even if the SCA was violated, the search was constitutionally reasonable under the Fourth Amendment, and a violation of the SCA would not change that conclusion.

McDonald v. City of Chicago

In a five-to-four decision, the U.S. Supreme Court in *McDonald v. City of Chicago*, ostensibly followed the path it took in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). In that case, the Court invalidated a District of Columbia ordinance that

continued on back page

the ProfessionalLine

Recent Court Rulings

Insurance Agents

Insurer Had No Duty to Advise Insured Where No Clear Request for Advice Was Made

***Mullen v. State Farm Casualty and Fire Company*, 2010 WL 2228369 (D.S.C.)**

After a fire destroyed his house, an insured made a claim against his homeowner's insurance policy. When the insured renewed his policy a few months before the fire, the policy provided coverage of $202,900 for any actual loss sustained by the insured's home, and an additional $40,580 in coverage for "Increased Dwelling Limit." Following the fire, the insured made three claims on the policy: (1) for the loss of the home; (2) content loss; and, (3) living expenses. In response, the insurer issued payment of $204,006.93 for the loss of the home, $203,509 of which represented the policy limit for the dwelling at the time of the fire. The insurer subsequently issued payment of $91,338 for the insured's content claim, and fully reimbursed the insured for certain living expenses.

After receiving the insurance company's payments, the insured sued the insurer for bad faith and breach of contract, arguing that the carrier had failed to timely pay sufficient benefits. The insured's complaint also included negligence and gross negligence claims, alleging that the insurer owed him a duty to adequately insure his home. Specifically, the insured alleged that the insurer's agents had failed to exercise due care in providing him appropriate coverage for his home.

The insurer moved for summary judgment, arguing that it had no duty to advise the insured regarding the appropriate limits. At the hearing on the motion, the insured abandoned his bad faith and breach of contract causes of action, leaving the negligence and gross negligence claims remaining. In ruling on the motion, the court started with the premise that "under South Carolina law, an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so." To evaluate whether a duty was impliedly created, the court analyzed the relevant factors, including: "(1) consideration beyond a mere payment of a premium; (2) a clear request for advice; and, (3) a course of dealing that would put an agent on notice that advice is being sought and relied on."

Finding no course of dealing between the insured and the agent, and no additional consideration paid, the court's decision turned on the question of whether the insured had made a clear request for advice regarding the amount of insurance needed to replace his house. The court recognized that the insured's complaint included an allegation of a conversation with the agent regarding the adequacy of coverage to rebuild in the event of a fire. However, the court ruled that "an allegation that a conversation occurred is different in form and effect from a clear interrogatory to an insurance agent sufficient to trigger an implied duty." Because no "clear request for advice" occurred, the court granted the insurer's motion for summary judgment.

Comment: Going forward, insureds will not be able to rely on mere recollections of conversations in order to demonstrate a request for information that gives rise to a duty to advise.

Bradley M. Zamczyk
San Francisco

Architects & Engineers

Florida Professionals Cannot Contractually Limit Damages for Their Independent Professional Obligation

***Witt v. La Gorce Country Club*, 35 So. 3d 1033 (Fla. 2010)**

A country club wanted to construct a reverse osmosis water supply treatment system at the country club. It entered into a design-build contract with ITT Industries, Inc. (ITT) and a contract with Gerhardt M. Witt and Associates, Inc. (GMWA) for consulting services and project administration. GMWA was to provide certain geological services needed to construct the facility. Gerhardt M. Witt (Witt) was a licensed professional geologist employed by GMWA to perform the professional services under the contract.

Numerous problems arose during the construction, resulting in the issuance of a change order. The project was eventually completed and the facility turned over to the country club, which began to operate the facility. From the beginning, the performance of the facility began to deteriorate until a complete system failure occurred after 14 months of operation.

The country club sued ITT, GMWA, and Witt in his individual capacity. The contract between the country club and GMWA contained a limitation of liability clause, which limited the liability of GMWA and its subconsultants to:

> the total dollar amount of the approved portion of the scope for the project for any and claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregated liability of [GMWA] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [GMWA's] total fee for services rendered on this project, whichever is greater. Such claims and causes include, but are not limited to, negligence, professional errors or omissions, strict liability, breach of contract or warranty.

Both GMWA and Witt raised that clause as a defense to the lawsuit. The trial court ruled that the clause not was applicable to Witt because he was not a party to the contract and because he could not limit his liability under the Florida statutes governing licensed professional geologists. The trial court then entered a $4 million judgment against Witt.

On appeal, the appellate court affirmed, noting that Florida Statutes Section 492.111(4) provides that a licensed professional geologist cannot limit liability for negligence, misconduct or wrongful acts that he or she commits. Further, the liability cannot be limited because the professional practices through a corporation or partnership. So, in addition to not being a *party* to the contract, Witt was prohibited under Florida law from limiting damages by means of his *employment relationship* with GMWA.

The appellate court held that the limitation clause was unenforceable, even if it were to apply to Witt, because under the Florida statute and based on prior decisions of the Florida Supreme Court, Witt was subject to a separate "extra-contractual" obligation to the country club. That separate professional obligation is not subject to any limitation. The court stated that the "public policy" of Florida, as reflected in statutory and case law, prohibits the application of the contractual limitation clause to this separate obligation. The court therefore affirmed the $4 million judgment against Witt, as a provider of professional services.

Comment: In states where the "economic loss doctrine" is applied, the professional would not have been sued in the first place. Florida's approach of allowing the employer, but not the employee, to limit liability for contract or negligence exposures would probably not be the rule elsewhere.

Darrell S. Dudzik
Phoenix

Architects & Engineers

Summary Judgment Granted Where No Causal Connection Between Lack of Guard Rail and Fall

***Zeimaran v. Commerical Concepts, Inc.*, 303 Ga. App. 447, 693 S.E.2d 513 (Ga. App. Ct. 2010)**

Plaintiff business owner contracted with an architect and a general contractor for the building of a beauty salon. After having operated the salon for approximately eight months, the business owner made a routine trip into a storage area to organize boxes of supplies. The last thing she remembered before waking up in the hospital was being on the storage platform organizing boxes. She learned that she had fallen through the acoustical tile adjacent to the storage platform and had struck the floor that was more than 10 feet below.

The business owner sued the general contractor and the architect, claiming that the applicable building codes required a railing around the storage area and that the architect was negligent for failing to include such a railing in the plans. The business owner also alleged that the general contractor was negligent for

Case Summaries & Conclusions

failing to construct the railing, even though it was not included in the plans.

The general contractor moved for summary judgment based upon language contained in a release that had been entered into when the business owner terminated the general contractor before completion of the work. At that time, the business owner entered into a "Settlement Agreement and Release," which provided for a full release of "any and all claims, . . . future claims or causes of action." That release, standing alone, was sufficient grounds for judgment to be entered in favor of the general contractor.

The architect also moved for summary judgment arguing that the business owner showed no causal connection between the lack of a guard rail and her fall because she did not know how or why she fell, and the lack of a guard rail was open and obvious. It was noted that the business owner had been on the platform on many occasions prior to the accident and was aware of the acoustical tiles not being able to bear her weight.

The Georgia Court of Appeals reviewed important but basic case law on a plaintiff's need to prove causation, and noted that courts have held that a mere possibility of causation is not enough, and that neither may it rest on pure speculation or conjecture. Because the business owner could not show that the failure of the plans to include a railing around the storage area was a proximate cause of her fall, summary judgment was entered in favor of the architect and affirmed on appeal.

One of the judges on the court commented in a concurring opinion that the law should not require someone who sustained brain damage after falling 10 feet to prove that she fell because there was no safety rail. "While the absence of the guard rail was obvious and open, the need for one was not." The concurring judge nevertheless ruled in favor of both defendants, but took a different position regarding the architect. Because the business owner fired the contractor before the work was completed, there was no proof that the structure would have been built to the architect's specifications. Nor could anyone have assumed the need for that safety feature before construction ended. Thus, under those "peculiar facts" summary judgment was still proper for the architect.

Comment: An architect is generally relieved of liability where the contractor deviates from his or her design, at least to the extent that a design not faithfully executed could not be the cause. In *Zeimaran*, instead of a variance from the design, there was incomplete work by the contractor, coupled with an *omission* in the architect's design. The concurring judge pointed out that the contractor's incomplete construction provided a proximate cause defense for the omission in the design, as contrasted with other cases concerning a variance from the design.

Kevin R. Sido
Chicago

Architects and Engineers

Statutory Authority to Practice May Impose Duty Despite Standard Contract Disclaimer

***Trikon Sunrise Assoc., LLC v. Brice Bldg. Co., Inc.*, 41 So. 3d 315 (Fla. App. 2010)**

An architect was sued for malpractice in connection with services he was performing for his employer, an architecture firm that was also named as a separate defendant. A tenant had hired the firm to provide various architectural services. The architect signed the contract on the firm's behalf. Approximately one year later, the tenant entered into a form contract with a general contractor. Plaintiff, the owner of the subject property, was not a party to either the general contractor's contract or the architecture firm's contract.

The contract provided that the general contractor would be solely responsible for, and have control over, the construction means, methods, techniques, sequences and procedures and for safety precautions and programs in connection with the work. Conversely, the architect would not be responsible for the contractor's failure to perform in accordance with the contract documents.

Hurricane Wilma struck Florida at a point when the construction of the walls for the project was incomplete. The walls had been temporarily braced by the contractor but nonetheless collapsed. The collapse caused the project to be delayed.

The property owner sued the general contractor and the architect, naming both the architecture firm and individual architect, alleging that they should have known that the temporary bracing was inadequate for hurricane force winds and that they thus breached a duty of care for failing to verify the details of the erection of the concrete wall panels, including temporary bracing. The property owner further alleged that the architecture firm and the individual architect also failed to conduct a proper review and approval process of the erection details, including the temporary bracing.

The architecture firm and the architect filed a joint motion for summary judgment, arguing that they never had the duty as alleged and, further, that the limitations expressed in the contract regarding construction means were a defense to the negligence claim. Although the property owner's complaint alleged a breach, no specific *contractual* obligation was so alleged. The trial court denied the architecture firm's motion for summary judgment but granted summary judgment in favor of the architect.

The appellate court pointed out the Florida statutes defining architecture and engineering and noted that the two disciplines are clearly distinct. But it also acknowledged that there would be occasions during a project where an engineer might perform architectural services, as permitted, that would be purely incidental to the engineering practice, and vice-versa. Because the pleadings and the contract for services referenced engineering services, the court held that a question of fact was raised as to whether the individual architect offered to perform "engineering" services and whether or not those services were indeed breached, all relative to bracing the wall.

Comment: Florida does not recognize the limitations of the "economic loss doctrine" as would be found in many other states. Therefore, the property owner was able to sue the architecture firm as well as the individual architect for negligence. The court's use of statutory definitions of architecture or engineering practice to impose a duty upon the individual architect was surely unusual, if not unprecedented. The court in its decision failed to recognize that a statutory ability to perform certain acts does not require their performance, especially if the contract disclaims them. Just because a professional is given the statutory privilege to practice does not necessarily mean that he or she will have a duty to perform all such permissible duties when a contract is otherwise silent on such duties. Further, in a negligence action, an individual professional faces personal liability as seen here.

Kevin R. Sido
Chicago

Architects & Engineers

Negligence Claims Against Architects and Engineers Barred by Economic Loss Rule

***Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010)**

The Indianapolis – Marion County Public Library sued architectural and engineering subcontractors, alleging defective design and inspection services during the construction of an underground parking garage. The subcontractors moved for partial summary judgment, arguing that the library's negligence claims were barred by the "economic loss doctrine." The trial court granted the motion, and the court of appeals affirmed. The case was then transferred to the Supreme Court of Indiana, which also affirmed.

The Indiana Supreme Court examined Indiana's well-established history of the economic loss doctrine and its application. Simply stated, the doctrine precludes recovery in tort for any purely economic loss—that is, loss unaccompanied by any property damage or personal injury. There are some exceptions to its application. Under the "other property rule," damage from a defective product or service may be recoverable under tort law if the defect causes personal injury or damage to other property.

The library's principal argument was that the economic loss doctrine was inapplicable because the subject loss was not purely economic; the library suffered damage to "other property" as well as physical damage. The library also argued that even if there was no physical damage, the

continued on back page

the ProfessionalLine

HINSHAW & CULBERTSON LLP

The Right to Privacy and the Right to Bear Arms – Two United States Supreme Court Decisions That Impact Local Units of Government

continued from front cover

prohibited the possession of hand guns, and held that the Second Amendment applied to the states with the same vigor it applied to the federal government. Accordingly, the Second Amendment now applies to state and local governments.

McDonald, however, was a fractured decision, with no majority of the Court agreeing as to how the Second Amendment was applicable to the states. A plurality of the Court held that the Second Amendment was incorporated under the Fourteenth Amendment's Due Process Clause. However, U.S. Supreme Court Justice Clarence Thomas, who cast the deciding fifth vote in *McDonald*, concluded that the Second Amendment applied to the states via the Fourteenth Amendment's Privileges and Immunities Clause. That clause has essentially been a dead letter since the Court decided *The Slaughter-House Cases* in 1873, which narrowly interpreted it as only protecting those rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws." In Justice Thomas' view, "the right to keep and bear arms is a privilege of American citizenship."

While the plurality acknowledged that the Court's interpretation of the Privileges and Immunities Clause in *The Slaughter-House Cases* may have been flawed, it saw "no need to reconsider that interpretation." The plurality explained that "[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment." It therefore, declined "to disturb the *Slaughter-House* holding." The plurality also rejected the argument that the Court "should depart from [its] established incorporation methodology on the ground that making the Second Amendment binding on the States and their subdivisions is inconsistent with principles of federalism and will stifle experimentation."

The plurality explained that the proper test for incorporation under the Due Process Clause addresses whether the right in question is "fundamental to our scheme of ordered liberty or as we have said in a related context, whether the right is 'deeply rooted in the Nation's history and tradition.'" The plurality observed that *Heller* conclusively established that point.

It bears mentioning that there is a subtle distinction between the Fourteenth Amendment's Due Process and Privileges and Immunities Clauses. The Due Process Clause applies to "all person[s]," whereas the Privileges and Immunities Clause only protects the rights of "citizens." Because *McDonald* did not involve the claim of a noncitizen, Justice Thomas refused to speculate on the extent to which states "may regulate firearm possession by noncitizens."

The plurality in *McDonald* explained that its conclusion "does not imperil every law regulating firearms." It reaffirmed several statements that the Court made in *Heller* that the Second Amendment does not endow "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." The Court in *McDonald* also repeated its mantra from *Heller* that the Court's holding should not be viewed a casting "doubt on longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive buildings, or laws imposing conditions on the commercial sales of arms.'" However, the Court did not elaborate on those points. As a result, the task of determining just how restrictive state and local gun-control measures can be without violating the Second Amendment will be left to the lower courts to resolve. For the time being, the firing line will be shifted back to the lower courts to address challenges that will be made to state and local laws limiting and regulating the sale and possession of handguns.

Recent Court Rulings — Case Summaries & Conclusions

continued from page 3

subcontractors created an imminent risk of personal injury, which amounted to physical damage.

The Supreme Court determined that the renovation of the parking structure was an integral part of the library's purchase of the entire construction project. The parking structure was not independent from the rest of the purchased services and therefore not damage to "other property," and so within the scope of the economic loss doctrine. The Court then held, citing past precedent, that the economic loss doctrine applied, notwithstanding the presence of imminent risk of danger.

The Court also rejected the library's public policy arguments. It held that the economic loss doctrine applies to professional services and bars negligence claims against engineers and construction design professionals, even in the absence of privity of contract, such that the engineers and design professionals had no liability in tort to the owner for purely economic losses caused by allegedly defective design. Whether an architect or engineer owes a duty to other contractors on a construction site to prepare competent plans and specifications, to supervise their implementation and the execution of the work, is to be determined by the language of the various contracts governing them as well as the conduct of the architect or engineer.

Comment: This case represents a significant victory for contractors and design professionals in the application of the economic loss doctrine under Indiana law. It strongly upholds a classic interpretation of the doctrine at its fullest, rejecting usual objections as offered in other jurisdictions. In passing, the Indiana Supreme Court also underscores the rule that the design professional's contract sets the scope of duty owed even to those not in privity.

David J. Hanus & Melissa J. Lauritch
Milwaukee

Hinshaw & Culbertson LLP
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601
312-704-3000
info@hinshawlaw.com
www.hinshawlaw.com

Editorial Contributors:

Chair, Professional Liability Group
Marissa I. Delinks
Boston, Massachusetts
617-213-7000
mdelinks@hinshawlaw.com

Executive Editor:
David L. Winnett
San Francisco, California
415-362-6000
dwinnett@hinshawlaw.com

Managing Editor:
Jill Buresh Nail
San Francisco, California
415-362-6000
jnail@hinshawlaw.com

Contributors:

Darrell S. Dudzik

David J. Hanus

Corinne C. Heggie

Melissa J. Lauritch

Steven M. Puiszis

Kevin R. Sido

Bradley M. Zamczyk

The Professional Line is published by Hinshaw & Culbertson LLP. Hinshaw is a national law firm with approximately 500 lawyers in 24 offices. We offer a full-service practice, with an emphasis in litigation, business law and corporate transactions, environmental, intellectual property, labor and employment law, professional liability defense, estate planning and taxation matters.

Our attorneys provide services to a range of for-profit and not-for-profit clients in industries that include alarm and security services, construction, financial services, health care, hospitality, insurance, legal, manufacturing, real estate, retail and transportation. Our clients also include government agencies, municipalities and schools.

Hinshaw was founded in 1934. The firm is headquartered in Chicago, and maintains offices in 12 states: Arizona, California, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New York, Oregon, Rhode Island and Wisconsin.