



COZEN

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2006 Rocky Mountain Subrogation Seminar

MONDAY, OCTOBER 23, 2006

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DENVER, CO 80204

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2006 Rocky Mountain Subrogation Seminar

TABLE OF CONTENTS

- I. Speaker Profiles
- II. Mediation Basics
written and presented by Judge Sanford M. "Sandy" Brook
- III. Anatomy of a Fire Investigation
written and presented by Jennifer Poynter, Esq., Cozen O'Connor and Thomas D. McAdam, CFEI
- IV. An Explosive Case
written and presented by Thomas M. Dunford, Esq.
- V. Update on Colorado Law
written and presented by Richard R. Rardin, Esq.
- VI. Allocation of Responsibilities Between General Contractors and Subcontractors
written and presented by Sarah Earle Killeen, Esq.



Brad W. Breslau

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AREAS OF EXPERIENCE

- General Litigation
- Property Subrogation
- Real Estate Litigation
- Subrogation & Recovery

EDUCATION

- J.D., University of Denver
College of Law, 1979
- B.S., University of Colorado at
Boulder, 1976

MEMBERSHIPS

- American Bar Association
- Colorado Bar Association -
Committee Member for
Litigation Section Council
- Colorado Defense Lawyers
Association
- Defense Research Institute
- National Association of
Subrogation Professionals -
Colorado Chapter, Board of
Directors

Brad W. Breslau joined the firm in June 2003 and is the Office Managing Partner of the Denver, Colorado office and Chair of the Subrogation & Recovery Department's Rocky Mountain regional offices. Brad practices with the Subrogation and Recovery Practice Group, concentrating in complex litigation, with an emphasis on insurance, subrogation and recovery. Brad also has an active litigation practice in the areas of commercial, real estate and oil and gas litigation. Prior to joining the firm, Brad was the founding and managing partner of, and practiced with, Grund & Breslau, P.C.

Brad has served as an arbitrator, expert witness and court-appointed mediator on numerous occasions. He has also lectured business professionals on numerous issues involving civil liability and has lectured attorneys and insurance professionals on the subjects of insurance, construction, employment discrimination and condominium litigation in Colorado.

In 1976, Brad received his bachelor of science degree from the University of Colorado at Boulder. He earned his law degree from the University of Denver College of Law in 1979.

Brad is a member of the American, Colorado, and Denver bar associations, the Colorado Defense Lawyers Association and Defense Research Institute. He is admitted to practice in Colorado state and federal courts, as well as before the United States Court of Appeals for the Tenth Circuit.

The Honorable Sanford M. Brook

Sanford M. "Sandy" Brook joined the Judicial Arbiter Group (JAG) in April, 2004 after sixteen years on the bench in Indiana. JAG is located in Denver, Colorado. Judge Brook is one of twenty former state and federal judges that compose the Judicial Arbiter Group. He performs both mediation and arbitration services at JAG. In 2006, a survey of the Colorado Bar published in *5280 Magazine* (a Colorado Legal, Business and Professional publication), named Judge Brook among the top ten Mediators in Colorado.

Judge Brook served five years on the Indiana Court of Appeals, three years as Chief Judge. Prior to service on the appellate bench, Judge Brook spent twelve years on the trial bench in South Bend, Indiana. In his last three years on the trial bench he served as Chief Judge.

Judge Brook obtained his law degree from the Indiana University School of Law in Bloomington. In 2003 he was inducted into the Academy of Law Alumni Fellows which recognizes distinguished Indiana University law school graduates.

Following law school, Judge Brook served as an Assistant City Attorney, a Deputy Prosecuting Attorney, and engaged in private practice.

As a trial lawyer he was involved in over 100 jury trials. As a trial judge he presided over 190 jury and 600 bench trials. While on the Indiana Court of Appeals he authored over 700 appellate opinions. While a judge, he promoted alternative dispute resolution in the Indiana court system by serving as a judicial mediator and conducting numerous settlement conferences at both the trial and appellate levels.

For eleven years Sandy served as an Adjunct Assistant Professor at the Notre Dame Law School where he taught both basic and advanced trial advocacy courses. He spent four years as an Adjunct Professor at the Indiana University Law School in Bloomington. For five years, Judge Brook served as a visiting instructor at the Nottingham Law School in England. He has taught advocacy in Scotland, Northern Ireland, Puerto Rico, Canada and Hong Kong.

Judge Brook is a member of the Colorado, Indiana and American Bar Associations. By appointment of the Dean, he serves on the Advocacy Advisory Board of the Stetson University School of Law.



Thomas M. Dunford

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AREAS OF EXPERIENCE

- Property Subrogation
- Subrogation & Recovery

EDUCATION

- J.D., University of Minnesota Law School, 1988
- B.A., Brigham Young University, 1985

MEMBERSHIPS

- Colorado State Bar Association
- Washington State Bar Association
- Idaho State Bar Association

Tom Dunford joined Cozen O'Connor in July 1991 and practiced in the Seattle office for more than 12 years. He relocated to the Denver office in August 2003, where he concentrates his practice in subrogation for property insurers. Tom pursues all types of property damage claims, including those based on product defects, product failure, structure failure, fire loss and tort liability.

Tom received his Bachelor of Arts degree from Brigham Young University in 1985 and earned his law degree, cum laude, at the University of Minnesota Law School in 1988. He was admitted to practice in Washington in 1988, Idaho in 1994, and Colorado in 2000. He is also admitted in the federal courts in those states.

Tom is a member of the Colorado, Washington, Idaho, and Colorado State bar associations. He is also a member of Phi Kappa Phi.

Tom coaches youth league basketball and is actively involved with the Boy Scouts of America.



Sarah Earle Killeen

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AREAS OF EXPERIENCE

- Arson and Fraud
- Complex Torts & Products Liability
- Construction Defect
- Construction Law & Litigation
- Products Liability
- Property Subrogation
- Subrogation & Recovery

EDUCATION

- J.D., University of Denver College of Law, 2000
- B.A., Barnard College, Columbia University, 1996

BAR ADMISSIONS

- Colorado
- California

COURT ADMISSIONS

- California Superior Court
- Colorado Supreme Court
- U.S. Bankruptcy Court -- Colorado
- U.S. District Court -- Colorado

MEMBERSHIPS

- California Bar Association
- Colorado Bar Association
- Denver Bar Association

Sarah Earle Killeen joined the firm in May 2004 as an Associate in the Subrogation and Recovery Department of the Denver office.

Sarah received her bachelor of arts degree from Barnard College, Columbia University in 1996, and her law degree from the University of Denver College of Law in 2000, where she was an editor of the University of Denver Law Review and a regional semifinalist of the ATLA Trial Team.

Sarah is admitted to practice in Colorado and California.

**Curriculum Vitae for
Thomas D. McAdam
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EMPLOYMENT

- 2005 -Present Senior Investigator, Phoenix Investigations, Inc.
- 1998 - 2005 Investigations Manager, Phoenix Investigations, Inc.
- 1996 - 1998 Fire Inspector, Elk Creek Fire Protection District, Conifer, Colorado
- Fire investigation
Fire prevention inspection
Plan review
Public education
Instructor-fire suppression
- 1979 - 1996 Deputy Fire Marshal, Arvada Fire Protection District, Arvada, Colorado
- Fire investigation
Fire prevention inspection
Plan review
Public education
Instructor-fire investigation, suppression, prevention
- 1975 - 1995 Volunteer firefighter, Arvada Volunteer Fire Department
- Fire-rescue response
Station officer
Instructor
- 1972 - 1974 Volunteer firefighter, Federal Heights Fire Department
- Fire-rescue response
Station officer

CERTIFICATIONS

- September 1993 Nationally certified fire and explosion investigator, National Association of Fire Investigators
- September 1993 Nationally certified fire and explosion investigation instructor, National Association of Fire Investigators
- 2002 Re-certified as Fire and Explosion Investigator, NAFI

EDUCATION

1961 High school diploma, Manistee High School, Manistee, Michigan

1969 Associates Degree, Chemistry, Kishwaukee College, Malta, Illinois

1980-1981 Studies in fire science, Red Rocks Community College, Lakewood, Colorado

AFFILIATIONS

International Association of Arson Investigators
Colorado Chapter, IAAI
National Association of Fire Investigators

CLASSES, SEMINARS, OTHER SCHOOLING

1980 Denver Fire Investigation Seminar

1981 Fire and Arson Investigation, National Fire Academy
Fire Safety Education, National Fire Academy
Laboratory Exams in Arson Matters, FBI Academy

1985 Fire Prevention Specialist II, National Fire Academy

1986 Advanced Fire Safety Education, National Fire Academy

1987 Denver Fire Investigation Seminar (Tested)

1988 Management of Fire Prevention Programs, National Fire Academy

1989 Code Management-A Systems Approach, National Fire Academy
Denver Fire Investigation Seminar (Tested)

1990 FBI Post-Blast Investigation Seminar (Tested)

1992 BATF Arson for Profit, Federal Law Enforcement Training Center

1993 NAFI Fire and Explosion Investigation Seminar (Tested)

1995 Kinesic Interview Techniques

1996 Denver Fire Investigation Seminar (Tested)

1998 Practical Aspects of Arson Case Management (Tested)

1999 Investigation of Gas and Electric Appliance Fires (Tested)

2001 Advanced Fire, Arson, and Explosion Seminar, Eastern Kentucky University

- 2002 Advanced Fire & Arson Career Development School, Grants Pass, Oregon
- 2003 Insurance Committee for Arson Control, 14th Annual Arson Training Seminar
- 2003 IAAI/National Institute of Trial Advocacy Courtroom Testimony Class (Tested)
- 2004 Insurance Committee for Arson Control, 15th Annual Arson Training Seminar
- 2004 Hands-On Vehicle Fire Investigation (Tested)
- 2005 Symposium on Scientific Fire Investigation, Spoilation and Subrogation

ACCOMPLISHMENTS

- 1979-2005 Investigated over 850 fires
- 1990 Training chairman, 1st Judicial District Combined Arson Response Team
- Chairman, Juvenile Firesetter Intervention Program, 1st Judicial District Combined Arson Response Team
- 1991 President, 1st Judicial District Combined Arson Response Team
- Special recognition by Colorado Advisory Committee on Arson Prevention for work on alleged hate crimes fire
- 1992 Reelected president, 1st Judicial District Combined Arson Response Team
- 1993 Member, committee to establish Colorado fire investigator certification program
- Director, Colorado Chapter, International Association of Arson Investigators
- 1995 Special recognition by Colorado Advisory Committee on Arson Prevention for work on Colorado fire investigator certification program
- 1996 2nd Vice-President, Colorado Chapter, International Association of Arson Investigators
- 1999 Secretary, Colorado Chapter, International Association of Arson Investigators

TESTIMONY & DEPOSITIONS

- 04/13/01 Deposition, U.S. District Court Case #CV002857, Farmers Truck Insurance v. MagneTek, Inc., and Texas Instruments, Inc.
- 07/17/02 Deposition, Arapahoe County District Court, Case # 98 CV 2101, Trailer Haven v. The City of Aurora
- 08/01/02 Deposition, Conejos County District Court, Case # 2000 CV 43, Bill Mumma et al v. James Metters et al
- 10/14/02 Deposition, Routt County District Court, Case # 01 CV 53, DeQuine & Stich v. Germain
- 7/29/04 Deposition, Routt County District Court, Case # 03 CV 133, Rouda v. Fire Insurance Exchange
- 3/28/05 Testimony, San Miguel County District Court, Case # 02 CV 94, State Farm Fire & Casualty v. Mericana Corporation et al
- 7/19/05 Deposition, Chaffee County District Court, Case # 04 CV 84, Sally Ann Milam Paschall et al v. Robert J. Gioscia et al
- 8/23/05 Trial, Chaffee County District Court, Case # 04 CV 84, Sally Ann Milam Paschall et al v. Robert J. Gioscia et al

PUBLICATIONS

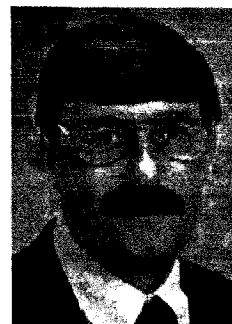
- March 1998 *Why Do Code Evaluations?*, Phoenix Investigations, Ink, A Quarterly Publication for Clients, Investigators, Insurance Companies, and Attorneys
- September 1998 *Public and Private Sector Fire Investigations - The Deciding Differences*, Phoenix Investigations, Ink, A Quarterly Publication for Clients, Investigators, Insurance Companies, and Attorneys
- May 1999 *Collecting and Documenting Evidence*, Phoenix Investigations, Ink, A Quarterly Publication for Clients, Investigators, Insurance Companies, and Attorneys
- January 2000 *The Hole Truth*, Phoenix Investigations, Ink, A Quarterly Publication for Clients, Investigators, Insurance Companies, and Attorneys
- November 2000 *Surviving the Fire Scene*, Phoenix Investigations, Ink, A Quarterly Publication for Clients, Investigators, Insurance Companies and Attorneys
- April 2001 *Quick Quiz*, Phoenix Investigations, Ink, A Quarterly Publication for Clients, Investigators, Insurance Companies and Attorneys
- September 2004 *2004 921*, Phoenix Investigations, Ink, A Quarterly Publication for Clients, Investigators, Insurance Companies, and Attorneys

Gerard P. Nolan

Assistant Director

Gerard P. (Jerry) Nolan is a claim professional with more than 20 years experience and proven leadership abilities.

Mr. Nolan previously served as Assistant Vice President of Claim Recovery for Reliance National Insurance Company and as a recovery specialist for St. Paul Fire and Marine Insurance Company. He has a comprehensive background in high-exposure recovery litigation including construction, products liability, medical malpractice, commercial property and workers' compensation.



While at St. Paul, Mr. Nolan recovered more than \$30 million, earning numerous service recognition awards. During his tenure at Reliance National, he developed procedures to improve recovery results, such as instituting an open and closed file review process. He has extensive experience investigating large commercial property and workers' compensation losses, including loss scene investigations.

Prior to joining St. Paul, Mr. Nolan held positions in liability claims adjustment and claims supervision at Liberty Mutual Insurance Company and American International Adjustment Company.

Mr. Nolan received a bachelor's degree in economics from St. John's University. He has served as an arbitration panelist for Arbitration Forums, Inc. and continues his personal development through claim technical and management development seminars.

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ATTORNEYS



Jennifer A. Poynter

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AREAS OF EXPERIENCE

- Construction Defect
- Products Liability
- Property Subrogation
- Subrogation & Recovery

EDUCATION

- J.D., University of Denver
College of Law, 1994
- B.A., University of Colorado,
Boulder, 1991

MEMBERSHIPS

- Arapahoe County Bar
Association
- Colorado Bar Association

Jennifer A. Poynter joined the firm's Denver office in June 2003 and practices with the subrogation and recovery group. Prior to joining Cozen O'Connor, Jennifer was an associate with Grund & Breslau in Denver. Jennifer has also worked as an associate with Patterson, Nuss & Seymour and Fogel, Keating, Wagner, Polidori, Shafner, Struthers and Heron, as well as serving as Corporate Counsel to Great-Wet Life & Annuity Insurance Company.

In 1991, Jennifer received her bachelor of arts degree from the University of Colorado, Boulder. She earned her law degree from the University of Denver College of Law in 1994, where she was the recipient of the University of Denver Law Scholarship from 1991-1994. Jennifer is licensed to practice in Colorado, as well as before its state and federal courts.

Jennifer is a member of the Arapahoe County Bar Association, where she is President, serves on the Board of Directors and as the CLE Chair. She previously served as Membership Chair and Law Day Chair, and has also received the Tommy D. Drinkwine Outstanding Young Lawyer of the Year Award from the association in 2002. Jennifer also serves on the Legislative Committee of the Colorado Defense Lawyers Association, where she also completed its Trial Academy Program. She is a member of the Board of Governors of the Colorado Bar Association, and a member of the Defense Research Institute. She also served on the Faculty of Federal Advocates, completing Pro Bono Services and receiving their Distinguished Service Award in 1998.



Richard R. Rardin

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AREAS OF EXPERIENCE

- Construction Defect
- Products Liability
- Property Subrogation & Recovery
- Subrogation & Recovery
- Worker's Compensation Subrogation & Recovery

EDUCATION

- J.D., University of Wyoming College of Law, 1991
- B.S., University of Wyoming, 1987

MEMBERSHIPS

- American Bar Association
- Colorado Bar Association
- Wyoming Bar Association
- Denver Bar Association

Richard R. Rardin joined Cozen O'Connor's Denver office in June 2003 and is a Member of the firm's Subrogation & Recovery Department. Prior to joining Cozen O'Connor, Richard was an associate with Grund & Breslau in Denver. Richard has also served as an assistant city attorney with the city and county of Denver, as well as a deputy district attorney with the 13th Judicial District in Sterling, Colorado, and deputy prosecuting county attorney in Rock Springs, Sweetwater County, Wyoming, in the 3rd Judicial District.

Richard received his bachelor of science degree in 1987 and his law degree in 1991 from the University of Wyoming. He is admitted to practice in Wyoming and Colorado, as well as before all state and federal district courts in those respective states.

Richard is a member of the American, Colorado, Wyoming and Denver bar associations.

Mediation Basics

Cozen O'Connor Subrogation Seminar
October 23, 2006

The 5 words a mediator hears during every mediation

We're here in good faith

Types of Mediation

- Facilitative – Conducted by neutral 3rd party with no authority to propose a solution or opine on issues.
- Evaluative – Conducted by 3rd party neutral who may give opinions and propose solutions.
- Med Arb – 3rd party mediator assists but if no settlement, issues a decision.

The Process

- Separate Rooms
- Shuttle Diplomacy by the Mediator
- Mediator's use of techniques
- A process, not an event
- Mediator guides the parties
- Parties guide the mediator
- Exploration of other sides case

Communicating With the Mediator
The Start

- **The Do's**
 - Give "best day in trial" analysis
 - Discuss opponent's factual weaknesses
 - Discuss your factual Strengths
 - Address what you do not want revealed
 - Discuss your "general" legal theory
 - Justify initial demand/offer

Communicating With the Mediator
The Start

- **The Don'ts**
 - Don't make outrageous demand/offer
 - Don't attack lawyer or party.
 - Don't Stretch the truth or speculate
 - Don't rely on evidence not yet obtained
 - Don't characterize behavior
 - Don't cut off potential avenues of settlement

During mediation...

- You are not trying your case to the mediator
- Move from law to facts
- Save some strength
- Posture to make middle ground your end
- Remember, venting is important
- Patience, patience, patience

Posturing During Mediation

- Start should be intriguing, not insulting
- Avoid significant movement - first two moves
- Match significant movement only if there is a reason
- Posture middle ground only if meaningful
- Response to policy limit demand

Patience???

Case: Chemical Plant Explosion

- Plaintiff - \$17,000,000.00
- Defendant - \$1,200,000.00
- Plaintiff - \$14,000,000.00
- Defendant - \$1,250,000.00
- Plaintiff - \$12,000,000.00
- Def. Counsel: Judge, I'm packing up. We'll not get this done today. Thank you for your time. John, do you agree?
- Corporate Counsel: Of course, let's go.

Elements Having Positive Impact on Mediation

- Give rationale for your moves
- Occasionally indicate you are persuaded
- Give concessions (not early on)
- Explore alternative routes
- Understand other factors in interest
- Keeping emotions in check

Elements Having Negative Impact on Mediation

- Making promises
- Making threats
- Engaging in intimidation
- Arguing case as though you are in trial
- Concentrating on minutia
- Becoming emotional when hearing other sides offer/demand
- Threatening to walk

The Mediation Judgments

- Communicating your bottom line
- Identifying your bargaining range
- Claiming "*final offer*" then conceding you have more."
- Communicating you are at the end
- Discussing Problems such as client control and client expectations
- Communicating priorities in multi-party Case

Mediation Basics

**Cozen O'Connor Subrogation
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October 23, 2006**

The Start and the Opening Statement

Torpedoing the Mediation Process

- As we all know, 3 people died in the explosion at the Rexon Chemical plant. Nobody would have died if the Rexon plant manager would have been doing his job. But, of course, he was really never adequately trained to do his job. And this responsibility falls upon the person sitting right over there – the CEO, Charlie Drummond. And you know, Mr. Drummond, it would have been nice if you would have said “I’m sorry” to my clients. Look them in the eyes – do you want to say anything now?

Analysis in Whether to Request Starting with Joint Caucus

- Reasons for joint caucus v. no joint caucus
- Dynamic of having parties together – Will it be a positive or neutral?
- Dynamic of having lawyers together – will it be positive or neutral?
- Strength of Mediator – will she assert proper control?
- Impact of your comments – will they be meaningful to the other side?

Factors to Consider in Whether Opening Statement is Beneficial

- Will it be meaningful?
- Will it set a **positive** tone?
- Will it accomplish a necessary or essential goal?
 - apology
 - demonstrating seriousness of purpose
 - eyeballing client/other side
 - recognition of respect

What A Good Opening Statement Will Accomplish

- Demonstration of your professionalism, preparation, personality and prowess
- Strength of case
- Strength of representation
- Commitment to your legal theory
- Synopsis of damages
- ??????

**Elements of a Good Mediation
Opening Statement**

- No argument
- Facts, not conclusions
- Give both legal and factual theories of your case.
- Show respect for the mediation process
- Be BRIEF
- Avoid credibility challenges
- Keep it simple
- Avoid details

Mediation Basics

**Cozen O'Connor Subrogation
Seminar
October 23, 2006**



ANATOMY OF A FIRE INVESTIGATION
written and presented by
Jennifer Poynter, Esq., Cozen O'Connor
and
Thomas D. McAdam, CFEI

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Anatomy of a Fire Investigation

Presented by: Jennifer Poynter, Esq.
Thomas McAdam, CFEI

Importance of Early Investigation

- Select Proper Expert
- Proper Investigation
- Notice
- Preserve Scene and Evidence
- Reporting



Selection of Proper Expert

- Area of Expertise
- Qualification
 - Knowledge, Skill, Experience, Training, Education
 - Licensing



Selection of Proper Expert (cont.)

- Ability to Interact With Others
 - Insured
 - Witnesses
 - Interested Parties
 - Other Investigators
 - Public Authorities: Police, Fire Department, Other (CBI)



Selection of Proper Expert (cont.)

- Ability to Coordinate With Adjuster
 - Initial Visit
 - Site Inspections



Selection of Proper Expert (cont.)

- Availability
- Competence
 - Depositions, Trial Testimony, Communicate with Jury



Proper Investigation - Basics

- Determination of Area of Origin
- Determination of Possible/Probable Causes
- Elimination of Other Reasonable Possible Causes
- Spoliation of Evidence
- Evidence Retention



Proper Investigation – NFPA 921

- National Fire Protection Association - Guide for Fire and Explosion Investigation
 - Basic Methodology
 - Basic Fire Science
 - Fire Patterns
 - Electricity and Fire
 - Building Fuel Gas Systems
 - Legal Considerations
 - Safety



Proper Investigation – NFPA 921(cont.)

- National Fire Protection Association - Guide for Fire and Explosion Investigation
 - Sources of Information
 - Planning the Investigation
 - Recording the Scene
 - Physical Evidence
 - Origin Determination
 - Cause Determination
 - Failure Analysis and Analytical Tools



**Proper Investigation – NFPA
921(cont.)**

- National Fire Protection Association -
Guide for Fire and Explosion Investigation
 - Explosions
 - Incendiary Fires
 - Fire and Explosion Deaths and Injuries
 - Appliances
 - Motor Vehicle Fires
 - Wildfire Investigations
 - Management of Major Investigations



**Proper Investigation – NFPA
921(cont.)**

- National Fire Protection Association -
Guide for Fire and Explosion Investigation
 - Referenced Publications
 - Explanatory Materials



**Proper Investigation – Common
Causes of Fire**

- Intentional
- Product Defect
 - Electrical Appliances (Toasters/Toaster Ovens)
 - Neon Signs
 - Shop Lights
 - Electric Fence Chargers



Proper Investigation – Common Causes of Fire (cont.)

- Electrical Wiring / Panel Boxes
- Motor Vehicles
- Natural Gas / Propane Appliances
- Fireplaces
- Hot Water Heaters
- Wildfires



Proper Investigation – Common Causes of Fire (cont.)

- Construction Activities
 - Roofing Applications
 - Drywall Nail Through Electrical Wiring
 - Improper Clearance Involving Fireplaces
 - Welding
 - Remodeling



Proper Investigation – Common Causes of Fire (cont.)

- Utilities
 - Downed Power Lines
 - Transformer Failures
- Repairman
- Controlled Burns
- **Do Not Forget Fire Spread Issues**
 - Alarms, Sprinklers, Fire Walls



Proper Investigation - Procedure

- Statements and Interviews
 - Who Interview, How Interview, Record Interview?
 - Typically Do **Not** Take Recorded Statements of Insureds
 - Statements Are Discoverable Under Colorado Law
- Photographs and Videotape



Proper Investigation – Procedure (cont.)

- Gathering Relevant Documents
 - Contracts/Leases
 - Waivers of Subrogation, Limitations of Liability, Exculpatory Clauses, Shortened Time Periods for Making Claims
 - Instruction Booklets – Warnings
 - Sales Agreements
 - Installation Manuals- Warnings
 - Service Records
 - Maintenance Agreements
 - Labels, Tags, etc.
 - Property Management Agreements



Avoid Spoliation – Notice and Evidence Retention

- Notice
 - Who to Notify
 - How to Notify
 - Who Should Notify the Responsible Party
- Take and Preserve Relevant Evidence
- Documents Process With Photographs
- Label Evidence – Ensure Clear Chain of Custody



Reporting

- Typically No Reports Until Litigation
 - Exceptions
- Control the Process





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AN EXPLOSIVE CASE STUDY
presented by
Thomas M. Dunford, Esq.

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An Explosive Case Study

What appears to be a straightforward property damage incident can have unique circumstances which make proper handling essential to producing a favorable subrogation outcome. An actual property loss will be presented as a basis for discussion, illustrating how thorough investigation and legal analysis can maximize recovery prospects.



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UPDATE ON COLORADO LAW
written and presented by
Richard Rardin, Esq.

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COZEN
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Update on Colorado Law

Presented by: Richard Rardin, Esq.
Cozen O'Connor
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Economic Loss Rule

***Park Rise Homeowners Assoc. v. Resource
Construction, No. 04CA0091***

Facts:

HOA sued developer and general contractor alleging property damage throughout condo complex community. HOA settled with developer prior to trial. After HOA presented its case, trial court directed a verdict on HOA's negligence claims in favor of contractor, Resource, based on the economic loss rule. The Court of Appeals reversed.


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Economic Loss Rule

Holding:

The Court of Appeals found the trial court did not have the benefit of the Supreme Court's decision in *A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862 (Colo. 2005), which the court found to be dispositive. That is, a general contractor and subcontractors "are under an independent tort duty of care to act without negligence in the construction of homes."



Economic Loss Rule

Holding (cont.):

The Court also held that expert testimony was not needed to apportion between what claimed damages were latent and patent defects, and that a plaintiff need only provide the fact finder with a reasonable basis for calculating actual damages using the relevant measure.



Economic Loss Rule

Analysis:

Regarding the economic loss rule, the Court cited *A.C. Excavating* and other cases prior to it, stating that there is “no doubt” that general contractors, such as Resource, “and other builders are under an independent tort duty to act without negligence in the construction of homes.”



Economic Loss Rule

Analysis (cont.):

Regarding Resource's argument that the trial court's dismissal was proper based on the HOA's failure to apportion damages between latent (hidden) defect and patent (obvious) defects, Resource cited *Cosmopolitan Homes, Inc. v. Weller*, 663 p.2d 1041 (Colo. 1983), which held that a subsequent purchaser of a home can recover “only for latent or hidden defect,” which have been defined as “those manifesting themselves after purchase and which are not discoverable through reasonable inspection.”



Economic Loss Rule

Analysis (cont.):

However, the Court of Appeals held that expert testimony is needed only where the issue does not lie within the ambit of common knowledge of ordinary persons and that there was no authority for the position that latent defects be identified through expert testimony. The Court stated that specific testimony was presented as to defects and that a jury based on its common knowledge and proper instruction could have determined which defects were latent.



Economic Loss Rule

Analysis (cont.):

** The court did find that plaintiff's CCPA claim was properly dismissed and that the phrase "quality construction" used by Resource in its sales literature was a matter of opinion and not a deceptive trade practice. The court held that as a matter of law, the CCPA does not make actionable a statement which would otherwise be mere puffery.



Colorado Governmental Immunity Act

***Ceja v. Lemire*, No. 05CA0335**

Facts:

Plaintiff was injured while riding his motorcycle when he collided with an automobile driven and owned by defendant Lemire. Plaintiff sued Lemire and Arapahoe County, Lemire's employer, on a respondent superior theory because Lemire was being reimbursed by the County at a set per mile rate. The County and Lemire filed motions to dismiss based on the Governmental Immunity Act ("GIA"). The court granted the motion as to the County but denied it as to Lemire who was entitled to immunity.



Colorado Governmental Immunity Act

Holding:

The Court of Appeals affirmed, holding that although immunity is waived by a public entity in an action for injuries resulting from the operation of a vehicle owned or leased by the entity, reimbursement for mileage does not create a lease of the vehicle for purposes of the GIA. The court also held that immunity applied to Lemire.



Colorado Governmental Immunity Act

Analysis:

The Court of Appeals turned to the dictionary to define the term lease in the statute. It found that there was nothing in the record that the County acquired possession, control or the right to use Lemire's car.



Colorado Governmental Immunity Act

Analysis (cont.):

With regard to Lemire, the Court of Appeals found that the intent of the GIA to grant immunity to negligent employees of immune governmental entities was definitively expressed in the GIA and although harsh, it was the plain language of the statute.



Colorado Governmental Immunity Act

Robinson v. Colorado State Lottery Division, No. 04CA1785

Facts:

Plaintiff sued the State Lottery Commission and Texaco, who had a license to sell lottery tickets, because they continued to sell for a period of a few weeks to several months, instant scratch game tickets after all represented and advertised prizes were awarded or claimed.



Colorado Governmental Immunity Act

Facts (cont.):

She alleged that defendants were aware that the represented and advertised prizes were not available and the retailers continued to sell the tickets, thereby condoning and authorizing the sales. She also alleged that for at least 5 years she had continued to buy various instant scratch game tickets with the expectation that she could win the represented and advertised prizes. The trial court granted judgment on the pleadings for the Commission and Texaco.



Colorado Governmental Immunity Act

Holding:

The Court of Appeals affirmed the dismissal of the claims against the Division/Commission, holding that it was immune under the GIA. However, it reversed the trial court's dismissal of the claim against Texaco. The Court held that Texaco was not a public entity per the statutory definition under the GIA, or an "instrumentality" of the state.



Colorado Governmental Immunity Act

Analysis:

The Court of Appeals rejected the plaintiff's arguments that although the GIA provides immunity to tort claims, plaintiff's claim was a breach of contract claim. The Court found that the claims were really negligent misrepresentation or fraudulent inducement claims that sounded in tort, not contract.



Colorado Governmental Immunity Act

Analysis (cont.):

For Texaco, the Court of Appeals looked to the legislative intent of the GIA so as to determine whether Texaco was an “instrumentality” of the state. The CA held that the General Assembly has expressed an intent to restrict the definition of instrumentality only to those entities that are governmental in nature, and that there was no indication it was the intent on the General Assembly to expand the scope of the GIA to any private person or corporation.



Colorado Governmental Immunity Act

Analysis (cont.):

** The kicker – The trial court awarded the Division/Commission \$52,514 in attorney fees, which award was upheld by the Court of Appeals. Much more than plaintiff is likely to recover if successful against Texaco.



Sudden Emergency Doctrine

McClintic D.C. v. Hesse II, No. 05CA0068

Facts:

While driving on I-70, plaintiff McClintic encountered a herd of bighorn sheep in her lane and on the shoulder of the highway. She slowed to a stop in her lane and was rear-ended by defendant Hesse when he switched lanes from his lane while behind a semi truck into McClintic's lane and could not stop in time. A jury awarded plaintiff damages of \$170,000 but found McClintic 30% comparatively negligent. The trial court denied plaintiff's motion for a directed verdict at the close of evidence, and a judgment notwithstanding the verdict, to find defendant 100% liable.



Sudden Emergency Doctrine

Holding:

The Court of Appeals reversed the trial court. The CA rejected the three arguments in support of plaintiff's comparative negligence – 1) plaintiff's failure to pull over to the shoulder; 2) plaintiff breached her duty to driver reasonable under the circumstances and exercise care for their safety of others, and; 3) plaintiff breached her duty not to drive excessively slow under the circumstances and thereby was negligent.



Sudden Emergency Doctrine

Analysis:

Although the CA could not find a Colorado case as to what constitutes negligence in a two-car, rear-end accident precipitated by animals on the roadway, the CA did turn to our neighbors north (Wyoming) and east (Kansas) that have invoked the sudden emergency doctrine when there is an unexpected confrontation with an animal on the highway. The CA agreed with the reasoning in cases from those states and adopted the same standard for Colorado.



Spoliation of Evidence / Adverse Inference Instruction

Aloi v. Union Pacific Railroad Corporation, No. 04SC320

Facts:

Plaintiff slipped and fell over a loose rubber mat and was injured while working as a conductor for Union Pacific and brought a personal injury action against UP. Prior to trial UP destroyed documents relevant to the litigation (Federal railroad and locomotive safety standards require carriers to make inspection reports and maintain the records for 92 days; when someone reports an accident, a UP claims agent should recover the relevant records prior to the expiration of the 92 day period to prevent their destruction).



Spoliation of Evidence / Adverse Inference Instruction

Facts (cont.):

As a sanction for spoliation of evidence, the trial court gave an adverse inference instruction three times throughout the course of the trial. Trial returned a verdict for plaintiff; UP appealed and the court of appeals held that the trial court did not err in giving an adverse inference instruction, but committed reversible error in the matter in which it was given.



Spoliation of Evidence / Adverse Inference Instruction

Holding:

Supreme Court held that where the trial court held that UP had willfully destroyed evidence which would have been introduced at trial, the trial court did not abuse its discretion by providing the jury with an adverse inference instruction. It also held that the trial court did not abuse its discretion in repeating the adverse inference instruction and by interrupting cross-examination to give the instruction.



Spoliation of Evidence / Adverse Inference Instruction

Analysis:

The SC made no distinction between the willful destruction of evidence and bad faith destruction of evidence, as argued by UP, because the opposing party suffers the same prejudice. Also, the broader approach serves the inferences' remedial and punitive purposes. The document still has to be relevant and otherwise be able to be introduced into evidence. Also, the trial court did not abuse its discretion in giving the adverse inference instruction three times during the trial as the repetition was not arbitrary, unreasonable or unfair.


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Spoliation of Evidence / Adverse Inference Instruction

Castillo v. The Chief Alternative, LLC, No. 04CA2306

Facts:

Plaintiff was dancing the night away at The Chief Alternative nightclub when a cylinder-shaped mirrored column that was turned by a motor (not the mirrored, glittering disco ball) fell and injured her. After it fell, the manager found a split locknut on the floor.


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Spoliation of Evidence / Adverse Inference Instruction

Facts (cont):

About 18 months later the club closed and the manager discarded the entire apparatus, including the housing, the mirrored column and the split locknut. The trial court denied plaintiff's motion for sanctions in throwing the items away, holding that when the items were discarded no case had been filed, no one on behalf of plaintiff had requested to view or retain the mirrored column and locknut, and The Chief Alternative was not instructed by its insurance company to keep anything. It ruled that although the club probably knew there was a claim still out there because its carrier had denied liability, the court found at most only simple negligence.



Spoliation of Evidence / Adverse Inference Instruction

Holding:

The CA held that there was no abuse of discretion by the trial court in its ruling in that it was not manifestly arbitrary, unreasonable or unfair. The CA cited the rule announced in the *Aloi* case that a party may be sanctioned for destroying evidence after notice is given that it is relevant to pending, imminent or reasonably foreseeable litigation.



Spoliation of Evidence / Adverse Inference Instruction

Analysis:

The courts stated that the behavior of the party moving for sanctions is an important factor for assessing whether sanctions are appropriate (citing Jamie S. Gorelick et al., *Destruction of Evidence* § 3.12 (1989)). The CA found that the club had kept the evidence for 18 months, discarded it when the club closed and that plaintiff had not requested to see the mirrored column or to have it preserved before it was discarded.



Spoliation of Evidence / Adverse Inference Instruction

Analysis (cont.):

It found the manager's discarding of the evidence was not willful conduct as described in *Aloi*. It also distinguished the case from *Aloi* in that plaintiff did not provide the club with clear, prompt notice that a complaint would be filed.



Restitution

Roberts v. People, No. 05SC140

Facts:

Defendant was convicted of theft from an at-risk adult and was ordered to pay restitution. Included in the restitution amount was pre-judgment interest of 8% and post-judgment interest, per statute, of 12% per annum. Court of Appeals affirmed the order. Defendant appealed the order of pre-judgment interest arguing the court exceeded its sentencing authority because the criminal statute provides only for post-judgment interest and thus precludes imposing pre-judgment interest.



Restitution

Holding:

The SC affirmed, holding that the pre-judgment interest is required under the restitution statute.



Restitution

Analysis:

The SC held that Colorado's sentencing statute requires "as a condition of every sentence of probation, trial courts *shall* order that the defendant make *full restitution* pursuant to" Colorado's restitution statute. The SC also held that the court has the discretion to set the rate of pre-judgment interest and absent a clearly erroneous finding of fact, the SC refused to interfere with the trial court's decision.



Restitution

Analysis (cont.):

It referenced the civil interest rate of 8% and while the SC said it is not controlling, it appears reasonable and appropriate under the circumstances; thus, no error.

The SC stated that the history of the sentencing and restitution statutes supports its interpretation that pre-judgment interest is restitution for "loss of use of money". The court also distinguished the policy goals of post-judgment interest, which is to encourage speedy repayment.



WYOMING UPDATE



Employer Negligence – Duty Owed

Black v. William Insulation Company, 2006WY106

Facts:

Defendant's employee fell asleep while operating his vehicle, crossed the center line and collided with David Black, killing him. Black's wife, as personal representative of Black's estate, sued defendant employer for negligence in requiring employee to commute long distances and work long hours without providing proper training or safeguards, breaching a duty to the public to prevent its employees from traveling to and from work when exhausted and tired.



Employer Negligence – Duty Owed

Facts (cont.):

Defendant was a subcontractor on an expansion project at an Exxon plant in a remote area. Plaintiff was arguing that the accident was a foreseeable consequence of employer's conducts, that the large influx of workers into the remote area where the employer's plant was located would cause traffic problems and despite knowing this, the employer required its employees to work long hours and make long commutes. The trial court granted summary judgment to defendant finding that it owed no duty to decedent under the circumstances.



Employer Negligence – Duty Owed

Holding:

Supreme Court affirmed holding that the decedent's injuries were not the "natural and probable consequence of" any acts of negligence by the employer in the course of decedent's employment. Rather, it found decedent's decisions and actions were the substantial factors that brought about the injuries.



Employer Negligence – Duty Owed

Analysis:

The Supreme Court held that in deciding whether the question of whether the employer owed a duty, it must determine whether employer's actions and/or inactions prior to the accident created a foreseeable risk of harm that the employer had a duty to guard against. The Court found that the scope of an employer's duty is "bound by activity that the employer can actually control within the employment relationship."



Employer Negligence – Duty Owed

Analysis (cont.):

The Court found that only evidence of causation for the accident was decedent's fatigue and falling asleep. The most obvious factor the Court found to be within the employer's control was the number of hours decedent was required to work. Just prior to the accident, he worked his normal 10 hour shift, which the court found was not an objectively unreasonable period of work.





ALLOCATION OF RESPONSIBILITIES BETWEEN GENERAL CONTRACTORS AND SUBCONTRACTORS

written and presented by
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**Allocation of Responsibilities
Between General Contractors
and Subcontractors**



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**Independent duties owed to
Homeowner**

- Subcontractor: A.C. Excavating v. Yacht Club II Homeowners Ass'n
- General contractor: Cosmopolitan Homes, Inc. v. Weller




**Homebuilder negligence for
subcontractor negligence**


- Independent duty analysis
- Assumed Duty
- Non-Delegable Duty
- Joint Liability
- Inherently Dangerous Activity
- Vicarious Liability




Independent duty analysis



Assumed Duty



Non-Delegable Duty



Joint Liability



Inherently Dangerous Activity



Vicarious Liability



**Subcontractor negligence for its
own work**

- Independent duty analysis
- Code violations



Allocation of Responsibility

- General always responsible?
- Degree of Collaboration



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