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MEN BEHAVING BADLY: WHAT ARE THE SURETY'S DEFENSES TO THE OBLIGEE'S LATENT-DEFECT CLAIMS WHEN THE PRINCIPAL AND OBLIGEE'S EMPLOYEES ACT FRAUDULENTLY?

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Remember the Kevin Spacey movie, The Usual Suspects? The movie employs a wonderful plot device – the nice guy you've been following all along turns out in the end to be the bad guy. And in the case of Kevin Spacey's character, he turns out to be a really bad guy. In the movie, a federal agent is interviewing Spacey's character, "Verbal" Kint, who serves as a kind of narrator for the action. We want the feds to win. After all, they are out to catch the bad guys and solve a horrific crime. Verbal Kint looks innocent enough. You might even call him wimpy. But just when you think the feds are about to catch the "real" bad guy, you find out that Spacey's character really is the bad guy, Keyser Söze. And he has been playing the feds all along – leading them down the primrose path, so to speak.

Unfortunately, sometimes the surety is like the feds in The Usual Suspects. The surety's performance-bond principal is supposed to be the good guy who has been victimized by the evil obligee (usually a project owner). But in the end, the principal turns out to be just as evil as the obligee.

Obviously, the word "evil" is tongue-in-cheek. But there are very real instances when principals and obligees act independently or in concert to perpetrate a fraud. And they often do so with the devil-may-care attitude that: "Hey, who cares? No one will really get hurt, because the surety will pay for everything." This is the same attitude that a somewhat remorseful robber may have upon holding up a convenience store. "Hey I'm not really hurting the store owner. He's got insurance."

This paper arose from a real fraud perpetrated by some of the principal's and obligee's employees on a bridge-repair job in Ohio. Consequently, much of the cited authority comes from Ohio. But the legal principles and surety defenses are universal. Thus, this paper reviews surety defenses that are useful whenever the surety is prejudiced by other people's actions, and it also analyzes more unusual defenses that occur in the context of principals and obligees who behave wrongfully.

I. BRIEF FACTS

The Ohio Department of Transportation, the project "Owner," hired a general contractor to repair several aging Ohio bridges. Most of the repair work consisted of removing rust and corrosion and stripping and sanding the old painted surface and applying a new one. The specifications for the job were lengthy and required the contractor to use certain chemicals, primers, sealers, and paints in various layers and combinations. Being a state job, performance bonds were issued. Some of the bonds covered not only the project's completion, but also bridge maintenance for five years. Thus, some of the bridges were covered by "maintenance" or warranty bonds. The contract required the state's inspectors and engineers to oversee the contractor's work and sign off that the specifications were being met. Once a bridge was done, the state would issue a certificate of completion and issue final payment.

Soon after all the bridges were completed, however, the newly-applied surfaces deteriorated – many years before they should have. The state inspected the work and discovered that it had not been done properly. Many steps in the resurfacing process had been skipped and the correct materials were not applied. Further investigation revealed that some of the contractor's employees knowingly failed to comply with the specs in order to save money. They got the state's inspectors to go along with this and certify that everything had

been done correctly. The contractor's employees then kicked back some of their savings to the inspectors.

The fraudulent employees all were prosecuted. But the State of Ohio didn't get the bridge-repair job it had bargained and paid for. Who do you think the State of Ohio thought should pay to re-do all of the bridges? Not Keyser Söze.

This paper reviews the defenses available to a performance-bond surety to avoid or limit its exposure when the principal or obligee, or both of them, behave wrongfully.

II. ANALYSIS OF POTENTIALLY AVAILABLE SURETY DEFENSES

A. The Principal is Not Liable to the Obligee

A venerable maxim of surety law is that if the principal is not liable to the obligee, then the principal's surety cannot be liable. *Hopkins v. INA Underwriters Ins.,* 44 Ohio App. 3d 186, 542 N.E.2d 679 (4th Dist. 1988); *see also, Restatement (Third) of Suretyship and Guaranty* § 34 (1996 & Supp. 2006). Another way of stating the same maxim is that the surety is entitled to all of the principal's defenses. *Id*.; *Merritt v. Pritchard*, 17 Ohio Dec. 257, 1906 WL 1264 (Ohio Com. Pl. 1906); (stating that "all defenses available to the principal may…be resorted to in favor of the promisor in suretyship."); *see also Blackfeet Tribe of the Blackfeet Indian Reservation v. Blaze Constr. Inc.*, 108 F. Supp. 1122 (D. Mont. 2000) (surety has all of principal's defenses; if principal's obligation extinguished, then surety's obligation also extinguished).

This section focuses on instances where the principal is not liable to the obligee. If the principal is not liable, then the surety cannot be.

1. Principal completed the contract in full and obligee accepted work.

Surety law, combined with the bond language, dictates when the surety's obligation on the performance bond ends. The Restatement gives the general rule that the obligee's release of the principal also releases the surety **unless** the release and circumstances show the obligee's intent to retain its claims against the surety. *Restatement (Third) of Suretyship and Guaranty* § 39 (1996 & Supp. 2006). In the bridge case, the Department of Transportation ("DOT") released its general contractors when it conducted a final inspection, issued the certificate of completion, made final payment, and released all retainage. Although it is axiomatic that when the obligee releases the principal, the surety is also released, project owners often include in their contracts that final payment doesn't waive any of the owner's rights. Owners then use this language to claim that the surety is still on the hook, even though the principal has been released from the completed job. In the case of latent defects, the surety may still be on the hook, assuming that applicable statutes of limitation or repose haven't expired. But a contract term stating that the owner doesn't waive its rights against the surety when it releases the principal is not a magic bullet to keep the surety bound. If it were, the surety could potentially be bound on every project until the statute of repose passed. In order for the rule in Section 39 of the Restatement to apply, the surety must also manifest intent to be bound after the principal has been released.

The case of *Gholson v. Savin,* 137 Ohio St. 551, 31 N.E.2d 858 (1941) is instructive. *Gholson* follows the first part of Restatement § 39 but holds that in a release of the principal, a

contract clause stating that the obligee retains its rights against the surety is ineffectual. *Id.* at 560, 31 N.E.2d at 863; *accord Merritt v. Pritchard,* 17 Ohio Dec. 257, 1906 WL 1264 (Com. Pl. Cuyahoga Cty. 1906); *Ohio Jurisprudence 3d*, § 54 (citing *Gholson* and affirming that the *Gholson* rule is still good law in Ohio).

In *Gholson*, the obligee released the principal for a lesser sum than the obligee claimed he was owed. In the release agreement, the obligee expressly reserved its right to collect the "balance" from the surety. The obligee then tried to collect from the surety. The Supreme Court, reversing the lower courts, held that the release fully discharged the debt owed to the obligee and the "reservation of right to enforce the claim against the surety is ineffectual." 137 Ohio St. at 560, 31 N.E.2d at 863.

In the bridge case, the owner in effect released its general contractors by accepting the job and making final payments. To be sure, the owner retained whatever warranty and latent-defect rights it has under the law.[1] But the job was over and the contractors were released from the contract. The surety should thereby also be released. Any contract clauses that claim to keep the surety on the hook despite the owner accepting the work should be a nullity under *Gholson*.

2. Obligee accepts a lesser-than-contracted-for performance

Two other Ohio cases are consistent with *Gholson* and hold that an obligee who accepts a performance that is less than what it contracted for, cannot recover from the surety.

United States v. Corwine is an oldie but goody from 1860. *See* 1 Bond 339, 25 F. Cas. 671, 3 Ohio F. Dec. 584 (Cir. Ct. S.D. Ohio 1860). The case helps sureties with two defenses. First, the case holds that if the obligee, who employed its own inspectors, accepts work that is less than it contracted for, the surety is discharged and the obligee can't complain that it got less than it bargained for. The case also addresses the "material alteration to contract" defense, discussed in Section II(B) below.

In *Corwine*, the U.S. government hired a contractor to open a shipping channel 300 feet wide and 20 feet deep at an outlet to the Mississippi River. 25 F. Cas. at 671. The contractor was also to maintain the channel at that width and depth for four and one half years.[2] The contract allowed the obligee to hire inspectors to check on the work and verify it was done to specifications. The obligee in fact had an inspector periodically check the project. The government paid the contractor only after inspector approval. *Id.* When the contractor completed the work, the obligee accepted it. The channel, however, was only 18 feet deep

[1] Note, the rule in most jurisdictions is that in spite of rulings such as *Gholson*, the performance-bond surety is still potentially liable for *latent defects*, assuming that the claim is not barred by applicable statutes of limitation or repose. *See, e.g. Salem Realty Co. v. W.K. Batson*, 256 N.C. 298, 123 S.E.2d 744 (1962). But a defect cannot be "latent" and therefore no recovery against the surety may be had, if: (1) the obligee knew of the defective work and accepted it anyway; or (2) the work is accepted "under such circumstances that knowledge of its imperfect performance may be imputed to" the obligee. *Id.* at 308, 123 S.E.2d at 751. Whenever an owner's employees accept a project knowing that all the specs haven't been followed, the surety should argue that these are circumstances where knowledge of the principal's imperfect performance should be imputed to the owner and bar a latent-defect claim.

[2] Notice how the facts of *Corwine* have both an initial construction and a multi-year maintenance aspect, just like the Ohio bridge case.

and not 20 feet. The obligee sued the contractor and surety, claiming that they failed to keep the "channel open, with a width of three hundred feet, and the depth of eighteen feet." *Id.* Though there was only one bond, the claim seems to be that the surety must pay for the contractor's failure to build the job to the correct specifications and keep the channel open at a 20-foot depth.

The *Corwine* court held that the surety cannot be liable for the contractor's failure to build the project to a depth of 20 feet. *Id.* at 671-72. Since the government had the chance to inspect the work and accepted it anyway, it cannot now complain that the contractor and surety failed to abide by their performance-bond obligations:

> The work was accepted by the secretary of war and paid for in full, as if completed according to contract. . . . In doing this, the obligation of the contract as to the dimensions of the channel was at an end, both as to the principals and the sureties, and the government was estopped from asserting any claim for a violation of that part of the contract. [*Corwine,* 25 F. Cas. at 672]

Undaunted, the obligee tried another tact. It argued that even if it accepted the initial work in its less-than-bargained-for condition, the principal and surety still had a four-and-a-half year obligation to keep the channel open at 20 feet, and this they did not do. In other words, the obligee claimed that the principal and surety breached their maintenance obligations. The court disagreed and explained that the surety's maintenance duty only came into existence if the channel were constructed to a depth of 20 feet. Since that never happened, the surety does not have a maintenance obligation:

> It follows as an inevitable conclusion, that the condition on which alone the sureties became bound for the maintenance or continuance of the channel, and on which their obligation was to attach, did not occur. There never was a channel of twenty feet depth, and their undertaking to keep it open was never operative, and is of no obligation on them. [*Id.* at 672]

Still undaunted, the obligee countered that the surety should be liable on the maintenance duty because it is no worse off with a channel of 18 feet versus one of 20 feet. The court again disagreed. The court noted that a shallower channel is harder to keep open because it more easily fills with sediment. Plus, the surety bargained to maintain a 20-foot-deep channel, which it would reasonably anticipate staying at 20 feet for some time before dredging was required. But since the channel was only 18 feet to begin with, the surety would have to begin dredging right away – a task and expense that it had not bargained for. *Id.*

Corwine is a wonderful case for the surety. Although the case recites the now outdated rule that any change to the contract automatically discharges the surety, the case is still helpful. All of the court's arguments against the obligee, explained above, can and do stand alone and do not require reliance on the "any change discharges the surety" rule.

Notice how neatly *Corwine* dovetails with the bridge-case facts. The contract required compliance with precise specifications. The contractor did not meet the specs. The obligee had inspectors who failed to detect the mistake, and they accepted the work and paid the

contractor. Only later did the obligee discover that the project was never built to spec. The obligee argued that the surety should pay to bring the project within the original specs. Alternatively, if the surety had no such duty, then the obligee argued that the surety should be liable on the maintenance portion of its bond. Both of the obligee's arguments were analyzed and shot down by the *Corwine* court. *Corwine* gave the surety good grounds to oppose recovery under the performance bonds **and** the maintenance bond in the bridge case.

Corwine also gives the surety a good argument why it should also not be liable under the maintenance bond. Under the maintenance bond, the surety's obligation was to take effect only after the bridges had been repainted according to certain specifications. The surety had reason to expect that if the bridges had been resurfaced according to spec, they would "last" for awhile and the duty to maintain them would not immediately arise. And if that duty did arise, the needed repairs would be of a limited extent since the bridge had been resurfaced according to strict specifications. The Ohio Department of Transportation apparently had the same expectation, because the penal sum of the maintenance bond was substantially less than the penal sum to undertake the initial repainting. In other words, the bridge-case surety agreed to issue the maintenance bond because it believed it was taking over bridges that were in good repair and wouldn't need much work over the life of the maintenance bond. Since that was not the case, and the bridges weren't in any where near the good condition that the surety expected, the surety should be relieved of its maintenance obligation.

The *Corwine* rationale still prevails in Ohio. If the obligee accepts work that is less than what it bargained for, the surety's duty is extinguished. *O'Brien v. Brauer,* 862 N.E.2d 549 (Ohio App. 1st Dist. 2006). In *O'Brien*, the court approvingly noted the axiom that accepting a lesser performance discharges the surety, but since the sureties failed to show evidence that a lesser performance had been accepted, the court found the sureties liable on their guarantees. *Id.* at *4. Although *O'Brien* is not a performance-bond case and the sureties lost on appeal, it is one of the only Ohio cases that cites the general rule followed in *Corwine*.

Other states are in accord. Generally, other states' cases hold that if the obligee accepts a lesser performance, either knowingly or with knowledge that could be imputed to it, then the surety is discharged. *See Transamerica Ins. v. Housing Auth. of Victoria*, 669 S.W.2d 818 (Tex. App. 1984) (surety may rely on certificate of completion by obligee's architect, who is obligee's agent, that job is complete and surety is discharged); *Salem Realty Co. v. Batson*, 123 S.E.2d 744 (N.C. 1962) (if obligee accepts principal's work with knowledge, or knowledge that can be imputed to the obligee, that the work was not done in accordance with the contract, the plans or specs, the principal's defective performance (and by extension, the surety's) is waived; but if the principal's defective performance consists of latent defects, unknown to the obligee and not discoverable by inspection, then the surety is liable for the principal's bad work).

There are noteworthy similarities between the Texas *Transamerica* case and the bridge case. In *Transamerica*, the obligee sued the general contractor and its surety for defective construction more than one year after the job was complete. 669 S.W.2d at 820-21. Although the obligee still held $5,000 in retainage for punch-list items that the contractor never completed, the job was nonetheless "substantially complete." *Id.* at 822-23. The obligee's architect issued a "Certificate of Completion," and except for retainage held to complete punch-list work, the obligee paid the contractor. In arguing that the job wasn't "really done" and that the architect's certificate was not a "conclusive determination that 'final completion of the

contract occurred,'" the obligee argued that the surety was still bound under the performance bond. The Texas Court of Appeals disagreed and held that the surety has a right to rely on the architect's certificate that the job is complete and in accordance with the contract:

> It is well settled that a surety on a performance bond is entitled to rely on the architect's Certificate of Completion as the final discharge of its duty on the bond because the architect is the agent or representative of the owner, and his representation is the representation of the owner. It is equally well settled that if the owner of the construction designates an architect (or other person) to supervise and approve the work performed, as is the case here, his decision is binding upon the owner, absent fraud or bad faith. [669 S.W.2d at 822 (inside citations omitted)]

In the bridge case, the owner had various employees who were in the position of the architect in *Transamerica*. Similarly, the owner's employees issued certificates of completion. Under *Transamerica*, the owner should be bound by its agents' acceptance of the work, and the surety should be discharged.

Note, however, that *Transamerica* included a fraud exception. In order for this case to help the surety against the Ohio Department of Transportation, it is important that the owner agents who accepted the work and issued the completion forms were not the fraudulent actors. If they were not, then the surety should be discharged upon project acceptance.

A case from Louisiana, however, illustrates the difficulty that the surety may have in using the "acceptance of project" defense when fraud is involved. *See City of Houma v. Municipal and Industrial Pipe Serv.*, 884 F.2d 886 (5th Cir. 1989) (applying Louisiana law and holding that the surety was *still liable* to the city for principal's defective performance, where the principal fraudulently submitted daily logs and pay applications for work it never did, and the city's third-party inspectors were incompetent and failed to detect the fraud and incomplete work).

In *Houma*, the obligee's general contractor was a bad actor. Its employees did not perform the work, and they submitted false records to cover up their omissions. The city's incompetent, third-party inspectors, however, failed to notice the fraud. The inspectors approved the work and recommended payment to the contractor. When the fraud was discovered, the court held that the surety was still liable on its performance bond. The key to the court's holding was that the obligee was innocent and did not participate in the fraud. 884 F.2d at 891. The *Houma* court would not impute the inspectors' incompetence to the obligee. Throwing a bone to the surety, however, the court held that the surety would have a claim against the third-party inspectors for failing to detect the fraud. *Id.* at 889-90; *accord Peerless Ins. v. Cerny & Assoc.*, 199 F. Supp. 951 (D. Minn. 1961) (finding that where obligee's independent architect negligently inspected work and certified pay apps, which resulted in principal being paid for work that was not completed, principal's surety had cause of action against third-party architect for the negligent overpayment).

The bridge case is distinguishable from *Houma*. The obligee employees were not innocent. Just as was stated in North Carolina's *Salem Realty Co. v. Batson*, *supra*, if the obligee has actual or imputable knowledge that the work was done improperly, the surety is discharged. Thus, if the obligee's wrongful employees are high enough up in their agency's

food chain so as to bind their employer, their knowledge should be imputable to the obligee and warrant a different outcome from *Houma*.

3. Obligee has materially breached the obligee-principal contract

Ordinarily, if one party to a contract is in material breach, then the other party is relieved from performing. Every state has authorities for this rule. Accordingly, if the project owner materially breached the contract, then the bond principals are relieved from their performance. And since sureties are entitled to their principals' defenses, the surety would not be obligated to perform the contract. *See, Four Seasons Environ'l v. Westfield Cos., 93 Ohio App. 3d 157, 638 N.E.2d 91 (1st Dist. 1994)* (surety is entitled to all defenses available to its principal); *accord Hopkins v. INA Underwriters Ins., 44 Ohio App. 3d 186, 542 N.E.2d 679 (4th Dist. 1988)* (same; plus surety liable only if principal is); *Merritt v. Pritchard, 17 Ohio Dec. 257, 1906 WL 1264 (Com. Pl. Cuyahoga Cty. 1906); Blackfeet Tribe of the Blackfeet Indian Reservation v. Blaze Constr. Inc.*, 108 F. Supp. 1122, 1134 (D. Mont. 2000) (explaining that if the public owner/obligee materially breached the contract with the general contractor, then the contractor's surety would be relieved from performing under the performance bond).

Similarly, an obligee cannot pursue a performance-bond claim if the obligee has not first complied with all conditions precedent under its contract with the general contractor. *United States Fid. & Guar. Co. v. Braspetro Oil Serv.*, 369 F.3d 34 (2d Cir. 2004) (applying New York law and holding that to have a bond claim, obligee must abide by all conditions precedent in the underlying construction construct); *accord Balfour Beatty Constr. v. Colonial Ornamental Iron Works*, 986 F. Supp. 82 (D. Conn. 1997).

Therefore, in instances like the Ohio bridge case, it's important to highlight as many material breaches by the obligee as possible. Material breaches in the bridge case included:

1. Failure by obligee to conduct competent inspections;
2. Obligee's failure to use good faith by letting criminals perform the inspections and confirm that the principal's work was done in accordance with the plans and specs.
3. Failure by the obligee to timely notify surety of faulty work, thereby preventing surety from correcting the work or completing the work with a different contractor.
4. Failure by the obligee to mitigate its damages. Had the Ohio Department of Transportation used competent inspectors or properly supervised their inspectors, much of the alleged damage could have been prevented. Indeed in the bridge case the owner, not the surety, was in the best position to mitigate damages.

4. Obligee has committed a crime in consort with the principal (in pari delicto)

As explained above, the surety is entitled to all defenses of its principal; and *in pari delicto* would be a defense that would prevent the owner from recovering against the principal. The legal maxim *in pari delicto potior est condition defendantis* (or *in pari delicto* for short) exists to prevent one party from recovering from another party who was the first party's cohort in crime or in causing a wrong. *Dent v. Ferguson,* 132 U.S. 50, 64, 10 S. Ct. 13, 33 L. Ed. 242 (1889); *see also Black's Law Dictionary* 318 (B. Garner ed., 1996) (explaining that "courts usually deny relief when parties have made an illegal agreement and both stand *in pari*

delicto."). The U.S. Supreme court explains the doctrine as one that prevents the law from aiding a wrongdoer, even if the wrongdoer has been "cheated":

> Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account; but, if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business, and been cheated, equity will not help him. [*Dent*, 132 U.S. at 65]

Ohio, likewise, has long followed *in pari delicto* and the courts will not help one party recover from his cohort in wrongdoing. *Miami Exporting Co. v. Clark*, 13 Ohio 1, 10 (1844). In *Miami Exporting*, the plaintiff and defendant entered into contracts and loans that violated banking laws. When the lender tried to recover from the borrower, the court refused to allow it, since the lender had violated laws against usury. The lender argued that the court could enforce the non-usurious portions of the parties' loans, but the court would not allow it. The court held that the *in pari delicto* doctrine prevented either party from recovering from the other:

> Both plaintiffs and defendant were violators of the law – the one in loaning, and the other in receiving, on an illegal contract. Can the transaction be dissected so as to enable us to separate the good from the evil, to reject the bad, and enforce the remainder? [T]he whole contract is alike tainted with the fraud and illegality. We hold, then, that as to the money actually received by the defendant in this case, both parties are *in pari delicto*, and the general rule in such case applies that no action can be maintained. [*Miami Exporting*, 13 Ohio at 10]

In pari delicto, is not an outdated relic of nineteenth-century law. Courts still employ the doctrine to prevent one wrongdoer from recovering from its co-wrongdoer. *See Maryland Cas. Co. v. Gough*, 146 Ohio St. 305, 65 N.E.2d 858 (1946) (superseded by statute on other grounds[3]); *Nevins v. Ohio Dept. of Transp.*, 132 Ohio App. 3d 6, 26-27, 724 N.E.2d 433, 446-47 (1998); *Fidelity & Cas. of N.Y. v. Federal Express*, 136 F.2d 35, 40 (6th Cir. 1943) (applying Ohio law).

In *Nevins*, both the Ohio Department of Transportation and one of its contractors were found jointly liable for a wrongful death. 132 Ohio App. 3d at 26-27, 724 N.E.2d at 446-47. Both entities either actually participated in the wrongful act that caused the deaths, or they both knowingly acquiesced in allowing a deadly situation to persist. Under these facts, *Nevins* held that under the rule of *in pari delicto* "no right of indemnification exists between" the department and its contractor. *Id.* at 26, 724 N.E.2d at 446.

In the bridge case, the obligee is likewise seeking indemnification. The obligee claims it suffered a wrong and will have to "pay twice" to have its bridges fixed. It wants the general contractors and their surety to indemnify the obligee for its loss. Were the obligee an innocent

[3] *See Turner v. Columbus Fireworks Display Mfg.*, 1980 WL 353834 (Ohio App. 10 Dist. Dec. 11, 1980) (explaining that in some instances, the contribution-among-joint-tortfeasors act provides that joint tortfeasors may have contribution against each other, but not indemnification).

victim, it may have the right to seek indemnity. But the obligee is not innocent. Its employees engaged in an illegal scheme. The scheme involved employees from the obligee and the general contractors. Just like the defrauding lender in *Miami Exporting*, the obligee should not be allowed to recover from its cohort in crime, the general contractors. The surety stands in the general contractors' shoes. Further, the surety is entitled to the contractors' defenses. Thus, if *in pari delicto* prevents the obligee from recovering against the general contractors it must also prevent recovery from their surety.

B. The Obligee Materially Altered the Contract Without the Surety's Consent

This defense arises when the obligee allows (or requires) the principal to materially deviate from the contract in a way that prejudices the surety or increases its original risk. This venerable defense used to be even better for sureties. At one point, **any** change to the contract automatically discharged the surety. Over time, however, the rule softened. Now compensated sureties such as the one in the Ohio bridge case will only be discharged if the change in contract is material, the surety is prejudiced, and even then, the discharge is only up to the amount of prejudice. *See Restatement (Third) of Suretyship and Guaranty* §§ 37(1), (2), and (3)(c), (d) & (f) and 41(b)(i & ii), cmts. d and e (1996 & Supp. 2006).

The U.S. Supreme Court explained the "material alteration" defense in *United States v. Freel,* 186 U.S. 309, 22 S. Ct. 875 (1902). There, the high Court held that changes to the construction contract not approved by the surety can relieve the surety of its bond obligations where the changes increased the general contractor's duties. Specifically, the Court found that contract changes requiring the contractor to make additional excavations and connections, all of which increased the cost and time to perform, discharged the surety to extent of the more burdensome changes. 186 U.S. at 317.

The best Ohio case on point is one already discussed above -- *United States v. Corwine,* 1 Bond 339, 25 F. Cas. 671, 3 Ohio F. Dec. 584 (Cir. Ct. S.D. Ohio 1860).[4] As to material alteration, *Corwine* made clear that the surety could not be liable on its 20-foot-deep maintenance obligation if the obligee had accepted a shallower – more difficult to maintain – channel:

> There is no principle better settled than that a surety is not bound beyond the terms of his contract, and that his liability can not be extended or enlarged by implication; and any change in its terms, unless expressly assented to by him, releases him from his legal responsibility. This is familiar law – so long and so well settled that it is not necessary to cite the numerous cases by which it is sustained. [25 F. Cas. At 672]

The court reasoned that by accepting an 18-foot-deep channel, the surety was immediately put into a more difficult and expensive position to maintain a 20-foot-deep channel. Recall, when agreeing to the maintenance portion of the performance bond, the surety assumed that its maintenance obligation would begin with a 20-foot-deep channel in

[4] Interestingly, the circuit court of appeal in *U.S. v. Freel*, cited Ohio's *Corwine* case with approval as one demonstrating when a material alteration in a contract can unfairly increase the surety's burden, resulting in the surety's discharge. *See U.S. v. Freel*, 92 F. 299, 307 (Cir. Ct. E.D.N.Y. 1899).

place. Since an 18-foot-deep channel substantially increased the surety's risk, he was discharged. *Id.*; *cf. London & Lancashire Indem. v. Board of Comm. Of Columbiana Cty.*, 107 Ohio St. 51, 140 N.E. 672 (1923) (stating the more modern Ohio rule that the surety is relieved only if changes to the underlying contract between principal and obligee are material).

All modern case law, including the Restatement, also require that the material change prejudice the surety (increase its risk) and the discharge is only to the extent of the prejudice. *See United States Fid. & Guar. Co. v. Braspetro Oil Serv.*, 369 F.3d 34 (2d Cir. 2004)(applying New York law and holding that the surety is not discharged unless there's a material change to the contract that increases surety's risk and in fact prejudices surety); *National Union Indem. Co. v. G.E. Bass & Co.*, 369 F.2d 75 (5th Cir. 1966) (applying Mississippi law and finding that payments by obligee to principal for materials not installed and without proof that principal had paid for materials, was a material violation of contract that excused surety's performance, not *in toto*, but to the extent of surety's prejudice; court also referred to this as an overpayment problem that impaired surety's security, discussed below in Section III); *United States v. Reliance Ins. Co., 799 F.2d 1382 (9th Cir. 1986)* (affirming summary judgment for surety and holding that material alteration in underlying contract, which impaired bonded party's ability to meet obligations and increased the surety's risk, exonerated surety to the extent of its prejudice from its bond obligations); *Mergentime Corp. v. Washington Metro. Area Trans. Auth.*, 775 F. Supp. 14 (D.D.C. 1991) (obligee's changes to underlying construction contract will relieve surety only to extent that surety is injured/prejudiced by the change); *Reliance Ins. Co. of Phil. v. Colbert*, 365 F.2d 530 (D.C. Cir. 1966) (material alteration will discharge surety to extent of prejudice; "alteration" includes departures in performance by obligee; when material changes to contract are made without surety's consent, it is the *obligee's burden of persuasion* to show no harm to surety); *Airtrol Eng. Co. v. United States Fid & Guar.*, 345 So. 2d 1271 (La. App. 1, 1977) (obligee's payment to principal before principal installed the materials at the jobsite was alteration from contract requirement and discharged surety to extent of prejudice); *Southwood Bldrs. v. Peerless Ins.*, 366 S.E.2d 104 (Va. 1988) (holding: (1) a material deviation from contract will discharge surety, and if deviation is severe enough, the deviation itself establishes sufficient prejudice to surety; and (2) an obligee who pays the principal without the contractually-required architect's approval may be *per se* prejudicial to the surety). A few of these cases warrant further attention.

In *National Union v. G.E. Bass*, the obligee paid its principal prematurely, often paying for materials that weren't installed or that the principal hadn't even paid for. 369 F.2d at 76-77. Such payments violated the contract. The court held that making such payments materially altered the contract, because the surety had a right to rely on the contractual requirement that its principal would be paid only after certain work was completed, and materials were actually installed and paid for. By making premature payments, the obligee increased the surety's risk that there would be a default under the bond:

> The rule in Mississippi and elsewhere . . . is well-settled as regards premature or unauthorized payments . . . . Where there has been a material departure from contractual provisions relating to payments and the security of retained funds, a compensated surety is discharged from its obligations on the performance bond to the extent that such unauthorized payments result in prejudice or injury. . . . The purpose of this [rule] is that the material departure from the terms of the contract deprives the surety of the inducement to

> perform which the contractor would otherwise have, and destroys, diminishes, or impairs the value of the securities [or contractual precautions] taken. [369 F.2d at 77 (inside citations omitted)]

Other cases are in accord. In *Airtrol*, the obligee paid its contractor for installation work that was never done. 345 So. 2d at 1271. The court held that the surety is released to the extent of its prejudice because "the bonding company is entitled to expect that payments will be made in accordance with the contract." *Id.* at 1273.

Similarly, in *Southwood*, the court discharged the surety where the obligee, in breach of the contract, paid its contractor without first obtaining the architect's approval. 366 S.E.2d at 106. In holding that material contract breaches are automatically prejudicial to sureties, the court held that the surety need not prove prejudice in order to be discharged:

> A separate showing of prejudice to the surety is unnecessary because a material deviation, in itself, establishes sufficient prejudice. In this case, the material deviation is established by proof that the [principal] was paid money before it was due and without approval by the architects. Such a procedure diminishes funds that should have been available to the surety in case of default, eliminates the architects' assurance that payments to the contractor are being used for the job, and undermines the inducement to the contractor to finish the work on schedule in order to be paid. [*Id.* at 108 (inside citations omitted)]

All of these cases have common facts and rules that apply to the bridge case. Like the wrongful obligees in *National Union*, *Airtrol*, and *Southwood*, the Ohio Department of Transportation paid the principals for work that was not done or that was not done according to the plans and specs. The obligee also paid for work that was not competently inspected. The surety believed that competent inspections were contractually required before payments were made. The surety also believed that under the contract, its principals would not be paid until the work was done. In making the payments, the obligee materially deviated from the contract. The surety lost the benefit of competent inspections and the contractual assurance that only work actually performed would be paid for. In addition, as discussed in more detail below, the surety lost collateral (in the form of funds held by the obligee) that it has a right to rely on if called on to perform.

C. The Obligee Improperly Pays or Overpays Principal; aka Impairment of Collateral by the Obligee

This defense arises when the obligee knowingly pays the principal for work that: (1) the principal did not do, or (2) does not comply with the plans and specifications. The money that the obligee holds (whether it's the contract balance or retainage) is collateral that benefits the surety. If the obligee disposes of that collateral without receiving a return performance from the principal, the surety has been prejudiced. This is because the surety is entitled to the contract balance or retainage whenever the principal defaults.

As shown by the *National Union* and *Southwood* cases, the impairment-of-collateral defense is similar to the material-alteration defense. Indeed, courts often do not separate the

defenses when analyzing whether a surety is entitled to discharge. What matters for the impairment-of-collateral defense is that something (the "collateral") that the surety counted on using to secure its bond obligations was destroyed or diminished by the obligee. Usually in so destroying or diminishing the collateral, the obligee violates a contract term that existed, at least in part, to preserve collateral for the surety. *See Restatement (Third) of Suretyship and Guaranty*, §§ 37 & 42, and § 42 cmt. f (1996 & Supp. 2006).

Ohio follows the basic rule that an obligee or creditor who releases or impairs collateral of the primary obligor (like a principal), thereby releases the surety to the extent of the impairment. *Mid-Continent Refrigerator v. Whitterson*, 32 Ohio App. 2d 227, 289 N.E.2d 379 (1st Dist. 1972); *see also McWane, Inc. v. Fidelity & Deposit Co.*, 372 F.3d 798 (6th Cir. 2004) (applying Ohio law and adopting the *Restatement (Third) of Suretyship and Guaranty* § 37(1) rule that if the obligee acts to increase the surety's risk of loss by increasing its potential cost of performance or decreasing its potential ability to cause the principal to bear the cost of performance, then the surety is discharged up to the amount of the impairment). Although the impairment-of-collateral defense exists in Ohio, there are no analogous cases. The *McWane* court, for example, found no impairment because the obligee had no collateral belonging to the principal that could've been impaired. Obviously, in the bridge case, the obligee had access to lots of the surety's collateral. All of the contract funds paid to the contractors constituted collateral for the surety. Each time the obligee paid for work not performed or not done according to the plans and specs, there was an overpayment, or more precisely, an impairment of collateral.

Several non-Ohio cases are also helpful. *See, especially, Continental Ins. v. Virginia Beach*, 908 F. Supp. 341 (E.D. Va. 1995) (holding that obligee's payment to principal when work not done and when obligee failed to make reasonable and prompt inspections of principal's work, relieved surety to the extent surety could show prejudice thereby); *Transamerica Ins. Co. v. Kennewick*, 785 F.2d 660 (9th Cir. 1986) (finding the surety not liable due to payments made by the obligee to the principal when obligee employees were negligent in certifying that principal's work was done to plans and specs); *Blackfeet Tribe of the Blackfeet Indian Reservation v. Blaze Constr. Inc.*, 108 F. Supp. 1122, 1137-39 (D. Mont. 2000) (granting surety's defense summary-judgment motion and holding that where obligee inspectors failed to inspect and sign off on principal's work before paying principal there was an overpayment to the principal, discharging the surety to the extent of its prejudice); *see also St. Paul Fire & Marine Ins. v. Commodity Credit Corp.*, 646 F.2d 1064 (5th Cir. 1981) (holding that obligee loses right to recover under bond if obligee impairs any collateral to which surety could've looked for reimbursement); *National Union Indem. Co. v. G.E. Bass & Co.*, 369 F.2d 75 (5th Cir. 1966) (applying Mississippi law and finding that payments by obligee to principal for materials not installed and without proof that principal had paid for materials was an overpayment that impaired surety's security and discharged surety to extent of prejudice); *National Surety Corp. v. United States*, 118 F.3d 1542 (Fed. Cir. 1997) (oft-cited case holding that government obligee's release/prepayment of retainage in contravention of the contract increased risk that surety was willing to assume and surety could be discharged to the amount it could show prejudice thereby); *Mergentime Corp. v. Washington Metro. Area Trans. Auth.*, 775 F. Supp. 14 (D.D.C. 1991) (prepayment of retainage funds or overpayment by obligee to principal for work not done by principal may discharge surety only to extent that surety proves it was harmed thereby); *United Pacific Ins. v. United States*, 16 Cl. Ct. 555 (1989) (granting summary-judgment to surety and holding that government obligee who paid for work not completed and work that would not pass government's inspection was improper impairment of

surety's subrogation rights, thus discharging surety); *Crescent City Constr. v. Monteleone*, 209 So. 2d 311 (La. App. 1968) (holding that if surety is prejudiced by prepayment by obligee to defaulting principal, then surety has a good defense against claim by obligee against surety).

A federal case from the Eastern District of Virginia serves up a double treat for the surety. In *Continental Ins. Co. v. Virginia Beach*, the court not only held that the surety was discharged due to the city's overpayment to the principal, but the surety could also recover from the city the surety's consultant and engineering fees. 908 F. Supp. at 348. In *Continental*, the city/obligee paid the principal without first making "reasonable and prompt inspections" of the work. *Id.* The city paid over $640,000 for materials that were installed but never tested. The city's contract required inspections, but like the Ohio bridge-repair contract, tried to "cover" the city in case the inspections either weren't done or if they failed to uncover defects. Relevant portions of the city's contract state:

> The failure of the [obligee/city's] inspector to reject or condemn improper materials and workmanship shall not prevent the [city] from rejecting materials and workmanship found defective . . . nor shall it be considered as a waiver of any defects which may be discovered later, or as preventing the city at any time prior to the expiration of the guarantee [warranty] period from recovering damages for work actually defective. [908 F. Supp. at 346]

As the court noted, the city's contract also contained provisions about the inspections that would take place periodically and before payment applications would be paid. Note how similar the city's contract is to the one in the bridge case. Also, like the Ohio Department of Transportation, the city argued that the "disclaimer" language quoted above preserved its rights against the surety if the inspections either didn't take place or if the inspections failed to uncover defects. The *Continental* court did not buy the city's argument and held that the entire contract must be construed together:

> The Court cannot interpret the provision as being a complete disclaimer, thus implying that the City has no duty to inspect during the lifetime of the project, because this interpretation would be patently inconsistent with other contractual provisions. For example, another general condition of the contract . . . *requires* the engineer or [city] to make reasonable inspections in order to make sure the project is in accordance with the contract. Moreover, a number of provisions in the Specifications section of the contract also require testing. . . . Therefore, to reconcile the terms [regarding testing] with [the] payment provisions [the contract] cannot be read to be a complete disclaimer of the city's duty to inspect. [*Id.* at 346-47 (internal citations omitted; emphasis in original)]

The court found that the city's failure to conduct all required inspections and its failure to uncover defects when it did inspect, resulted in a wrongful overpayment to the principal. Following the *Southwood* case, discussed above, the *Continental* court explained the policy reasons behind the impairment-of-collateral defense:

> [P]remature payments both diminish available contract funds and reduce the incentive for the contractor to complete his project . . . . Because of the City's premature payments, the project's funds had been significantly decreased to the detriment of the surety. In addition, the City's policies encourage contractors to 'take the money and run.' [S]imilarly, the City's payment and inspection procedures do not induce the construction contractor to finish the work on schedule or at all. The City is apparently unconcerned with its defective payment and inspection procedures because, as one of its employees stated, 'The project has a surety.' For policy reasons, therefore, this Court . . . finds [that the City's actions] discharge[e] the surety's obligations under the contract to the extent that it was prejudiced by the City's premature payments. [*Id.* at 348]

To further prove its point, the court also held that the surety could recover from the city all of the surety's consulting and engineering fees in analyzing the alleged defective work. "These expenses were foreseeable as a result of the material variation from the contract and flowed naturally from the City's breach of the payment provisions." *Id.*

The *Continental* case is potentially powerful, and its facts analogous to the bridge case. The obligee agreed to inspect the project. In some cases, the obligee used third-parties; in others it used its own employees. Whether by fraud or incompetence, the obligee's inspectors failed to detect defects. The obligee claims that defects are substantial and obvious. According to the obligee, the contractors didn't perform key preparation work required by the plans and specs. In spite of the contractor's failures, however, the obligee paid the entire contract balance. Now there is no source of funds for the surety to use when responding under the performance bond. This is exactly the problem that the surety faced in *Continental*. And, as in *Continental*, the obligee claims that its anti-waiver provisions in the contract allow the obligee to recover even if its inspectors failed to uncover defects. Such obligee arguments were thoroughly beaten back by the *Continental* court.

The *Transamerica Ins. Co. v. Kennewick* case is also helpful, but it is not quite as pro-surety as *Continental.* In *Kennewick*, the obligee's inspectors were negligent and failed to detect defects. The inspectors erroneously (but not on purpose) certified that the work was done according to the plans and specs when in fact it was not. 785 F.2d at 661-62. The court held that the city inspector's negligence "excuses the surety to the extent of the overpayments negligently made." *Id.* at 662. The city argued that since it didn't make the overpayments on purpose, the "good faith" defense should prevent discharging the surety. The court disagreed, stating that only if the city/obligee were innocent and did not act willfully or negligently in making the overpayment would there be no discharge. *Id.*

Indeed, the *Kennewick* court's conclusion is helpful. The facts may even be analogous. There may be some instances where the Ohio Department of Transportation's inspectors were simply negligent instead of willfully fraudulent. Either way, under *Kennewick* the surety is discharged. But the *Kennewick* court cited to *Young Men's Christian Assoc. v. Gibson*, 108 P. 766 (Wash. 1910), which found no discharge where the obligee relied on negligent inspections by third-party engineers. In distinguishing *Gibson* from *Kennewick*, the court said that "by contrast, the City here relied on certifications negligently made by its own employee." 785

F.2d at 662. Thus, under *Kennewick*, the surety in the bridge case would not be discharged for incompetent inspections by non-department of transportation employees.

A federal case from Montana is accord with *Continental* and *Kennewick*. *See Blackfeet Tribe of the Blackfeet Indian Reservation v. Blaze Constr. Inc.*, 108 F. Supp. 1122, 1137-39 (D. Mont. 2000). In *Blackfeet*, the obligee paid its general contractor nearly all of the contract balance even though the contractor still needed to build 21 of the 72 homes the contractor agreed to build. 108 F. Supp. at 1136-37. In finding that the payments to the contractor were negligent, the court held that the surety was discharged to the extent of its prejudice:

> In this court's opinion, the current record demonstrates [obligee's] improperly overpaid [the contractor] and acted without due care to [the surety's] security . . . . Consequently, [obligee] acted negligently and cannot assert a good faith defense for their overpayments. [*Id.* at 1138]

The only potential caveat in using *Blackfeet* to support the surety is the court's comment that the result might have been different had the contractor made material misrepresentations to the obligee to entice the overpayment. Thus, in fighting the obligee's claim, the surety needs to focus on the obligee's bad conduct. In the bridge case, the project owner was not an innocent obligee who reasonably relied on a defrauding principal. Even in *Blackfeet*, the court stressed the obligee's lack of innocence:

> [The obligee's] uncontroverted testimony demonstrates [that the obligee] visually monitored the work progress and, in fact, documented the work with photographs. [Obligee] did not merely rely upon [the contractor's] representations in documents to account for work done, or materials purchased, for which [the contractor] requested payments.
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> * * *
>
> The uncontroverted testimony . . . shows that [the contractor] was paid only after [obligee] inspected the work. [*Id.* at 1139]

Thus, in the bridge case, it's important to emphasize that the obligee did not merely rely on its contractors' word. The obligee had culpability of its own. The culpability of the obligee, whether intentional or negligent, is what matters in discharging the surety under the cases addressed above.

D. Fraud by the Obligee in Obtaining the Bond

This defense applies when the obligee materially misrepresents something to the surety or fails to disclose material information to the surety when there's a duty to disclose, and the obligee has reason to believe that such misrepresentation or failure to disclose would increase the surety's risk and make it unwilling to give a bond. *Restatement (Third) of Suretyship & Guaranty,* § 12(1) & (3) (1996 & Supp. 2006), as modified by *Rachman Bag Co. v. Liberty Mut. Ins.*, 46 F.3d 230 (2d Cir. 1995). No Ohio cases address this defense.

The leading case on fraud by the obligee is *Rachman Bag*. The case is notable because in addition to the elements listed in § 12 of the *Restatement*, the *Rachman* court

added a fourth element – a duty of the obligee to disclose the relevant information. The case discusses various contexts when an obligee has a duty to disclose to the surety.

Other cases are in accord. *See St. Paul Fire & Marine Ins. v. Commodity Credit Corp.*, 646 F.2d 1064 (5th Cir. 1981) (active and fraudulent concealment of pertinent facts by obligee during bond negotiations will discharge surety); *G & S Foods v. Vavaroutsos*, 438 F. Supp. 122 (N.D. Ill. 1977) (principal's fraud that induced surety to sign on as guarantor, cannot be a defense to obligee's claims, unless obligee knew of or participated in principal's fraud); *Greenblatt v. Delta Plumbing & Heating*, 834 F. Supp. 86 (S.D.N.Y. 1993) (same holding as *G & S Foods*); *National Union Fire Ins. Of Pittsburgh v. Robuck*, 203 So. 2d 204 (Fla. App. 1967) (principal's fraud on surety does not relieve surety as to obligee unless obligee was a party to the fraud or concealed facts of fraud when there was a duty to disclose); *New Jersey Econ. Dev. Auth. v. Pavonia Restaurant*, 725 A.2d 1133 (N.J. App. 1998) (surety discharged if: obligee knows of material facts that increase risk to surety, surety doesn't know facts, obligee had opportunity to disclose facts, the obligee has reason to believe the facts would increase risk beyond what surety willing to accept, and obligee fails to reveal such facts).

The bridge case did not uncover facts showing that the obligee was involved in the scheme *before* the surety issued the bonds. If employees capable of binding the obligee knew of the fraud plan before the surety issued the bonds, then the surety would be discharged. The elements required to get a discharge for fraud are discussed in detail in *Rachman*. They should be reviewed before deposing any obligee employee.

E. As Between Innocent Parties, the One Who Enabled the Bad Actor to Cause the Loss Must Bear the Loss

"Whenever one of two innocent parties must suffer by the act of a third, he who has enabled such person to occasion the loss, must sustain it." *Guider v. Shafer,* 5 Ohio Law Abs. 179, 1927 WL 2565 (Hardin Cty. App. 1927); *accord* 52 *Ohio Jur. 3d* "Guaranty and Suretyship," §§ 87 & 153 (1997 & Supp. 2006). Another way of stating the same rule is as follows. Where one of two innocent parties must suffer by the fraud of a third person, the one who first trusted that third person and placed in that person's hands the means which enabled him or her to commit the wrong, must bear the loss. *Public Loan Corp. v. Jacobs,* 75 Ohio Law Abs. 572, 144 N.E.2d 505 (Mahoning Cty. App. Ct. 1955).

The courts may have a difficult time deciding who should bear the loss in the bridge case. One could argue that both the general contractors and the obligee were innocent victims. Plus, the Ohio Department of Transportation has Ohio taxpayers on its side. The Courts will be reluctant to force Ohio taxpayers to pay twice for bridge-repair work. A large, wealthy surety company is a more attractive target to bear the loss than the Ohio taxpayers.

On the other hand, as among the obligee, the principal contractors and the surety, the surety is the most innocent party. No surety employees committed fraud. The only bad actors were obligee and contractor employees. The surety had no control over any of these employees. If the Court chooses to characterize the contractors and obligee as innocent victims, they are still the parties who enabled the bad guys to commit their fraudulent acts. The obligee and the contractors were in the best position to prevent the rogue employees from committing the fraud. Plus, as the rule is stated in the *Jacobs* case, the obligee and the

contractors were the entities who first trusted the bad actors. Accordingly, they and not the surety should bear the loss.

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REPRESENTATIVE ARTICLES

● Co-Author, "North Carolina," in Performance Bond Manual of the 50 States, District of Columbia, Puerto Rico and Federal Jurisdictions 429-56 (L. Lerner & T. Baum eds. 2006).

● Co-Author, "The Employer's Guilty Plea as a Possible Bar to Fidelity Bond Claims," *16th Annual Northeast Surety and Fidelity Claims Conference Proceedings*, sect. 11, pp. 1-11 (September 2005).

● "Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives," *45 Case Western Res. L. Rev. 1191*, 1995.

● Co-Author, "The Hasty Embrace of Critical Thinking by Business Law Educators," *9 J. Legal Stud. Educ. 515*, 1991.

● Co-Author, "Critical Thinking is Distinct from Thinking Like a Lawyer," in *Selected Papers of the American Business Law Association National Proceedings 169-284* (D. Herron ed. 1990).

PRESENTATIONS

● "The Fundamentals of Construction Contracts: Understanding the Issues in North Carolina," Lorman Education Services Seminar, Asheville, North Carolina, December 11, 2008.

● "The Fundamentals of Construction Contracts: Understanding the Issues in North Carolina," Lorman Education Services Seminar, Charlotte, North Carolina, July 22, 2008.

● Co-Author and Lecturer, "Update on Civil Practice Basics," Mecklenburg County Bar Association, February 2005.

● Co-Author and Lecturer, "Litigation: Basics A to Z," Mecklenburg County Bar Association, December 2003.

SETTLEMENTS, VERDICTS AND REPORTED DECISIONS

● 2008. Negotiated $4 million settlement for traumatic-brain injury victim (details confidential).

● 2007. Achieved $2.64 million settlement with taverns for wrongful-death victims even though there were no eye-witnesses who would testify that they saw the drunk driver being served alcohol while intoxicated. http://www.slk-law.com/pdf/nc-lawyers-weekly-article.pdf.

● Oct. 2, 2007. Overturned summary judgment in reported decision: Park East Sales, LLC v. Clark-Langley, Inc., 186 N.C. App. 198, 651 S.E.2d 235 (2007), rev. denied, 362 N.C. 360, 661 S.E.2d 736 (2008).
http://www.aoc.state.nc.us/www/public/coa/opinions/2007/pdf/061496-1.pdf.

● Dec. 1, 2000. Obtained highest soft-tissue injury jury verdict in county history, per judge presiding in: Dr. Stephen R. Byrd v. Moddassir M. Ali, Davidson County Superior Court, case no. 99-CVS-2352.

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- New York Law School 1983, J.D.
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