HANNAH SHERIDAN & COCHRAN
ATTORNEYS AT LAW

HSC 2.0—NEW YEAR, NEW OPPORTUNITIES, FRESH START

By: Nan E. Hannah

By now, many who receive the HSC newsletter are aware that 2018 proved to be a year of challenges and transitions for this law firm. We weathered those storms and are working through 2019 with a positive outlook about the bright future ahead. As part of that, we want to re-introduce our line-up.

Nan Hannah, a partner in the firm, continues practicing in hopes of improving her skills as a lawyer every day. Nan spends much of her time assisting material suppliers and others in the construction industry with commercial collections, contract review and negotiation, creditor's rights in bankruptcy, and is a certified mediator in the North Carolina Dispute Resolution Commission's Civil Superior Court mediated settlement program. She also is experienced in the world of appellate practice. Nan is being trained by a 10-pound gray tabby cat named Sasha and recently added a 12-pound brown tabby cat named Carter. Nan loves to cook, read and travel.

Chad Cochran, also a partner in the firm, is a native of Tennessee and Vols' fan. Chad assists businesses whether it is in formation, mergers, sales or acquisitions, or protecting their interests in civil litigation. Chad works with clients in the construction industry and beyond. His experience includes litigation in the federal courts as well as the North Carolina state court system, and arbitration and mediation. Chad is a world traveler when allowed to slip away from the office for some well-deserved time off.

Emily Anne Buttrick is the newest attorney at HSC having joined the team in October. Emily Anne came to us with three years of civil litigation experience including trial work and dispute resolution opportunities. She is a newlywed who also enjoys traveling (are you sensing a theme here?). Emily Anne has her feet under her in this new position and is looking forward to fostering relationships with HSC's clients and to developing her own client base. - Continued on Page 2 -

LEGAL FOUNDATIONS NEWSLETTER

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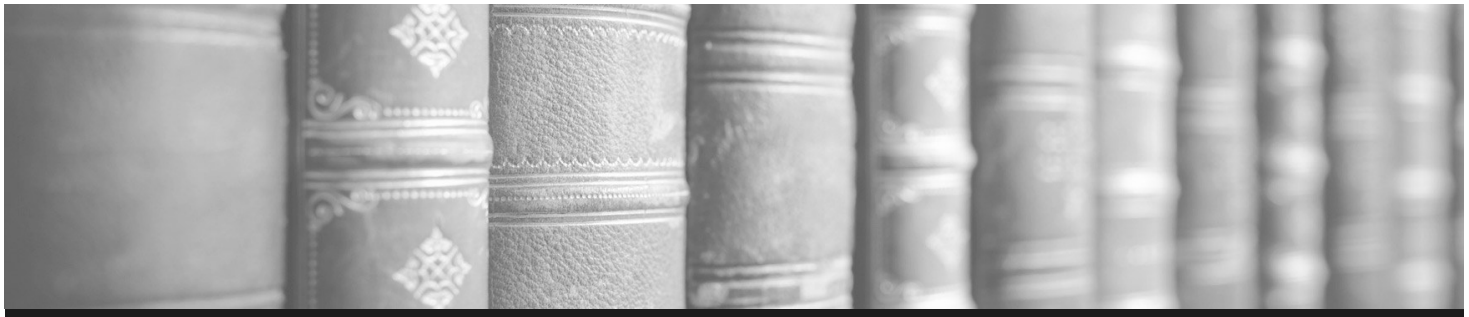


Civil Litigation

RECOUPING ATTORNEYS' FEES IN LITIGATION

By: Emily Anne Buttrick

One frequent question we receive is whether you can recoup your attorneys' fees spent pursuing or defending a lawsuit. The well-established rule in North Carolina is that each party bears its own costs of litigation, unless a statute specifically awards attorneys' fees. Outside of family-law issues, there are only twenty-five (25) statutes in North Carolina that grant the Court the authority to award attorney's fees. Even in these 25 scenarios, the grant of attorney's fees is permissive, meaning that it is within the judge's discretion whether to award the prevailing side the cost of their attorneys.

One area where attorneys' fees are allowed by statute is in lien actions. Pursuant to N.C. Gen. Stat. § 44A-35, "the presiding judge **may** allow a reasonable attorneys' fee to the attorney representing the prevailing party . . . upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter [.]" N.C. Gen. Stat. § 44A-35. Who the prevailing party is depends upon the amount sought in the lawsuit and the amount ultimately awarded in trial or arbitration. If the party bringing the lawsuit obtains a judgment of at least 50% of the amount sought, then the person bringing the lawsuit is the "prevailing party." Alternatively, if the amount awarded is less than 50% of the amount sought by the lawsuit, the defendant is the "prevailing party." An "unreasonable refusal to settle" is not merely declining a settlement offer, but is determined by a totality of the circumstances. Ultimately, the Court will consider whether settlement offers acknowledged any work performed, approached the undisputed costs incurred on a project, or if a party was unnecessarily stubborn.

Attorneys' fees may also be awarded if there is a contractual provision entered into for business or commercial purposes where each party agrees "to pay or reimburse the other parties for attorney's fees and expenses incurred by any suit, action, proceeding, or arbitration involving the business contract." N.C. Gen. Stat. §§ 6-21.2 and 6-21.6(a)(4). When considering whether to award fees, the legislature outlined thirteen (13) factors for the judge to evaluate when awarding "reasonable" attorneys' fees, including settlement offers and their timing, the results obtained, and the skill required to perform the legal services rendered given the novelty and difficulties of the questions of law raised in the action. Therefore, it is possible that, if you have an attorneys' fees provision in a contract, the court could refuse to award fees altogether or award a lower amount.

Although attorneys' fees are rarely awarded at the end of litigation, it is worth remembering the limited circumstances in which a court may award them. The attorneys at HSC consider it very important to freely communicate with clients about the economics of a case throughout the litigation process. If you believe that you may be entitled to attorneys' fees in conjunction with a civil legal claim, please contact our office.

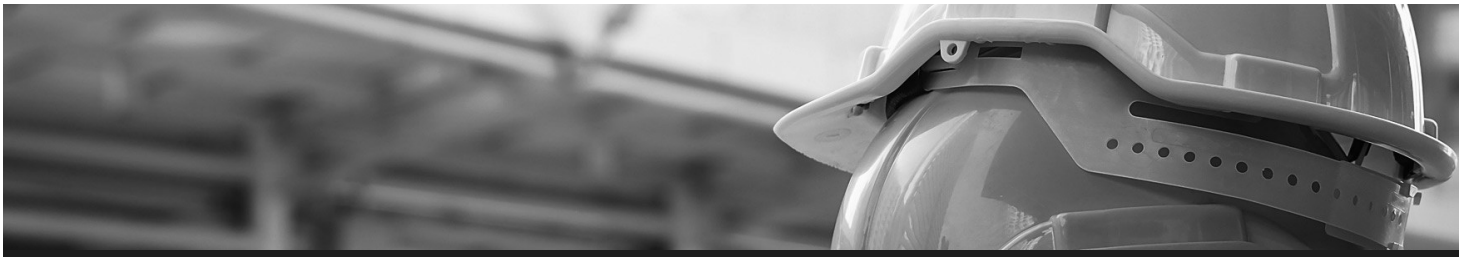
HSC 2.0 (Cont.)

Kendall Rush is our senior paralegal. She is an Appalachian State University graduate and completed the paralegal program at Meredith College. She is a certified paralegal.

Bethany Sneed joined our firm the same day Emily Anne did. A graduate of North Carolina Central University, Bethany received her paralegal training at UNC-Chapel Hill. She is quickly learning the ropes here at HSC and looks forward to assisting our clients.

One of the most shocking events of 2018 was Paul Sheridan's cancer diagnosis. Paul retired effective October 23, 2018 to devote time to his family and his treatment. He is constantly in our thoughts and prayers as he fights the disease.

As we enter 2019, the Hannah Sheridan & Cochran team looks forward to working with our clients to meet their legal needs. And, as always, we welcome the opportunity to meet and serve new clients so please consider referring business to us. Thank you for your continuing support of our firm.



Construction Law

Salinas: A Federal Circuit Court Decision Linking a General Contractor to Unpaid FLSA Overtime Benefits Owed to Subcontractor Employees

By: Chad J. Cochran

North Carolina's federal appellate circuit court issued a 2017 employment law decision which is causing ripple effects in the construction industry concerning the way general contractors structure their subcontractor relationships. In *Salinas v. Commercial Interiors,* the 4th Circuit issued a decision whereby it found that a general contractor was effectively responsible for the unpaid overtime benefits owed to a subcontractor's employees. The two constituted a "joint employer".

The Court issued a detailed opinion which ultimately set out a test for determining joint employment under the Fair Labor Standards Act (FLSA). The two-step test first looks into the relationship between the subcontractor and contractor entities. The second step looks into whether the worker constitutes a worker or independent contractor."

As to the second test question, the Court determined that the independent contractor v. employee question represented an issue for the jury.

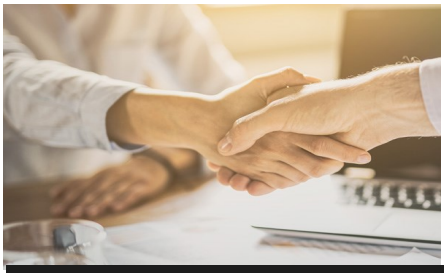
In regards to the first question (gc-sub relationship), the Court issued six non-exclusive factors: (1) Whether the putative joint employers together determine the power to direct control, or supervise the worker'; (2) Whether the putative joint employers together determine the power to hire or fire the worker or modify the terms or condition of employment; (3) The degree of permanency and duration of the relationship between the putative employers; (4) Whether, through shared management or ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer; (5) Whether the work is performed on a site owned or controlled by one or more of the putative joint employers; or (6) Whether the putative joint employers together determine responsibility over functions ordinarily carried out by an employee, such as handling payroll, providing workers' compensation insurance, paying payroll taxes, or providing the facilities, equipment, tolls or material necessary to complete the work.

The Court analyzed the *Salinas* general contractor–subcontractor relationship and found the following facts important: (i) the sub worked primarily for the gc; (ii) the gc provided tools, materials, equipment, and foreman supervision; (iii) the gc required the sub employees to attend its safety meetings; (iv) the gc required sub employees to clock in/out with the gc on a time and material basis; (v) the gc provided the sub employees with hard hats, vests, sweatshirts in the gc's name; and (vi) the gc even instructed the sub employees to indicate that they worked for the gc if asked. The Court found that the overwhelming control deemed the general contractor a joint employer responsible for providing FLSA benefits to the subcontractor's employees.

Most importantly, the Fourth Circuit issued clear guidance for future general contractors to consider. The Judges stated: "[W]hen—as here—a general contractor contracts work out to a subcontractor that directly employs workers, the general contractor will face no FLSA liability so long as it either (1) disassociates itself from the subcontractor with regard to the key terms and conditions of the workers' employment or (2) ensures that the contractor "cover [s] the workers' legal entitlements" under the FLSA.

Wise general contractors should consider these tips when structuring their subcontractor relationships. They might mitigate their risks as a result.

BEWARE OF YOUR CONTRACT TERMS
By: Emily Anne Buttrick



Contract Law

The North Carolina Court of Appeals recently took up the issue of construction defects in the case of *Cannizzaro v. Set in Stone, Inc.,* COA18-594, 19 February 2019 (unpublished).

Plaintiff, Ms. Cannizzaro, contracted with Defendant, Set in Stone, Inc., to install stone drains and to demolish and re-pour her driveway and walkway. There were four agreements in the contract: (i) the total price was $11,995.00, (ii) dimensions of the driveway were to remain the same, (iii) all work was to be done in a workmanship like manner according to standard practices, and (iv) Defendant guaranteed the work against defective workmanship for one year past the completion date.

As sometimes happens, the homeowner was not satisfied with the work the mason performed. While Set in Stone attempted to repair the defects, numerous and substantial defects remained. The Court of Appeals identified eight (8) separate "substantial defects" including jagged and misaligned edges, discoloration, boot prints, incorrect finish, incorrect dimensions, and "general unevenness." Although there were multiple substantial defects, Plaintiff paid and Defendant accepted full payment at the contract price.

At trial, Plaintiff testified regarding the timeline of the project, that she was not satisfied, and that she was repeatedly assured that the problem would be remedied. Defendant returned to Plaintiff's property and began working without her permission. Defendant also testified at trial. He noted that he had poured more than 100 driveways in his twelve (12) years of business and that the driveway was completed in a workmanlike manner. Any alleged issues would not impact the functionality or longevity of the driveway.

Ultimately, the Court of Appeals affirmed the decision and found that Defendant breached the contract, but did not address the workmanship issues. Ultimately, the Court noted that the size and dimensions of the driveway were an essential part of the contract. Based upon the testimony, the driveway was not built to the same specifications. Therefore, Defendant did not uphold their end of the bargain and breached the contract. The Court found it was not necessary to address the guarantees since Defendants breached the agreement on the dimension issue.

How can you avoid this issue? Be careful of your contract terms. If you wish to enter into a construction contract, please contact one of the attorneys at HSC to review the terms with you in order to assist you.

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