THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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SUMMER 2012
VOLUME 40
ISSUE 2
WWW.SCDTAA.COM

Summer Meeting
Asheville, NC
July 26-28

Fall Boot Camp
September 27,2012
Greenville, SC

Annual Meeting
The Sanctuary at Kiawah Island
November 8-11

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

President's Message

by Molly H. Craig

The Shining Superstars

For those who attended Trial Superstars, you know firsthand what the title of this article is referencing. On April 13, 2012, some of the finest trial lawyers in South Carolina on both the plaintiff and defense sides converged on the Charleston County Courthouse to try a case from the SCDTAA Trial Academy fact pattern. All of the participating lawyers were invited to join in this trial exercise based upon their significant trial experience and success. Due to the efforts of this outstanding faculty, the mock trial was spectacular. The courtroom audience and those that tuned in via teleconference witnessed top notched lawyers showcase their trial skills and all attendees left with new trial techniques and innovative tactics to incorporate into their own practices. It was also a great day for the South Carolina Bar because this mock trial demonstrated how both plaintiff and defense lawyers can work together toward the worthy goal of helping others become better trial lawyers. The Trial Superstars faculty is listed in this publication and I would like to thank each person for their participation and countless hours of preparation. Judge Early, as the presiding judge, did a terrific job streamlining the trial in an efficient and entertaining way. Judge Young who played the part of the Plaintiff, may have unearthed a second career with his acting prowess. We have received glowing reports from the attendees, faculty and judges who attended this event. None of this could have been possible without the invaluable hard work of our Program Chair, Jamie Hood. Stay tuned for further analysis and discussion of Trial Superstars in the upcoming Trial Academy, Summer Meeting and Annual Meeting. The jury consultant company that handled the mock trial, R&D Strategic Solutions, will assist us by highlighting key jury information for our upcoming CLEs. We will use video footage from the trial and jury deliberations in other programs throughout the remainder of the year.

On April 24, 2012 we had record attendance at our Corporate Counsel Seminar in Columbia. In-house counsel from across the state joined us for this complimentary seminar. I would like to congratulate David Anderson, Duncan McIntosh and Melissa Nichols for organizing a most successful Corporate Counsel seminar. Our Legislative/Judicial reception at the Oyster Bar in Columbia followed the Corporate Counsel seminar and was well-attended by our members, judges and legislators. I appreciate the hard work of Gray Culbreath and Jeff Thordhal in planning this special event.

In addition to everything else, the Association held our Third Annual PAC Golf Tournament at Spring Valley Country Club in Columbia on April 25, 2012. We had twelve teams compete this year and a good time was had by all. All proceeds from the tournament go to our PAC fund. Many thanks to Johnston Cox and Anthony Livoti for chairing the PAC Golf Tournament for the past two years.

The SCDTAA Board continues to work hard to provide real value and exceptional benefits to our members. The SCDTAA started with a bang in 2012 with Trial Superstars and we expect the positive momentum to continue throughout the year. Please make plans for you and your family to join us at the Summer Meeting at the Grove Park Inn in July 26-28, 2012. We have an outstanding program planned with timely and relevant topics that will interest all trial lawyers. In addition to the main CLE program, we will have special workers' compensation breakouts on both days, including a mock appeal to the full commission. Other exciting events coming this year include Evidence Bootcamp, Workers' Compensation Bootcamp, Product Liability CLE, Construction Law CLE, judicial receptions and of course, the Annual Meeting at The Sanctuary. Make plans to join us!

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

Letter From The Editors

by David A. Anderson, Jack Riordan, and Breon Walker

"Diversity" – The condition of having or being composed of differing elements; the inclusion of different types of people (as people of different races or cultures) in a group or organization.

Merriam-Webster Dictionary

When most people think of diversity, they think of the inclusion of minorities in the work place or in an organization such as the SCDTAA. While this is definitely an important aspect of diversity, the meaning and the need for diversity is a much broader concept. When we look at the membership of the SCDTAA, "diverse" is not a word that comes to mind. This is something that we are committed to changing and have been for some time. But what does this really mean? It means that our organization should be comprised of differing elements: small firms, large firms, solo practitioners, women, younger members of the Bar, lawyers of different ethnic backgrounds and members from every jurisdiction in the State.

Although the goal of diversity should come about because it is the right thing to do, most firms, corporations and organizations are not driven by that moral aspect; instead, they are driven by the benefits derived from having diverse employees and members. This is not a bad thing…it is just the way of the world. By now, most people recognize the need for diversity. In the law firm setting in which most of us practice, diversity is something that is now required by most clients, especially in the insurance defense context. These organizations realize the need for representation that is more indicative of the world in which we live; a world that is not just black and white. Therefore, firms promote diversity to attract and keep clients, which allows them to make more money and, thus, derive the benefit. However, this reason alone is not enough.

Why should the SCDTAA focus on increasing diversity in its membership? For starters, a more diverse membership gives us a broader base from which we can pull ideas. Diversity is about learning from others who are different from us and about creating an environment that encourages such learning and captures the advantage of diverse perspectives. Instead of doing the same things we have been doing for years, we gain a perspective from those who have not traditionally been members of our organization. New ideas generate excitement and increased energy, which are both helpful tools as our organization continues to grow. Additionally, our judiciary and elected officials are becoming increasingly diverse and we routinely invite members of both groups to our meetings and functions, as well as rely on them to help foster the mission of the SCDTAA, which is: To promote justice, professionalism and integrity in the civil justice system by bringing together attorneys dedicated to the defense of civil actions. By increasing diversity we focus on a key aspect of our mission, that is, bringing lawyers together.

The next logical question is, how do we—as members of the SCDTAA—go about increasing diversity? As we all know, this is not a simple task. We must work to promote and market our organization to everyone and not just those who look like us or with whom we routinely practice or socialize. We must reach out and make a concerted effort to include those who will benefit our organization and bring in new ideas.

While diversifying our membership has been a goal for some time, what better way to work towards that goal than to put the issue at the forefront in *The DefenseLine*! This edition includes articles written by more women and younger members as well as profiles of two female, African-American members of our judiciary. We hope you enjoy this edition and join us as we work to increase diversity in our organization. If you have any ideas to help us reach our goal, please do not hesitate to contact one of us, a member of our Board of Directors, or our Executive Director, Aimee Hiers. As always…we love to hear from you!

David A. Anderson

Jack Riordan

Breon Walker

Michael Freeman

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

SCDTAA Docket

Drew H. Butler of Richardson Plowden selected as AWR Litigator of the Year

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Drew Hamilton Butler is the recipient of the A. William Roberts, Jr., & Associates (AWR) Litigator of the Year award. The award was presented to Butler by Bill Roberts, AWR CEO, at the South Carolina Lawyers Weekly Leaders in Law Ceremony in March. Butler focuses his practice on general litigation. He earned his Juris Doctor from Pennsylvania State University Dickinson School of Law in 2002. In addition to his practice at Richardson Plowden, for more than seven year, Butler has acted as a pro bono special prosecutor for criminal domestic violence prosecution with the South Carolina Attorney General's Office. He has also helped instruct classes for young lawyers interested in joining the program. Recently Butler was selected as a 2012 Rising Star by the South Carolina Super Lawyers® publication. He is a member of the South Carolina Bar, Richland County Bar Association, Charleston County Bar Association, and the American Bar Association. He is the past president of the Young Lawyers Division of the South Carolina Defense Trial Attorneys' Association.

Collins & Lacy Attorneys Selected for South Carolina Super Lawyers® 2012 List, and 2012 Rising Stars List

Four Collins & Lacy, P.C. attorneys have been named to the 2012 list of South Carolina Super Lawyers®. Joel W. Collins, Jr., Stanford E. Lacy, Jack D. Griffeth, and Michael Pitts were among those attorneys recently selected for inclusion in the publication. Super Lawyers® is a listing of attorneys who have attained a high degree of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis, and the selection process is multi-phased and includes peer nominations, independent research and review by peer attorneys in the same practice area. Additionally, firm shareholder Andrew Cole, has been named to the inaugural Rising Stars list for South Carolina. The Rising Stars list was established to recognize the top up-and-coming attorneys in each state. Rising Stars are attorneys, 40 years of age or younger, who have been practicing for 10 years or less.

Nelson Mullins Riley & Scarborough expands to Nashville, TN

Nelson Mullins Riley & Scarborough is pleased to announce the opening of their Nashville, TN office. Five recognized and experienced Tennessee attorneys with national practices in business, technology, real estate, corporate, and securities work will join the Firm to help establish and expand the office. The Nashville office will be managed by Laurence M. Papel, who concentrates his practice primarily in the areas of corporate transactions and real estate. Also joining the firm is Jason Epstein, a nationally recognized business and technology attorney who acts as outside general counsel to companies in various industries. David J. White, who concentrates his practice in the areas of corporate, municipal and structured finance, portfolio real estate transactions, and airport and aviation-related finance and development projects, also comes to Nelson Mullins as a partner in its Nashville office. Other new partners in Nashville will include Geoffrey P. Vickers, and Kelly L. Worman, along with Christopher Lalonde an associate in the Firm's Nashville office.

Two Wyche Attorneys Recognized by South Carolina Super Lawyers®

Two Wyche attorneys, Wallace Lightsey and Troy Tessier, were recognized in 2012 by South Carolina Super Lawyers®, a rating service of outstanding lawyers from more than 70 practice areas who have obtained a high degree of peer recognition and professional accomplishment. Lightsey, Chair of Wyche's Executive Committee, received special recognition as one of South Carolina's top 25 lawyers. The annual selections are made using a rigorous multi-phased process that includes a statewide survey of lawyers, an independent research evaluation of candidates, and peer reviews by practice area.

Turner Padget Attorneys Named Among South Carolina Super Lawyers®

Turner Padget Graham & Laney, P.A. is pleased to announce that 12 of the firm's shareholders have been named by Super Lawyers® magazine as top attorneys in South Carolina for 2012. In addition, six attorneys are named as South Carolina Rising Stars. From Turner Padget's Charleston office, shareholder John S. Wilkerson, III is recognized for his work in General Litigation. Nosizi Ralephata, who was recently named as a shareholder of the firm, is honored as a Rising Star for Business Litigation. In the firm's Columbia office, the following shareholders are recognized: Reginald W. Belcher for Employment and Labor; John E. Cuttino for Civil Litigation Defense; Lanneau Wm. Lambert, Jr. for Real Estate; Curtis L. Ott for Personal Injury Defense: Products; Thomas C. Salane for Insurance Coverage; Franklin G. Shuler, Jr. for Employment and Labor; and of

Continued on next page

counsel Catherine H. Kennedy for EstatePlanning and Probate. In addition, shareholders Nicholas William Gladd and Carmelo ("Sam") D. Sammataro are included as Rising Stars for Personal Injury Defense: Products. In Florence, J. René Josey and Arthur E. Justice, Jr., both shareholders, are recognized for Criminal Defense and Employment and Labor, respectively. Three Florence-based attorneys were named as Rising Stars: newly appointed shareholder Pierce C. Campbell for Business Litigation; associate J. Jakob Kennedy for Employment Litigation: Defense; and shareholder John M. Scott III for Estate Planning and Probate. From Turner Padget's Greenville office, shareholders William E. Shaughnessy, for Workers' Compensation, and Timothy D. St. Clair, for Intellectual Property Litigation, are recognized among Super Lawyers®.

The Claims and Litigation Management Alliance Selects Collins & Lacy Attorneys for Membership

Collins & Lacy, P.C. is pleased to announce that Scott Wallinger and Christian Stegmaier are the latest Collins & Lacy attorneys selected as CLM members. The CLM is a nonpartisan alliance comprised of insurance companies, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals and attorneys. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows. Wallinger and Stegmaier join Collins & Lacy attorneys Ellen Adams and Pete Dworjanyn as South Carolina members of the international organization. All four attorneys are chairs of their respective practice areas at Collins & Lacy and bring that diversity of experience to their involvement with CLM.

Four Smith Moore Leatherwood Attorneys Honored with "Leadership in Law" Awards

Three Smith Moore Leatherwood attorneys, Steven E. Farrar, Robert W. Pearce, Jr., and Kurt M. Rozelsky have been recognized by South Carolina Lawyers Weekly as "Leadership in Law" Award winners at an awards ceremony on March 15 at the Francis Marion Hotel in Charleston. Farrar is an experienced trial lawyer whose practice focuses on complex cases. He routinely works on cases involving complicated business litigation, professional liability defense and major products liability issues. Bobby Pearce has built a practice including corporate law, private securities offerings, venture capital, mergers and acquisitions, real estate finance, lender representation and trademark law. Kurt Rozelsky's practice focuses on the defense of complex litigation, including transportation matters, product liability claims, and other technical and expert driven litigation.

Turner Padget's Elaine Fowler Selected Leadership in Law

Turner Padget Graham & Laney, P.A. is proud to announce that Elaine H. Fowler has been selected as a recipient of the 2012 Leadership in Law award by the South Carolina Lawyers Weekly. The award recognizes those individuals whose leadership, both in the legal profession and in the community, has made a positive impact on our state. Ms. Fowler is a shareholder in our Charleston office and is a former president of the South Carolina Bar. She is a member of the firm's Business Transactions Group. In addition to devoting much time to her legal career, she is committed to service in her community and serves as Vice Chair of the Sullivan's Island Planning Commission and on the Executive Committee of the Charleston Regional Development Alliance.

Collins & Lacy, P.C. Charleston Office is Already Growing

Collins & Lacy, P.C. is pleased to announce the growth of their Charleston, S.C. office with the addition of Lowcountry attorney. Mikell Wyman. Wyman started his 10-year legal career at a small firm working in civil litigation, family law, residential real estate and workers' compensation defense matters. He later joined a larger firm in its Charleston, South Carolina office to focus his practice solely in the area of workers' compensation defense. Mikell has developed particular experience in the defense of pulmonary injury/inhalation claims. Mikell graduated from The Citadel with a degree in Political Science and later obtained his law degree from the University of South Carolina School of Law. While in law school, he served as an editor of the South Carolina Environmental Law Journal. Mikell will join Collins & Lacy shareholders Tom Bacon and Bennett Crites at the Charleston office.

Carlock, Copeland & Stair Attorney Joins Claims and Litigation Management Alliance

Carlock, Copeland & Stair, LLP is pleased to announce that David J. Harmon has accepted a nomination to join the prestigious Claims and Litigation Management Alliance (CLM). The CLM is an alliance of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. CLM's goal is to promote and further the highest standards of litigation management in pursuit of client defense. Attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows, in-house claims professionals. Harmon is a Partner in the firm's Charleston office focusing his practice in the areas of environmental, construction and professional malpractice litigation.

Turner Padget Launches Community Associations Blog

Turner Padget Graham & Laney, P.A. is pleased to announce the launch of its first blog, aimed at providing perspective regarding the complex legal issues impacting Community Associations and Private Clubs. The blog, which can be accessed at www.turnerpadget.com/blog/show/community-associations-blog, will be updated by the firm's community association lawyers in an effort to serve as a resource for information related to issues faced by

associations, their boards of directors and management companies. Turner Padget's Community Associations and Private Clubs attorneys routinely represent large, medium and small community associations and private clubs in their formation, governance and operation, including, but not limited to: advising officers and boards of directors and property managers on governance issues, including fiduciary duties, ARB issues, and preparation and revision of covenants, master deeds and bylaws; defending of directors in litigation; developer turnover and defective design/construction disputes; real estate development and financing; leases, management and other contracts; taxation; employment law; environmental matters, land use planning; miscellaneous litigation; and collections.

Griffith, Sadler & Sharp, P.A. Attorneys Selected for South Carolina Super Lawyers®

Griffith Sadler & Sharp, P.A. attorneys E. Mitchell Griffith and Mary E. Sharp have been named 2012 South Carolina Super Lawyers®. The annual selections are made using a rigorous multi-phased process that includes a statewide survey of lawyers, and an independent research evaluation of each nominee's background and experience. The designation is given to those who have attained a high degree of peer recognition and professional achievement. Only five percent of the lawyers in South Carolina are selected for inclusion in South Carolina Super Lawyers®.

Carlock, Copeland & Stair Attorneys Selected for South Carolina Super Lawyers® and Rising Stars®

Carlock, Copeland & Stair, LLP is proud to announce that firm partner, Kent Stair has been selected for inclusion on the 2012 South Carolina Super Lawyers® list, along with 2012 Rising Stars list honorees David W. Overstreet, Jackson H. Daniel, Amanda K. Dudgeon and Michael B. McCall. This is the first year that Rising Stars have been selected for South Carolina. Rising Stars is a listing of exceptional lawyers who are 40 years of age or under, or who have been practicing for 10 years or less, and have attained a high degree of peer recognition and professional achievement. Only 2.5 percent of the total lawyers in the state are honored on the Rising Stars list.

Twelve Gallivan, White & Boyd, P.A. Attorneys Recognized as Super Lawyers® and Rising Stars for 2012

Gallivan, White & Boyd, P.A. are pleased to announce that eight Gallivan, White & Boyd, P.A. attorneys from the firm's Greenville and Columbia offices have been selected for inclusion in South Carolina Super Lawyers® 2012. GWB attorneys appearing in the 2012 edition of South Carolina Super Lawyers® include W. Howard Boyd, Jr., Deborah Casey Brown, Gray T. Culbreath, H. Mills Gallivan, John T. Lay, Phillip E. Reeves , T. David Rheney, and Daniel B. White In addition, four Gallivan, White & Boyd attorneys have been recognized as South Carolina Rising Stars by Super Lawyers®. Those attorneys include: James M. Dedman, IV, W. Duffie Powers, Thomas E. Vanderbloemen, and Breon C.M. Walker.

State Defense Attorneys' Association Selects Sullivan for Medical Malpractice Committee

The South Carolina Defense Trial Attorneys' Association has chosen Kelli Sullivan, an attorney with McKay, Cauthen, Settana, & Stubley, P.A., to serve on the Medical Malpractice Committee. Ms. Sullivan had nine years of experience as a Plaintiff's attorney in medical malpractice, employment litigation and personal injury matters before joining The McKay Firm last year. Ms. Sullivan is a certified mediator. Her extensive knowledge of the insurance industry and experience as a Plaintiff's attorney make her uniquely suited to help clients resolve their most complicated cases. Her background on both sides of complex issues is an asset to The McKay Firm and its clients. She also serves as an active member of the Ethics Advisory Committee of the South Carolina Bar Association, and a volunteer mediator for Magistrate's Court cases in Richland and Lexington Counties.

McAngus Goudelock & Courie's Charleston Office Moves to Mt. Pleasant

The law firm of McAngus Goudelock & Courie, LLC, is pleased to announce that its Charleston office is relocating to Mt. Pleasant. The new location is located at 735 Johnnie Dodds Blvd.

For the first large firm in the Carolinas to be designated as an ABA-EPA Law Office Climate Challenge Partner, a main concern in creating the new office space was to make it as "green" and efficient as possible. The new office, designed by architect Roy Abernathy from Jova/Daniels/Busby Architects, creates a more efficient workflow and allows more collaborative work and interaction among employees. The use of natural light, glass panels and open spaces helps to accommodate the office's 35 employees in a space that is smaller but feels just as spacious as the previous location. MG&C chose to outfit the new office with workstations from Evolve Furniture Group, which are made of recycled materials and will be completely recyclable once they are no longer being used. The office received a technological upgrade as well. Visitors are greeted by a virtual receptionist, which connects them to the live receptionist at MG&C's headquarters in Columbia, S.C., who can then direct visitors to a conference room and remotely unlock doors and request hospitality services. The new conference rooms are all outfitted with iPads to control the digital displays, as well as digital, interactive panels outside the rooms that show the day's schedule for that room and allow users to create room reservations.

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Member News cont.

Turner Padget Recognized as South Carolina Firm of the Year by Benchmark Litigation

Turner Padget Graham & Laney, P.A. is pleased to announce its recognition by Benchmark Litigation as South Carolina Firm of the Year. The honor was presented at Benchmark's inaugural awards ceremony on March 8, 2012 in Atlanta. Turner Padget was selected for the award following outstanding peer feedback conducted by Benchmark's research team from November 2011 to January 2012. The 2012 edition of Benchmark Litigation: A Definitive Guide to America's Leading Litigation Firms and Attorneys, which was published in November 2011, named Turner Padget as a "highly recommended firm" for litigation in South Carolina. In addition, the publication recognized nine of Turner Padget's shareholders as "local litigation stars."

Nelson Mullins Awards Two S.C. Legal Aid Organizations Grants for Children's Issues

South Carolina Legal Services and the South Carolina Appleseed Legal Justice Center will each receive grants from Nelson Mullins Riley & Scarborough to help provide charitable legal services to children. The organizations will use the grants to hire summer law clerks who will work on children's issues. SC Appleseed will hire law clerks to work on children's hunger and education issues in Charleston, Columbia, Myrtle Beach, and Greenville. S.C. Legal services will hire interns for various children's issues. Nelson Mullins maintains a donor directed foundation fund to provide yearly assistance to organizations that serve the legal needs of low-income children. The law firm has provided both organizations Fellowship grants to support attorneys working on children's issues since the program's inception in 1997. Nexsen Pruet Up in Ranking of Largest U.S. Law Firms

Nexsen Pruet has moved up in The National Law Journal's annual ranking of the largest law firms in the United States.

Nexsen Pruet comes in at 216th on the NLJ 250 for 2012 - up four slots from last year's 220 position. Only two South Carolina-based firms made the list. Each January, the NLJ surveys approximately 300 U.S. law firms. This year's survey showed that Nexsen Pruet had 184 attorneys practicing in its eight offices across the Carolinas. Nexsen Pruet has made The National Law Journal list of largest U.S. law firms since 2004, except for 2007.

Four Richardson Plowden Attorneys Named 2012 South Carolina Super Lawyers®, Four Named 2012 South Carolina Rising Stars

Richardson Plowden & Robinson, P.A., is pleased to announce that four of its attorneys, George C. Beighley, Eugene H. Matthews, Anthony E. Rebollo, and Franklin J. Smith, Jr., have been selected to the 2012 South Carolina Super Lawyers® listing. Four other attorneys were selected to the 2012 South Carolina Rising Stars listing: Drew Hamilton Butler, Emily R. Gifford, Michelle Parsons Kelley, and Jocelyn T. Newman. This is the first year Beighley has been recognized as a South Carolina Super Lawyer. He was recognized for his work in Personal Injury Defense: Medical Malpractice. Matthews has been recognized as a South Carolina Super Lawyer for the last five consecutive years. He was recognized for his work in Employment and Labor Law. This is the first year Rebollo has been selected as a South Carolina Super Lawyer. He has been honored for his work in Tax Law. Smith has been recognized as a South Carolina Super Lawyer for the last five consecutive years. He was honored for his work in Construction Law. This is the inaugural year for the South Carolina Rising Stars recognition. The Rising Stars addition to Super Lawyers® recognizes the top up-and-coming attorneys in the state who are 40 years old or

younger, or who have been practicing for 10 years or less. Butler, Kelley and Newman were recognized for their work in General Litigation and Gifford was recognized for her work in Construction/Surety Law.

Rogers Townsend Attorney Selected to Editorial Board of National Environmental Publication

T. McRoy Shelley III, a shareholder in the firm's Columbia office, has been selected as a member of the editorial board of the Environmental Claims Journal (ECJ). The ECJ is a quarterly journal that focuses on the many types of claims and liabilities that result from environmental exposures. The Journal publishes articles and updates on current environmental litigation, environmental policy, technical developments, environmental forensics, and on environmental insurance and coverage issues. As an editorial board member, Shelley's contribution to the journal will include writing articles on a wide array of environmental topics, reviewing and editing article submissions, and providing insights on environmental policy, litigation, and insurance issues. Shelley leads Roger Townsend's litigation department and handles litigation involving construction, products liability (most frequently defending claims related to construction materials), commercial claims, trucking accident, personal injury, property and casualty, environmental claims, insurance coverage, and criminal law.

Smith Moore Leatherwood Named Go-To Law Firm in Litigation and Labor & Employment Categories

Smith Moore Leatherwood, LLP is proud to announce that the firm has been named a 2012 Go-To Law Firm for the Top 500 Companies for its work in two categories: Litigation and Labor & Employment. Nominated by a Fortune 500® client, Smith Moore Leatherwood was selected for the honor by ALM after in-depth research of numerous resources, including public records, leading publications and well-respected commercial databases. ALM's list of the top Litigation law firms will be featured in the spring 2012 edition of Litigation, a stand-alone supplement distributed with the May editions of Corporate Counsel and The American Lawyer magazines.

Turner Padget Launches Drug and Medical Device Practice

Turner Padget Graham & Laney, P.A. is pleased to announce the launch of its Drug and Medical Device practice group. The formalization of this industry group builds on Turner Padget's long-standing history of providing legal services to the pharmaceutical and medical device industries. Turner Padget's Drug and Medical Device attorneys have significant experience representing clients with interests in the drug and medical device industries. The practice group will handle complex litigation claims, intellectual property matters, fraud investigations and regulatory actions. Attorneys within the group have experience defending various complex pharmaceutical and medical device product liability and related claims for clients, including multi-party and multi-jurisdictional cases. Group members' trial skills and sophisticated knowledge of expert witnesses will provide clients with excellent trial support as well as strategic settlement guidance.

Carlock, Copeland & Stair Partner Honored as a Charleston Forty Under 40

David Overstreet, Partner in the Charleston office of Carlock, Copeland & Stair, has been honored with the Charleston Regional Business Journal's Forty under 40 Award. This annual award honors the professional successes and community involvement of forty people younger than 40 years of age who are making their mark on the region's business community. All 40 winners were featured in the Charleston Regional Business Journal published on March 26, 2012. Overstreet focuses his practice on commercial litigation. A significant amount of his time is spent defending professionals, including lawyers, accountants, real estate agents, and others.

Heath M. Stewart III Joins MG&C's Columbia Office

The law firm of McAngus Goudelock & Courie is pleased to announce that Heath M. Stewart III has joined the firm's Columbia, S.C. office. Mr. Stewart's practice focuses on general liability defense. He received his law degree as part of the first graduating class of the Charleston School of Law, where he served as part of the inaugural Honor Council. He holds a bachelor's degree in English from the University of South Carolina. He is a member of the American Bar Association, South Carolina Bar Association and Richland County Bar Association. He is admitted to practice before all South Carolina state courts, the U.S. District Court for the District of South Carolina and the U.S. Fourth Circuit Court of Appeals.

Collins & Lacy, P.C. Attorneys Jack Griffeth and Ross Plyler Elected to South Carolina Bar Association House of Delegates

Collins & Lacy, P.C. attorneys Jack Griffeth and Ross Plyler, both of the firm's Greenville office, were elected to the South Carolina Bar Association House of Delegates in the Thirteenth Judicial Circuit. The House of Delegates acts as the legislative arm of the South Carolina Bar Association and convenes at least twice annually to establish the policy of the Bar. Counties are divided into judicial districts and allotted a certain number of delegates who each serve a two-year term. Jack and Ross will each serve a two-year term with the House of Delegates effective immediately.

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Member News cont.

Jonathan Kresken Joins Turner Padget

Turner Padget Graham & Laney, P.A. is pleased to announce that Jonathan P. Kresken has joined the firm's Myrtle Beach office. Mr. Kresken is a member of Turner Padget's Business Transactions Team and will concentrate his practice in the areas of real estate, estate planning, estate administration, bankruptcy, business formation and probate litigation. Mr. Kresken most recently served as president and chief executive officer of the Waccamaw Community Foundation. Mr. Kresken received a B.S. from The Citadel and his Juris Doctor from the University of Richmond. He began practicing law in the Myrtle Beach area in 1995 and has served as an adjunct instructor for Horry Georgetown Technical College. He has extensive experience in real estate, estate planning, probate administration and litigation matters.

Nexsen Pruet Attorneys Recognized By Peers; Eight Named to 2012 Super Lawyers® List for South Carolina

Nexsen Pruet is pleased to announce that twenty-four attorneys have been listed in the 2012 edition of South Carolina Super Lawyers®. Those attorneys practice in the firm's Charleston, Columbia, Greenville and Myrtle Beach offices. Attorneys listed from Charleston are Cherie Blackburn, marvin Infinger, Tom Tisdale and Brad Waring. Attorneys listed from the Columbia office are Gene Allen, David Dubberly and Susi McWilliams. Elbert Dorn is listed from the Myrtle Beach office. Additionally, Nikole Mergo in Columbia was listed as a "Rising Star."

Collins & Lacy, P.C. Expands Statewide Footprint with Opening of Charleston Office

Collins & Lacy, P.C. is pleased to announce the opening of its Charleston, S.C. office. The Charleston office will be home to attorneys who know the Lowcountry, its businesses and its people. Shareholders Tom Bacon and Bennett Crites have worked in the Lowcountry legal circuit for more than 15 years combined. Each attorney brings a unique skill set to serve the needs of the business community. The office is located in the heart of Downtown Charleston at 200 Meeting Street, Suite 403, Charleston, SC 29401.

Moser and Winburn Join MG&C's Columbia Office

The law firm of McAngus Goudelock & Courie is pleased to announce that Matthew S. Moser and E. Scott Winburn have joined the firm's Columbia, S.C. office. Both attorneys practice in the area of workers' compensation defense. Mr. Moser received his law degree from the University of South Carolina School of Law, where he was a member of the ABA Real Property, Probate and Trust Journal. He holds a bachelor's degree in public relations from the University of North Carolina at Chapel Hill. Prior to joining MG&C, Mr. Moser worked as an assistant solicitor for the Sixth Circuit Solicitor's Office. He is member of the South Carolina Bar Association's Young Lawyers Division and serves on the Special Olympics Committee and the Professional Development Committee. Mr. Winburn received his law degree from the Charleston School of Law, and he holds a bachelor's degree in history from Clemson University. Prior to law school, he worked as a special assistant for South Carolina Governor Jim Hodges' office and as a lobbyist in Columbia, S.C. After graduating from law school, Mr. Winburn served as law clerk to the Honorable Edward B. Cottingham. He is admitted to practice law practice before all South Carolina state courts, the U.S. District Court for the District of South Carolina and the U.S. Fourth Circuit Court of Appeals.

United Way names Ed Mullins 2011 Alyce Kemp DeWitt Award Winner

United Way of the Midlands has honored Ed Mullins of Nelson Mullins Riley & Scarborough LLP as the 2011 Alyce Kemp DeWitt award winner. The award recognizes a volunteer whose creativity and passion have made an extraordinary impact on United Way of the Midlands. The Alyce Kemp DeWitt award is United Way's most prestigious award for long-term service to the organization and community. In order to be eligible, an Alyce Kemp DeWitt Award winner must have worked with United Way for a minimum of four years and made a measurable impact on the organization. Mr. Mullins has spent his career addressing human service issues and community needs both financially and with his time serving on boards, volunteering, or soliciting others into service and giving. Mr. Mullins is Of Counsel to Nelson Mullins, which has more than 180 donors to United Way as well as 58 leadership givers.

Smith Moore Leatherwood Attorneys Selected for Inclusion in South Carolina Super Lawyers® Magazine

Three Smith Moore Leatherwood attorneys, Steve Farrar, Rob Moseley, Jr., and Kurt Rozelsky, have been named top attorneys in 2012 by South Carolina Super Lawyers® magazine. In addition, Fredric Marcinak, III has been selected as a South Carolina Rising Star of 2012.

Turner Padget's Art Justice Recognized by United Way for Leadership and Commitment to Community

Turner Padget Graham & Laney, P.A., is pleased to announce Arthur E. Justice, Jr., received the United Way of Florence County's Ashpy P. Lowrimore Annual Award during the organization's annual meeting held April 3. The Ashpy P. Lowrimore Award is the United Way of Florence County's most esteemed award given for community service. Lowrimore's legacy in the Florence community is one of consistent service and dedication to community building for the benefit of Florence County citizens and families.

Young Lawyer Update

by Jared H. Garraux

Summer is upon us, and many great events are just on the horizon for the South Carolina Defense Trial Attorneys' Association. April and May were busy months for the SCDTAA. I appreciate all of the young lawyers who have actively participated during the first part of the year, as well as those who have offered assistance. Please remember that the Young Lawyers Division now has designated representatives covering the entire state. So, if you are interested in becoming involved, please get in contact with one of these reps.

In April, the SCDTAA hosted its Legislative/ Judicial Reception at the Oyster Bar in Columbia and followed it up the next day with its Annual PAC Golf Tournament at the Spring Valley Country Club in Columbia. Both events were a great success. In May, the SCDTAA hosted the first of two lawyer boot camps for 2012. The boot camp focused on many relevant issues in workers compensation law and was well attended by young lawyers from around the state.

Looking ahead, we have several great events taking place during the summer months, and I welcome any young lawyer looking to get involved to contact me or a young lawyer representative about opportunities. On July 26th-28th, the SCDTAA will hold its Annual Summer Meeting at The Grove Park Inn in Asheville, NC. Every year the Young Lawyers Division is responsible for organizing the Silent Auction at the Summer Meeting. This year's Silent Auction will be held on Thursday evening, July 26th. We are currently in the process of gathering items for the Silent Auction. If you would like to contribute an item to the auction, or if you know of someone who may be willing to contribute, please let me know. This year, proceeds will benefit the iCivics program, the South Carolina Bar Foundation and the National Foundation for Judicial Excellence, I have already contacted many of you about assisting with the Silent Auction. However, we are always looking for good help, so please contact me if you would like to be a part of this event. Additionally, I strongly encourage all young lawyers to attend the summer meeting. It is one of the best events held by the SCDTAA.

The Fall Boot Camp has been scheduled for September 27th in Greenville, SC. The Fall camp will focus on evidentiary issues and will be presented by Judge Few, Chief Judge of the South Carolina Court of Appeals. Additional information will be forthcoming. So, be on the look out, as you will not want to miss this event. As always, I will send an e-mail reminder to all young lawyers prior to the event.

Rounding out the year, the SCDTAA will host its Annual Meeting from November 8th-11th. This year's Annual Meeting will take place at The Sanctuary at Kiawah Island. I encourage all young lawyers to consider attending the Annual Meeting. It is a wonderful event and always well attended by our Judiciary. If you would like additional information about the Annual Meeting, please contact me, or Aimee Hiers.

In closing, again, I would like to thank all of the young lawyers who have helped, or offered their assistance, during the first part of the year. I will be calling on many of you over the next several weeks to help with the Silent Auction. In the meantime, if you would like to learn more about the SCDTAA and opportunities for involvement, please do not hesitate to contact me.

Fall Boot Camp

September 27, 2012

Greenville, SC

Workers' Comp Boot Camp

by Eric K. Englehardt

On May 24, 2012, the SCDTAA debuted a new CLE endeavor for its members, the Workers' Compensation Boot Camp at the Marriott in Columbia. With an aim toward providing an interesting, interactive continuing education experience for young practitioners, the Boot Camp Committee surveyed the Workers' Compensation community for timely topics. Based on the feedback from those who attended, it seems the committee reached its goal.

First, Committee Chair (and mediator) Eric Englebardt of Turner Padget Graham & Laney spoke on the proposed new mandatory mediation regulation for Workers' Compensation claims, and provided tips on good communication in the mediation setting. He was ably assisted by CLE attendees and volunteers Myada El-Sawi of Turner Padget Graham & Laney and Katie Lyall of McAngus Goudelock & Courie, who each presented a mock mediation opening statement for discussion by the group.

Next up was Michelle Yarbrough of Gallivan White & Boyd, who led a discussion with Commissioner Andrea Roche on her likes and dislikes of the commissioners. Even the experienced workers' compensation attorneys in the room were surprised at some of Commissioner Roche's comments and tips.

Mary League, of Ellis Lawhorne & Sims then helped answer some of the most perplexing questions a young lawyer faces ("how do I advise my clients?") with her talk entitled "Case Evaluation: Tips on Letting Your Client Know What to Expect".

Mark Allison of McAngus, Goudelock & Courie then presented a helpful talk, "Using Social Media in Defending a Claim". We understand there were several Facebook status deletions at the end of Mark's presentation, and that his Twitter feed picked up many new followers.

Finally, Turner Padget's Vernon Dunbar, a former commissioner himself, helped the attendees learn "What in the World Should I ask this Expert?". This presentation, complete with some great war stories, was a great end to an afternoon full of informative talks.

Special thanks go out to Boot Camp Co-chairs Josh Howard of Haynsworth Sinkler Boyd and Jared Garraux of Richardson Plowden & Robinson, as well as SCDTAA Executive Director Aimee Hiers for their help in making our first Workers' Compensation Boot Camp a success. And mark your calendars for our next boot camp on September 27 in Greenville when Court of Appeals Chief Judge John Few takes us through the ins and outs of Evidence Law.

Legislative Update

by Jeff Thordahl, SCDTAA Lobbyist

As the 2012 legislative Session comes to a close, the dust has settled on the changes in the Senate triggered by the resignation of former Lt. Governor Ken Ard. Lt. Governor Glenn McConnell is uniquely skilled in presiding over the Senate, Senator Larry Martin never missed a beat in assuming the Chairmanship of the Senate Judiciary Committee, and Senator Jake Knotts has enthusiastically embraced the role of Rules Committee Chairman. On the House side, the retirement of long time Chairman of the Judiciary Committee, Jim Harrison, signals new leadership. It appears Representative Greg Delleney from Chester will be elected the new Chairman after the fall elections.

However, as soon as the Senate changes had become the norm, one of the biggest election controversies in recent times came to light after the filing period for elected offices closed on March 30th. Chaos erupted when confusion enthused over what constituted full compliance with the candidate filing requirements – what forms were required and in what format and whether one was an incumbent or new candidate for office. In the end there was not a judicial remedy for those who did not comply and close to 200 new candidates for state and local office were eliminated from the ballot upon the Supreme Court's ruling. A legislative remedy was attempted, but that was quickly derailed over disagreement on how or if there should be a fix. Needless to say, there will be a review of the requirements before the elections in two years and there will be clear publication and instruction of the requirements. As a small consolation for those who were eliminated, the State Election Commission intends to refund the filing fees to the Democratic Party and Republican Party who will then refund the fees to the individuals.

As discussed in the last issue of *The DefenseLine*, the biggest issue before the General Assembly that will directly affect the legal community is the addition of several new at-large judicial seats. Chief Justice Jean Toal has been advocating this for years and the time was finally right. At the time of this article we know that there will be three new at-large circuit court seats and at least three new at-large family court seats. There had been some concern by some in the Senate that the at-large seats would go only to the most populous counties and that new judges were perhaps not as critical a need as others believed. This caused a delay in adopting the legislation. Nonetheless the Senate did approve six family court seats and three circuit court seats. Since the House version of the bill has the three circuit court judges and only three family court judges the two version must be reconciled. In addition the budget must be finalized to accommodate the additional judges. It is likely that the budget will match up with the final version of the bill authorizing all six new judges (H.4699).

Several attorneys with an interest in the new seats have already begun elevating their interest level at the Statehouse. There will be filing deadlines and a screening schedule posted on the Judicial Merit Selection Commission website. You can check that site at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php.

The 16 Jade Street LLC Opinion issued on April 4, 2012 created a burst of activity in the General Assembly. This is the case that dealt with the question of whether a member of a limited liability company can be held personally liable for torts committed while acting in furtherance of the company's business. The House and Senate introduced bills in an attempt to clarify the legislative intent of the Limited Liability Corporation Act (S. 1467 and H. 5150). Both bodies quickly passed their respective legislation however there has been no further activity on the bills. If neither of these bills pass or even if one of them does pass it may warrant a closer look at the need for further legislative action.

Finally it is notable that there are several attorneys making their first effort to run for House and Senate Seats. In some instances they are running in open seats and in some instances they are running against incumbents. It may be worth a look at your local seats to see if this is the case near you. In one election, attorney and current Representative Tom Young from Aiken is running for the seat being vacated by Senator Greg Ryberg. Tom is unopposed so he will make the move from one of 124 House members to one of 46 Senators in November. That Senate Seat is adjacent to the Senate Seat of Senator Shane Massey, SCDTAA Board Member.

Corporate Counsel Update

Record Attendance at Annual Corporate Counsel Seminar

by Melissa M. Nichols

The SCDTAA held its annual Corporate Counsel Seminar at the Hilton Columbia Center on April 24, 2012. By all accounts, the program was a tremendous success. Attendance at the program has grown significantly during the four years the SCDTAA has been offering the free CLE to in-house counsel, reflecting growing connections between the organization and in-house attorneys. The SCDTAA had record attendance at this year's seminar, with 30 attorneys registered for the event. For those unable to attend the corporate counsel event, this year's seminar is highlighted below. Two well-received speakers at the seminar, Mark Fava and Stuart Mauney, will be speaking at the SCDTAA's Summer Meeting at the Grove Park Inn, so send in your registration forms!

Boeing and the NLRB—a Case Study of In-House Counsel Coordination and Communication: Mark Fava, Chief Counsel for Boeing South Carolina, described the challenges Boeing faced in opening its 787 final assembly line in North Charleston, South Carolina, including the charge the International Association of Machinists filed with the NLRB. As the opening of the Boeing facility and the NLRB complaint was covered by both state and national press, Mark Fava's discussion of the challenges he faced as an in-house attorney and the strategies Boeing employed in addressing those challenges was fascinating. Feedback from corporate counsel after the seminar included comments about how helpful it was to hear an in-house attorney describe how he had dealt with the challenges of the job.

Public Policy Exception to Employment at Will; Social Media and Section 7 of the NLRA: Next, Brian Quisenberry presented recent developments regarding the public policy exception to at-will employment. See the Spring 2012 volume of *The DefenseLine* (available at www.SCDTAA.com) for an excellent article on this issue. Eric Schweitzer tackled the ways the NLRA has expanded the definition of what constitutes concerted activity based on employee use of social media. He noted that many employers' electronic communication policies may be overly broad and could be construed as improperly interfering with employee rights to self-organize. He cautioned that employers must be careful not to prohibit employees from discussing terms and conditions of their employment.

Illegal Immigrants in the Work Place and New E-Verification Standards: Emily Gifford, Cliff Rollins and Austin Smith discussed the South Carolina Immigration and Reform Act (the "Act"), which became effective January 1, 2012 and applies to all private employers. The Act imposes new burdens on employers to verify the work authorization status of a new employee. E-Verify is a free, internet-based system through the U.S. Citizenship and Immigration Services that enables employers to verify the work eligibility of their employees. Employers can no longer simply accept a state-issued driver's license or state identification card. While the Department of Justice has sued South Carolina and Governor Haley, challenging certain enforcement provisions in the Act, the E-verify and authorization provisions are likely to survive the legal challenge.

The Lawyer's Epidemic: Depression, Suicide and Substance Abuse: All attorneys must now complete one hour of ethics instruction devoted exclusively to substance abuse or mental health issues every three years. Stuart Mauney provided an opportunity for attendees to fulfill this requirement and learn about the risks lawyers face of developing depression and substance abuse. Alcohol abuse and chemical dependency may be as much as twice as prevalent in the legal profession as in the general population. If you believe you or someone you know may be struggling with depression or substance abuse, the following resources are available:

Lawyers Helping Lawyers
toll-free helpline: 866-545-9590

LifeFocus Counseling Services:
866-726-5252.
This service will provide a referral for a local counselor.

After the seminar, attendees were invited to a reception at the Oyster Bar with the local judiciary, workers compensation commissioners and legislators. Many thanks to all of the speakers for making this year's corporate counsel seminar such a success.

The Honorable Jacquelyn D. Austin
United States Magistrate Judge

Jacquelyn D. Austin attended the University of South Carolina, where she graduated with a Bachelor of Science in Electrical Engineering. Judge Austin went on to attend law school at the University of South Carolina School of Law and graduated with a Juris Doctor in 1996. While in law school, Judge Austin was a member of the John Belton O'Neal Inn of Court and the National Moot Court Team. She was also a recipient of the Student Compleat Lawyer Award and served as Student Notes Editor on the Environmental Law Journal.

Following law school, Judge Austin clerked for the Honorable Matthew J. Perry. Upon completing her clerkship, she entered private practice for fourteen years, most recently with the law firm Womble Carlyle Sandridge & Rice, LLP, before being sworn in as a United States Magistrate Judge for the District of South Carolina. Judge Austin spent three years of private practice drafting and prosecuting United States and European patent applications and eleven years in commercial litigation matters, including patent litigation and cases involving racial discrimination, the Fair Housing Act, engineering design, product liability, real estate matters, and other contract disputes.

Judge Austin has been active in the bar and in the community. She served as President of the Carolina Patent, Trademark, and Copyright Law Association from 2004 through 2005, a member of the Judicial Qualifications Committee from 2004 through 2011, the Greenville Bar Editor, and on a church committee establishing a charter school for troubled teens and dropouts. Additionally, Judge Austin has been a member of the American Intellectual Property Law Association, International Trademark Association, Defense Research Institute, ABA Litigation and Intellectual Property Sections, BESLA, Trial and Appellate Advocacy Board, Jack & Jill Incorporated, and Delta Sigma Theta, Incorporated.

Q. As a new judge, what has been the biggest challenge you face with the court system?

The biggest challenge I face is managing a much larger work load than I had at my previous law firm. My case load at any one time can range upwards of 130 cases, with new cases being filed daily. My challenge is to address each case issue that arises in a timely and efficient manner. I try to prioritize my workload by dealing with the oldest issues or motions first. Sometimes that strategy is thrown off course when an issue with a more sensitive time for response arises. The challenge is not impossible; I just have to be purposeful about what I choose to do on a daily basis.

Q. What advice do you have for lawyers appearing in your courtroom?

All of the lawyers who have appeared before me in my year and a half on the bench have been great. I love the practice of law, and I love to see it in action. Typically, if I need something from counsel before a hearing, I ask for it; and vice versa.

Q. What are the mistakes you most often see lawyers make in cases before you that could easily be corrected?

Most of the mistakes I see are related to big-picture issues in cases dealing with pro se litigants and prisoners. For instance, on a number of occasions, we've been ready to address motions for summary judgment only to see that some of the parties were never served or that jurisdiction may be questionable due to a prisoner's failure to exhaust administrative remedies. In those instances, the parties have gotten so involved in addressing the legal issues, they've failed to go back to make sure all of the procedural details have been resolved. Even in cases where both parties are represented, we've had instances where

Continued on next page

jurisdiction has been questionable and we've had to ask both parties to brief the issue before we could proceed on the underlying motions.

Q. Who has been the biggest influence in your legal career? How has this person influenced you?

The most influential person, of course, was Judge Matthew J. Perry, Jr. Judge Perry was the consummate example of hard work, thoughtfulness, graciousness, humility, and humor. Judge Perry loved the law, loved lawyers, and found it his duty to make sure everyone had a fair day in his court. I hope to emulate all that he stood for in my career. During my career as a practicing lawyer, however, I've had numerous influences and mentors, including Brent Clinkscale and Sandra Miller, who both made sure I worked really hard, but also made the practice fun.

Q. As a mother of two, what advice do you have for other working mothers out there trying to balance personal life and legal careers?

I would first understand that balance is always a moving target and depends on what is going on in your life and your children's lives. My children come first; work will always be here. My children understand that I have work to do, but they are also confident that if they need me, they are my priority. Balancing work life and children is such a personal decision and will be different for everyone. My advice is to do what's best for you and your family. Any law firm or business that desires your best will know that your ability to find that balance is imperative to your success as a partner, associate, or employee.

Q. What is your favorite quote?

One can easily judge the character of a person by the way they treat people who can do nothing for them.

SCDTAA Announces New Trial Order Database — and Seeks Submissions!

The SCDTAA is pleased to announce the launch of a new website feature containing useful trial court orders in a variety of practice areas! The database also includes requests to charge and verdict forms organized topically.

The topics for which we are publishing and soliciting trial court orders include the following:

1. **the Affidavit of Merit Statute;**
2. **Apportionment Among Defendants;**
3. **Contribution;**
4 **Discovery; and**
5. **Set-Off.**

This database is a special, password protected feature that is only available to SCDTAA members. To view the database, logon by inputting your email address and password in the top right corner at http://www.scdtaa.com/.

This new feature will be a great resource for SCDTAA members. However, the SCDTAA is still in the process of building this database and needs your help.

Please send trial court orders, requests to charge and verdict forms to Carrie Raines at CRaines@hnblaw.com to be included in the database. Anyone who contributes more than five orders, jury charges or verdict forms to this database will be mentioned in the next issue of *The DefenseLine*.

The Honorable DeAndrea Gist Benjamin
United States Circuit Judge

A life-long Columbia native, DeAndrea Gist Benjamin was born in Columbia, South Carolina on October 4, 1972 to Donald and Adrienne Gist. She is married to the Honorable Stephen K. Benjamin, attorney and Mayor of Columbia, South Carolina. The Benjamins have two daughters.

Judge Benjamin attended public school in Richland County and graduated from Columbia High School in 1990. She enrolled in college at Winthrop University in 1990 and graduated in 1994 with a Bachelors of Arts. While at Winthrop, she was inducted into the Political Science Hall of Fame and received the Order of the Omega.

Judge Benjamin went on to attend Law School at the University of South Carolina and graduated with a Juris Doctor in 1997. While in Law School she served on the Student Government Council and was selected as a Kellogg Child Welfare Fellow. She was admitted to the South Carolina Bar on November 18, 1997, the SC District Court in September 2001 and the Fourth Circuit Court of Appeals in November of 2002.

Following law school, Judge Benjamin clerked for the Honorable L. Casey Manning. Upon completing her clerkship she began her career as a Prosecutor in the Fifth Circuit Solicitor's Office and the Attorney General's Office. In 2001, she joined her father's law firm, Gist Law Firm, where she practiced until being elected to the Circuit Court bench on February 2, 2011.

She has served on the Juvenile Parole Board (2001-2004) and as a Municipal Judge for the City of Columbia from July 2004 until April 2011.

Judge Benjamin has been very active in the bar and in the community. She has served on the SC Bar Board of Governors, SC Bar House of Delegates, SC Bar Young Lawyers Division (Chair 2006-2007), Children's Law Committee (Chair 2010 –2011), Richland County Bar Association, SC Black Lawyers Association, SC Women Lawyers Association, and Appleseed Legal Justice Board. As a young lawyer, Judge Benjamin, was very active in the American Bar Association Young Lawyers Division. She served as District Representative for South Carolina and the Virgin islands and served on various committees.

Judge Benjamin has served on the Edventure Children's Museum Board, Sexual Trauma Services Board, Congaree Girl Scouts Board, Arts Council, USC Community Advisory Board, North Main Street

Redevelopment Advisory Committee, and St. John Baptist Church Preschool Foundation Board. She is a member of the Columbia Alumnae Chapter of Delta Sigma Theta Sorority, Inc. and Jack and Jill of America.

Judge Benjamin and her family attend St. John Baptist Church in Columbia, SC.

Question: The Fifth Judicial Circuit has mandatory Mediation, how do you view mediation to resolve disputes and do you see it impacting the Fifth Circuit?

Answer: Mediation is a useful method in getting matters resolved. It is always better to have matters resolved by the parties when possible. It has had a tremendous impact on the Common Pleas docket in Richland County. Cases are appearing on the Common Pleas docket right at a year after the filing date.

Question: What advice do you have for lawyers appearing in your courtroom?

Be prepared. When lawyers aren't prepared it makes it difficult for the parties, the court, and the jurors.

Question: Is there a particular pet peeve that you have as it relates to conduct in your courtroom or for practitioners before you?

Answer: I find myself to be very reasonable and rarely aggravated by much. However, I don't like bickering amongst lawyers in the courtroom, especially before the jury. I think that you can be a zealous advocate for your client and still remain courteous to the other side.

Continued on next page

Judicial Profil cont.

Question: From your observations how has the use of technology in the courtroom impacted trial practice?

Answer: Technology in the courtroom makes a big difference in the presentation of cases. The updated technology that the court has makes it more efficient for the court also, especially having research capabilities at your fingertips.

I have had the opportunity to sit in some of the circuits with new courthouses and state of the art technology, the tools and resources available in the courtroom assist the lawyers in their presentation and the court in running an efficient courtroom.

Question: Who has been the biggest influence in your legal career?

Answer: My father. Prior to taking the bench, I had the opportunity to practice with my father. Being able to work hand in hand and try cases with my father has had a great impact on my career.

Question: What factors led you to a career in the law?

Answer: Of course my father influenced my career choice, but it was not until I had the opportunity while in College to sit in Judge Matthew Perry's courtroom and observe, that I decided that I wanted to attend law school and someday be a judge.

Question: What advice do you have for lawyers appearing in your courtroom?

Be prepared. When lawyers aren't prepared it makes it difficult for the parties, the court, and the jurors.

Question: Your husband is both a practicing Attorney and Mayor of our Capital City Columbia, how do you balance both work and family commitments?

Answer: My first priority is to my family, especially my children. Steve and I are blessed to have a great support system with four grandparents (who are all local), family, and friends.

DRI Update

Calling All DRI Members

by Peggy Fonshell Ward

You already know how valuable DRI is to your practice, with the arrivals of The Voice each week and For The Defense each month. Here's how you can get even more from DRI.

With 22,000 members around the country, DRI provides support and resources for defense attorneys in many different types of practice. Much of the work and, most important, networking of DRI is done by its substantive law committees. If you are not currently a member of any of the DRI Substantive Law Committees, please join now. If you aren't receiving newsletters and other valuable information about your practice area each month, you can tell you have not joined a committee. You are missing out on exchanges regarding changes and developments in the law, experts, colleagues for referrals and many other useful resources to grow your practice and learning.

You can join the Committees at no cost. Almost all distribute regular newsletters and other publications with information on a specific area of practice. They provide to their members the opportunity to serve in leadership positions, publish and speak to attorneys in your practice area and plan first quality seminars on the current law.

Plus, if you are an in-house counsel at insurers or corporations and you join the Corporate Counsel Committee, you can attend any DRI seminar for free, as many as you want.

The committees allow you to network with defense attorneys in your area of practice from across the country. There are also committees dedicated to other areas such as the Diversity, Women in the Law and the Young Lawyers committees.

To join submit the convenient online Committee Membership Form available at http://www.dri.org. If you have an interest in getting active in a committee, please let me know and I'll get you connected with the committee leaders right away.

ARTICLE

Reflections

by Edward W. Mullins, Jr.

Editors Note: Edward W. Mullins, Jr., is of counsel to the Firm Nelson Mullins Riley & Scarborough LLP. He was born in Columbia in 1936 and graduated from the University of South Carolina with a Bachelors of Arts degree in 1957. He earned his J.D. degree, cum laude in 1959 from the University of South Carolina where he was a member of the Order of Wig and Robe and Phi Delta Phi. He is a life long resident of Columbia, where he serves as a mediator and practices in the areas of product liability, business, and general litigation. Mr. Mullins has long held positions of leadership within his firm. An active trial lawyer for 50 years, Mr. Mullins is Chair Emeritus of the Firm and its Litigation Department and was instrumental in the growth of the law firm from five attorneys to more than 400 attorneys and government relations professionals with 12 offices in South Carolina, North Carolina, Georgia, Washington, DC, West Virginia, Tallahassee, and Boston. Mr. Mullins is the recipient of numerous awards for service to the legal profession, including the Robert W. Hemphill Award given by the South Carolina Defense Trial Attorneys' Association in 1990. In 1991, he received the John Watson Williams Award, given by the Richland County Bar Association for outstanding service to the Richland Bar and the local community. In 2002, he received the Compleat Lawyer Award, given by the University of South Carolina School of Law for outstanding service to the law school and legal community. Additionally, Mr. Mullins has been listed in The Best Lawyers in America and in the International Who's Who of Product Liability Lawyers since their first editions. He was listed in the inaugural edition of South Carolina Super Lawyers in 2008 and was listed again from 2009-2012. He served as our Association President from 1972-73. Below are his thoughts as a continuation from our previous article by Ben Allston Moore, Jr.:

Although Ben's and my memories of events so long ago are being heavily taxed, I do recall the meeting in Charleston where Ben talked me into drinking a Greek after-dinner drink. I remember that my head the next morning felt as if a laser beam were trained on my forehead; however, I do recall the meeting being that of the Executive Committee.

Be that as it may, the first annual meeting I recall was in 1969 in Columbia. We intentionally had it in Columbia and on a USC football weekend in order to attract lawyers from the lower part of the state and the upstate. We continued that the first few years in order to gain traction for our future animal meetings. I was in charge of the program and we had a lawyer from Illinois and a lawyer from Florida speak to us on Product Liability. We had an attendance of around twenty-five (25) lawyers as well as a good number of their spouses. Grady Kirven of Watkins Vandiver in Anderson was elected President and I was elected Secretary-Treasurer. For the next two (2) years we continued to have the annual meetings in Columbia with some increased attendance each year. During those years, Harold Jacobs of Nexsen, Pruet, Jacobs and Pollard in Columbia and Dana Sinkler of the then Sinkler, Gibbes in Charleston were elected presidents. In 1972 I was elected President. In that year we decided to untie ourselves from the Columbia/USC football tandem and held the meeting in Hilton Head. We had our biggest crowd of fifty (50) lawyers and like number of spouses. It was a broad based program dealing with many areas of practice and had a wide array of speakers. Three (3) were from out-of-state: Paul Fager, the Vice President in charge of claims of Liberty Mutual, Dean Page Keaton of the University of Texas Law School, and Walter Workman, head of litigation of the mega Texas firm of Baker & Botts. Also appearing was Dave Robinson senior partner in Robinson McFadden and Judge Frances Nicholson of Greenwood in the 8th Circuit.

During this time there was some interest in having insurance claims men eligible to join as well as government lawyers. Finally, to avoid any conflict of interest and to focus on our mission of improving the skills of defense attorneys on the civil side and of leveling the playing field in civil justice system in South Carolina, we decided to limit membership only to defense attorneys in private practice. Not too long afterwards, we dealt with the issue by establishing an annual summer joint meeting with the South Carolina Claims Association. Some of the old timers I remember who became president were Dewey Oxner, Bob Carpenter, Sanders Bridges, Mark Buyck, Bruce Shaw, Bobby Hood, and Jack Barwick. With Molly Craig being president now that makes the first

Continued on bottom of next page

2012 Annual Meeting

The 2012 Annual Meeting...Don't Miss It.

by William S. Brown

My friendly advice to you: "don't miss the 2012 Annual Meeting of the South Carolina Defense Trial Attorneys' Association." Benjamin Franklin once said, "Wise men don't need advice. Fools won't take it." I am confident that those reading this are wise and understand the tremendous benefits and rewards of attending the Annual Meeting. I hope no one will follow the foolish path and miss out on the great educational program and social time with the judiciary and your friends in the defense bar.

The Sanctuary on Kiawah Island provides a fabulous and new venue for our program. The Sanctuary is an amazing property with a combination of Southern hospitality, elegance, and relaxed atmosphere. With the sounds of the waves softly breaking on the beach and the wind blowing through the ocean front dunes, Kiawah provides a perfect get away for the Annual Meeting. The world-class golf courses and tennis facilities are also ideal for our recreational activities.

The Annual Meeting Committee is working diligently to put together a top level educational program to match the 5-star accommodations of The Sanctuary. You will not want to miss the 2012 Annual Meeting. We are excited about this year's meeting, some format changes which we will implement to the meeting schedule, and the new venue at The Sanctuary on Kiawah Island. We look forward to seeing you at Kiawah November 8-11, 2012.

The Sanctuary on Kiawah Island

November 8-11, 2012

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father-daughter presidents in our association and, if that were not enough, when Sterling Davies, the son of former president Bill Davies, becomes president that will make the first father-son. Sometime during this period the association offered firm memberships which allowed all the trial lawyers in that firm to boost membership numbers when talking to the Legislature. The only judges who were invited were ones that we had as speakers until our association became much more active and invited many judges. We had a defense line, but nothing resembling this one and we had a legislative committee but not nearly as effective as the one now with its paid lobbyist.

It has been both a refreshing and rewarding experience to look way back in order to write this article as it makes one see just how far the South Carolina Defense Trial Attorneys' Association has come since its beginning.

Trial Superstars

by Jamie Hood

FACULTY

JUDGE:

The Honorable Doyet A. Early, III,
Chief Administrative Judge, Second Judicial Circuit

PLAINTIFF:

Keith M. Babcock, Lewis, Babcock & Griffin, LLP
Ronnie L. Crosby, Peters Murdaugh Parker Eltzroth & Detrick, PA
O. Fayrell Furr, Jr., Furr & Henshaw
S. Randall Hood, McGowan Hood & Felder LLC
James M. Griffin, Lewis, Babcock & Griffin, LLP
Mark Joye, Joye Law Firm
Richard S. Rosen, Rosen Rosen & Hagood, LLC
Carl L. Solomon, Solomon Law Group, LLC
Michael E. Spears, Michael Spears, PA

DEFENDANT

William A. Coates, Roe Cassidy Coates & Price, PA
M. Dawes Cooke, Jr., Barnwell Whatley Patterson & Helms, LLC
Elbert S. Dorn, Nexsen Pruet, LLC
Robert H. Hood, Hood Law Firm, LLC
Rebecca Laffitte, Sowell Gray Stepp & Laffitte, LLC
John T. Lay, Gallivan White & Boyd, PA
Samuel Outten, Womble Carlyle Sandridge & Rice, PLLC
T. David Rheney, Gallivan, White & Boyd, P.A.
Morgan S. Templeton, Wall Templeton & Haldrup, PA
John Wilkerson, III, Turner Padget Graham & Laney, PA

After much anticipation, Trial Superstars® exceeded all expectations on April 13, 2012. With the Honorable Doyet A. Early presiding, the titans of the plaintiff and defense bar faced off at the Charleston County Courthouse for a one day mock trial. The faculty tried the Trial Academy fact pattern to verdict before both a Charleston County jury and a Hampton County jury. The many hours of preparation and effort that went into preparing for and executing Trial Superstars by the faculty resulted in an outstanding program full of memorable learning experiences for the spectators. The entire program was recorded in real-time via webcast for those wishing to attend remotely, as the event sold out within twenty-four hours of the registration opening. For those in attendance, they were able to observe the lawyers performing live and were also

Continued on next page

able to watch the juries' real-time responses thanks to the incredible setup provided by R&D Strategic Solutions.

Wired with individual keypads, the jurors recorded their real-time responses to the elicited testimony and those responses were visible on the monitors in the Courthouse providing the spectators with a look inside the jurors' minds.

After lengthy deliberations, the Charleston County jury returned a verdict for the Plaintiff in the amount of $5 million actual damages and $75,000 punitive damages. The Hampton County jury was a little more generous awarding $7 million to the Plaintiff's actual damages and $500,000 in punitive damages.

For those who missed Trial Superstars®, DVDs of the event will be available for sale soon. Much of the jury research obtained during the exercise will be presented in the upcoming Summer and Annual Meetings which you do not want to miss.

Special thanks go to Julie Armstrong and Don Michel at the Charleston County Courthouse who were incredibly generous with their time and resources allowing SCDTAA to host the Trial Superstars at the Charleston County Courthouse. The venue provided an outstanding location for the event and made the entire experience as realistic as possible. We are grateful for our sponsors including the kickoff cocktail party on Thursday evening that was sponsored by AW Roberts Trial Solutions who also provided the trial presentation of the evidence.

Dixon Hughes Goodman provided lunch to the attendees, faculty and jurors and volunteered Perry Woodside to testify as an economist on behalf of the Plaintiff. Brian Boggess of SEA Limited served as a defense biomechanical expert witness and Stacy Imler with Exponent was the biomechanical expert for the Plaintiff. Jill Wylerd of Litigation Presentation assisted the participants in making the effective demonstrative exhibits that were seen during the trial. Of course, many, many thanks to R&D for their tireless effort in organizing, conducting and evaluating the entire mock trial exercise. We look forward to having a chance to showcase the highlights at the Summer and Annual Meetings.

ARTICLE

Preparing for Tomorrow: A Practical Analysis of Alternative Fee Arrangements

by Laura E. Paris and N. Keith Emge, Jr.[1]

For the last 50 years, the billable hour system has been the default method for attorneys to bill clients for work.[2] However, when asked how they feel about the system, most attorneys express emotions ranging from frustration to loathing.[3] Similarly, since the 2008 financial crisis, more and more clients are demanding value-based alternatives to traditional billing.[4] Today, global law firms are responding to these demands and exploring a variety of alternative methods to meet the needs of their clients and better the professional lives of their attorneys.[5]

This article discusses why firms should give serious consideration to alternative fee arrangement ("AFA"), what those alternative methods are, and the practical and ethical implications of AFAs.

Why We Should Consider the Alternatives

Firms should consider billable-hour alternatives for a number of reasons. First and foremost, we should consider our clients. In actual practice, there is not necessarily a correlation between the quantity and the quality of attorney work.[6] A savvy attorney may quickly secure a settlement or dismissal of a case after billing very little on the file; another attorney may bill millions dragging a client through years of litigation. The savvy attorney has acted in the best interests of his client but has missed out on the opportunity for several years' worth of billable work and, potentially, significant legal fees. Unfortunately, the billable hour system, which rewards attorneys for churning out long hours, does not always reward smart, economical work. Following the 2008 financial crisis, corporate clients began to recognize this phenomenon and have been demanding alternative methods which provide them with more value for their dollar.[7]

Along those same lines, the billable hour system creates a certain amount of mistrust between attorneys and clients. In a February 12, 2011 article, former ABA President Stephen Zack was quoted reminiscing about the days of billing for legal services rendered which, he opined, fostered real relationships between attorneys and client.[8] However, the billable hour can promote an almost adversarial relationship between the attorney and the client. Clients, mistrustful that a firm may not be pushing hard enough to conclude a case, may question the necessity of each 6-minute incremental task performed by the attorney. Conversely, attorneys spend countless hours entering their billable time into software attempting to secure adequate compensation for work performed only to later have to defend the work performed when it is called into question by the client or the client's outside billing auditor. The perpetuation of this adversarial relationship is detrimental to both the attorney-client relationship and to the reputation of the practice.

Finally, serious consideration should also be given to the effect of the billable hour system on the mental health of attorneys. In a 2011 article in Psychology Today, the author opined that a primary cause of the extreme depression and the record high suicide and alcoholism rates among attorneys is the grueling work schedule.[9] Indeed, countless studies have found that the intense work schedule required by traditional billing firms coupled with the desire to succeed has led to epidemic career dissatisfaction in the profession.[10] Even for attorneys who aren't working under 60 hour+ weekly requirements, there can be real frustration based on the billable limitations. The mindlessness of constantly tracking one's time in 6-minute increments, unthinkable to a lay person, takes up large amounts of time that could be spent actually working on cases. Further, constantly checking to ensure that the task the attorney is about to engage in, which may be important to furthering the case, is an approved "billable" task, can be frustrating. Given that the billable hour system, which rewards grinding hours above all, is at the heart of this very real sickness in the profession, alternative methods of conducting our practices should be considered.

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ARTICLE CONT.

Examining the Alternatives

There are three (3) very practical methods available for defense-oriented civil litigators and several generally less practical, but viable methods. In examining the various alternative fee arrangements currently used, the hybrid flat-fee with an hourly fee for trial-preparation and trial is the most practical for defense-oriented civil litigators. The flat fee is simply that – the client pays a set amount for particular services rendered up until the time of trial. If the case must be tried, an hourly rate is paid to compensate counsel for trial time as a contingency. Engaging in this format requires the attorney to be very knowledgeable as to the type of the case and the time and effort likely required to see the case through to mediation and / or the start of trial.[11] The contingency addresses the concern that if the attorney is not successful, having made his best effort to settle or conclude the case prior to trial, he is still compensated for unforeseeable additional time expended. For attorneys who engage in discrete practices, like construction litigation or medical malpractice, there are very real advantages to this billing methodology.

Attorneys engaged in hybrid flat fee arrangement must know precisely the tasks that need to be performed, the discovery that needs to be conducted, and must measure the merits of the case from inception. To some extent, we already do this in the litigation budgets we provide to our clients. Knowing this information in advance, they can work with the client to agree upon a fee that will guarantee that compensation for the work necessary to complete the case. Further, for the attorney, it eliminates pointless minute by minute task-tracking and allows counsel to focus on furthering the matter. From a client's perspective, there is a real advantage in that there are no surprise bills; the case has been paid for in its entirety. The client can rest assured that the attorney is working diligently to conclude the case as soon as is reasonably possible – there is no incentive for the attorney to prolong the matter. Similarly, because trial is still based on an hourly billing schedule, the client need not fear that counsel will agree to unreasonable settlements early on to try and take a windfall. There is still incentive for counsel to try the case if she cannot reasonably conclude the case prior to trial.

There are disadvantages to this billing method if attorneys are not careful. It is essential that the attorney exercise due diligence prior to accepting the case. If there are unforeseen events that unreasonably prolong the case, counsel may find herself working on a case that is absorbing too many resources. Further, attorneys and clients need to be very clear about the tasks and responsibilities of the attorney. If the client has unreasonable expectations as to what lengths the attorney will go to resolve the case, there could be conflict if those client expectations are not met. As in all attorney client relationships, what the attorney will and will not do as well as the client's goals should be clearly outlined and memorialized in writing from inception. However, if properly planned, the flat rate with hourly rate for trial time can be beneficial for both the attorney and the client.

Another useful hybrid of the flat rate billing system is the task-based fee method.[12] Like the pure flat rate system, this system allows the client and attorney to identify the various stages of litigation or tasks involved in litigation and assign a flat rate value to those tasks.[13] This method incorporates many of the same advantages found in the flat-rate billing system, but provides a bit more predictability for the client and the attorney. Thus, in a flat-rate system, an attorney might assign a case a $10,000 flat rate value, but experience a windfall if she is able to secure dismissal upon a simple motion. Under the task-based fee system, if the client has broken down the case into flat rates for various components, including a value of $5,000 for settlement negotiations, the attorney would be paid $5,000 for the totality of the case. The benefit to the attorney is that she can adjust her fees to compensate for unforeseen complications if the representation agreement allows. Like the flat rate billing system, the task based method encourages the relationship between the client and the attorney because it forces both parties to come to an agreement as to the services expected and the value to the client for those services. Moreover, it removes the specter of unnecessary prolonged litigation and encourages forward momentum in a case.[14] Finally, this method also eliminates needlessly tracking the attorney's moment-by-moment progress on the case.

Contingency fees or "success" fees are a risky but viable alternative method of attorney compensation. Contingency fees are based on results. In the context of civil litigation, which very often concludes in settlement rather than trial, these contingencies can be based on the settlement amount or, if tried, verdict. For example, in defending a case of attorney malpractice, the client might provide that if the case settles prior to trial for less than $10,000, counsel shall be paid $100,000. If the case settles prior to trial for more than $10,000 but less than $25,000, counsel shall be paid $85,000. If the case is tried and the client is found not liable, counsel shall be paid $150,000. However, if the case is tried and the client is found liable for up to $25,000, counsel shall be paid $100,000. Under these terms, counsel knows she will be compensated for the full value of her work. However, she is encouraged to work harder on significant tasks as it will increase her compensation. Further, it presses counsel to honestly evaluate whether to settle or try the case without risking her own fortunes and focus on the best interests of the client. There is no incentive to prolong the case and there is every incentive to seek out the best resolution for the client. Again, as in the task-based and flat-fee methods, this method eliminates constantly

tracking each task accomplished by counsel.

There are significant risks with using contingency fees. As attorneys know, juries are unpredictable. An attorney can perform very valuable work, but, with the wrong jury, may not receive the compensation commensurate with the value imparted to the client. Further, firms are forced to carry the costs of the attorney until completion of the case. If a case continues for several years, this can prove to be burdensome.

As mentioned, there are a number of less popular, but still viable billing methods available to attorneys engaged in civil litigation defense work. The pure flat rate is one such method. Under the flat rate, the client and attorney agree upon a single fee for the entirety of the case. While this does foster the attorney-client relationship by removing the specter of unknown costs to the client, it can prove dangerous. If there are any unforeseen complications and the client refuses to accept reasonable settlement offers and the case must be tried, the attorney can take a heavy financial hit. Further, it could engender mistrust on the part of the client that the attorney is pressing too hard to settle the case quickly rather than fully litigate viable defense. Because of the risks involved in the pure flat rate fee, the hybrid flat rate fee with a contingency for trial is clearly superior.

Another notable, but less practical alternative is the hourly rate combined with a contingency. The normal, hourly rate is utilized for the duration of the case and the contingency is given if and when the client's goal is achieved.[15] While this encourages a positive attorney-client relationship in which both parties are comfortable that the attorney is working towards the client's goals and the attorney is fully compensated for his work, it is not particularly workable for civil litigators. In actual practice, much of civil litigation defense work is settled. If from the outset the client's goal is an all or nothing win of the case, attorneys would likely try to press more cases for trial – potentially against their better judgment that such cases should be settled. Moreover, it is unlikely that clients would agree to provide a contingency fee for simply settling cases – a result for which they are already paying the regular billable rate. Finally, under this method, the majority of the case is worked on using the billable hourly rate; thus, the billable hourly rate plus contingency method does not do much to change the status quo.

Ethical Implications of AFAs: A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice[16]

As in all things, when determining the billing method to utilize with a client, an attorney must examine the ethical implications. There are several rules that are of particular import depending on the method of billing utilized. These include Rule 1.5 and, to a lesser extent, Rule 1.2 of the South Carolina Rules of Professional Conduct. In discussing the ethical implications of AFAs, it is essential to address Rule 1.5.[17] The Rule states, "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall be communicated to the client, preferably in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses the client will be expected to pay. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there

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is a recovery, showing the remittance to the client and the method of its determination."

The overriding factor is whether or not the fee and expenses are "unreasonable." [18] This implicates both the flat rate and flat rate plus contingency hybrid. In the example cited above, an attorney settles a case for $10,000 upon a simple motion. If the total investment of the attorney's time is less than 5 hours to prepare and argue the motion, one might argue that $10,000 is "unreasonable." However, complete and careful disclosure to the client at the time of engagement accompanied by a well-written engagement agreement can mitigate the potential for disputes as to the reasonableness in case of a potential windfall.

As noted above, there are 8 factors considered by the Court when disputes under Rule 1.5 arise. In the case of the $10,000 windfall upon dismissal by a simple motion, factors 1, 3, and 4 will likely be seriously considered. Specifically, in any case, it is rare for an attorney to secure a dismissal after only a simple motion. In such a case, it is likely that the skill of counsel played a strong role. Further, given that the cost to secure a dismissal in most jurisdictions is likely significant, the cost windfall received by the attorney, while not comparable to 5 hours worth of work, is comparable to the totality of litigating a case to dismissal. Finally, the 4th factor discusses the amount involved and the results obtained. If the client was willing to pay $10,000 to litigate the case in its entirety to secure dismissal, why is securing dismissal earlier any less valuable?

In any case, Rule 1.5 does not require, but recommends a written engagement. Proceeding in any case without a clear engagement agreement is imprudent. Most conflicts between counsel and client occur because there is a fundamental misunderstanding of the services to be rendered for the fees charged. Regardless of billing method, a well written engagement agreement ameliorates the likelihood that counsel and client are in agreement from the inception of the case.

Rule 1.2 of the South Carolina Rules of Professional Conduct requires that: "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter..[.]

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

This Rule is particularly important as relates to the flat fee and flat fee with contingency for trial hybrid case. Because the flat fee case is most profitable to an attorney when the case can be settled early on with less work involved, the temptation for the attorney to press for settlement is high. However, in the event the client unreasonably refuses to accept reasonable settlement offers, the attorney can be trapped into continuing to litigate a case without reasonable compensation. As such, an attorney entering into a flat fee or flat fee hybrid case should have a very clear engagement letter and a good mutual understanding with the client from inception as to what potential settlements the client might offer. Ultimately, the attorney must respect Rule 1.2 and understand that the decision to settle belongs to the client, regardless of profitability.

Another aspect of Rule 1.2 that must be addressed when considering AFAs is the limitations on representation. In the task-based method discussed above, the attorney's work is divided into discrete tasks or goals to be achieved each of which is paid at an agreed upon rate. Similarly, in the case of flat rate and flat rate hybrid, a single fee is being paid for the entirety of the case. As such, the goal of the attorney will always be to secure the best result for the client while still maximizing her profit. However, the client may have different expectations as to the work to be provided relative to the tasks for which he is paying. For example, under any of the aforementioned billing methods, the attorney may deem it sufficient to engage in only basic written discovery and forego taking any depositions. However, while unnecessary to the success of the case, the client may expect counsel to take the depositions of all parties and any other related witnesses. Under the flat rate, flat rate hybrid, or set rate task-based methods, the cost of taking these depositions might well exceed the amount the attorney is being paid for the work. However, given that the client is in charge of her case, without a thorough engagement letter and a clear understanding on the part of both counsel and her client, the attorney might find herself in conflict of Rule 1.2.

In Sum

For years attorneys and firms have struggled to find beneficial alternatives to the billable hour. To varying degrees, the different methods promote better attorney-client relationships, further value-driven and success-driven litigation, and, to some extent, improve attorney career satisfaction. In particular, real consideration should be given to flat rate and flat rate hybrid systems which, when entered into with open eyes and clear engagement letters, provide viable alternative methods for billing clients. Regardless of the billing method utilized, counsel should always be mindful that the agreement with her client be fair and reasonable and respect the dictates of the model rules. However, given the ongoing paradigm shift towards alternative fee arrangements, it is essential that attorneys and firms consider adapting their practices to these more client-friendly billing methods in order to compete in tomorrow's legal market.

Hemphill Award Call for Nominations

1. Eligibility

(a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.

(b) The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.

2. Criteria/Basis for Selection

(a) The award should be based upon distinguished and meritorious service to legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.

(b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.

(c) The candidate may be honored for recent conduct or for service in the past.

3. Procedure

(a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community and the reasons why the nominee is being put forward.

Nominations are due to Aimee Hiers at SCDTAA Headquarters by July 9th.

For more information contact Aimee at aimee@jee.com.

SCDTAA
One Windsor Cove • Suite 305
Columbia, SC 29223

Footnotes

1 Laura Paris is an associate in the Charleston office of Carlock, Copeland and Stair, LLP. N. Keith Emge, Jr. "Chip" is the managing partner of the Charleston Office. Laura is a graduate of Georgia State University and St. John's University School of Law. Her practice focuses primarily on Construction Litigation representing contractors and subcontractors involved in a variety of construction disputes. Chip is a graduate of Duke University and University of Virginia School of Law. Chip's practice focuses on construction and commercial litigation in addition to professional liability.

2 Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms,* N.Y. TIMES, Jan. 30, 2009, at A1.

3 *Curbing those Long, Lucrative Hours*, ECONOMIST, July 22, 2010, available at http://www.economist.com/node/16646318. See also Evan Chesler, *Kill the Billable Hour*, FORBES MAG., Dec. 18, 2008, available at http://www.forbes.com/forbes/2009/0112/026.html.

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11 WINNING ALTERNATIVES TO THE BILLABLE HOUR, 125–6 (James A. Calloway et al. eds., American Bar Association 2nd ed. 2002).

12 *Id.* at 136.

13 *Id.*

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15 *Id.* at 133.

16 SC R A CT RULE 407 RPC PREAMBLE

17 WINNING ALTERNATIVES TO THE BILLABLE HOUR, 24–25 (James A. Calloway et al. eds., American Bar Association 2nd ed. 2002).

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ARTICLE

Spoliation and Event Data Preservation:

Are you sure you downloaded that ECM?

by Joseph W. Rohe

The United States District Court for the Middle District of Florida recently handed down a decision concerning spoliation of evidence as it related to the failure to preserve data from a truck's Electronic/Engine Control Module (ECM) following a fatal collision. Plaintiff – asserting that the defendants failed to preserve ECM data, which would provide information concerning the vehicle's wheel speed, accelerator position, braking, engine RPM, and other data ("Snapshot data") – moved for contempt and sanctions against the defendants on the ground that they spoliated evidence by failing to retain pertinent information. Defendants maintained that they attempted to capture the ECM data immediately following the accident, but did not become aware until later that a full download had not occurred.

On March 9, 2010, a 2000-model Kenworth tractor trailer was involved in a collision with a 1995 Dodge pick-up truck in Lee County, Florida, which resulted in the death of the pick-up's driver. Counsel was retained by the defendant trucking company along with an accident reconstruction expert within hours of the collision. An ECM download was performed by a qualified service center; however, the technician downloading the ECM failed to obtain the Snapshot data from the incident QuickStop (a QuickStop occurs any time the vehicle decelerates quicker than 8 mph/second). The company's attorney, not being qualified to interpret ECM data, did not recognize the download was incomplete and simply placed the results in his file. Testimony provided that technicians at the engine dealer do not normally download Snapshot information in the normal course. Thus, it would be prudent for counsel to specifically direct that this information is included in any post-accident ECM download.

Nearly a year later, upon discovering the data download to be incomplete, the attorneys again tried to access the ECM data on the vehicle; however, any Snapshot data for the incident QuickStop had been overwritten by a more recent QuickStop event. Testimony by the attorneys involved was that there was no intent to spoliate evidence or block plaintiff from accessing the vehicle or data, and that there was no bad faith on the part of the defendants – the defendants did everything possible to retain and preserve the ECM data and, upon realizing some of the data was missing, did everything possible to recover it.

It was not disputed that the defendants did not preserve the Snapshot data from the ECM download immediately following the accident or the data from their subsequent access (it allegedly being apparent that it was an overwrite and not related to the subject accident). In its analysis, the Court specifically noted that the attorneys were not an expert in ECM downloads and were not initially aware that data was missing. Likewise, the defendants' expert was unaware additional information was obtainable or missing. Accordingly, the Court held the defendants did not intentionally destroy the information and their actions or inactions did not constitute spoliation.

There were however several additional factors that may have played a role in the Court's decision. There was evidence that the ECM data may not have been reliable and there was additional "roadway" evidence available (skid marks, etc.) to allow plaintiff's experts to reconstruct the accident. Although the Court did not find spoliation occurred, it did note that "the facts of this case point out the changes to the practice of law that are occurring as information technologies evolve." To that end, "[i]t is incumbent on the Court and counsel to understand the ramifications of technology, and most importantly, to determine what it is that we may have and how do we preserve it." Accordingly, it is increasingly important for counsel and experts to stay abreast of developments in the technology of our field and understand how to direct proper preservation of electronic data and evidence.

As a side note, up until recently, only U.S.-based auto makers included "black box" technology in their vehicles. However, officials have mandated that all vehicles equipped with black box technology manufactured after September 1, 2012 be in compliance with 49 C.F.R. Part 563 governing how and what data must be recorded.

Joseph W. Rohe is an attorney practicing in the Litigation and Transportation Industry Groups at Smith Moore Leatherwood, LLP in Greenville. He is licensed in state and federal courts in Georgia and South Carolina.

ARTICLE

Personal Liability for LLC Members: Defining the Limits of Limited Liability

by Andrew M. Connor [1]

On April 4, 2012, the South Carolina Supreme Court decided *16 Jade Street, LLC, v. R. Design Construction Co., LLC*, [2] holding that a member of a limited liability company can be held personally liable for torts committed while acting in furtherance of the company's business. Previously, this issue had remained undecided in South Carolina. Now, under the *Jade Street* precedent, an LLC does not provide a sweeping liability shield protecting member tortfeasors from personal liability.

As a result, this decision will have significant ramifications for both attorneys and their clients. At the outset, LLC members may need to evaluate actions taken in furtherance of the company in light of this new case. Additionally, moving forward, choices regarding the preferable mode of business formation may need to be re-evaluated under the *Jade Street* decision.

In light of the inevitable impact of this decision, this article begins with an analysis of the decision in *Jade Street*, undertakes a discussion of its impact on the landscape of limited liability company law in South Carolina, and concludes with an overview of potential concerns attorneys will need to talk about with their clients.

The Decision

The *Jade Street* case involved a dispute over defects discovered during the construction of a condominium building located in Beaufort, South Carolina. Carl Aten, a contractor engaged in building spec houses, operated his business through an entity named "R. Design Construction Co., LLC" of which Aten was a member. R. Design entered into an agreement with 16 Jade Street, LLC to build a four-unit condominium project. Aten, through R. Design, would act as the general contractor and would hire the necessary sub-contractors to perform the work needed to complete the project. One of those sub-contractors was Catterson & Sons Construction. Catterson & Sons was responsible for framing and installing portions of the foundation.

Soon after construction began, problems became apparent in the work that Catterson & Sons had performed. Inspections revealed numerous defects. After a payment dispute, Catterson & Sons abandoned the construction site. Aten, through R. Design, was slow in addressing the identified defects and also left the job site. 16 Jade Street, LLC hired another company to complete construction. During the completion of the project, more than sixty defects were discovered in the original work performed by R. Design and Catterson & Sons.

Jade Street then sued R. Design, Aten, Catterson & Sons, and Catterson individually for negligence and breach of implied warranties. Jade Street also brought claims against R. Design and Aten for breach of contract. The case was decided by a bench trial. The circuit court found in favor of Jade Street on the majority of its claims including its claim against Aten, individually, for negligence. The court noted that, despite the fact Aten was a member of an LLC, he could be held personally liable in tort for construction defects by virtue of the fact that he holds a general contractor's license. Aten subsequently appealed the circuit court's decision and presented arguments to the South Carolina Supreme Court.

The issue presented to the Supreme Court asked whether Aten, a member of an LLC, could be held personally liable for negligent acts he committed while working for the LLC. The Supreme Court agreed that the language of the LLC statute appears to insulate members from personal liability. The relevant language is found in Section 33-44-303(a) of the South Carolina Code which reads:

> Except as otherwise provided […], the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

However, the Court concluded that it was not the intent of the General Assembly to provide LLC members with broad immunity from personal liability.

In reaching its decision, the Supreme Court relied heavily on the maxim of statutory construction

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ARTICLE CONT.

which states, "[s]tatutes will not be held in derogation of the common law unless the statute itself shows that such was the object and intention of the lawmakers, and the common law will not be changed by doubtful implication." [3] Following this rule, the Supreme Court found that it was not the intent of the legislature to abrogate the long-standing common law right to sue one's tortfeasor when it passed the LLC statute. Instead, the Court ruled that the language of § 33-44-303(a) was only intended to protect LLC members against vicarious liability for the acts of other members. As a result, the statute does not shield members from personal liability for their own actions.

Impact in South Carolina

Before the *Jade Street* decision, the South Carolina Supreme Court had not directly encountered the issue of personal liability for an LLC member's own actions. Unlike instances where the Court overturns previously controlling decisions, the *Jade Street* decision does not represent a drastic sea change in South Carolina's jurisprudence. However, the decision is no less important as it stakes out South Carolina's stance on the issue of whether LLC members can be held personally liable for their tortious conduct. The Court notes that a majority of states that have dealt with this issue have ruled that LLC members are always liable for their own torts – even if the tort was committed while acting on behalf of the company. [4] The *Jade Street* decision brings South Carolina in line with the majority view.

Interestingly, both North Carolina and Kentucky, two sister states in close proximity to South Carolina, adhere to the minority view. In *Hamby v. Profile Products, L.L.C.*[5], the North Carolina Supreme Court held that a member-manager of an LLC is shielded from personal liability for acts committed while engaged in LLC business. This holding seems erroneous in light of the relevant North Carolina statute which states that LLC members or managers may be held personally liable for their "own acts or conduct."[6] However, the North Carolina court explains that "this language appears to simply clarify the earlier principle: the liability of members or managers is not limited when they act outside the scope of managing the LLC."[7] The Kentucky Court of Appeals also takes the minority view in *Barone v. Perkins*[8]. In facts similar to the *Jade Street* case, the Kentucky court held that LLC members are shielded from personal liability when acting in furtherance of the LLC's business.

The South Carolina Supreme Court acknowledged contrary decisions in other states such as *Barone v. Perkins* as well as the argument that allowing personal liability for LLC members would eliminate the very reason for forming an LLC – limiting personal liability. In doing so, the Court seems to concede that single-member LLCs will receive no protection for personal liability under its decision. However, the Supreme Court referenced, but did not specifically enumerate, "myriad other benefits available to those who choose to form an LLC[.]"[9] Ultimately, the Court was not persuaded that its decision would eliminate the relevance of the LLC business structure.

In addition to following the majority view, the *Jade Street* decision also harmonizes South Carolina's laws regarding liability for LLC members and corporate shareholders. This harmonization makes sense considering the degree of organizational similarity between LLCs and corporations. In fact, the Court acknowledges that LLCs "borrow heavily" from the corporate structure.[10] The Court quotes S.C. Code Section 33-6-220(b), which states, "a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."[11] The quoted statute clearly allows shareholders of a corporation to be held personally liable for their own torts. This concept is mirrored by the Court's holding in *Jade Street*.

A Practical Response

The Court's decision in *Jade Street* is important as it clarifies the law of South Carolina regarding personal liability for LLC members. A careful reordering of client perceptions may prove necessary as a result of *Jade Street*, especially given South Carolina's proximity to states such as North Carolina which adhere to the minority view. As a result, attorneys should take steps to make current and future clients participating in business as members of LLCs aware of the *Jade Street* decision.

As a first step, identify existing clients that conduct business through an LLC and notify them of the *Jade Street* decision. *Jade Street* presents an opportunity to dispel any false assumptions held by your clients regarding the scope of liability protection under the LLC Act. While an LLC is a great tool for protecting personal assets, LLC membership is not an absolute shield against personal liability. As such, attorneys should explain to their clients the limits of the liability protection afforded by doing business through an LLC, especially in the case of sole proprietorships. This will enable the client to better navigate through difficult business decisions while minimizing exposure to unnecessary risk.

Next, help current and future clients evaluate or re-evaluate their options in forming business entities. The options for business formation are myriad. Partnerships, limited liability companies, limited partnerships, S-corporations, C-corporations, and the list goes on. *Jade Street* presents an opportunity for both the attorney and client to carefully assess whether the client's current business structure adequately serves the client's needs.

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ARTICLE

Changes to Federal Jurisdiction and Procedure

by C. Fredric Marcinak III

The recently enacted Federal Courts Jurisdiction and Venue Clarification Act of 2011, P.L. 112-63 (December 7, 2011), significantly amends the federal jurisdictional statutes, including provisions covering diversity jurisdiction, venue, federal question jurisdiction, and removal. The Act was effective on January 6, 2012. The Act includes several changes that are significant for parties seeking to litigate in Federal Court, including changes that are beneficial for parties removing cases to Federal Court and for obtaining jurisdiction in Federal Court.

Removal Procedure

The Act begins by codifying the long-standing requirement that in order for an action to be removed to Federal Court there must be unanimity among the defendants removing an action. Thus, in keeping with prior case law, all defendants must agree and join together to remove a case to Federal Court. Importantly, however, the Act goes on to clarify the mechanics of the removal of a case by multiple defendants by resolving a split among the federal circuits as to the procedure by which such actions are removed. Previously, the majority of circuits had adopted the "last served defendant rule," which provided that each defendant had a separate thirty (30) days in which to remove an action from its particular date of service. Thus, the last served defendant could remove within thirty (30) days of its date of service and previously served defendants could join in that removal, even though these earlier served defendants had not removed the action to Federal Court. In contrast, other circuits, including the United States Court of Appeals for the Fourth Circuit, adhered to the "first served defendant rule." Under this rule, the first served defendant had the option of removing the case within thirty (30) days of its date of service. Any defendant served after the initial thirty (30) days of service from the first served defendant had expired could not remove the action to Federal Court. The Act adopts the "last served defendant rule." Thus, in jurisdictions such as the Fourth Circuit that had adopted the "first served defendant rule," each party will now have thirty (30) days to remove the case to Federal Court after it has been served. Any earlier-served defendants must join in the later-served defendants' notice of removal so that unanimity is maintained. This change also prevents plaintiffs' attorneys from manipulating the timing of service of process so that defendants less likely to remove are served first. Instead, each defendant will now have an equal opportunity to remove to Federal Court.

The Act also makes modifications to the procedure for determining the amount in controversy. Currently, the amount in controversy in a particular case must exceed $75,000 in order for the case to be removable. The Act states that where a state court pleading does not specify an amount in controversy, or where state practice permits a plaintiff to recover more than the amount sought, the defendants may remove to Federal Court and file documentation along with their Notice of Removal to demonstrate that the amount in controversy exceeds $75,000. The removal will succeed if the defendants can show by a preponderance of the evidence that the amount in controversy exceeds $75,000. Alternatively, in this situation, the defendants can leave the action in state court and can remove the action at a later time if a document is produced which indicates that the amount in controversy exceeds $75,000. In those circumstances, the defendants must remove within thirty (30) days of receipt of the document indicating that the amount exceeds $75,000. On the other hand, where the state court pleadings state an amount sought in the lawsuit, that amount can be used to determine the amount in controversy and it will be conclusive as to the amount in controversy, except in states where state law or procedure permits the plaintiff to recover an amount beyond the amount named in the Complaint. In those states, defendants may remove the matter to Federal Court and argue that the amount in controversy nonetheless exceeds $75,000 despite the amount claimed in the Complaint.

Finally, the Act adds several provisions to ameliorate the harshness of the one-year bar on removal of cases to Federal Court based on diversity jurisdiction. Under current law, a party may not remove a case to Federal Court on the basis of diversity jurisdiction if more than one year has elapsed since the date the action was filed. The Act creates two excep-

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tions. First, a party can remove a case to Federal Court after one year has passed where the plaintiff acted in "bad faith" to prevent removal of the case. Second, the Act provides that if the court finds that the plaintiff deliberately failed to disclose the amount in controversy to prevent removal, such action constitutes bad faith. Currently, it is common practice for attorneys who want to prevent removal of a lawsuit against a citizen of a different state to include a citizen—even one whose liability to the plaintiff is tenuous—of the same state of the plaintiff to defeat diversity jurisdiction. Oftentimes, the in-state defendant will be dismissed from the case after the one-year prohibition against removal has been triggered. In these situations, defendants will now be able to assert that the plaintiff has acted in bad faith to prevent removal and that the action should be removable, the one-year bar notwithstanding.

Jurisdiction

With regard to federal question jurisdiction, the Act makes one change that, upon first reading of the statute, appears to be broader than it is. The Act states that where a Complaint asserts a claim under federal law and also claims under state law, the entire action can be removed to Federal Court but that a District Court "shall sever" and "shall remand" any claim that is not within "the original or supplemental jurisdiction of the District Court." On first blush, this appears to require that any state law claims that are removed along with the federal claim must be remanded to District Court. However, the key phrase in the statute is the reference to supplemental jurisdiction. Supplemental jurisdiction, formerly known as ancillary or pendant jurisdiction, and currently embodied in 28 U.S.C. § 1367, provides that state law claims that are "so related to [federal] claims in the action . . . that they form a part of the same case or controversy" may generally be removed to Federal Court along with the federal claim. Thus, even under the amendments made by the new Act, state law claims that are related to the claim that is removed on the basis of federal jurisdiction will remain in Federal Court. Only unrelated state law claims over which there is no diversity jurisdiction must be remanded to state court. It is certainly unusual to find a Complaint that pleads both related and unrelated claims, therefore the circumstances in which the Act will be invoked to remand state law claims to state court appear to be limited. However, the apparently broad terms in which the Act speaks are likely to lead to confusion in that arguments for remand of related state law claims are likely to be made, and the Act must be carefully parsed and briefed to the courts so that claims over which supplemental jurisdiction exists will be maintained in Federal Court.

Venue

Finally, the Act makes several changes to venue provisions. The most important of these is that District Courts now have the ability to transfer any civil action "to any district or division to which all parties have consented" for "the convenience of the parties and witnesses and in the interest of justice." This statute allows the parties to consent to transfer to any venue that they can agree on. Further, the Act eliminates the distinction between federal question and diversity actions for purposes of venue and adopts a single, general venue statute.

Conclusion

The changes made by the Act are likely to eliminate some of the confusion surrounding the timing and procedure for removal of actions to Federal Court and jurisdiction in Federal Court. Overall, these changes will likely work to the benefit of defendants who are seeking to have actions removed to Federal Court. These changes will be beneficial to parties who seek the uniformity of federal policy and procedure, the avoidance of bias in local state courts, and the ease and access of electronic filing in Federal Courts.

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Conclusion

In Jade Street, the South Carolina Supreme Court ruled that S.C. Code § 33-44-303(a) does not protect LLC members from personal liability for their own torts. Although not a fundamental shift in South Carolina jurisprudence, the Court's opinion answers an important and novel question of South Carolina law. As a result, the law governing personal liability for members of an LLC is brought into harmony with the law governing corporate shareholders. Looking forward, the decision will provide guidance for both attorneys and clients in evaluating their options with regard to choosing a business structure to best fit the clients' needs.

Footnotes

1 Andrew M. Connor is an associate in the Myrtle Beach office of Nelson Mullins Riley & Scarborough, LLP. He practices in the areas of business litigation, construction litigation, and premises liability.

2 *16 Jade Street, LLC, v. R. Design Construction Co.*, LLC, No. 27107, 2012 WL 1111466 (S.C.Sup.Ct. Apr. 4, 2012).

3 *Jade Stree*t, No. 27107, 2012 WL 1111466 at *5 (citing 82 C.J.S. Statutes § 534).

4 *Id*. at *3.

5 *Hamby v. Profile Products, L.L.C.*, 361 N.C. 630, 652 S.E.2d 231 (2007).

6 See N.C.G.S. § 57C-3-30(a).

7 *Hamby*, 361 N.C. at 637, 652 S.E.2d at 236.

8 *Barone v. Perkins*, 2008 WL 2468792 (Ky.App.) (not reported in S.W.3d).

9 *Jade Street,* at *5.

10 *Id*.

11 *Id*.

ARTICLE

The New Amalgamation in South Carolina - A shortcut to corporate liability?

by Andrew Cole

We are witnessing the creation of common law in South Carolina. The new amalgamation legal theory was first referenced in a Court of Appeals case decided in 1986. Two recent cases—also from the Court of Appeals—confirm the establishment of this new amalgamation. Although there are a handful of cases that reference or seemingly give some analysis to this newly referenced legal theory, the majority and most significant of these cases come from construction defect cases.

The "common law" is a "body of law derived from judicial decisions, rather than from statutes or constitutions."[i]

> Historically, [the common law] is made quite differently from the Continental code. The code precedes judgments; the common law follows them. The code articulates in chapters, sections, and paragraphs the rules in accordance with which judgments are given. The common law on the other hand is inarticulate until it is expressed in a judgment. Where the code governs, it is the judge's duty to ascertain the law from the words which the code uses. Where the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision. They did not do so by construing the words of is judgment. They looked for the reason which had made him decide the case the way he did, the *ratio decidendi* as it came to be called. Thus, it was the principle of the case, not the words, which went into the common law. So historically the common law is much less fettering than a code.[ii]

The new amalgamation theory was first used in the case of *Kincaid v. Landing Development Corp*.[iii] This theory played a significant role in two recent cases from the court of appeals: *Pope v. Heritage Communities, Inc.*[iv] and *Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc.*[v] As of the drafting of this article, neither of these cases is final through the appellate process.[vi]

As a quick aside, the author recommends reading the *Pope* and *Magnolia North* decisions for some other, important discussions about rulings on certain evidentiary and damages questions. For example, the court in both cases discusses the case of *Whaley v. CSX Transportation, Inc.*[vii] and its application of the "substantially similar" evidentiary fact test that lead to the admission of evidence at trial of other construction projects that were built by the defendants. Under this evidentiary issue is the interplay between the "substantially similar" admission of certain evidence at trial and the introduction of evidence regarding punitive damages.[viii] Also important is the discussion of the effect the defendants' trial strategy has at the directed verdict stage of the trial.[iix] However, our focus is upon new amalgamation.

For centuries an amalgamation meant generally the same thing. "Amalgamation is an English term used to designate a consolidation or merger."[x] It is "[t]he act of combining or uniting; consolidation," as in the "amalgamation of two small companies to form a new corporation."[xi] It is "[a] consolidation or merger, as of several corporations."[xii] That is, amalgamation is a term understood to mean a deliberate merger of two or more companies with the express intent to create a new entity.

A recent search for the term "amalgamation" in South Carolina case law yields less than thirty cases on Westlaw. About one-third of this list uses the term in some reference to a corporation. A majority of the corporation-amalgamation cases were decided in the 19th and early 20th centuries during the expansion of the railroads. Indeed, the various attempted[xiii] and intended railroad company mergers were created with documentation that was referenced generally as "articles of amalgamation and consolidation."[xiv] By 1986, use of the term "amalgamation," when referencing and/or describing companies, was never specifically defined or analyzed. The term was a descriptor of the intent of two or more companies merging into one by either stock or asset purchases. That is, "[w]hen two corporations merge or consolidate, each may be said to have contributed its net assets to the newly undertaken joint venture."[xv]

The new amalgamation now defines the term as the mere blurring of legal distinctions between corporations and their activities. To understand the

new amalgamation, a brief history is necessary.[xvi]

The *Kincaid* case was a construction defect lawsuit involving a single family residence. The Kincaids purchased a lot from the defendant developer; the lot being sold by the defendant sales and marketing company. They then contracted with the defendant contractor to build their home. The defendant developer, defendant contractor, and defendant sales company were all sister companies. Without referencing any legal precedence, the Court of Appeals matter-of-factly affirmed the trial court's ruling that the three defendant companies should be deemed one entity. The court agreed with the trial court's finding that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities."[xvii] The appellate court provided a list of factors – with no reference to any statutes or common law - why the defendant developer, sales, and construction entities should be considered one. The court noted that the entities had the same vice president, shareholders, officers, office space, point of contact for consumer complaints, and disseminated literature that described the sales and marketing company as "A Development, Construction, Sales, and Property Management Company."[xviii] The *Kincaid* court made no reference to or findings regarding corporate forms, corporate formalities, or even piercing the corporate veil.

The first case that actually attempted to analyze the new amalgamation theory created by *Kincaid* was *Mid-South Management Co., Inc. v. Sherwood Development Corp.*[xix] This case involved a fight to determine which corporate investors were liable for a settlement of a homeowners' association lawsuit. Generally, one group of investors involved in a joint venture condominium project settled a construction defect lawsuit and then made a capital call on another company in the joint venture to pay its portion of the settlement. Mid-South argued that the defendant and its parent company were liable for their portion of the settlement proceeds under the alternative theories of piercing the corporate veil, alter-ego, and/or amalgamation. The Court of Appeals analyzed these three theories of corporate liability and concluded that none of them applied in the case. Notably, this is the first case that discussed new amalgamation, and, by context, placed the theory at an equivalent footing as the piercing and alter-ego theories.

Piercing the corporate veil is considered an extreme remedy. It should be reserved for the rare circumstances when it would be grossly unfair to insulate the company owners from personal liability. "If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons."[xx] We need not delve into a deep discussion about the two-part piercing the corporate veil test that was first set forth in the *Sturkie* case. Suffice to say, the first prong looks at whether the corporation acted like a corporation and the second prong requires an analysis of whether there is "an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals."[xxi] "The essence of the [second prong] fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneurship by doing so through a corporate veil."[xxii]

The alter-ego theory is similar to piercing. Where piercing examines the relationship between the company and its owners, the alter-ego or instrumentality theory considers the relationship between separate companies. "An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby."[xxiii] Although control of a company by another is the key to the alter-ego theory, "control, in and of itself, is not sufficient to find that a subservient corporation is the alter-ego of the dominant one."[xxiv] Like piercing, the alter-ego theory "does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice."[xxv]

The piercing and alter-ego theories set a high bar for invading the corporate veil. Both look to the level of unfairness that is based on fraud or the equivalent misuse of the corporate shell to shield the owners or parent company from liability. New amalgamation sets the bar much, much lower. The question therein is whether the conduct of multiple companies is such that the legal distinctions between them are "blurred." This step down from fraud to blurriness is significant. The Court of Appeals in *Mid-South* explains that in *Kincaid* "this court found a sibling company liable for the obligation of another sibling company due to the evidence revealing an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities."[xxvi] Apparently, it is no longer necessary to prove a deliberate or fraudulent attempt to misuse a corporate entity, nor is it necessary to prove some fundamental unfairness if the corporate shell is honored.

Lenders have also been caught up in new amalgamation. In *Kennedy v. Columbia Lumber & Manufacturing Co., Inc.*[xxvii] the Supreme Court weighed in by noting that it is possible that a lender could become so involved in the construction process that it is deemed a de facto developer and/or builder. This occurs "when the lender becomes highly involved with construction in a manner that is not normal commercial practice for a lender…. [so that] the lender may be said to be a joint venturer."[xxviii] The lender would then be deemed to

have impliedly warranted the workmanship and/or the habitability of the home construction. Although it did not find that the lender in *Kennedy* should be liable under those facts, the Supreme Court reached its conclusion that the possible liability is real by a "see generally" reference to *Kincaid* that "[t]he lender may be liable if it is so amalgamated with the developer or builder so as to blur its legal distinction."[xxix] Nearly two decades later, the Supreme Court found that the question whether a bank is so "substantially involved" in construction of a house is a question for the jury. [xxx]

New amalgamation analysis has appeared in other areas of the law. In *Ost v. Integrated Products, Inc.*[xxxi] the question was raised in a workers' compensation action. The issue was whether the number of employees of one company should be amalgamated with the number of employees of a sister corporation when determining the number of employees under a statutory employee analysis. Although the case did not cite *Kincaid*, the general discussion in *Ost* mirrored the "amalgamation as blurriness" conclusion of *Kincaid*. The conclusion was that all the employees should be counted and, therefore, the total number of employees was more than the four person threshold requiring workmen's compensation coverage. New amalgamation was also mentioned briefly in a footnote that suggests that it could be used to prove proper service on a corporation.[xxxii]

The Court of Appeals does not outline elements for new amalgamation. However, we can extrapolate a short list of factors, which includes: (1) shared owners/shareholders; (2) shared officers; (3) shared office location; and (4) other evidence generally showing the companies present themselves to the public as having common interests. The burden to prove amalgamation should be on the party seeking this involuntary merger.[xxxiii] Notably, new amalgamation does not rely on whether the subject companies were legitimate or in fact acted like corporations.

As referenced at the outset of this article, the most recent applications of new amalgamation are in the *Pope* and *Magnolia North* cases. Mr. Pope was the class representative of a condominium development: The Riverwalk at Arrowhead Country Club. The Riverwalk and Magnolia North projects are located in Horry County, South Carolina. The developer for both projects was Heritage Communities, Inc. (HCI) and the general contractor for both projects was BuildStar Corporation. HCI is described as the parent corporation of BuildStar. HCI was also the parent corporation of specially created seller entities named Heritage Riverwalk, Inc., and Heritage Magnolia North, Inc. for the respective projects. Although not specifically discussed in the opinions, the buildings at Riverwalk and Magnolia North were similar in design, being multi-family, multi-floor buildings with exterior stairwells and commons walkways on the fronts of the building. In short, the buildings are the typical, non-high-rise, multi-family structures that were constructed along the Grand Strand in the late 1990s and early 2000s.

Construction at Riverwalk started in June 1997 and was completed in December 1999. There were a total of 228 units in nineteen buildings at this project. Construction of Magnolia North started in 1998 and the project, after twenty-one buildings were completed, was turned over to the POA in September 2002. HCI and BuildStar constructed four additional projects with varying multi-family building styles during this same time period.

Unfortunately, HCI and BuildStar, along with the special purpose sales entities, were named as defendants in multiple lawsuits. At least four of the claims, in whole or in part, were tried to a verdict. The Pope/Riverwalk and the Magnolia North matters were tried during the Multi-Week Trial Docket in January and May, 2009, respectively. In both cases, the Plaintiffs moved for and the trial court found the defendant entities were amalgamated entities. These rulings greatly simplified the respective Plaintiffs' cases. Instead of having to prove the alleged causes of action that would otherwise correspond to specific defendants, the claims for negligence, breach of implied warranty of workmanlike service, and breach of fiduciary duty were all lumped together.[xxxiv] Stated another way, new amalgamation also blurred the legal claims that were pled in the lawsuits.

Although there can be some overlap, the legal duties of a developer are different from the legal duties of a contractor, and different still from the legal duties of a sales company. The developer's duty springs from its implied fiduciary relationship with the subsequent project owners.[xxxv] The contractor, however, is not a fiduciary. The contractor has a duty to exercise the reasonable degree of skill usually possessed by a member of the building occupation and verify that the work is done in conformity with the applicable building code and in a good and workmanlike manner.[xxxvi] The sales agents should refrain from misleading sales tactics. If all of these entities are amalgamated together and deemed conjoined as a single entity, then any legal distinctions of the various causes of action are lost.

South Carolina often markets itself as a business friendly State. One of those friendly business notions is that a corporate shell is intended to protect investors and/or business owners from liability where their conduct is not so egregious that the corporate shell should be invaded. The new amalgamation appears to erode away some of the corporate protections as it bypasses the traditional mechanisms established by the courts to attack the corporate shell. The *Pope* and *Magnolia North* cases highlight this shift in the Appellate courts away from some protections provided by the corporate shell. Unfortunately, it appears that this trend is expand-

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ing. During the drafting of this article, the Supreme Court handed down another construction defect opinion titled *16 Jade Street, LLC v. R. Design Construction Co., LLC.*[xxxvii]

In *16 Jade Street*, the owner of a condominium project sued the general contractor, framing subcontractor, as well as the principal members of these limited liability corporations, alleging a series of construction defects. The trial resulted in a nearly seven-figure verdict for the condominium owner against both of the contractor entities as well as the individual licensee holder-member of the general contractor. The majority of the Supreme Court applied the rules of statutory construction to conclude that the South Carolina Limited Liability Corporation statute (Section 33-44-303(a)) "only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions."[xxxviii] The majority opinion explains that there was "no clear intent by the General Assembly" to extend the corporate protection to all members of the LLC.[xxxxix] The dissent and some in the South Carolina Senate disagree with this conclusion.

The holding in *16 Jade Street* is likely more well-known amongst the contractors and subcontractors of South Carolina than the *Pope* and *Magnolia North* cases; nonetheless, the holdings in each were likely surprising. (*16 Jade Street* was likely the most surprising to the many contractors and subcontractors operating as single member or husband-wife member limited liability corporations who now learn they don't have the same corporate shell protection they thought they had one month before.) The cases discussed in this article may signal a shift in the common law away from some corporate protections.

Where does this leave the business owners, contractors, and subcontractors operating in South Carolina? With unfettered clarity, it can be said that nothing is certain. The appellate process as to these issues grinds forward. Rehearing in *16 Jade Street* was recently granted.[xl] Moreover, the Legislature has chimed in with a proposed Joint Resolution to clarify the specific Legislative intent that all members of a LLC are "shield[ed] … from personal liability for actions taken in ordinary course of business of the LLC."[xli] The appeals of the new amalgamation are just now seeking certiorari to the Supreme Court. Perhaps the best advice to the contractors and subcontractors that are affected by these interim opinions is to warn them to be wary of commingling corporate interests and to warn the person who holds the license and/or is actually in the field in charge of a construction site that they have a bigger target on their back. By the end of the year, all of the appeals should be final and we can then advise our clients whether they should cringe or breathe a sigh of relief.

Footnotes

i Black's Law Dictionary p. 270 (7th Ed. 1999).

ii *Id*. Black's provides this additional explanation of the common law by quoting this passage from Patrick B. Devlin, The Judge p. 177 (Oxford 1979) (USC Law Library Call No. KD7285.A75 D48 1979).

iii 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).

iv 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), reh'g den. (Dec. 12, 2011).

v 2012 WL 469730 (S.C. App. Feb. 15, 2012).

vi The author contacted the Clerk for the South Carolina Supreme Court to inquire about the status of the appeals of these cases. As of the drafting of this article: the petition for certiorari in the Pope case has been pending since February 11, 2012; the petition for rehearing in *Magnolia North* was denied on April 20, 2012 - the deadline to file a petition for certiorari to the Supreme Court had not been reached. The Court of Appeals described the two cases as "similar action[s]." *See Magnolia North* at *1,n.1. In fact, two of the three appellants in each case are the same; two of the three appellate court judges—including the authoring judges of each opinion—decided the cases; the same attorneys represented the plaintiffs; the same trial judge—the Honorable Clifton Newman—presided over the trials; and the appeals question the same legal findings from their respective trials. The Court of Appeals resolved the two cases the same. We will have to monitor whether the Supreme Court chooses to weigh in on these points.

vii 362 S.C. 465, 609 S.E.2d 286 (2005).

viii The author believes that some of these evidentiary issues may be decided differently in the future in light of the bifurcation of punitive damages statute that was passed after the *Pope* and *Magnolia North* trials. South Carolina Code § 15-32-520, which statute was created by 2011 Act No. 52, is effective for all actions that accrue on or after January 1, 2012.

ix Hint: expect more successful directed verdict motions by plaintiffs when the defendants acknowledge that there are some portions of the subject buildings in a construction defect lawsuit that require repairs since "[a]n admission of counsel or evidence supporting less than all of the complaints' specifications of negligent conduct is sufficient to support a directed verdict for the POA." Magnolia North at *9.

x 19 Am.Jur.2d Corporations § 2166.

xi Black's Law Dictionary p. 79 (7th ed., 1999).

xii The American Heritage Dictionary p. 57 (3rd ed., 1992).

xiii The majority of the railroad cases decided in South Carolina State and Federal courts during this time period pontificate over possible monopolies.

xiv *See: Brown v. Am. Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924) (Discussing whether a purchasing railroad assumes the debts of the selling railroad and referencing the synonyms "reorganization, consolidation, amalgamation, or union."); *Ex Parte the Trustees of the Greenville Academies,* 7 Rich.Eq. 471, 28 S.C.Eq. 471, 1854 WL 2881 (S.C.App.Eq. 1854) (Discussing whether a lay (non-religious, eleemosynary) company, a school, can merge into, or amalgamate into, an ecclesiastical (religious) corporation.); *Coleman v. The Greenville & Columbia RR Co.*, 5 Rich. 118, 39 S.C.L. 118, 1851 WL 2568 (S.C.App.L. 1851) (The term amalgamation is used to describe the intentional merger of two railroad companies); *T.H. Colcock & Co. v. The Louisville, Cincinnati,*

and Charleston R.R. Co., 32 S.C.L. 329, 1847 SL 2124 (S.C.App.L. 1847) (Amalgamation used to describe the merger of two railroads.); *Smith v. Smith*, 3 Des. 557, 3 S.C.Eq. 557, 1813 WL 373 (S.C. 1813) (Using the term amalgamation to describe the deliberate attempt to merge an ancient society of masons into a modern society of masons to create a new society of masons.); *Tomlinson v. Branch*, 82 U.S. 460 (U.S.Sup.Ct. 1872) (Amalgamation used to describe merger of two railroads by way of a stock exchange and/or trade.); *In re Safety-Kleen Corp.*, 2002 WL 32349819 (D.S.C. 2002) (unpublished) (Noting in the facts that the subject corporation "represents an amalgamation of three different entities" following as series of name changes and mergers.); *Phinizy v. Augusta & K.R. Co.*, 62 F. 678 (1894) (Referencing the "amalgamation and consolidation" of a number of separate railroad lines (companies) into single railroad companies.).

xv *See Fidelity-Baltimore Nat'l Bank v. U.S.*, 328 F.2d 953, 955 (1964) (Noting the combined corporate assets do not necessarily infuse new money into the new company. "The amalgamation works a change in the assets underlying the stock of the stockholders of each constituent, but there is no new capital."); *see also Rivera v. Am. Gen. Fin. Serv., Inc.*, 259 P.3d 803, 815 (N.Mex. 2011) ("In corporate law, the term 'successor' is a legal term of art meaning a 'corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.'" (quoting Black's Law Dictionary 1569 (9th ed. 2009))).

xvi *See Mid-South Management Co. Inc. v. Sherwood Development Corp.*, 374 S.C. 588, 605, 649 S.E.2d 135, 144 (Ct. App. 2007), reh'g den. (Aug. 24, 2007), cert. den. (May 30, 2008) (citing *Kincaid*).

xvii *Kincaid* at 96, 344 S.E.2d at 874 (quoting the trial court).

xviii *Id.*

xix 374 S.C. 588, 649 S.E.2d 135 (Ct.App. 2007), reh'g den. (Aug. 24, 2007), cert. den. (May 30, 2008).

xx *Mid-South* at 597, 649 S.E.2d at 140 (quoting *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct.App. 1984)).

xxi *Mid-South* at 597-598, 649 S.E.2d at 140 (quoting *Sturkie* at 457-58, 313 S.E.2d at 318).

xxii *Mid-South* at 598, 649 S.E.2d at 141 (quoting *Multimedia Publ'g of S.C., Inc. v. Mullins*, 314 S.C. 453, 551, 556, 431 S.E.2d 571, 573 (1993)).

xxiii *Mid-South* at 603, 649 S.E.2d at 143 (quoting *Colleton County Taxpayers v. School District of Colleton County*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006)).

xxiv *Id*. (citing *Baker v. Equitable Leasing Corporation*, 275 S.C. 359, 367-68, 271 S.E.2d 596, 600 (1980)).

xxv *Id*. (quoting *Colleton County Taxpayers* at 237, 638 S.E.2d at 692).

xxvi *Mid-South* at 605, 649 S.E.2d at 144 (quoting *Kincaid* at 96, 344 S.E.2d at 874)).

xxvii 299 S.C. 335, 384 S.E.2d 730 (1989).

xxviii *Id*. at 340, 384 S.E.2d at 734 (citation omitted).

xxix *Id.* at 340-341, 384 S.E.2d at 734.

xxx *Kirkman v. Parex, Inc*., 369 S.C. 477, 632 S.E.2d 854 (2006) (Using the language from Kennedy that relied on the amalgamation language from Kirkman to find that summary judgment in favor of the lender was premature.)

xxxi 296 S.C. 241, 371 S.E.2d 796 (1988).

xxxii *Schenk v. National Health Care, Inc.*, 322 S.C. 316, 319 n.2, 471 S.E.2d 736, 737 n.2 (Ct.App. 1996), reh'g den. (June 21, 1996), cert den. (Dec. 5, 1996) (Noting, after a parenthetical reference to the new amalgamation theory in *Kincaid*, that "[w]e assume the appellant [National Health Care, Inc.] and 'National Healthcare Corporation' [which was the entity served] are one and the same or are so closely connected and related that judgment against one would bind the other.")

xxxiii *See Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) ("The party seeking to have the corporate identity disregarded has the burden of proving that the doctrine should be applied.")

xxxiv In both cases, the trial court directed verdicts in favor of the defendant developers on plaintiffs' breach of express warranty claims.

xxxv *See Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corporation*, 349 S.C. 251, 562 S.E.2d 633 (2002) (Discussing the developer's duty to either transfer common areas to the homeowners' association in good repair or to provide the necessary funds to all a "reasonably good repair" of the common elements.).

xxxvi *See Fields v. J. Haynes Waters Builders, Inc*., 376 S.C. 545, 560, 658 S.E.2d 80, 88 (Quoting from the charge the trial judge gave to the jury, that "a builder who undertakes construction of a building impliedly represents that he possesses and will exercise a reasonable degree of skill usually possessed by a member of the building occupation; and that a builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code and in a good and workmanlike manner." (internal punctuation omitted)).

xxxvii 2012 WL 1111466 (Decided Apr. 4, 2012), pet. for reh'g granted (May 7, 2012).

xxxviii *Id.* at *6.m Justice Hearn drafted the majority opinion, of which Justices Pleicones and Kittredge concurred. Justice Beatty wrote in his dissent, to which Justice Toal concurred, that S.C. Code § 33-44-303(a) was unambiguous and should be read to provide limited liability for all members of a Limited Liability Corporation that are working pursuant to the charter of the company.

xxxix *Id*. at *5.

xl *Id.*

xli See Proposed Joint Resolution S.1416, introduced in the Senate on April 10, 2012, and referred to the Senate Committee on Judiciary on April 11, 2012.

PAC Golf Tournament Revisited

by Anthony Livoti

Beautiful spring weather greeted players and sponsors alike on April 25th for the Third Annual SCDTAA PAC Golf Classic. This year twelve teams competed in a four man scramble with winners in gross and net categories. For the second year in a row, the firm of Aiken Bridges made up of Glenn Elliott, Jay Saleeby, Buddy Arthur and Jay Lee won honors in the gross category and the Hood Law Firm won the net division.

Once again EveryWord court reporting served as the tournament sponsor and has been a great supporter of the event. Thanks to all the firms who have faithfully supported this event since its inception, as well as the vendors who have served as sponsors. This support has funded our PAC, which helps give the defense a voice at the legislature. We look forward to another great event next year.

ARTICLE

The 411 on Medicare Set Aside Arrangements

by Ashley Kirkham and Myada El-Sawi

MSAs are for more than just workers' compensation claims these days, so defense attorneys should be aware of Medicare's requirements--and Medicare's power to levy hefty fines on either party for any violation.

The Medicare Secondary Payer Act was enacted in 1981 to mitigate increasing healthcare costs imposed on the Medicare system. A study by the Government Accounting Office revealed that from 1991 through 1998, the federal government paid an estimated $40 million for medical care in workers' compensation cases in which Medicare was not the primary payer.[i] The Act has inverted the system and shifted responsibility onto private insurers, as it requires Medicare beneficiaries to exhaust all available private insurance coverage before resorting to their Medicare coverage.[ii] Thus, private insurers covering the same treatment have become the "primary" payers, leaving Medicare as the "secondary" payer.[iii] The Act ensures that Medicare does not pay for a beneficiary's medical expenses when payment should be made by the primary payer, which includes payment under a workers' compensation plan, liability insurance policy or plan, automobile insurance policy including a self-insured plan, or under no-fault insurance.[iv]

If the Centers for Medicare & Medicaid Services (CMS) determines that a party has failed to provide primary payment for medical services or has failed to submit reimbursement to CMS for Medicare's payment, CMS has the authority to recoup payment from the rightful primary payer and can pursue double damages against the carrier.[v] Additionally, CMS may (1) ignore the terms of the settlement agreement, (2) revoke one's right to Medicare coverage, or (3) make a demand or bring suit against the attorneys involved in the settlement.[vi]

Recommendations for Settling Liability Claims Involving Future Medical Payments

The first step is to determine the plaintiff's status as a qualified individual. The plaintiff is deemed a Class I qualified individual if he (1) is a Medicare beneficiary, (2) is age sixty-five or older and is therefore eligible for Medicare, (3) has been receiving Social Security Disability benefits for twenty-four months or longer, or (4) meets the Medicare eligibility requirements for end stage renal disease.[vii] The plaintiff is a Class II qualified individual if he has a "reasonable expectation" of becoming a Medicare beneficiary within thirty months of the date of settlement.[viii] An individual has a "reasonable expectation" if he (1) is age sixty-two and a half or older, (2) has applied for Social Security Disability benefits, (3) is denied Social Security Disability benefits and is anticipating an appeal, or (4) has been diagnosed with end stage renal disease that does not yet qualify for Medicare.[ix] If the plaintiff in your case meets any of the above-listed criteria, you may be required to put Medicare on notice of the settlement.

Ashley Kirkham

Myada El-Sawi

All parties are required to protect Medicare's interest.[x] However, protecting Medicare's interest is not difficult in a case where the plaintiff does not meet any of the aforementioned criteria that qualify him as a Class I or Class II qualified individual. If the plaintiff is not a qualified individual, simply make a note in your case file that lists the reasons why he does not qualify, and you will then have the note available if CMS ever comes knocking. If the plaintiff *does* meet the criteria discussed above, you are required to protect Medicare's interest, which will most likely involve creating a Medicare Set Aside arrangement (MSA). CMS requires mandatory approval of all MSAs for Class I qualified individuals with total settlement values greater than $25,000 or greater than $250,000 for a Class II qualified individual.[xi] The "total settlement value" for CMS includes not only future medical care but also costs for indemnity, attorney's fees, and property damage. Even if your settlement does not reach the current CMS threshold, you should go ahead and create a MSA to prove that you have protected Medicare's interest by requiring the plaintiff to use funds designated in the MSA for medical services and products for which Medicare would have otherwise been the primary payer.

Continued on next page

ARTICLE CONT.

Closing a File: Settlement when a CMS Approved MSA is Required

Once you determine that the plaintiff is a qualified individual, secure a MSA vendor to review medical records and draft an allocation report. The MSA vendor will look at the plaintiff's last two years of medical records and life expectancy to determine the cost of medical services and products over the plaintiff's life expectancy that would have been provided by Medicare if the plaintiff's injuries were not the result of the current admitted claim. Your vendor may also request pharmacy records to determine the amount of drugs being prescribed and filled.

The next step is to discuss the administration of the MSA and determine who will be responsible for additional funding of the MSA if CMS rejects the arrangement prepared by your vendor. You must also notify Medicare concerning whether the MSA will be paid in a lump sum or an annuity. However, despite paying the MSA with an annuity, "the total settlement value" is still the actual amount of the settlement, not the discounted annuity rate.[xii] The funds projected for use in the MSA are required to be kept in a separate, interest bearing account that will only be used to pay for medical services and devices that would have otherwise been covered by Medicare.[xiii] CMS also requires annual account status updates.[xiv]

An MSA can be managed through (1) self-administration by the plaintiff, (2) professional administration, or (3) trust administration.[xv] If the plaintiff plans to self-administer the MSA account, provide him with a list of the responsibilities for self-administration and ensure that the plaintiff signs an agreement stating that he understands the duties, which include keeping an account of all medical bills paid with MSA funds and reporting to CMS annually. A second option is professional administration, which you should discuss with your MSA vendor or administrator. The professional administrator will be responsible for processing and paying all medical bills through the MSA fund, as well as reporting to CMS. Based on the complexity of the MSA, you may not need professional administration until the plaintiff's death. For example, you may choose professional administration for a few years followed by a period of transition into self-administration where the plaintiff would still have contact with the professional administrator for any questions regarding payment from the MSA account and reporting to CMS.

Counsel must also negotiate and determine which party will be responsible for providing increased funding to the MSA if CMS responds with a higher number than that reflected in the MSA proposal. Alternatively, you could reserve your client's right to either fund the additional amount or leave the medical portion of the claim open in the event that CMS responds with a higher amount. If you have already provided the MSA funding to the plaintiff and your client decides to keep the medical portion of the claim open, you must include language in the settlement agreement stating that the remaining MSA funds should be returned to your client. Furthermore, the agreement should include a provision providing an alternative if CMS comes back with a lower amount than your MSA proposal. Such an option may either allow the plaintiff to retain the additional money or require the plaintiff to reimburse your client with the additional funding of the MSA that CMS did not require.

If you are settling the claim on a denied and disputed basis, you should have a $0 MSA prepared. If your settlement does not require CMS approval of the MSA, you should still have a $0 MSA prepared to keep in your case file. Since all parties are required to protect Medicare's interest, contact your MSA vendor to draft a $0 MSA in which you state your reasons for denial (e.g., statute of limitations defense). Taking such steps will establish that your client was never the primary payer, and Medicare would have always been the primary payer for the plaintiff's medical services or products. If you have paid for any medical treatment or services, discuss why you originally began payment and why you now believe that you are no longer required to pay for medical expenses (e.g., plaintiff alleged left shoulder injury, and your client began to pay for his medical expenses until the surveillance video showed the claim of accident was fraudulent). Even if your settlement does not currently meet the CMS review threshold, all settlements of future medical care must, nonetheless, protect Medicare's interests.

The Harsh Consequences of Failing to Protect Medicare's Interest

Penalties can be imposed on *any* entity responsible for primary payment.[xvi] Moreover, the government, on behalf of Medicare, may file suit against *any* or *all* entities responsible for payment with respect to the same item or service under a primary policy or plan.[xvii] Such entities are subject to various penalties. For example, the responsible party may be charged interest on the amount of the reimbursement from the date of notice of payments made by Medicare until reimbursement is made.[xviii] Additionally, CMS may seek damages against any entity that received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.[xix] Such entities include a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer that has received a primary payment.[xx]

The Act also provides for a private cause of action to collect double damages against the primary payer.[xxi] Double damages services two purposes.[xxii] [i]They deter and punish the disfavored conduct of shifting costs from private insurers to Medicare.[xxiii] Second, they incentivize healthcare providers to support and defend Medicare's interests.[xiv]

Furthermore, penalties may arise not only out of non-compliance with the Act but also for failure to comply with state law. For example, the Court of Appeals for the Fourth Circuit ordered an employer to pay penalties and attorney's fees when the employer failed to fund the Medicare Set Aside account within thirty days of judicial approval of the settlement, as required by state law.[xxv]

Ensuring compliance with the Act is essential because violations affect *all* parties involved in the settlement. As discussed previously, the carrier or self-insured may be exposed to double damages and subject to paying future medical expenses, while the plaintiff risks having future medical care declined. Moreover, the government may also have the right to recover against the attorney handling the claim.[xxvi] If a beneficiary and his attorney receive a third party settlement payment, the government has an independent right of recovery for reimbursement within sixty days of receipt of the settlement proceeds.[xxvii] There have been several instances where the courts have held attorneys individually liable to Medicare for reimbursement, plus interest on the total amount of reimbursement in cases where the attorney has settled a third party claim and failed to reimburse Medicare.[xxviii] In such cases, the attorney is deemed a "recipient" of payments owed to the Government and is, therefore, required to reimburse Medicare.[xxix] Consequently, compliance with the Act protects all parties' interests, including the attorneys involved.

Conclusion

The Medicare Secondary Payer Act requires all settlements of future medical care to consider and protect Medicare's interest. If the plaintiff is not a Class I or II qualified individual, a note to the file explaining why a MSA is not needed is most likely sufficient. If the plaintiff is a Class I or II qualified individual but the total settlement amount does not meet the current CMS review threshold, you should still have a MSA prepared to ensure your compliance with the Act. Moreover, if the plaintiff is a Class I or II qualified individual and the total settlement amount meets the review threshold, the MSA must be reviewed by CMS. Because the settlement will most likely be executed before CMS approves or rejects the MSA, it is essential to include language in your settlement agreement regarding the MSA. The settlement agreement should state that the MSA was prepared for the purpose of protecting Medicare's interest and should also include language addressing the type of administration chosen and the consequences that will result if CMS determines the MSA needs more or less funding.

Protecting Medicare's interest is essential when settling a claim that closes future medical benefits; therefore, complying with the Act will ensure that the necessary steps are taken in order to protect not only Medicare's interest but also all involved parties' interests.

Footnotes

i 166 N.J.L.J. 501 (Nov. 5, 2001).

ii *Bio-Medical Applications of Tenn., Inc. v. Cent. States Southeast*, 656 F.3d 277, 278 (6th Cir. 2011).

iii *Id*.

iv 42 U.S.C. § 1395y(b)(2)(A)(ii) (2012).

v *Id.*

vi *U.S. v. Harris*, No. 5:08CV102, 2009 U.S. Dist. LEXIS 23956 (N.D. W. Va. Mar. 26, 2009), aff'd, U.S. v. Harris, No. 09-1485, 2009 U.S. App. LEXIS 23394 (4th Cir. W. Va., Oct. 23, 2009); *U.S. v. Stricker*, No. VC09-BE-2423-E, 2010 U.S. Dist. LEXIS 106981 (N.D. Ala. Sept. 30, 2010).

vii Centers for Medicare and Medicaid Services, http://www.cms.gov/Medicare/Coordination-of-Benefits/WorkersCompAgencyServices/wcsetaside.html.

viii *Id.*

vix *Id*.

x *Id*

xi *Id*

xii *Id*

xiii *Id*. athttp://www.cms.gov/Medicare/Coordination-of-Benefits/WorkersCompAgency Services/administeringwcmsas.html.

xiv *Id*.

xv *Id*.

xvi 42 U.S.C. § 1395(y)(b)(2)(B)(iii); *Cox v. Shalala*, 112 F.3d 151, 154 (4th Cir. 1997).

xvii *Id*.

xviii 42 U.S.C. § 1395(y)(b)(2)(B)(ii).

xix 42 U.S.C. § 1395(y)(b)(2)(B)(iii).

xx 42 C.F.R. § 411.24(g) (2012).

xxi 42 U.S.C. § 1395(y)(b)(2)(B)(iii).

xxiii Bio-medical Applications of Tenn., Inc., 656 F.3d at 279.

xxiii *Id*.

xxiv *Id*

xxv *Francis Macfarlane v. Schneider Nat'l Bulk Carriers, Inc.*, 984 So. 2d 185, 190 (4th Cir. 2008).

xxvi *U.S. v. Sosnowski*, 822 F. Supp. 570 (W.D. Wis. 1993); 42 C.F.R. § 411.24(g)-(h).

xxvii *Id*.

xxviii *See e.g., U.S. v. Harris,* No. 5:08CV102, 2009 U.S. Dist. LEXIS 23956 (N.D. W. Va. Mar. 26, 2009).

xxix *See e.g., U.S. v. Stricker*, No. VC09-BE-2423-E, 2010 U.S. Dist. LEXIS 106981 (N.D. Ala. Sept. 30, 2010).

Case Notes

Summaries prepared by Jack Riordan

Fairchild v. SCDOT, Palmer Construction and Palmer, Op. No. 27112 (S.C. April 11, 2012)

This matter arose from an automobile accident on 95 South in March, 2001. Just prior to the accident, a SCDOT dump truck with an attached trailer pulled over to the left side of the road in order to turn around and enter northbound traffic. However, the back of the trailer allegedly protruded at least partly into the left southbound lane. Several cars ahead of the Plaintiff's minivan noticed the SCDOT vehicle and moved to the right. Plaintiff sought to do the same, initially "flashing" her brakes and continuing to brake as she moved to the right. Unfortunately, she was struck from behind by a construction truck causing the Plaintiff's minivan to flip and roll over. Though the SCDOT vehicle was never physically involved, Plaintiff brought suit against SCDOT and the construction truck (Palmer Construction Company) along with its driver, Mr. Palmer. Before trial, Plaintiff apparently entered into a Covenant Not to Sue with SCDOT which was dismissed as a party. Though Plaintiff sought actual and punitive damages, the trial court granted defendant's motion for a directed verdict regarding punitives, stating there was no evidence of reckless conduct by the defendant driver. However, the trial court also concluded that two statutes relating to traffic safety were implicated and gave a charge regarding the same for both 56-5- 1520(a) Traveling Too Fast for Conditions and 56-5-1930(a) Following Too Closely. The jury returned a verdict in favor of the Plaintiff for $720,000. Both parties appealed. The Court of Appeals affirmed in part, reversed in part and remanded. Thereafter, Defendant Palmer's Petition for a Writ of Certiorari was granted.

In its analysis, the Supreme Court addressed four issues:

(1) Punitive Damages. At trial, the court had granted the Defendant's Motion for Directed Verdict as to punitive damages claiming there was no evidence of reckless conduct by the defendant driver. However, having charged the two driving statutes, it was clear that violations of such statute were implicated. Therefore, the Court of Appeals, citing long standing precedent, held that the violation of a statute constitutes negligence per se which is some evidence of recklessness and willfulness and therefore requires submission of the issue of punitive damages to the jury. Justice Beatty's opinion reiterated the same, opining that such should be submitted to a jury when evidence susceptible of more than one reasonable inference exists. Moreover, it is not the duty of the trial court to weigh the testimony in ruling for a motion for directed verdict. The opinion recounted the ample evidence that existed for which recklessness might be found. Therefore, the Supreme Court affirmed the Court of Appeals' decision that the trial court erred in excluding punitive damages. The court did kindly remind that the Defendant would retain the opportunity to challenge the propriety of any resulting punitive damage award and the trial court had the authority to review the award and if found inappropriate or excessive, exercise its discretion to order a new trial or a remitter.

(2) Intervening Negligence of Third Party. Defendant Palmer also alleged Court of Appeals error in determining the trial court should have charged the jury on intervening negligence of third parties. Plaintiff had submitted multiple instructions to remind that the negligence of a third party will not excuse the negligence of the original wrongdoer if such ought to have been foreseen in the exercise of due care. Plaintiff specifically sought an instruction that the aggravation of an injury resulting from the negligent act of a treating physician was part of the immediate and direct damages which naturally flow from the original injury. The Court of Appeals found the trial court's declination of the instruction to be error since the defense had implied that over-medication rather than the original injury was the source of many of the Plaintiff's alleged ailments. Given that the defense had actually called an expert witness to testify regarding Plaintiff's headaches and the use of OxyContin, etc., the Court of Appeals, as well as the Supreme Court, felt that in such circumstance, where the treatment and medical condition were the focus of so much testimony, the trial court's failure to give the requested charge on intervening acts of third parties was error.

(3) Independent Medical Examination. Finally, defendant Palmer contended the Court of Appeals erred in holding that the trial court did not abuse its discretion in denying a Motion for an IME. At trial, following the motion for an IME, Plaintiff did not oppose the IME itself but objected to the specified examining doctor due to his preexisting relationship with the defense. Plaintiff asserted that: this doctor had been named as an expert witness and paid a retainer months before; that the doctor had already

examined Plaintiff's medical records sent to him by the defendant and formed opinions about Plaintiff's conditions prior to the IME; that this doctor was expected to testify as a defense witness and had been referred to the defendant by yet another defense witness retained to question the extent of the Plaintiff's injuries. Given the Plaintiff's objections, the trial court denied Defendant's motion for this specific doctor to perform the IME. However, when an alternative list of physicians was requested, the defense apparently informed the court that they were unwilling to pay for an IME by any other physician. The trial court concluded that, given this election by the defendant, there was no alternative other than to deny the motion in full.

With both parties agreeing that this was a novel issue in the State of South Carolina, close examination of Rule 35 was conducted. The Supreme Court thereafter determined that under the plain language of Rule 35(a) the defendant does not have a unilateral right to select the examining physician; rather, the court alone has the right to make the appointment. Moreover, a "reasonable objection," simply means the reason for the objection must not be frivolous. The court determined that the better rule was that a physician should not be affiliated with either party in order to serve the purposes of Rule 35. Therefore, the Supreme Court found that the Plaintiff's reasonable objection was sufficient basis for the court's discretionary exercise and was amply supported by the record.

Grier, PR of the Estate of Fee v. AMISUB, Op. No. 27118 (S.C. May 2, 2012)

This matter concerns the sufficiency of the affidavit of an expert witness to be filed with the Notice of Intent to File Suit in regard to a medical malpractice allegation.

The deceased was admitted to the Piedmont Medical Center in Rock Hill, South Carolina in January, 2008 for a host of ailments and remained at Piedmont until September of 2008. At that time he was discharged to another facility for future care. However, he was readmitted to Piedmont 12 days later and he remained there until his death in February, 2009.

Prior to bringing the wrongful death and survival action against Piedmont stemming from alleged medical malpractice, the Plaintiff filed the notice of intent to file as required by Section 15-79-125(a). It was claimed that Piedmont's failure to monitor and treat the deceased for bedsores and sepsis contributed to his death. Along with the notice was the affidavit from a nurse with experience treating bedsores and their complications. In the affidavit, the nurse opined, based upon her review of the medical records, that Piedmont breached its duty of care towards the decedent in multiple respects and that these breaches contributed to decedent's death.

The defense filed a Motion to Dismiss, claiming the nurse was ill qualified to render an opinion as to cause of death and therefore the affidavit did not contain a competent causation opinion. The circuit court agreed that the nurse was ill qualified to opine as to cause of death. In additionally holding that the requirements of the tort reform act mandated a showing of proximate cause in the affidavit, defendant's motion to dismiss was granted. While the trial court allowed Plaintiff 30 days to submit a "qualifying" affidavit, Plaintiff failed to do so and instead initiated appeal.

On appeal, while the Plaintiff conceded that the nurse was not qualified to render a causation opinion, it was maintained that the pre-suit affidavit did not require an opinion as to proximate cause. Thereafter, Justice Hearns' opinion applying pure statutory interpretation, found §15-79-125(a) to provide no specifics as to the expert affidavit. The statute instead refers to §15-36-100 but it merely requires: "an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit."

Given that no party alleged the statutes at issue to be ambiguous, the plain language was applied. Given that the term "negligent act or omission" had consistently referenced only a breach of duty and never causation, it was found that no causation was required by the tort claims act affidavit statute. Finding under well established principles of statutory interpretation that the General Assembly did not intend any further requirement, the court determined they were in no position to go further themselves. Read plainly and strictly, §15-79-125(a) simply requires the contemporaneous filing of both the notice and the affidavit - with the affidavit subject to the requirements established by §15-36-100. Given that §15-36-100 merely requires the affidavit to specify at least one negligent act or omission, no causation requirement can be found.

Despite Piedmont's "implicit legislative intent" argument, the Court again reminded that the statute is unambiguous and the Court was therefore confined to what the statute stated, not what it ought to state. Finally, it was found that Piedmont had not shown how the application of the plain language would lead to results so patently absurd it could not have been intended by the General Assembly.

Accordingly, the decision of the circuit court was reversed. The court did remind that the holding in no way would limit the Plaintiff's burden to come forward with expert testimony to support the merits of her claims, if necessary later in the litigation process.

Verdict Reports

Type of Action: Medical Malpractice

Injuries alleged: wrongful death and survival action

Name of Case: Susan B. Carter as Personal Representative of the Estate of Dean W. Carter, deceased v. Upstate Cardiology, P.A., Douglas S. Head, M.D., Arrhythmia Consultants, P.A., and Robert W. Hull, M.D.

Court: (include county): Circuit Court-Greenville County

Case number: 09-CP-23-1700

Name of Judge: The Honorable Lettita H. Verdin

Amount: Defense Verdict

Date of Verdict: March 21, 2012

Attorneys for defendant (and city):
Molly H. Craig, James B. Hood, T. Happel Scurry, Charleston, South Carolina

Description of the case: The Plaintiff filed a medical malpractice action against an electrophysiologist and his practice in connection with the death of a fifty-two year old man following the implantation of an implantable cardioverter defibrillator ("ICD"). The Decedent had a previous history of a myocardial infarction and occluded LAD six years prior to implantation. During a nuclear stress test in 2006, the Decedent experienced ventricular tachycardia and was referred to the electrophysiologist for ICD implantation due to the risk of sudden death from a lethal arrhythmia. Prior to the implantation, the Decedent experienced new onset atrial fibrillation of unknown duration. The Plaintiff alleged the doctor was negligent in failing to treat the atrial fibrillation which caused the heart arrhythmia to continue resulting in twenty shocks from the ICD the day after hospital discharge and ultimately causing the patient's death. To counter the temporal relationship between the implantation and the death, the defense presented expert testimony that the cause of the death was an unpredictable and unpreventable pulmonary embolus related to the Decedent's underlying cardiac problems and not the shocks from the ICD. The case was tried for a week and a half and the jury returned a defense verdict for the electrophysiologist and his practice.

Type of Action: Medical Malpractice

Injuries alleged: wrongful death and survival action

Name of Case: Hope Dangerfield, as Personal Representative of the Estate of Linda Dangerfield, deceased v. James M. Ravenel, M.D. and Charleston Gastroenterology Specialists, PA

Court: (include county): Circuit Court-Charleston County

Case number: 09-CP-10-614

Name of Judge: The Honorable Deadra L. Jefferson

Amount: Defense Verdict

Date of Verdict: May 18, 2012

Attorneys for defendant (and city):
Robert H. Hood, Molly H. Craig, Brian E. Johnson, Charleston, South Carolina

Description of the case: The Estate filed a medical malpractice action against a gastroenterologist and his practice alleging negligence in the failure to diagnose chronic mesenteric ischemia. The decedent was referred to the Defendant gastroenterologist by her primary care physician in December 2004 for complaints of abdominal pain and she treated with the Defendants on six occasions from December 30, 2004 to November 30, 2005. The decedent did not return to the gastroenterologist after November, 2005. The patient subsequently treated with a number of physicians before traveling to an Arizona treatment facility for eating disorders in July, 2006. While a patient at the facility, the decedent had two evaluations at the local hospital and ultimately, on August 16, 2006, a CT angiogram was performed followed by balloon dilation and stent placement. Upon return to South Carolina, the patient was treated at MUSC for surgical revascularization and management of mesenteric ischemia. Multiple operations followed related to complications of the initial surgery and the patient died on April 28, 2007 at MUSC.

The Plaintiff's expert witnesses alleged the Defendants breached the applicable standard of care in failing to order imaging studies directed at the patient's abdominal vasculature between May and November 2005 and, had the condition been diagnosed and treated at that time, the patient most likely would have survived. The Defendants presented testimony that the patient had symptoms of a number of gastrointestinal disorders, including irritable bowel syndrome, and the patient attributed

her weight loss to other stressors. The Defendants also established chronic mesenteric ischemia is a diagnosis of exclusion and the tests ordered during the course of treatment were reasonable and appropriate to rule out more common disorders. Additionally, the patient did not return to the gastroenterologist to notify him she continued to lose weight after November 2005 as instructed. Finally, the Defendants disputed causation presenting testimony that imaging studies, if ordered in 2005, would not have diagnosed chronic mesenteric ischemia given the negative results of the initial CT Scan of the patient in August 2006. The jury returned a verdict for the Defendants on the standard of care after deliberating for approximately three hours.

Type of Action: Federal Employers Liability Act (FELA)/Personal Injury

Injuries alleged:
Burst fracture with permanent disability

Name of Case: Jerry E. Morris v. Norfolk Southern Railway Company

Court: (include county): Buncombe County Superior Court, Asheville, NC

Case number: 2011-CV-2088

Name of Judge: The Honorable Michael E. Powell

Amount: $250,000.00 reduced by Plaintiff's own negligence (pure comparative under federal statute) of 51% to $122,500.00.

Date of Verdict: May 18, 2012

Last Demand: $550,000.00

Last Offer: $150,000.00

Attorneys for defendant (and city):
Christopher M. Kelly, Gallivan, White & Boyd, P.A., Charlotte, North Carolina.

Description of the case:
Plaintiff was run over by a hy-rail gang truck traveling on railroad tracks and suffered a burst fracture (fracture in three places) of the T3 vertebrae, fractured sternum, five broken ribs, broken fibula, shoulder surgery and left knee replacement surgery. Plaintiff alleged permanent disability. Parties stipulated that plaintiff suffered $137,304.00 in past lost wages. Plaintiff asked jury for $1 million for past and future pain and suffering.

Type of Action: Automobile Accident with admitted liability.

Injuries alleged: Torn pectoralis muscle; pain in left shoulder and arm; medical specials of $6,198.00.

Name of Case: Arlene Kirby v. Larry D. Jennings

Court: (include county): Circuit Court – Orangeburg County

Case number: 2010-CP-38-01082

Name of Judge: The Honorable Diane S. Goodstein

Amount: $13,198.00 for Plaintiff

Date of Verdict: February 28, 2012

Last Demand: $24,000.00

Last Offer: $18,000.00

Attorneys for defendant (and city):
Breon C. M. Walker, Gallivan, White & Boyd, P.A., Columbia, South Carolina.

Description of the case: Plaintiff was attempting to enter Canon Bridge Road from her private driveway as Defendant was approaching from the opposite direction. Defendant veered off of the roadway, collided with several mailboxes, and then collided with Plaintiff's vehicle. Defendant testified that he dozed off immediately prior to the collision.

Type of Action: Premises Liability

Injuries alleged: Injuries to back and bruised kidney

Name of Case: Gino McCoy v. Wolfe Company, Inc., and Mazzie Madden

Court: (include county): Circuit Court – Richland County

Case number: 2010-CP-40-07526

Name of Judge:
The Honorable R. Lawton McIntosh

Amount: Defense verdict

Date of Verdict: December 1, 2011

Last Demand: n/a

Last Offer: n/a

Attorneys for defendant (and city): A. Johnston Cox, Gallivan, White & Boyd, P.A., Columbia, South Carolina.

Description of the case: Plaintiff alleged injuries to back and kidneys after allegedly tripping in a sink hole in the backyard of a property managed by Defendant Wolfe Company, Inc.

Type of Action: Motorcycle/Automobile Accident

Injuries alleged: Broken leg that required several surgeries; MRSA infection; $254,126.49 in medical specials; $657,825.00 in lost wages

Name of Case: Troy A. Reason, Sr. v. Spring Valley Air Conditioning, Inc.

Court: (include county): Circuit Court – Richland County

Case number: 2010-CP-40-6555

Name of Judge: The Honorable Alison R. Lee

Amount: Defense verdict

Date of Verdict: January 19, 2012

Last Demand: None

Last Offer: None

Attorneys for defendant (and city):
John T. Lay, Jr., and Breon C. M. Walker, Gallivan, White & Boyd, P.A., Columbia, South Carolina.

Description of the case:
Plaintiff alleged that he was traveling on a motorcycle behind a van owned by Defendant Spring Valley Air Conditioning, Inc., when the van "suddenly without warning" stopped in the middle of Highway 1, without a turn signal or any other warning as to the driver's intention to stop. Plaintiff alleged that he had to slam on brakes to avoid colliding with Defendant's van, and that his motorcycle slid under the rear of Defendant's vehicle, but never made contact with Defendant's vehicle.

Type of Action: Trip and Fall/Premises Liability

Injuries alleged: Head injury

Name of Case: Anetta Van Haagen v. Starbucks

Court: (include county): Circuit Court-Greenville County

Case number: 2010-CP-23-2683

Name of Judge: The Honorable Eddie Welmaker

Amount: Defense Verdict

Date of Verdict: March 20, 2012

Last Demand: $50,000.00

Last Offer: $0

Attorneys for defendant (and city): T. David Rheney, Gallivan, White & Boyd, P.A., Greenville, South Carolina.

Description of the case: Trip and fall. Plaintiff stopped at a Starbucks on Pelham Road while traveling from a trade show in Atlanta to her home in Maryland. After getting out of her car she tripped and feel over a wheel stop in the lane next to her. Plaintiff initially claimed she had a brain injury with various symptoms since the accident. However, in a ruling on a motion in limine, the judge allowed her to say only that she had a head injury since there was not going to be a doctor that would testify that she had a brain injury.

2012

Spring

TRIAL ACADEMY

A great success! Look for a recap in the next issue of *The DefenseLine*

Summer

SUMMER MEETING

July 26-28

The Grove Park Inn

Asheville, NC

Fall

ANNUAL MEETING

November 8-11

The Sanctuary

Kiawah Island, SC

South Carolina Defense Trial Attorneys' Association
1 Windsor Cove, Suite 305
Columbia, SC 29223

ADDRESS SERVICE REQUESTED

Annual Meeting
The Sanctuary at Kiawah Island
November 8-11