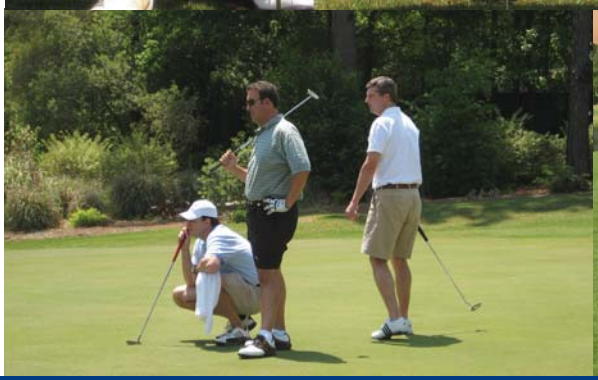
THE DEFENSE LINE

S.C. Defense Trial Attorneys' Association

IN THIS ISSUE:

- Analysis of the Crossman case
- Limits on the duty to warn in SC products liability law
- Judicial profile of the Hon. Henry M. Herlong, Jr.
- PAC Golf Tournament information
- Upcoming SCDTAA events



SPRING 2011
VOLUME 39
ISSUE 1
WWW.SCDTAA.COM

MARK YOUR CALENDARS

SCDTAA PAC Golf Tournament
April 14, 2011
Spring Valley Country Club

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

President's Message

by Gray T. Culbreath

Since my John Boehner moment in Pinehurst, the first four months of my presidency have been a whirlwind. There are so many things that you think you know serving on the Executive Committee but don't realize until you are sitting in the President's chair. The one thing I did know going in is that SCDTAA is made up of many talented and energetic people. One of the first and toughest tasks I had to undertake was appointing members to the Executive Committee to committee positions. Frankly, that is a hard task because we have so many talented people and only so many positions of responsibility. By the time someone has gotten on the Executive Committee, they have demonstrated some measure of initiative and all want to do a good job. Thus far, I have not been disappointed by any of our committees.

The Executive Committee had its first meeting in December to chart a course for the year and discuss planning. We followed that meeting with our retreat as part of the bar convention in January. The South Carolina Bar was very gracious to host us as part of the bar convention on Hilton Head Island. The central theme of this year's retreat was long range planning for the various Committees of the Association. We spent Saturday morning working in small groups to develop desk books for future leaders to use as a reference for "how to" do the work of that committee. I believe the retreat was a success and everyone learned a little more about the work of our committees and ways to make them better.

Why is this important? For one, it is important for the future of the association. As we develop leaders and programs, it is important that resources be preserved and documented so all the best practices and knowledge from our past can be used for our future. It is also important to continue to deliver quality programming to our membership. SCDTAA programs like Trial Academy, Deposition Boot Camps and our Joint and Annual meetings have competition. Many of our members also belong to other organizations and in tight economic times, law firm dollars to attend programs are at a premium. As a result, we have to do everything we can to make sure SCDTAA programming is the first choice of our members resources.

This organization has a long and stored history. I have been privileged to serve the Association for over 11 years with some of the best and brightest defense lawyers not only in this State but in this Country. I am a better lawyer and leader from serving with these men and women. As I think about the future of SCDTAA, it is incumbent on all of us to give our young lawyers the same opportunities that many of us have had through service to the profession. One of the ways to give young lawyers that opportunity is through service and work on our substantive law committees. We have seven substantive law committees: products liability, construction, insurance and torts, law firm management, ADR, medical malpractice and workers compensation. Service on one of these committees is an excellent opportunity for a young lawyer to market and network. If you or lawyers in your office have not signed up for one of these committees please do so. Not only does it benefit your practice but it helps SCDTAA develop future leaders.

So what does the future hold for 2011 with the SCDTAA? We have already had an extremely successful construction law CLE and will follow up with our now not to miss Corporate Counsel CLE, Legislative Reception and PAC golf tournament in Columbia on April 13 and 14. While the legislative reception is something we have done for a number of years, the corporate counsel and the PAC golf tournament are relatively new but have become solid events for the Association.

Finally, many of you know that I have taken an active role in legislative affairs. I have spent a good bit of time already at the State House along with our legislative chair Bill Besley and our lobbyist Jeff Thordahl. This year the issues are much bigger than Tort Reform. Instead, judicial funding is at the forefront. If you follow the news, you know that this is a very difficult budget year and we all hope that any budget cut to the Judicial Branch will not be as stark as expected. Any cut in the judicial budget could very well impact all of our practices particularly if they have to shut court down. While I do not believe that will take place, we will need to support the judicial branch in any way we can to insure there is no shut down.

In the meantime, I look forward to another successful year for the SCDTAA and its members. Get involved and get the lawyers in your firm involved. It is your organization, and its future is bright with everyone's involvement.

Letter From The Editors

by William Brown, Ryan Earhart, and Bre Walker

The *Defense Line* has grown through the years to be an ever increasingly informative and useful publication for members of the South Carolina Defense Trial Attorneys' Association. We are looking forward to the opportunity to continue this tradition and build upon the successes of the past with the *Defense Line*. The *Defense Line* provides a valuable opportunity for our young lawyers to publish and become involved in the SCDTAA. It also provides an opportunity for us all to learn from the wisdom of our most experienced colleagues. We encourage anyone who has a topic of interest to contact us regarding submission of an article for the *Defense Line*. We always want to be informed of the areas or issues which are important to the SCDTAA membership and will seek to provide timely analysis or commentary on these topics.

Just as the *Defense Line* has grown and developed over the years, so have the many different opportunities to learn, serve, and work with fellow defense counsel developed within the SCDTAA. The Annual Meeting and Joint Meeting each year are always well attended and well presented seminars. However, they are only the tip of the iceberg of the opportunities available within the SCDTAA. The Trial Academy presented annually provides a fabulous opportunity for young lawyers to obtain training and experience on their feet, an invaluable learning experience at a time when the opportunities to take a case to trial are fewer than in years past. This Academy is regularly praised by other organizations. In addition to providing guidance from experienced lawyers and judges, the Trial Academy provides the opportunity for young lawyers to interact with one another in preparation for a trial.

The SCDTAA has also recently instituted a program for providing continuing legal education specifically on the art of handling and preparing for a deposition. The deposition "boot camps" have provided an opportunity to both young and more experienced attorneys to focus on the nuances and details necessary for an effective deposition. The SCDTAA has presented two deposition seminars annually in recent times.

The SCDTAA further is building upon its relationships and connections to in-house counsel by providing seminars and events geared towards these in-house counsel. Growing opportunities for relationships with in-house counsel will continue to strengthen our organization.

We welcome your input to make both the *Defense Line* and the SCDTAA, as a whole, stronger. If you would like to be involved in the *Defense Line* publication or any other activity of the SCDTAA, please do not hesitate to contact us. We believe your involvement will be rewarding to you.

William Brown

Ryan Earhart

Bre Walker

Submissions Wanted!

Have news about changes in your firm, promotions, memberships and organizations or community involvement? Please send all firm news to aimee@jee.com in word format.

To submit verdict reports: the form can be found on the SCDTAA website and should be sent in word format to aimee@jee.com

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

SCDTAA Docket

Best Lawyers Names Gibson of Buist Moore Smythe McGee as "Lawyer of the Year"

Buist Moore Smythe McGee P.A.is pleased to announce that *Best Lawyers*®, the peer-review publication for the legal profession, has named C. Allen Gibson, Jr. (Construction) as "Charleston, SC *Best Lawyers*® Lawyer of the Year" for 2011.

Henry B. Smythe, Jr. and William C. Cleveland, III Named to the *2010 Guide to the World's Leading Product Liability Lawyers*

Buist Moore Smythe McGee P.A. is pleased to announce that Henry B. Smythe, Jr. and William C. Cleveland, III have been named to the *2010 Guide to the World's Leading Product Liability Lawyers*. Published biennially by Legal Media Group, the *Guide to the World's Leading Product Liability Lawyers* is considered one of the international legal market's leading guides to top practitioners advising on product liability law.

Buist Moore Smythe McGee P.A. turned 40

On November 16th, 1970, two of the oldest law firms then in Charleston (Buist, Buist, Smythe & Smythe and Moore, Mouzon & McGee) came together to create Buist, Moore, Smythe & McGee. The Firm's founders were Henry Buist, B. Allston Moore, Sr., Augustine T. Smythe, Henry B. Smythe, Sr., B. Allston Moore, Jr., and Joseph H. McGee. They began their partnership and the newly renovated offices at 5 Exchange Street became home to a law practice that combined the litigation and admiralty practice of Messrs. Moore and McGee with the real estate, trust and estates and business law emphasis of the Smythe brothers. Forty years later, the address is the same, but Buist Moore Smythe McGee P.A. has grown to 44 attorneys and 43 legal support staff offering an expanded range of services that include advising and representing clients in the areas of Bankruptcy and Creditors' Rights, Business and Banking, Business and Civil Litigation, Construction, Employment, Health and Administrative Law, and Product Liability in addition to the original practice areas.

C. Allen Gibson, Jr., has joined the Board of Directors at Harbor National Bank.

Mr. Gibson has more than twenty five years of trial experience and is the head of the Firm's Construction and Construction Product Liability practice groups and also practices in Alternative Dispute Resolution, Business Litigation and Civil Litigation. His extensive community service includes former board positions with Trident Technical College Foundation, the Charles Webb Easter Seal Center and he served as Chairman of the Lowcountry S.C. Selection Committee for the Jefferson Scholars Program. Harbor National Bank opened its doors in February 2006 and has three branches: downtown Charleston, West Ashley and Mount Pleasant. The bank's business strengths come from local decision making and strong local relationships already in place in the community.

Brian A. Comer of Collins & Lacy Selected to Serve as SCDTAA Products Liability Co-Chair

Collins & Lacy, P.C. is pleased to announce Brian Comer has been selected to serve as Co-Chair of the Products Liability Substantive Law Committee for the South Carolina Defense Trial Attorneys' Association (SCDTAA). As Co-Chair of the Products Liability Substantive Law Committee, Comer will be responsible for providing current information to members about developments in South Carolina products liability law, as well as planning educational programs about this area of the law for SCDTAA's meetings throughout the year. Comer is Of Counsel to Collins & Lacy, practicing in the areas of products liability and professional liability. Comer is also the founder and contributing author of "The South Carolina Products Liability Law" blog at http://scproductsliabilitylaw.blogspot.com, which provides current information on trends in South Carolina products liability law for individuals and product manufacturers.

Carlock, Copeland & Stair elects two new partners in Charleston

Carlock, Copeland & Stair, LLP recently announced that it has elected Of Counsel attorney Sarah E. Wetmore and Associate Kathy A. Carlsten to join the Firm's partnership in their Charleston office. Sarah E. Wetmore's practice focuses on general civil litigation, at both the state and appellate level. She is currently the President of the Charleston Lawyers Club, an organization celebrating fifty years of fostering events that focus on the camaraderie of the local bar. Kathy A. Carlsten concentrates on professional liability defense and transportation law. She began her career as a Law Clerk to the Honorable A. Victor Rawl, Judge for the Ninth Circuit. Kathy also served as a prosecutor in the Ninth Circuit Solicitor's Office in Charleston, South Carolina for two years.

Continued on next page

Member News cont.

Collins & Lacy P.C. Named to the 2010 Best Law Firms List

Collins & Lacy, P.C. has received a first-tier ranking in the inaugural Best Law Firms 2010 list, released by the U.S. News Media Group and Best Lawyers. The firm received a first tier ranking in numerous practice areas for both the Columbia and Greenville metropolitan areas: **Columbia, S.C.**: Banking and Finance Law, Criminal Defense: White-Collar, General Commercial Litigation, Product Liability Litigation – Defendants, Workers' Compensation Law – Employers. **Greenville, S.C.**: Alternative Dispute Resolution, Workers Compensation Law – Employers. The mission of Best Law Firms is to help guide referring lawyers and clients form the country's largest companies. The rankings include 30,322 rankings of 8,782 law firms in 81 major practice areas.

Curtis Ott elected secretary of the SCDTAA

At the Annual Meeting of the South Carolina Defense Trial Attorneys' Association, Curtis L. Ott, a shareholder with the firm of Turner Padget Graham & Laney, P.A., was elected to serve as Secretary of the Executive Committee. Curtis has served on the Executive Committee since 2003. Curtis is a resident in the Columbia office and practices in the areas of product liability, personal injury, trucking litigation and appellate matters. He is a member of the International Association of Defense Counsel, Defense Research Institute, Trucking Industry Defense Association and the South Carolina Trucking Association.

Danny Crowe Named ADR Lawyer of the Year

Turner Padget is proud to announce that Danny C. Crowe has been named the "Columbia, SC *Best Lawyers* Alternative Dispute Resolution Lawyer of the Year" for 2011. Danny is a shareholder and has served as a mediator and arbitrator since 1991. He is certified as a circuit court mediator and arbitrator by the South Carolina Supreme Court , and as a mediator by the U.S. District Court for South Carolina.

Elmore & Wall listed in *BEST LAWYERS* and *BEST LAW FIRM IN AMERICA*

Elmore & Wall has announced that four founding shareholders have been selected for inclusion in the 2011 edition of The Best Lawyers in America. Frank Elmore was selected in the areas of Construction Law and Commercial Litigation. Elmore, of the firm's Greenville, South Carolina office, limits his practice to construction and surety matters. Andy Goldsmith was selected in the area of Construction Law. Mark Wall and Morgan Templeton, of the firm's Charleston office, were both selected in the area of Insurance Law. Wall's practice has primarily involved complex litigation, including the defense of medical malpractice claims, product liability claims (including asbestos and tobacco), and construction defects. Templeton practices in the areas of insurance coverage, including bad faith litigation, construction litigation, products liability, class action defense, and other complicated litigation matters.

Templeton joins Council of Litigation Management

Elmore & Wall, P.A., is pleased to announce that Morgan S. Templeton has been invited to join the prestigious Council on Litigation Management. The Council is a nonpartisan alliance comprised of thousands of insurance company, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals, and attorneys. Through education and collaboration the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

Walker recognized as Emerging Legal Leaders by *South Carolina Lawyers Weekly*

South Carolina Lawyers Weekly has named Ellis Lawhorne attorney as a finalist in the first annual Emerging Legal Leaders Awards. Breon C. M. Walker is among 18 attorneys from across the state selected as finalists. The winners will be announced at a gala reception January 27 at the Columbia Metropolitan Convention Center. The Emerging Legal Leaders Awards recognize attorneys who have been licensed for ten years or less and who are making a difference in the legal profession and in their communities.

Walker Named to Executive Committee of the South Carolina Defense Trial Attorneys' Association

Ellis Lawhorne's Breon C. M. Walker has been named to the Executive Committee of the South Carolina Defense Trial Attorneys' Association, which is composed of attorneys from across the state. Walker earned her Bachelor of Science degree in Business Administration from the University of South Carolina Honors College and her juris doctor from Emory University School of Law in 2003.

Ellis Lawhorne ranked among nation's *Best Law Firms* by *U.S. News & World Report*

Ellis Lawhorne is pleased to announce it was recently recognized by *U.S. News & World Report* and *Best Lawyers in America®* in the inaugural issue of *2010 Best Law Firms*. It received a metropolitan first-tier ranking for its work in general commercial litigation, product liability litigation for defendants, real estate law, trusts and estates law, and workers' compensation law for claimants and employers. The announcement comes on the heels of 14 of Ellis Lawhorne's shareholders being selected to the 2011 edition of *Best Lawyers in America®* in August.

Lay selected as *Greater Columbia Business Monthly's* 2010 Legal Elite

John T. Lay, Jr., shareholder at Ellis Lawhorne, has been selected by their peers as *Greater Columbia Business Monthly* magazine's 2010 Legal Elite. *Greater Columbia Business Monthly* invited Midlands attorneys to nominate the attorney who they consider the best in his or her practice area. There were eight different practice categories. Lay was selected for the Personal Injury category. The top ten attorneys in each category were selected for the Legal Elite listing featured in the October 2010 issue.

Gallivan, White & Boyd's Products Liability blog chosen one of *ABA JOURNAL'S BLAWG 100*

Editors of the *ABA Journal* announced they have selected *Abnormal Use: An Unreasonably Dangerous Products Liability Blog*, the official legal blog of Greenville-based Gallivan, White & Boyd, P.A., as one of the *ABA Journal Blawg 100.* The *ABA Journal* describes its Blawg 100 as "this year's 100 best legal blogs." *Abnormal Use* (www.abnormaluse.com) is authored by partners Phillip E. Reeves and Stephanie G. Flynn with contributing authors: Kevin Couch, Jim Dedman, Mary Giorgi, Laura Simons and Frances Zacher. *Abnormal Use* features posts each business day regarding products liability cases and litigation in addition to interviews with law professors and practitioners.

Gallivan, White & Boyd, P.A. ranked a *Best Law Firm by US NEWS and BEST LAWYERS*

Gallivan, White & Boyd, P.A. announced its ranking as a *Best Law Firm by U.S. News and Best Lawyers* in its inaugural edition of this listing. GWB is ranked in Tier 1 of the Metropolitan Rankings for Greenville, South Carolina in seven distinct practice areas: Alternative Dispute Resolution, General Commercial Litigation, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, Railroad Law, Real Estate Law, Transportation Law and Workers' Compensation Law – Employers.

Gallivan, White & Boyd, P.A. attorney named to *Super Lawyers Corporate Counsel*

Gallivan, White & Boyd, P.A. announced that Deborah Casey Brown has been selected for inclusion in *Super Lawyers, Corporate Counsel Edition* in the practice area of Workers' Compensation. Super Lawyers is a listing of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. *Super Lawyers* selects attorneys based on peer nominations and evaluations combined with third party research. Brown, a Shareholder with Gallivan, White & Boyd, P.A., has over 20 years of experience representing management in employment and workers' compensation cases and is a Certified Specialist in Employment Law. In addition to her law practice, she currently serves as the Chair of the Financial Stability Council for the United Way of Greenville County where she has been a volunteer for 20 years. Brown received her J.D. from the University of South Carolina School of Law in 1986.

Gallivan, White & Boyd, P.A. announces election of new partners

Gallivan, White & Boyd announces the election of James M. Dedman, IV as a Partner. Dedman joined the firm in 2006 having previously practiced in Southeast Texas. He practices in the areas of tort, products liability, and transportation litigation and was integral in the creation and success of the firm's award-winning Products Liability Blog, *Abnormal Use*. He is a member of the Greenville County Bar Association, the South Carolina Bar, the American Bar Association, the Defense Research Institute and the South Carolina Defense Trial Attorneys' Association. Dedman received his B.S. from the University of Texas in 1998 and his J.D. from the Baylor University School of Law in 2002.

Gallivan, White & Boyd, P.A. announces associate hire

Gallivan, White & Boyd, P.A. announced that Nicholas A. Farr has joined the firm as an Associate. Farr received his Bachelor of Science degree, *magna cum laude*, from Clemson University in 2003 and received his Masters in Comparative Religious Ethics from Wake Forest University in 2007. While at Clemson University, Farr was a member of the National Society of Collegiate Scholars and the Golden Key International Honor Society. In 2010, he received his J.D. from the University of North Carolina School of Law where he was a member of the Trial Law Academy and participated in the Holderness Moot Court Bench. Farr currently practices in GWB's Insurance Practices group focusing on tort and personal injury litigation and insurance coverage.

Haynsworth Sinkler Boyd ranked among *Best Law Firms by U.S. News & World Report*

Haynsworth Sinkler Boyd, P.A., has been recognized as the law firm with the most first-tier rankings in South Carolina, according to *U.S. News Media Group and Best Lawyers* that released its 2010 Best Law Firms rankings. The rankings, which are presented in tiers both nationally and by metropolitan area or by state included 30,322 rankings of 8,782 law firms in over 80 major practice areas. Those Haynsworth Sinkler Boyd practice areas that excelled include the following Tier 1 in metropolitan rankings: Charleston: Admiralty & Maritime Law, Alternative Dispute Resolution, Construction Law, Corporate Law, General Commercial Litigation, Health Care Law, Medical Malpractice Law – Defendants, Public Finance Law, Real Estate Law. Columbia: Antitrust Law, Banking and Finance Law, Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Corporate Law,

Continued on next page

General Commercial Litigation, Insurance Law, Non-Profit/Charities Law, Project Finance Law, Public Finance Law, Real Estate Law, Securities / Capital Markets Law, Tax Law, Trusts & Estates Law. Florence: Tax Law, Trusts & Estates Law. Greenville: Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Construction Law, Corporate Law, Employee Benefits (ERISA) Law, General Commercial Litigation, Health Care Law, Medical Malpractice Law – Defendants, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, Professional Malpractice Law – Defendants, Public Finance Law, Real Estate Law, Trusts & Estates Law.

Haynsworth Sinkler Boyd names new shareholders

Haynsworth Sinkler Boyd, P.A., is pleased to announce that Courtney C. Atkinson, and Christopher B. Major have been named shareholders. Courtney C. Atkinson focuses on employment law and commercial defense litigation. She joined Haynsworth Sinkler Boyd's Greenville office in 2003. A Greenville native, Atkinson was named one of the "Best and Brightest 35 and Under" by *Greenville Magazine* (2006). She received her J.D., in 2003 from Washington and Lee University, and graduated *cum laude* from the University of Georgia in 2000, with a B.A. degree in political science. Christopher B. (Chris) Major, joined the Firm's Greenville office in 2006. He is admitted to practice in both North Carolina and South Carolina as well as the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Federal Circuit. The Greenville native regularly represents clients in the transportation and construction industries. Prior to joining the Firm, Major served as a law clerk to The Honorable G. Ross Anderson, Jr., U.S. District Judge for the District of South Carolina, and practiced law in Charlotte, North Carolina. A 2003 *magna cum laude* graduate of the University of South Carolina School of Law, Major was a staff member of the South Carolina Law Review during law school. He graduated *magna cum laude* from the University of South Carolina Honors College in 2000, with a B.A., in history.

Sean Keefer Publishes First Novel

Sean Keefer announces the publication of his debut novel, The Trust. Set primarily in the lowcountry of South Carolina, The Trust blends elements of traditional southern literary fiction, suspense and mystery. For attorney, Noah Parks, the probate of a will should be a simple task. And, it was not unusual that the deceased was unknown to Parks. Though Parks has never heard of Leonardo Xavier Cross, Cross' Will and Last Testament specifically directs that Parks provide legal representation for the estate. As payment for those legal services, Parks is to receive the contents of a safe deposit box. Neither the contents nor even the existence of the safe deposit box were known to Cross' relatives prior to reading the will's instructions. Intrigued, Parks agrees to undertake probate of the estate. With each day, his role becomes more complicated as he is forced into the shocking and deceptive Cross family history, setting the stage for dangerous encounters Parks can only hope to survive. The Trust is available through Amazon or directly from Old Line Publishing at http://www.oldlinepublishingllc.com The book is also currently available for Nook through Barnes & Noble and will soon be available for Kindle e-readers. In addition to writing, Mr. Keefer is a practicing attorney in Charleston, South Carolina, with the firm of Keefer & Keefer, LLC.

Erin M. Farrell Selected for Childrens Law Committee

McKay, Cauthen, Settana & Stubley, P.A. ("The McKay Firm") is pleased to announce that Erin M. Farrell has been selected by the South Carolina Bar Association to serve on the Childrens Law Committee. Erin is a 2007 graduate of the University of South Carolina, School of Law. Erin practices in the areas of Civil Litigation and Insurance Defense, Trucking and Transportation Litigation, Civil Rights and Section 1983 Defense and Habeas Corpus Defense. The Childrens Law Committee is made up of members of the South Carolina Bar Association and addresses issues related to child welfare and the effect of the legal system on children. The Committee also works closely with the Children's Law Center at the University of South Carolina.

McKay Cauthen Settana & Stubley, P.A. ranked among *Best Law Firms by U.S. News & World Report*

McKay Cauthen Settana & Stubley, P.A., announces that it has been selected by *Best Lawyers in America® and U.S. News & World Reports* for inclusion in the Inaugural Edition of the *2011 Best Law Firms in America®* for its practice in the area of workers' compensation defense. In addition, Marcy J. Lamar has again been selected for inclusion in the *2011 Edition of Best Lawyers in America®*, for her practice in the area of workers' compensation defense.

Douglas McKay, Jr. honored by South Carolina Bar Foundation

McKay, Cauthen, Settana & Stubley, P.A. is pleased to announce that the late Douglas McKay, Jr., the firm's founder, has been selected as one of the SC Bar Foundation's Memory Hold the Door honorees. Douglas McKay, Jr., began practicing law in 1941. "Mr. Doug," as he was known by his friends and colleagues, retired at the age of 86 and passed away in 2008. Among his many accomplishments, he was the Chairman of the Governors Advisory Committee on Improvement of Worker's Compensation Laws and was a key contributor in writing the South Carolina Workers' Compensation Act. Douglas McKay, Jr. was the first attorney to receive the Worthy Adversary Award given by the American Trial Lawyers' Association. The Memory Hold the Door program honors deceased lawyers and judges who have provided distinguished service to the public and the South Carolina Bar.

McAngus Goudelock & Courie Opens New Headquarters in Columbia, S.C.

McAngus Goudelock & Courie opened its new headquarters in Columbia on Monday, November 15. The firm has moved from 700 Gervais Street in the Vista to two floors in the Meridian Building at 1320 Main Street. MG&C worked with F3 Concepts to choose earth-friendly workstations made by Evolve Furniture Group. MG&C's new office is designed to create more efficient workflow and to allow more collaborative work and interaction among employees with expanded break areas and small conference areas throughout the space.

McAngus Goudelock & Courie Ranked in 2010 Best Law Firms List

McAngus Goudelock & Courie is ranked in U.S. News Media Group and Best Lawyers' inaugural Best Law Firms list as one of the top law firms in South Carolina. The firm received four first tier and three second tier rankings, placing it among the top law firms in each city. The firm received first tier rankings in: Employee Benefits Law – Charleston, S.C., Insurance Law – Greenville, S.C. , Banking and Finance Law – Columbia, S.C. , Workers' Compensation Law – Columbia, S.C. The firm received second tier rankings in: Workers' Compensation Law – Charleston, S.C. , Personal Injury Law – Greenville, S.C.

John C. Bradley Jr. Joins MG&C's Columbia office

McAngus Goudelock & Courie is pleased to announce that John C. Bradley Jr. has joined the firm's Columbia, S.C. office. Mr. Bradley's practice focuses on professional liability, general insurance defense, premises liability and construction litigation. He graduated from University of South Carolina *magna cum laude* with a bachelor's degree in history, and he received his law degree from the University of South Carolina School of Law. He began his career as a law clerk for South Carolina Circuit Court Judge Dan F. Laney before moving into private practice. Mr. Bradley is currently an instructor at Virginia College teaching courses in Medical Law and Ethics and Pharmacy Law and Ethics. He also serves as the president of Friends of South Carolina Libraries and on the Friends of the Richland County Public Library Board of Directors. He is a member of the American Bar Association, South Carolina Bar Association, Richland County Bar Association, South Carolina Defense Trial Attorneys' Association and the Defense Research Institute.

MG&C Welcomes Brittany Lozanne to the Columbia Office

McAngus Goudelock & Courie is pleased to announce that attorney Brittany Lozanne has joined the firm's Columbia office. Mrs. Lozanne's practice focuses on workers' compensation. She received her law degree and a certificate in health law from the University of Pittsburgh School of Law, as well as a master's of public administration from the University of Pittsburgh's Graduate School of Public and International Affairs. She also holds a bachelor's degree in communications and political science from the University of Pittsburgh.

McAngus Goudelock & Courie Elects New Members

McAngus Goudelock & Courie is pleased to announce that attorneys Stuart Moore, Charles O. "Bo" Williams and Mikell Wyman have been elected as members of the firm. Stuart Moore received his law degree from the University of South Carolina School of Law. He practices workers' compensation defense in the firm's Columbia, S.C. office. He joined MG&C in 2004. Charles O. "Bo" Williams received his law degree from the University of South Carolina School of Law. His practice focuses on civil litigation and construction defect litigation in the firm's Columbia, S.C. office. He joined MG&C in 2002. Mikell Wyman received his law degree from the University of South Carolina School of Law. He practices workers' compensation defense in the firm's Charleston, S.C. office. He joined MG&C in 2005.

Anthony Livoti accepted into the International Association of Defense Counsel

Murphy and Grantland announces that shareholder Anthony Livoti has been accepted into membership of the International Association of Defense Counsel. The IADC membership is composed of prominent and leading corporate and insurance attorneys throughout the world and membership is by invitation only. IADC members are distinguished partners in large and small law firms, senior counsel in corporate law departments and corporate and insurance executives throughout the world.

Nexsen Pruet Moves Up On List of Largest Law Firms in America

Nexsen Pruet has moved up on the *The National Law Journal's* list of the 250 largest law firms in America. Results from publication's 2010 survey were released on Monday. Nexsen Pruet is now listed as the 217th largest firm in the country - up from 233rd in 2009. Each year the publication surveys approximately 300 U.S. law firms. This year is the second consecutive year where the overall number of attorneys declined. Even still, Nexsen Pruet added four attorneys to its headcount for a total of 178 practicing at its eight office locations across North and South Carolina. Nexsen Pruet made *The National Law Journal* list previously in 2004, 2005, 2006, 2008 and 2009.

Nexsen Pruet ranked among nation's *Best Law Firms* by *U.S. News & World Report*

Nexsen Pruet is proud to announce the firm has earned thirty-seven first-tier rankings in the inaugural edition of *U.S. News – Best Lawyers*® "Best Law Firms" rankings. The firm also earned seven second and third tier rankings. The rankings are for various practice areas in Charleston, Columbia, and Greenville, SC as well as Charlotte and Greensboro, NC. For Charleston, the firm earned six first-tier

Continued on next page

rankings, in the areas of: Corporate Law, Employment Law – Management, General Commercial Litigation, Insurance Law, Intellectual Property Law, Real Estate Law. For Columbia, the firm earned seventeen first-tier rankings, in the areas of: Banking and Finance Law, Bankruptcy and Creditor Debtor Rights /Insolvency and Reorganization Law, Construction Law, Corporate Law, Employee Benefits (ERISA) Law, Employment Law – Management, Environmental Law, Family Law, Health Care Law, Labor Law – Management, Mergers & Acquisitions Law, Public Finance Law, Real Estate Law, Securities / Capital Markets Law, Tax Law, Trusts & Estates Law, Workers' Compensation Law – Employers. For Greenville, the firm earned eight first-tier rankings, in the areas of: Alternative Dispute Resolution, Criminal Defense: White-Collar, Employment Law – Management, Environmental Law, Intellectual Property Law, Labor Law – Management, Real Estate Law, Workers' Compensation Law – Employers.

Nexsen Pruet attorney in the *Greater Columbia Business Monthly* magazine's "Legal Elite"

Nexsen Pruet is pleased to announce that one of its attorney, Angus Macaulay, has been listed in the *Greater Columbia Business Monthly* magazine's "Legal Elite" for 2010. The listings appear in the October 1st edition. *The Greater Columbia Business Monthly* invited lawyers from across the Midlands to nominate attorneys who work in areas of the law: Criminal Law; Labor and Employment; Taxes, Estates & Trusts; Business Law; Family Law; Bankruptcy & Creditors' Rights; Real Estate Law; and Personal Injury. Angus Macaulay was listed in the area of Labor and Employment.

ichard W. Riley receives South Carolina Bar Foundation's 2010 DuRant Distinguished Public Service Award

Richard W. Riley, who has served notable terms as South Carolina governor and U.S. Secretary of Education, receive the South Carolina Bar Foundation's 2010 DuRant Distinguished Public Service Award for meritorious service to the law and the community. The annual recognition is the most prestigious statewide award members of the Bar can bestow on a fellow attorney. Mr. Riley is a senior partner of Nelson Mullins Riley & Scarborough LLP and its affiliate, Education Counsel LLC. As a former U.S. Secretary of Education (1993-2001) and a former Governor of South Carolina (1979-1987), he remains an ambassador for improving education in the state, nation and abroad.

Nelson Mullins Tops 2010 National Product Liability Group Rankings

Crucial victories in some of the nation's biggest cases has resulted in Nelson Mullins Riley & Scarborough LLP being placed at the top of the 2010 product liability group rankings of Portfolio Media, online publishers of Law 360 newswire for business lawyers. The Nelson Mullins Product Liability, Counseling and Reporting Practice Group currently serves as national and regional counsel for numerous companies in various industries across the United States. In mid-November, Law360 solicited submissions from more than 300 law firms for the series and received more than 400 responses across 15 practice areas. A team of Law360 editors culled the submissions, highlighting product liability groups for their achievements over the last year. According to Law 360, the firm was entrusted by major corporations with much on the line…and proved their mettle by successfully navigating the complex legal proceedings from trial courts and settlement rooms to top appellate venues."

Nelson Mullins Rank as a *US News, Best Lawyers* Top Tier Firm

U.S. News Media Group and Best Lawyers have listed Nelson Mullins Riley & Scarborough LLP as a top tier law firm in 24 practice areas and eight metropolitan areas in the inaugural *2010 Best Law Firms* rankings. The rankings will be published in a standalone guide called The Best Law Firms. The practice areas in South Carolina are: Charleston: Environmental Law, Health Care Law, Insurance Law, Product Liability Litigation – Defendants, Tax Law, Water Law. Columbia: Administrative / Regulatory Law, Banking and Finance Law, Bankruptcy and Creditor Debtor Rights /Insolvency and Reorganization, Employee Benefits (ERISA) Law, Franchise Law, General Commercial Litigation, Government Relations Practice, Health Care Law, Insurance Law, Intellectual Property Law, Mass Tort Litigation / Class Actions – Defendants, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, Tax Law, Trusts & Estates Law. Greenville: Family Law, Insurance Law, Labor Law – Management.

Nelson Mullins Riley & Scarborough and Boston-based Lahive & Cockfield Join Forces

Lahive & Cockfield, a top-ranked Boston intellectual property law firm, has combed with Nelson Mullins Riley & Scarborough, a large East Coast law firm known nationally for its technology and science-related litigation. The move expands services for clients of both firms, increases the combined intellectual property team to more than 70 attorneys and technical specialists, and will double the size of the Nelson Mullins Boston office.

Harry F. Cato has contracted with Nelson Mullins Riley & Scarborough LLP to advise the firm's government relations clients

Former South Carolina House of Representatives Speaker Pro Tem Harry F. Cato has contracted with Nelson Mullins Riley & Scarborough LLP to advise the firm's government relations clients and expand its practice. Mr. Cato served in the S.C. House from 1991 through November 2010, representing District 17 in Greenville County. The Nelson Mullins government practice guides clients through the design and implementation of government relations strategies before state governments and in Washington, DC.

The firm has registered lobbyists in South Carolina, Georgia, North Carolina, Massachusetts and Washington, DC. Mr. Cato will not engage in lobbying during his initial year out of public office.

Nelson Mullins Riley & Scarborough Columbia partners David E. Dukes, Stuart M. Andrews, and George S. Bailey named 2011 Columbia, S.C. Best Lawyers

Best Lawyers, a legal peer-review publication, has named Nelson Mullins Riley & Scarborough Columbia partners David E. Dukes, Stuart M. Andrews, and George S. Bailey as the 2011 Columbia, S.C. Best Lawyers in their respective practices: Mr. Dukes, managing partner of the Firm, Personal Injury Litigator of the Year; Mr. Andrews, Health Care Lawyer of the Year; and Mr. Bailey, Tax Lawyer of the Year. *Best Lawyers* designates "Lawyers of the Year" in high-profile legal specialties in large legal communities. Only a single lawyer in each specialty in each community is being honored as the "Lawyer of the Year."

Companies name Nelson Mullins Riley & Scarborough as a "2011 Go-To Law Firm for the Top 500 Companies"

Three companies have named Nelson Mullins Riley & Scarborough as a "2011 Go-To Law Firm for the Top 500 Companies" in litigation and intellectual property in surveys conducted by American Legal Media. Danaher Corporation named Nelson Mullins for Intellectual Property work as well as Litigation, while Norfolk Southern and Whirlpool named the Firm for Litigation. The Firm will be featured in the eighth annual edition of Corporate Counsel's reference guide, In-House Law Departments at the Top 500 Companies. Nominees are chosen from a national survey of general counsel from the Top 500 companies along with in-depth research and analysis of various public filings and resources. The surveys ask which outside law firms they use and for which practice areas.

Steve Morrison honored with Civic Star Award

The Richland County Bar Association has honored Steve Morrison, a partner with Nelson Mullins Riley & Scarborough LLP, with its prestigious Civic Star Award. The honor recognizes Mr. Morrison's distinguished and meritorious service to the legal profession and to the public. Mr. Morrison has worked with and is a former chairman of the Richland County Public Defender Corp. and has served as chairman of the board of the Columbia Urban League. He serves on the board of Benedict College and was instrumental in helping Allen University secure the funding for its new state-of-the-art dormitory on Harden Street. He also has served on the board of that historically black university. Mr. Morrison also has served in leadership roles for the Columbia Museum of Art and the Historic Columbia Foundation.

Nelson Mullins Riley & Scarborough LLP elects attorneys to partnership

The partners of Nelson Mullins Riley & Scarborough LLP have elected Columbia attorneys Jody A. Bedenbaugh and Alana Odom Williams to partnership. The two were formerly associates. Also, associate Paul T. Collins was promoted to "of counsel." Mr. Bedenbaugh practices in the areas of banking, creditors' rights, and bankruptcy. Ms. Williams practices in the areas of business litigation, complex consumer and financial services litigation, and insurance coverage and bad faith claims. Mr. Collins practices in the areas of civil litigation, insurance litigation, product liability, pharmaceutical and medical device litigation, construction litigation, breach of warranty, and dealer litigation.

Derek A. Shoemake joined Nelson Mullins Riley & Scarborough LLP as an associate

Derek A. Shoemake has joined Nelson Mullins Riley & Scarborough LLP as an associate in its Columbia office. Mr. Shoemake focuses his practice on product liability, business litigation, and electronic discovery. Prior to joining the Firm, Mr. Shoemake was a law clerk for U.S. District Judge G. Ross Anderson, Jr., of South Carolina. Mr. Shoemake also worked as an editor for The Item, a newspaper in Sumter, S.C., as well as a defense contractor for the General Dynamics Corporation in Norfolk, Va. Mr. Shoemake served in the United States Marine Corps from 1997-2001 as a combat correspondent. He was named Leatherneck magazine's Journalist of the Year, during his time in service. Mr. Shoemake also received several decorations, including five Navy and Marine Corps Achievement Medals. In 2009, Mr. Shoemake earned his Juris Doctor, *magna cum laude*, from the University of South Carolina School of Law. In 2004, Derek earned his Bachelor of Science, magna cum laude, in Political Science from Old Dominion University in Norfolk, Va.

Hawkins appointed vice chair of the Climate Change, Sustainable Development, and Ecosystems Committee of the ABA's Section of Environment, Energy, and Resources

Bernie Hawkins, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, has been appointed as a vice chair of the Climate Change, Sustainable Development, and Ecosystems Committee of the American Bar Association's Section of Environment, Energy, and Resources. The section is a forum for lawyers working in areas related to the environment, natural resources, and energy. The section provides members with opportunities to enhance professional skills, stay on top of developments, and to participate in dialogue in these substantive areas. It represents more than 10,000 members with a wide range of professional interests.

Continued on next page

Member News cont.

Macaulay Elected President-Elect of the SC Bar and Waring to Serve as State Bar Delegate

Nexsen Pruet is proud to announce that Angus Macaulay has been elected President-Elect of the South Carolina Bar. Brad Waring has been selected to serve as State Bar Delegate to the American Bar Association. Macaulay and Waring will be sworn into their positions on May 5th, 2011. The Bar's nominating Committee made its selections in September and the picks became official when nominations closed on January 15th. Prior to being President-elect, Macaulay served the SC Bar as Treasurer, a member of the Board of Governors and President of the Young Lawyers Division. Macaulay earned his B.A. in English from Sewanee: University of the South and law degree from University of South Carolina School of Law. Waring is former President of the SC Bar. Waring earned his undergraduate and law degrees from the University of South Carolina School of Law.

William A. Coates was inducted as a Fellow of the American College of Trial Lawyers

Roe Cassidy Coates & Price, P.A. is pleased to announce that founding shareholder William A. Coates was inducted as a Fellow of the American College of Trial Lawyers at the College's 2010 Annual Meeting in Washington, D.C. Fellowship in the College is extended by invitation only and after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality. Lawyers must have a minimum of fifteen years trial experience before they can be considered for Fellowship, and membership in the College cannot exceed one percent of the total population in any state. Qualified lawyers are called to Fellowship in the College from all branches of trial practice.

Jared Garraux selected a 2011 Emerging Legal Leader Finalist by South Carolina Lawyers Weekly

Richardson, Plowden & Robinson, P.A. is pleased to announce that attorney Jared H. Garraux was selected as one of 18 finalists for *South Carolina Lawyers Weekly's* 2011 Emerging Legal Leaders. The Emerging Legal Leaders recognition is the first annual awards event hosted by *South Carolina Lawyers Weekly* to honor young lawyers. The Emerging Legal Leaders awards seek to highlight and honor those attorneys that have been licensed for ten years or less and work on a daily basis to make a difference both in and out of their legal profession. Finalists were selected based on their leadership, professional involvement, and community outreach. Garraux is a member of Richardson Plowden's Construction Law Practice Group..

Richardson Plowden names Summers as a shareholder, Butler as equity shareholder

Richardson, Plowden & Robinson, P.A. is pleased to announce that Mason A. Summers was recently named a shareholder in the firm and Drew H. Butler was named an equity shareholder in the firm. Summers joined Richardson Plowden in 2005 and Butler joined the firm in 2002. Summers is a member of Richardson Plowden's Litigation Practice Group and focuses his practice on appellate advocacy, insurance coverage, and environmental and regulatory law. Prior to joining Richardson Plowden, Summers served as staff counsel in the Office of General Counsel for the South Carolina Department of Health and Environmental Control (DHEC). He earned his juris doctor from the University of South Carolina School of Law. Butler is also a member of the firm's Litigation Practice Group. He focuses his litigation practice on construction defects, products liability, premises liability, personal injury, and insurance defense cases. Butler earned his juris doctor in 2002 from Pennsylvania State University Dickinson School of Law.

Richardson Plowden Gives a Holiday Gift that Warms the Heart

For Richardson, Plowden & Robinson, P.A., holiday gifts were be a little different this year. No holiday baskets or edible treats. Instead, the Columbia-based law firm did something a little more heartfelt—making a charitable contribution to the Wounded Warrior Project. The Wounded Warrior Project is a non-profit organization that honors and empowers wounded soldiers. The organization also provides physical and emotional support to wounded veterans in an effort to get them back to good health. The topic of supporting troops hits particularly close to home for the Richardson Plowden family. Recently, the attorneys and staff gathered for a special farewell breakfast for attorney Eugene Matthews. Matthews, a commander in the United States Navy Reserve, was deployed to Iraq for a one-year tour on November 19. Matthews stated it was hard to leave, especially before the holiday season.

Newman joins American Mensa and the Ronald McDonald House Charities Advisory Board

Richardson, Plowden & Robinson, P.A. is pleased to announce that attorney Jocelyn Newman has recently been selected as a member of American Mensa and of the Friends Advisory Board of the Ronald McDonald House Charities of Columbia. American Mensa is a national organization for professional development. As a member, Newman will be an active participant in the organization's special interest groups including community service outreach and working with gifted youth. As a member of the Ronald McDonald House Charities Advisory Board, Newman will work with the board to enhance programs and services. Newman is a member of the Richardson Plowden Litigation Practice Group.

Turner Padget Recognized as Leading Litigation Firm by Benchmark Litigation

Turner Padget Graham & Laney, P.A. is pleased to

announce that the firm has been recognized in the 2011 edition of *Benchmark Litigation: A Definitive Guide to America's Leading Litigation Firms and Attorneys* as a recommended litigation firm in South Carolina. This marks the second consecutive year in which Turner Padget has earned Benchmark's recommendation. In addition, the publication recognizes six of the firm's shareholders as "Local Litigation Stars," R. Wayne Byrd (Myrtle Beach), Edward W. Laney IV (Columbia), Steven W. Ouzts (Columbia), W. Duvall Spruill (Columbia), Timothy D. St. Clair (Columbia) and John S. Wilkerson (Charleston). "Local Litigation Stars" are considered to be among the most senior litigators in the state. D. Andrew Williams (Columbia), Richard S. Dukes (Charleston) and Nicholas William Gladd (Columbia) are listed as "Future Litigation Stars," which indicates a strong level of litigation experience.

Mike Chase Named Legal Advisor to the Board of SCSIA

Turner Padget is pleased to announce that Michael E. Chase, shareholder in the Columbia office, has been elected to serve as legal advisor to the Board of the South Carolina Self-Insurers Association (SCSIA). Mr. Chase concentrates his practice in the area of workers' compensation and is certified by the Supreme Court of South Carolina as a Certified Civil Court Mediator. He has been recognized by the Best Lawyers in America in the area of workers' compensation since 2008. The South Carolina Self-Insurers Association, Inc. was formed in 1975 to develop and support the interests of employers self-insured for workers' compensation in South Carolina. Over the years the association has served as an effective voice at the General Assembly and before the South Carolina Workers' Compensation Commission. The self-insurers association is one of the most useful resources for continuing education about workers' compensation in South Carolina.

Turner Padgett Elects Three Shareholders

Turner Padget has elected Shannon F. Bobertz, Matthew R. Cook and J. Brandon Hylton as shareholders of the firm. Bobertz practices in the areas of torts and insurance and municipal law. Cook and Hylton concentrate their practices in the area of workers' compensation. Ms. Bobertz is based in the Columbia office. Shannon joined Turner Padget in 2004, after clerking with Justice Costa M. Pleicones on the South Carolina Supreme Court. She graduated from Cornell College in 1997 and the University of South Carolina School of Law in 2002. Shannon is a former adjunct professor for legal writing courses at the University of South Carolina School of Law and was recently nominated as a finalist for the S.C. Lawyers Weekly's 2011 Emerging Legal Leaders. Mr. Cook is also a resident in the Columbia office. Matt graduated from the University of South Carolina in 1999 and earned his Juris Doctor from the University of South Carolina School of Law in 2002. He is an active member of the South Carolina Workers' Compensation Educational Association and has been a featured speaker and presenter at various seminars. Mr. Hylton is based in the Florence office. He began practicing law in 2002 practicing first in Anderson, South Carolina before moving to Florence, South Carolina in 2005. Practicing almost exclusively in workers' compensation defense, Brandon represents employers and insurance companies in work related injury claims brought by employees.

Ashley R. Kirkham joined Turner Padget Graham & Laney, P.A.

Ashley R. Kirkham has joined the law firm of Turner Padget Graham & Laney, P.A. as an associate attorney. She is a resident in the Columbia office practicing in the area of workers' compensation law. A 2006 cum laude graduate of Clemson University's Calhoun Honors College, Ms. Kirkham received her Juris Doctor, *magna cum laude*, from Florida State University College of Law earlier this year. While in law school, she was awarded the Charleston School of Law Moot Court Professional Award.

Lambert Elected Officer of Junior Achievement of Central South Carolina

Turner Padget Graham & Laney, P.A. is pleased to announce that Lanneau Wm. Lambert, Jr. has been elected to serve as the Vice President for Community Relations for Junior Achievement of Central South Carolina for the 2010-2011 term. Mr. Lambert has served on the Board of Directors since 2008. He is a past president of the South Carolina Bar, serves on Turner Padget's Executive Committee and is a shareholder in the Columbia office.

Sam Sammataro Elected Officer of the Federal Bar Association

Sam Sammataro, a shareholder in the Columbia office of Turner Padget Graham & Laney, P.A., has been elected to serve as Vice President of the South Carolina Chapter of the Federal Bar Association. Having most recently served as secretary and treasurer of the South Carolina Chapter, Sam began serving his 2010-2011 term in September. Mr. Sammataro concentrates his practice in product liability and appellate matters. As Vice President, Sam will assist the chapter President with on-going and new activities designed to aid the federal bench and bar, including the annual CLE and reception to take place in 2011.

Shaughnessy Awarded Lifetime Member Award by SCWCEA

Turner Padget is pleased to announce that the South Carolina Workers' Compensation Educational Association (SCWCEA) presented William E. (Bill) Shaughnessy with its Lifetime Member Award at the 34th Annual Conference. The award is presented in recognition of a member's distinguished service to the Educational Association. Bill is a shareholder in our Greenville office and concentrates his practice in the area of workers' compensation.

Continued on next page

Member News cont.

Turner Padget's Frank Shuler Authors Book on Drafting Employee Policies

Turner Padget Graham & Laney, P.A. is pleased to announce that Franklin "Frank" G. Shuler, Jr., a shareholder in the firm, has authored a book titled A Guide to Drafting an Employee Policies Manual. The publication, now in its eighth edition, is produced by the South Carolina Chamber of Commerce as part of its Carolina Legal Reference Series. The book serves as a guide to South Carolina businesses to ensure that employment policies adequately address new amendments and regulations.

Franklin G. Shuler, Jr. appointed Chair of the Employment and Labor Law Specialization Advisory Board

Turner Padget Graham & Laney, P.A. is pleased to announce that Franklin G. Shuler, Jr. has been appointed the Chair of the Employment and Labor Law Specialization Advisory Board for the South Carolina Supreme Court Commission on Continuing Legal Education and Specialization. Mr. Shuler is a shareholder in the Columbia office and concentrates his practice in employment and labor law.

Stover Joins Turner Padget Law Firm

Jeffrey T. Stover has joined the law firm of Turner Padget Graham & Laney, P.A. as an associate attorney. He is based in the Charleston office practicing in the areas of business litigation, intellectual property, product and professional liability. After obtaining a master of science degree from Clemson University, Mr. Stover began his career as an aerospace engineer. Thereafter, he obtained his Juris Doctor, *summa cum laude*, from the Charleston School of Law in 2010. While in law school, Mr. Stover became a member of the patent bar.

Barefoot Selected to Serve on TWIN Board

Turner Padget is pleased to announce that Walter H. Barefoot has been recently selected to serve on the TWIN (Tribute to Women and Industry) Honorary Board of Directors. Mr. Barefoot is the Managing Shareholder of Turner Padget's Florence office and is a member of the firm's Workers' Compensation practice. The Pee Dee Area TWIN program was developed in conjunction with the YWCA of the Upper Highlands, Inc. Through TWIN, the YWCA encourages women to consider and to prepare for a wider range of career opportunities and to help make significant contributions to the workplace.

Turner Padget Attorney Selected Co-Chair ABA Committee

Turner Padget is pleased to announce that D. Andrew Williams, a shareholder in the Columbia office, has been appointed to serve as national co-chair of the Construction Litigation Committee of the American Bar Association. Drew practices in the areas of construction litigation, product liability, and premises liability. He previously served as the Program Chair for this committee and was twice named Outstanding Subcommittee Chair by the ABA. Drew is a graduate of Leadership Columbia and serves on the Board of Directors for Harvest Hope Food Bank and the Township Theatre Foundation Board.

Turner Padget Ranked Among Best Law Firms by *U.S. News & World Report*

Turner Padget Graham & Laney, P.A. is pleased to announce the firm's inclusion in the inaugural Best Law Firms list, published by *U.S. News & World Report* in conjunction with Best Lawyers. Turner Padget is recognized as a top firm in 16 practice areas throughout the state. Inclusion on the *U.S. News & World Report Best Law Firms* list signals a combination of excellence and breadth of experience. Turner Padget is recognized as a top tier firm in the following categories:

Charleston:Medical Malpractice Law – Defendants, Professional Malpractice Law – Defendants.

Columbia:Alternative Dispute Resolution, Banking and Finance Law, Insurance Law, Medical Malpractice Law – Defendants, Municipal Law, Product Liability Litigation– Defendants, Real Estate Law, Trusts and Estates Law,Workers' Compensation Law – Employers.

Florence: Alternative Dispute Resolution, Criminal Defense: White-Collar, Trusts and Estates Law. Greenville: Alternative Dispute Resolution, Workers' Compensation Law – Employers.

Shannon Furr Bobertz and Nosizi Ralephata Named as Emerging Legal Leaders

Turner Padget Graham & Laney, P.A. is pleased to announce that two of its attorneys have been named among South Carolina Lawyers Weekly's "Emerging Legal Leaders" for 2011. Shannon Furr Bobertz, a shareholder in the firm's Columbia office, and Nosizi (Nosi) Ralphata, a Charleston-based attorney, were two of 10 attorneys selected from a pool of 18 finalists for the honor. The complete list of winners will be published in *South Carolina Lawyers Weekly* on January 31. Ms. Bobertz focuses her practice in torts and insurance, municipal law and insurance coverage law. She earned her undergraduate degree from Cornell University and her J.D. from the University of South Carolina School of Law. Ms. Ralephata is an experienced trial lawyer who handles litigation in a wide range of substantive areas. She has been a resident of South Carolina since 1999, bringing her international perspective to Turner Padget as a native of Zimbabwe. *South Carolina Lawyers Weekly* selected 10 attorneys who have practiced for 10 years or less from around the state for inclusion in its inaugural list, based on "outstanding leadership in their profession, community and personal lives." The "Emerging Legal Leaders" were nominated by clients, colleagues or their firms.

Haynsworth Sinkler Boyd Shareholders Recognized as"Lawyers of the Year" by *The Best Lawyers in America*®

Haynsworth Sinkler Boyd, P.A. shareholders Stephen F. (Steve) McKinney; of the Firm's Columbia, SC office; and H. Sam Mabry III of the Firm's Greenville, SC office were named Best Lawyers' 2011 Lawyers of the Year by *The Best Lawyers in America*® for their areas of practice. Only a single lawyer in each specialty in each community is being honored as the "Lawyer of the Year" for 2011. H. Sam Mabry III has been named the "Best Lawyers' 2011 Greenville, SC Product Liability Litigator of the Year." He has practiced with Haynsworth Sinkler Boyd, P.A., and its predecessors since 1983. Mabry received his J.D., *cum luade*, and his B.A. from the University of South Carolina. Stephen F. (Steve) McKinney has been named the "Best Lawyers' 2011 Columbia, SC Bet-the-Company Litigator of the Year." McKinney received his B.A., *magna cum laude*, from Furman University; a Masters in Divinity, with honors, from Southeastern Seminar, Wake Forest; and a J.D. from Emory University.

Collins & Lacy, P.C. Names New Products Liability Practice Group Chair

Collins & Lacy, P.C. is pleased to announce Brian Comer has been selected to serve as Chair of the firm's Products Liability Practice Group. Comer is Of Counsel to Collins & Lacy, practicing in the areas of products liability and professional liability. His practice focus includes the defense of product manufacturers and distributors in claims arising from product defect. Comer presently serves as Co-Chair of the Products Liability Substantive Law Committee for the South Carolina Defense Trial Attorneys Association (SCDTAA). He is also the founder and contributing author of "The South Carolina Products Liability Law" blog at http://scproductsliabilitylaw.blogspot.com, which provides current information on trends in products liability law in South Carolina for individuals and product manufacturers.

Collins & Lacy Attorneys Emerging Legal Leaders

Collins & Lacy, P.C. is proud to announce two attorneys have received the *South Carolina Lawyers Weekly* Emerging Legal Leaders Award. Suzanne (Suzy) Boulware Cole and Robert F. Goings were among the 10 attorneys honored at the magazine's January 27 reception at the Columbia Metropolitan Convention Center. The 10 award winners were chosen from among 18 finalists and were honored for their professional excellence, community involvement and contributions to the practice of law. Cole is a shareholder concentrating in workers' compensation in Collins & Lacy's Greenville office. Some of the community organizations to which Cole has devoted her time over the years include serving as commissioner of the Spartanburg Housing Authority and a volunteer for Girl Scouts of South Carolina-Mountains to Midlands. Robert Goings joined Collins & Lacy in 2006. Goings practices in civil litigation involving business torts, employment law, healthcare litigation, defective products, professional malpractice, bad faith insurance claims, catastrophic personal injury and wrongful death claims. Robert has chosen three specific entities to which he devotes a considerable amount of his time, energy and faith. They are the Columbia Rotary Club, the Wofford College Alumni Association and Trenholm Road United Methodist Church

Clayton Selected to S.C. Bar's Leadership Academy

Michelle Clayton has been selected to participate in the 2011 South Carolina Bar's Leadership Academy. The South Carolina Bar's Leadership Academy is a highly selective program designed to equip young lawyers (in practice from three to 10 years) with networking opportunities, professionalism training, community awareness and other skills necessary to give back to the profession and position themselves as leaders in the community. Ms. Clayton is based in the Columbia office of Turner Padget and has a diverse practice that focuses on employment law defense, commercial litigation, and bankruptcy.

Stephen G. Morrison recognized for excellence in client services

Nelson Mullins Riley & Scarborough partner Stephen G. Morrison was recognized for excellence in client services in the BTI Client Service All-Star Team for Law Firms 2011. The BTI Client Service All-Star Team for Law Firms 2011 draws on unprompted candid feedback from corporate counsel at the world's largest organizations. As part of BTI's one-on-one interviews, they ask General Counsel and their direct reports to delineate, unprompted, the attorneys delivering the absolute best client service. This year, 318 individual attorneys from 201 law firms earned the recognition. Mr. Morrison is a partner in the Columbia office where he practices in the areas of technology law and litigation, business liability, product liability, and securities litigation.

Second Annual SCDTAA PAC Golf Classic

April 14, 2011 • Spring Valley Country Club

by Johnston Cox

The Second Annual SCDTAA PAC Golf Classic sponsored by Everyword, Inc. will be held at Spring Valley Country Club on Thursday April 14, 2011. We look to build upon last year's successful inaugural tournament, which raises money for the SCDTAA Political Action Committee ("PAC"). The SCDTAA formed its PAC several years ago, recognizing the importance our members place on having a voice in the political process. In this volatile political environment, having a strong PAC is more important than ever.

Unfortunately, actually getting members of the General Assembly to hear our concerns about issues that affect our membership takes time, and therefore, money. Our President and members of our Legislative Committee give their time generously to the SCDTAA, spending hours in the lobby and testifying before the General Assembly on matters important to our membership. However, we cannot expect these volunteers to shoulder the burden alone. Your support of this tournament helps them and the SCDTAA tremendously.

Not to mention, it is fun. There will be a Captain's Choice format with a noon shotgun start. We will again have a hole-in-one contest with the chance of winning a new car. While some of us admittedly have a better chance at winning the car than others, everyone has the same chance of having a great time. Last year, lawyers, experts and vendors from every part of the state attended. We would like to see even more of our friends this year.

Please come out on April 14, 2011. We look forward to another great day of golf.

Hemphill Award CALL FOR NOMINATIONS

Nominations are due to SCDTAA Headquarters by Wednesday, June 1, 2011

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. All information should be sent to SCDTAA Headquarters; 1 Windsor Cove, Suite 305; Columbia, SC 29223.

S.C. Chief Justice selected 1st recipient of Sandra Day O'Connor Award for Advancement of Civics Education

Chief Justice of South Carolina Jean Hoefer Toal has been named the first recipient of the National Center for State Courts' (NCSC) Sandra Day O'Connor Award for the Advancement of Civics Education. NCSC established the award in 2010 to honor an organization, court, or individual who has promoted, inspired, improved, or led an innovation or accomplishment in the field of civics education. The date and location of when Justice O'Connor will present the award to Chief Justice Toal have not been finalized.

"The business and decisions that take place in our state courts affect the daily lives of all our citizens. Yet, few people understand how our justice system works," said NCSC President Mary McQueen. "Chief Justice Toal recognized this need and is taking great strides to improve students' understanding of our courts."

"Chief Justice Toal has made remarkable progress in bringing civics education into the classroom for South Carolina students," said Texas Chief Justice Wallace Jefferson, chair of the NCSC Board of Directors. Most recently Chief Justice Toal encouraged and supported the use of "Justice Case Files," a graphic novel series developed by the NCSC that teaches students how the courts work, and she was instrumental in making South Carolina one of the first pilot states for Justice O'Connor's iCivics web-based interactive civics education program for students.

Under Chief Justice Toal's leadership, the South Carolina Judiciary has a long history of supporting civics education. In addition to iCivics and the "Justice Case Files" series, South Carolina has implemented three state civics programs:

- The Class Action Program, which brings middle- and high-school students to the state Supreme Court to hear oral arguments.

- The Case of the Month Program, which provides streaming video of a case argued before the state Supreme Court. Students are allowed to review the briefs submitted for the case and watch the proceedings.

- South Carolina Supreme Court Institute, which is held for middle- and high-school social-studies teachers to teach them how to bring law to life for their students.

Information on the South Carolina programs, is at: www.sccourts.org/edResources/index.cfm.

The NCSC award is named after Justice Sandra Day O'Connor, who has made improving civics education one of her priorities since retiring from the U.S. Supreme Court in 2006. South Carolina is one of the first states in the country to offer students both the Justice Case Files graphic-novel series and the iCivics project.

In addition to Chief Justice Toal, the following individuals and organizations contributed to making the South Carolina iCivics program a success: Dr. Jane Brailsford, coordinator of Virtual Schools and Professional Development, Lexington County School District; Catherine Templeton, iCivics National Coordinator; Molly H. Craig, iCivics National Coordinator; the South Carolina Defense Trial Attorneys' Association; and the South Carolina Bar.

Chief Justice Toal was the first woman appointed to the state's Supreme Court and became South Carolina's first woman chief justice in 2000. Prior to joining the bench, Chief Justice Toal served in the South Carolina House of Representatives, 1975-88, and worked in private practice for Belser, Baker, Ravenel, Toal & Bender. She served as President of the Conference of Chief Justices and Chair of the NCSC's Board of Directors in 2007-08.

The National Center for State Courts, headquartered in Williamsburg, Va., is a nonprofit organization dedicated to improving the administration of justice by providing leadership and service to the state courts. Founded in 1971 by the Conference of Chief Justices and Chief Justice of the United States Warren E. Burger, NCSC provides education, training, technology, management, and research services to the nation's state courts.

Opportunities Abound for SCDTAA Young Lawyers

by Jared Garraux

Are you a young lawyer? Do you own the billable hour? Do you often find yourself taking afternoon naps at work because you've already billed 10 hours by lunch? Are you looking for ways to fill all of the free time in your schedule? If so, perhaps I can help. As President of the Young Lawyers Division for the SCDTAA, one of my goals for 2011 is to generate more participation among our young lawyers.

How do you know if you are a young lawyer? Well, the SCDTAA defines young lawyers as those practicing for less than 10 years. So, if you meet that criterion, congratulations, you're a young lawyer. Now, shouldn't you be billing instead of reading this publication?

Being an attorney is both challenging and stressful. It is even more so as a young attorney?at least that is what I tell myself, "It only gets easier from here." Days, weeks and months are consumed by the billable hour. With all of the pressure and requirements placed on young associates, it's easy to focus solely on billing hours. So, I am here to encourage you to stop focusing solely on the billable hour. Look at the big picture, branch out, broaden your horizons, expand your peripherals, widen your spectrum, enlarge your focus . . . well, you get my point.

The SCDTAA is a great organization, filled with some of the brightest and most talented lawyers in the state of South Carolina. Numerous opportunities exist for young lawyers to get involved. And, being involved can be quite rewarding. Not only does the SCDTAA promote networking within the defense bar, but the association provides unique access to the Judiciary and, often times, an insider's view into legislative happenings.

So, what can you do as a young lawyer? Well, just about anything. However, the Young Lawyer Division ("YLD") does have some specific projects for each calendar year. For one, the YLD is responsible for coordinating jurors and witnesses for the SCDTAA's Annual Trial Academy. Many of you have participated as attorneys in this great event.

Another project for the young lawyers division is the coordination and organization of the Silent Auction at the Annual Joint Meeting at the Grove Park Inn in Asheville, NC. Proceeds of the Silent Auction benefit South Carolina charities. This year's Annual Joint Meeting will take place during the last full week of July.

In addition to the specific projects mentioned above, young lawyers play an active role in many of the SCDTAA's committees. If writing is your forte, The DefenseLine or the Amicus Curiae Committee would love to have your participation. If, like me, you would rather strike up a conversation with a door knob than write articles, perhaps the Judicial Committee or Joint Meeting Committee would be of more interest to you. The point is that the SCDTAA has a variety of committees eager for an infusion of youthful talent and ideas.

For 2011, the YLD will be hosting several happy hours around the state to build relationships and generate participation among the young lawyers. I will be notifying all of the young lawyers as to the exact dates and locations, and I would encourage all of you to attend. It will be a great opportunity for you to meet fellow young lawyers and find out more information about the SCDTAA and how you can become involved.

The bottom line is that there are a myriad of opportunities within the SCDTAA. And, becoming involved is a great way to establish your name and build your reputation within the defense bar.

So, stop making excuses and stop it with the ".2's." There is much more to the legal profession than billing hours. There are opportunities abound. Take advantage of them.

If you would like more information on how you can get involved with the SCDTAA, please contact me at jgarraux@richardsonplowden.com, or, you can contact the YLD President-Elect John Hawk at jhawk@buistmoore.com. We look forward to hearing from you.

44th Annual Joint Meeting
July 28 - 30, 2011 • Asheville, NC

by David A. Anderson

Please mark your calendars and plan to join us at the beautiful Grove Park Inn (GPI) in Asheville, NC July 28th – 30th, 2011 for the 44th Annual Joint Meeting between the South Carolina Defense Trial Attorneys Association and Claims Management Association of South Carolina. The GPI provides a wonderful venue to spend time with family and friends to enjoy an informative and fun filled conference. Your Joint Meeting Committee consists of Graham Powell, Mitch Griffith, Chris Adams, Jared Garraux, Jenna Garraux, Mark Allison, Shane Williams and Drew Butler. Your Committee is working hard along with the Claims Management Association Officers to ensure an exciting and informative meeting.

Presently all of our South Carolina Worker's Compensation Commissioners have been invited to attend this meeting. We will have educational breakout sessions where the latest in worker's compensation and construction law will be discussed. We also have presentations lined up by the new Director of Insurance, David Black as well as the new Department of Labor and Licensing Director, Catherine Templeton. Additional speakers on traumatic brain injuries, construction defects, mediation principles and legal ethics will highlight our educational program.

We are working hard to keep costs down for you and your family while enjoying a first rate conference. There will be plenty of leisure time to go along with the educational programs. On Friday afternoon attendees will have lots of options including Golf, swimming, wine tasting, outdoor activities along with the many areas of interest that Asheville offers. For those of you with kids, bring them along. We will have wonderful children's programs, as well as babysitting by professional sitters offered by GPI.

Please plan to join us and let your Committee Members know if there are topics of interest in which you would like for us to address. Additionally, please encourage all claims managers that you know or with whom you work to attend this event.

Legislative Update

by Bill Besley

It has been an dynamic year at the Statehouse for legislation which might affect our membership. Gray Culbreath, Jeff Thordahl, and I have been actively monitoring the flurry of activity on behalf of the SCDTAA.

Two significant bills affecting the South Carolina Bar are moving through the legislative process. One bill is the continuation of Tort reform. The last 2 year cycle of the General Assembly ended in June 2010, with Tort reform on the verge of passage; however, it failed in the last week. The current session started in January with the Tort reform bills from last year being reintroduced and prioritized by both the House and the Senate. The House has already passed their version of the bill to the Senate. The Senate is now working on their version of the bill.

Both the House bill and Senate bill consist of 4 issues: 1. Punitive Damages Cap, 2. Non-use of Seat Belts Admissibility as Evidence, 3.The Private Attorney Sunshine Retention Act ("PARSA"), and 4. A Clarification to the Statute of Repose. The Senate amended this bill to also require the disclosure of insurance limits in automobile cases.

After extensive hearings again this year, the Senate has amended the House bill in the areas of punitive caps, seat belts and PARSA. With regard to punitive damages, the changes concern exceptions to the cap and also to whom the punitive damages should be paid. With regard to seat belts, the change involves setting a threshold of value before which admissibility is not applicable. PARSA has been amended to deal with when and how Solicitors may retain private attorneys.

We expect further changes to the bill as it advances through the full Judiciary Committee and then again on the Senate floor. Ultimately, the two bodies' differences will need to be resolved through the legislative process. Given the multi-year effort, the relative similarity of the two versions, the desire by interested parties to pass this legislation, and the priority of passage by the new Governor Haley administration, it is very likely this legislation will be concluded by June. The effective date is likely to be January 1, 2012.

The House bill has become the legislative "vehicle." Some of the most recent amendments are not immediately available online, but may be attained by contacting Gray, Jeff, or me.

The business communities view these changes as necessary to make sure South Carolina's tort laws are comparable with other states in the southeast so that our laws are not used against us as we compete for economic development opportunities. In addition, these bills have emanated in part as a result of recent cases such as Fortis.

Another significant bill is S.431 which was introduced in response to the Crossmann Communities v. Harleysville Mutual Insurance Company Supreme Court decision dealing with insurance coverage under CGL policies and whether certain property damages are the result of a covered "occurrence." As soon as the opinion was issued, the construction professionals began efforts to have legislation drafted to amend the law to reflect the status of insurance coverage for construction liability as it existed prior to the Crossmann decision. Two bills have been introduced in the Senate and two in the House. S.431 has become the bill that is moving the fastest. This bill was taken up by the full Senate Banking and Insurance Committee without a subcommittee hearing, which indicates the level of importance and urgency the construction professionals have in changing the law. There are two strong lobbying sides involved. Even though the bill is on the Senate Calendar for debate, the path forward is not necessarily a quick one. Given the magnitude of the interests on both sides, the General Assembly is likely to give this great attention and discussion.

The SCDTAA is monitoring the issues which could impact our members closely. If you, as a member has a question or concern regarding legislative issues, do not hesitate to call.

JUDICIAL PROFILE

Hon. Henry M. Herlong, Jr.
Senior U.S. District Judge, District of South Carolina

by Giles Schanen

"*I try to learn something new every day.*" Those words are a guiding principle for Senior U.S. District Judge Henry Michael Herlong, Jr., who sees one of the greatest rewards of being a judge as the opportunity to be continually educated, whether it be in evolving areas of the law, in various types of businesses, or in science and technology. To Judge Herlong, "Each case provides the chance to become a mini-expert in a new field, which is one of the challenges, as well as one of the great benefits, of being a trial judge."

Judge Herlong was appointed a U.S. District Judge in 1991 by President George H.W. Bush. He brought to the bench a wealth of legal experience in both the government and private sectors, having worked as an Assistant U.S. Attorney in the civil and criminal divisions, a legislative assistant to Sen. Strom Thurmond, and a private practitioner in his hometown of Edgefield, South Carolina. Judge Herlong also had prior judicial experience, having served as a U.S. Magistrate Judge from 1986 to 1991.

During his time on the bench, Judge Herlong has developed a reputation as a fair-minded and efficient jurist. He is thorough in his analysis and is decisive, striving to "rule quickly" so that cases can progress without delay. He presides with a measured temperament, and treats all who appear before him with courtesy and respect.

In his nearly twenty years as a district judge, Judge Herlong has presided over many significant cases. In 2010, a civil action before him resulted in a jury verdict of $14.5 million against an insurance company that was found to have wrongfully refused to pay a claim for damage caused by arson. In 2007, he presided over only the second federal death penalty case to be tried in South Carolina, as well as the prosecution of those involved in a nationwide organized drug conspiracy.

Judge Herlong took senior status on June 1, 2009, his 65th birthday. While he still maintains a significant caseload, senior status allows him more time to pursue his many personal interests. First among those is spending time with his seven grandchildren. Judge Herlong also enjoys hunting and fishing, working around his farm, and attending football games at his alma mater, Clemson University, where he played running back on the freshman football team. Judge Herlong and his wife enjoy riding their Tennessee walking horses on trails up and down the east coast. He is well known for his common sense and witty sense of humor, which were on full display when he shared with me his first rule of horseback riding – "Always keep the horse between you and the ground!"

Judge Herlong graciously agreed to share his thoughts on a variety of issues related to the practice of law in South Carolina. Judge Herlong was forthright and candid in his responses, just a few of which were as follows:

Q: From your observations as a trial judge, how has the use of technology in the courtroom impacted trial practice?

A: The ability to present evidence at trial electronically has been a tremendous advancement. If used effectively, it can give lawyers a significant advantage in presenting their cases to a judge or jury. This is especially true in cases that are document intensive. However, I would advise lawyers to make sure they, or the persons running the presentation for them, are very comfortable with the trial presentation software. I have seen lawyers fumble with their presentations or run into technical problems that they could not fix. When that happens, it can affect the flow of trial, and also can cost them points with the jury.

Also, while the new technology can be an advantage, lawyers should not lose sight of the old tried and true methods. For example, some of the best lawyers that appear before me still use dry erase boards or felt boards. Especially now that electronic presentation of evidence is so common, the use of traditional methods can provide a nice contrast.

Finally, I would encourage lawyers to use electronic presentations and other demonstrative tools during motion hearings. It is not a common practice, but using these tools during hearings can be highly effective in communicating arguments to a judge.

Continued on next page

Judicial Profile cont.

Q: Since you became a district judge, the use of mediation to resolve disputes has become widespread. Do you see that as a positive development?

A: I am a big proponent of mediation. Lawyers have embraced it, and we are fortunate to have a number of highly skilled mediators in South Carolina. In many instances, lawyers can best serve their clients by resolving cases other than through jury trials. Particularly in complex business cases, mediation allows parties to reach mutually beneficial business solutions, rather than leaving those cases in the hands of juries who typically only have the ability to award monetary damages.

The only downside to the expansion of mediation is that lawyers rarely have the opportunity to try civil cases. The result is that there are fewer highly skilled litigators than in the past. The ability to present a case to a jury of laypersons is something that comes with experience, and jury trials are the only place to gain that experience. Today, lawyers are not as comfortable in the courtroom, and they are not as proficient with the rules of evidence. There are plenty of outstanding lawyers in our state, but the ability to try a case effectively to a jury is becoming a lost art.

Q: Do you have any advice for lawyers appearing before you?

A: Be prepared, and know your case backward and forward. Thorough preparation is a common trait of all outstanding lawyers. On the other hand, the biggest mistake a lawyer can make is to come to court unprepared. A judge or jury can quickly tell whether a lawyer has not done his or her homework, and that will undoubtedly affect the way they view the case.

When preparing for trial, I recommend that lawyers start from the end of the case and work backward. Very rarely do lawyers submit proposed verdict forms, and yet the verdict form contains the ultimate questions the jury will answer. It can be to a lawyer's advantage to frame those questions in a way that fits his or her theory of the case. Lawyers should not hesitate to submit proposed verdict forms, and if they are reasonable, the Court will likely adopt them. From the verdict forms, work backward through the jury instructions, the closing argument, the presentation of evidence, and finally the opening statement. Preparing in that fashion ensures that all of the elements of the case are covered. I have had trials where lawyers tried great cases, and lost because they left out a seemingly minor required element of their claim or defense. Don't let that happen to you!

A common complaint I hear from jurors is that lawyers are overly repetitive in their presentation of evidence. Trials can be tedious and time consuming, and it is easy for lawyers to lose the attention of the jury. Lawyers should be sure to get all their proof into evidence, but to focus most of their time on the major points. Then, they can use the closing argument to tell the jury how they have proven all the required elements of their case.

Finally, in motions practice, lawyers should thoroughly brief their arguments. Do not save arguments for the hearing, because there may not be one. For reasons of judicial economy, I generally hold hearings only if they are necessary for me to gain a full understanding of the issues.

Q: What are your impressions of the South Carolina Bar?

A: I am highly impressed with the lawyers in the South Carolina Bar. I believe the quality of lawyers in this state is higher than it has ever been. You always hear that we have a collegial bar, and, as a judge, I certainly appreciate the high degree of cooperation and respect that our lawyers usually show. I frequently have cases involving out-of-state lawyers, and there is often a discernable difference in the way that those lawyers interact with each other and with the Court. I am very fortunate to serve as a judge in South Carolina.

ARTICLE

Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.: An "Occurrence" Trilogy

by C. Mitchell Brown and James E. Brogdon, III [1]

In January of 2011, the South Carolina Supreme Court issued its landmark opinion in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Ins. Co.*[2] The Court's *Crossmann* decision looks to have finally put an end to the uncertainty in South Carolina law surrounding what constitutes an "occurrence" under a standard Commercial General Liability ("CGL") policy. More specifically, the Court addressed whether certain damage to non-defective components of an insured's project, resulting from faulty workmanship, constitutes an "occurrence." The Court held that in order for "faulty workmanship to give rise to potential coverage, the faulty workmanship must result in an occurrence, that is, an unintended, unforeseen, fortuitous, or injurious event." [3] This article provides a brief background of the CGL policies at issue and traces the evolution of South Carolina case law that led to the Supreme Court's stated ultimate resolution of this issue in *Crossmann*.

Relevant Background of the Governing CGL Policies

Prior to *Crossmann*, the South Carolina Supreme Court addressed the issue of what constitutes an "occurrence" in *L-J, Inc. v. Bituminous Fire & Marine Ins. Co*.[4] and *Auto Owners Inc. Co. v. Newman*.[5] In all three cases, the CGL policies provided coverage for "property damage" caused by an "occurrence." The policies defined an "occurrence" as "***an accident***, including continuous or repeated exposure to substantially the same general harmful conditions." The *Crossmann* Court concludes that in order to be an "occurrence" and trigger coverage, the event that caused the "property damage" must have been fortuitous.

The standard CGL policies also contained an exclusion, referred to as the "your work" exclusion, which provided that the policy "will not cover 'property damage' to 'your work.'" However, the "your work" exclusion did not apply "if the damaged work or the work out of which the damage [arose] was performed on your behalf by a subcontractor." This latter exception to the "your work" exclusion is often referred to as the "subcontractor exception."

The Evolution of South Carolina Law Through The Trilogy of "Occurrence" Cases

Part 1: The L-J Decision

Prior to 2002, few cases in South Carolina addressed what constituted an "occurrence" under a standard CGL policy, where the claim for recovery was based upon faulty workmanship. However, in 2002, the landscape began to change with the Court of Appeals' decision in *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*[7] There, an insured contractor and various other insurers brought a declaratory judgment action against an insurer for indemnification and contribution, seeking to recover all defense costs and settlement payments arising from negligence and breach of contract claims against the insured for faulty road construction. Specifically, the faulty construction created repeated water runoff, which ultimately caused the roads to fail.

The special master for Charleston County found that the subcontractor's negligent construction of the road constituted an "occurrence" under the CGL policy, even though the only resulting damage was to the road itself. The Court of Appeals affirmed, holding that the pavement was tangible property as defined by the policy and that repeated exposure to water runoff caused the pavement to fail.[8] Because subcontractors, and not the general contractor, constructed the road, the Court of Appeals found no evidence that the general contractor expected or intended the pavement to fail. Accordingly, the Court of Appeals concluded that the damage was the result of an "accident," and thus, an "occurrence" under the CGL policy.

Then Chief Judge Hearn, now Justice Hearn, filed a dissenting opinion, expressing her disagreement with the majority's finding of an "occurrence." According to her, where the resulting damage occurs solely to the work product itself, there can be no "accident," and hence no "occurrence," if the damage is the "natural and probable consequence" of the faulty work. Justice Hearn found that the damages in *L-J* were the "natural and proximate result of the faulty work[,]" and therefore, could not give rise to an "occurrence" under the CGL policy. [9]

The Supreme Court then granted certiorari and

Continued on next page

ARTICLE CONT.

ultimately reversed the Court of Appeals' decision.[10] The Supreme Court found that all of the negligent acts were examples of faulty workmanship that only caused damage to the roadway system, and therefore, did not give rise to an "occurrence" under the CGL policy. According to the Supreme Court, the fact that the roads were subject to surface water runoff was not an "accident," but instead, was the direct result of the faulty workmanship. The Court stated that to hold otherwise would transform the CGL policy into a performance bond, as opposed to an insurance policy.[11]

At the time, the Supreme Court's decision in *L-J* seemed to answer the question of when property damage to work product alone constitutes an "occurrence."

Part 2: The *Newman* Decision

Four years after *L-J*, the Supreme Court issued its decision in *Auto Owners Ins. Co. v. Newman*,[12] producing some level of uncertainty as to the effect of its *L-J* decision.

In *Newman*, the insurer filed a declaratory judgment action, challenging an arbitrator's award on the grounds that the CGL policy did not cover the damages awarded. The damages arose from the subcontractor's negligent application of stucco, which caused substantial moisture damage to the home's exterior sheathing and wooden framing. In the appeal, the Supreme Court found that, "although the subcontractor's negligent application of the stucco does not on its own constitute an 'occurrence,' . . . the continuous moisture intrusion resulting from the subcontractor's negligence is an 'occurrence' as defined by the CGL policy."[13] The Court explained, "In our view, the continuous moisture intrusion into the home was 'an unexpected happening or event' not intended by [the general contractor]—in other words, an 'accident'—involving 'continuous or repeated exposure to substantially the same harmful conditions.'" [14]

The Supreme Court distinguished *L-J* by finding that there was "property damage" beyond that of the work product itself. [15] The Court reasoned that "[t]o interpret 'occurrence' as narrowly as Auto Owners suggests would mean that anytime a subcontractor's negligence led to the damage of any part of the contractor's overall project, a CGL insurer could deny recovery on the basis that it is excluded from the policy's initial grant of coverage."[16] The Court opined that such a narrow interpretation of "occurrence" would render the policy's "your work" exclusion meaningless.[17] Justice Pleicones filed a dissenting opinion where he argued that based on the Court's holding in *Bituminous*, the property damage was only to the work product itself, and therefore was not an "occurrence" under the CGL policy.[18] Justice Pleicones reasoned that a general contractor's "work product" "is the entire home, including the stucco, the framing, and the exterior sheathing", not just the individual task performed by the subcontractor.[19]

Part 3: The *Crossmann* Decision

Finally, in January of 2011, the Supreme Court resolved the seeming conflict created by the opinions in *L-J* and *Newman*.[20] In *Crossmann*, homeowners of five condominium projects brought suit against the contractors of those five projects, asserting claims based on faulty workmanship. The contractors settled the lawsuit with the homeowners for approximately $16.8 million. The contractors then sought coverage for the damages they paid from their CGL policy carrier, which denied coverage. In the contractors' suit for coverage, the Court stated that the parties stipulated to the amount of damages, that the damage to the condominium projects "resulted from water intrusion, that the damage was progressive in nature, and that the damage was caused by the negligent construction of the subcontractors." Therefore, the only issue before the trial court was whether coverage existed under the CGL policy. The contractors sought coverage under the "subcontractor exception" to the "your work" exclusion. The insurer argued that the absence of any "occurrence" did not allow the Court to reach the "your work" exclusion.

The Supreme Court began its analysis by discussing the two different approaches that courts follow in deciding whether "a CGL policy covers damage to property caused by faulty workmanship." The "no occurrence" approach, which is the majority rule,[21] concludes that claims of poor workmanship alone do not constitute an "occurrence" within the meaning of a CGL policy.[22] Courts applying this approach engage in various analyses, generally based upon one of two premises--the "business-risk/tort-risk" distinction or the "natural and ordinary consequences" finding. In distinguishing between business risks and tort risks, those courts "reason that CGL policies are intended to insure tort-risks, but not business risks" because the policies are not meant to "insure risks that the business can and should control." Thus, "faulty workmanship that causes damage only to a contractor's work product constitutes economic loss, which is a business risk, and . . . not "property damage" under the . . . policy." Other courts "reason that faulty workmanship does not possess any element of fortuity and the resulting damages are the natural and ordinary consequence of the faulty work and, therefore, not accidental."

By contrast, the "occurrence" approach, which is the minority rule,[23] concludes that damages flowing from faulty workmanship constitute an "occurrence," as long as the insured did not "intend or expect the resulting damage."[24]

In *Crossmann*, the Supreme Court adopted the "no occurrence" approach, relying upon the "natural and ordinary consequences" premise. Specifically, the Court focused on the CGL policy's inclusion of the term "accident" in the definition of "occurrence." The Court noted that the term "accident," by definition, requires a "fortuity component" or some form of "chance." Under the facts of

Crossmann, the Court found the necessary fortuity element lacking because "[t]he natural and expected consequence of negligently installing siding to [the] condominiums is water intrusion and damage to the interior walls." Therefore, the insured failed to show an "occurrence" that would provide coverage under the CGL policy.

Because the Court found no occurrence, the Court noted that it "need not determine whether there is "property damage" under the facts of *Crossmann*. The Court did, however, clarify where and when the "property damage" analysis fits into the equation. "[I]n analyzing whether a claim is covered under a CGL policy," courts must "first focus on whether there has been an 'occurrence.'" Damages that "do[] not arise from a fortuitous event" and "are the natural and probable consequences of faulty workmanship" do not constitute an "occurrence." However, faulty workmanship can give rise to potential coverage if "the faulty workmanship . . . result[s] in an occurrence, that is, an unintended, unforeseen, fortuitous, or injurious event." If the court finds such an occurrence, then it should analyze "whether there has been 'property damage' as defined by the policy."

The *L-J* decision was consistent with this analytical framework because the absence of an occurrence was dispositive of the coverage issue and, in any event, because the complaint did not allege any property damage to non-defective components of the project. *Newman*, however, did not comport with the governing analysis in part because, like *Crossmann*, *Newman* "lacked the predicate 'occurrence.'" Accordingly, the Court "overrule[d] Newman to the extent it permitted coverage for faulty workmanship that directly causes further damage to property in the absence of an 'occurrence' with its fortuity underpinnings." The Court further held that "the additional language of 'continuous or repeated exposure to substantially the same harmful conditions' neither creates an ambiguity for insurance contract construction purposes nor diminishes the fortuity element inherent in an 'accident.'" To be clear, the Supreme Court explained "that *Newman* was incorrectly decided, but the analytical framework of 'property damage' in Newman remains sound, provided there is, in the first instance, an 'occurrence.'"[25] To illustrate this framework, the Court set forth several examples that Harleysville presented in its brief. One of these illustrations is as follows:

> "Assume the insured is a general contractor that built an apartment building using various subcontractors to complete the work. Also assume a subcontractor installed all wiring in the apartment building. After the building is complete and put to its intended use, a defect in the building's wiring causes the building to sustain substantial fire damage. . . In such an instance, an occurrence would exist, the insurer could point to the 'your work' exclusion, but then the 'subcontractor exception' would provide an exception to the exclusion." [26]

The second example is as follows:

> "Assume that a subcontractor failed to properly construct the foundation of a new home. After the home is complete, the new homeowner then hires a landscaping company to plant shrubs near the house. During the landscaping project, while using a Bobcat machine to dig a hole for a shrub, the landscaper bumps the foundation of the home with the machine. Due to the poorly constructed foundation, after the landscaper hit the home with the machine, a collapse of all or some of the home occurs."[27]

Defense of *Crossman*

In *L-J*, *Newman*, and *Crossmann*, the justices of the South Carolina Supreme Court read numerous briefs, listened to hours of oral argument, and undoubtedly devoted countless amounts of time researching the law in South Carolina and other states regarding the proper interpretation of "occurrence" under a CGL policy. The justices are therefore well positioned to determine whether faulty workmanship constitutes an "occurrence" under the insurance provisions, and because contract interpretation is a function reserved for the courts. Nevertheless, some voice criticism of the Court's decision in *Crossmann*.

Some critics mistakenly believe that the Court's decision in *Crossmann* precludes an insured contractor from ever recovering under a CGL policy for damage resulting from faulty workmanship. Those who espouse this view misconstrue the holding in *Crossmann*, overlook the public policy considerations that created the CGL policy, and ignore the meaning of the terms required to trigger coverage. The Court's ruling does not foreclose the possibility of recovering for damage caused by faulty workmanship, as long as the damage is not a "natural and ordinary consequence" of the faulty work. The Court aptly recognized the impropriety of interpreting a CGL policy in a manner that would transform it into a performance bond.

Further, if the Court had interpreted the policy terms to provide coverage for poor workmanship, its decision would have created an undesirable disincentive for contractors to do their work correctly from the outset. Such a ruling would allow contractors to cut costs and provide a substandard product, yet avoid financial repercussions, which the insurer would bear in bringing the project into compliance with the intended standard. A contrary ruling would also absolve general contractors from any obligation to oversee their subcontractors' work. As a result, *Crossmann* helps ensure that homes are built properly in the first place, which is the most efficient way to protect homeowners and keep the cost of insurance reasonable for contractors.

Continued on next page

As the Court noted, its *Newman* decision effectively "read out of the definition of an 'occurrence' the fortuity component of an accident…."[28] As a result, insurers would be forced to increase premiums and/or create new exclusionary endorsements, which in turn would cause contractors to increase the cost of their services, which the contractor would ultimately pass to the homeowner. This inevitable result would unduly burden general contractors who provide a high level of workmanship and do not cut corners or costs by forcing them to subsidize the cost to the industry caused by contractors who choose profit over performance and proper supervision.

Some challenge the Court's reasoning based upon a perceived inconsistency between *L-J* and *Newman*. However, in *Crossmann*, the Court expressly clarified any uncertainty produced by those previous decisions by either reconciling the reasoning or results or, in the case of *Newman*, overruling part of the prior opinion. Thus, the Court stabilized the law governing the interpretation of an "occurrence" under a CGL policy in South Carolina. The Court aligned South Carolina with the majority of other states on the issue of when faulty workmanship, standing alone, constitutes a covered "occurrence" under a CGL policy.

Footnotes

1 C. Mitchell Brown is a Partner in the Columbia, South Carolina office of Nelson Mullins Riley & Scarborough, LLP. His practice concentrates in appellate work. He served as appeal counsel for Harleysville Mutual Insurance Company in the Crossman matter. James Brogdon is an Associate in the Columbia office of Nelson Mullins Riley & Scarborough, LLP, who has a general litigation practice.

2 Op. No. 26909, 2011 WL 93716 (S. C. Jan. 7, 2011).

3 *Id.*, 2011 WL 93716, at *9.

4 366 S.C. 117, 621 S.E.2d 33 (S.C. 2005).

5 385 S.C. 187, 684 S.E.2d 541 (S.C. 2009).

6 *See Crossmann Cmtys. of N.C., Inc.*, 2011 WL 93716, at *6 ("The finding of an 'occurrence'. . . without regard to the fortuity component of an 'accident' [is] error.").

7 *L-J, Inc.*, 350 S.C. at 549, 567 S.E.2d at 489.

8 *Id.* at 560, 567 S.E.2d at 495.

9 *L-J, Inc.*, 350 S.C. at 560, 567 S.E.2d at 498 (Hearn, J., dissenting).

10 *L-J, Inc.*, 366 S.C. at 119, 621 S.E.2d at 35. Following a rehearing, the Supreme Court withdrew its original *L-J, Inc.* opinion and re-filed a substitute opinion, which is the one found at 366 S.C. 117, 621 S.E.2d 33 and discussed in this article.

11 *Id.* at 124, 621 S.E.2d at 36.

12 As in *L-J*, the Supreme Court granted a rehearing, withdrew its original opinion, and re-filed a substitute opinion, which is the one discussed in this article. *See Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009)

13 *Id.* at 195, 684 S.E.2d at 541.

14 *Id.* at 194, 684 S.E.2d at 545.

15 *Id.* at 193, 684 S.E.2d at 544.

16 *Id.* at 194, 684 S.E.2d at 545.

17 *Id.*

18 *Newman*, 385 S.C. 187, 198, 684 S.E.2d 541, 547 (2009) (Pleicones, J., dissenting).

19 *Id.*

20 *Crossmann*, Op. No. 26909, 2011 WL 93716 (January 7, 2011).

21 Four (4) federal circuit courts of appeal and twenty-two (22) states join South Carolina in holding on various grounds that faulty work does not, standing alone, constitute an "occurrence." see *J.Z.G. Resources v. King*, 987 F.2d 98, 103 (2d Cir. 1993) (New York law); *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 948 (9th Cir. 2004) (Hawaii law); *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684, 689 (7th Cir. 2008) (Illinois law); *Norwalk Ready Mixed Concrete v. Travelers Ins. Co.*, 246 F.3d 1132, 1137 (8th Cir. 2001) (Iowa law); *Essex Ins. Co. v. Holder*, 261 S.W.3d 456, 460 (Ark. 2008); *Times Fiber Commc'n, Inc. v. Travelers Indemnity Co. of Ill.*, No. 05cv030196619, 2005 Conn. Super. LEXIS 335, at *22 (Conn. Super. Ct. Feb. 2, 2005); *Group Builders, Inc. v. Admiral Ins. Co.*, 231 P.3d 67, 73 (Haw. Ct. App. 2010); *Viking Constr. Mgmt. v. Liberty Mut. Ins. Co.*, 831 N.E.2d 1, 16 (Ill. App. Ct. 2005); *Pursell Constr., Inc. v. Hawkeye-Sec. Ins. Co.*, 596 N.W.2d 67, 71 (Iowa 1999); *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 73 (Ky. 2010); *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 386 (Me. 1989); *Commerce Ins. Co. v. Betty Caplette Builders*, 647 N.E.2d 1211, 1214 (Mass. 1995); *Groom v. Home-Owners Ins. Co.*, No. 272840, 2007 Mich. App. LEXIS 1068, at *13 (Mich. Ct. App. Apr. 19, 2007); *Am. States Ins. Co. v. Mathis*, 974 S.W.2d 647 (Mo. Ct. App. 1998); *Bonded Concrete, Inc. v. Transcon. Ins. Co.*, 12 A.D.3d 761 (N.Y. App. 2004); *Prod. Sys. v. Amerisure Ins. Co.*, 605 S.E.2d 663 (N.C. Ct. App. 2004); *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979); *U. Nat'l Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153 (Nev. 2004); *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372 (Okla. 1991); *Oak Crest Constr. Co. v. Austin Mut. Ins. Co.*, 998 P.2d 1254 (Or. 2000); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006); *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, No. 26909, 2011 WL 93716 (S.C. Jan. 7, 2011); *Schwindt v. Valley Ins. Co.*, 1999 Wash. App. LEXIS 3816 (Wash. Ct. App. Mar. 8, 1999); *Corder v. William W. Smith Excavating Co.*, 556 S.E.2d 77 (W. Va. 2001); *Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming, LLC*, No. 06-CV-020-WCB, 2006 U.S. Dist. LEXIS 94826 (D.Wy. Oct. 20, 2006); *Pulte Home Corp. v. Fid. & Guar. Ins. Co.,* 2004 Va. Cir. LEXIS 381 (Va. Cir. Ct. Feb. 6, 2004); *City of Burlington v. Nat'l Union Fire Ins. Co.*, 163 Vt. 124 (Vt. 1994).

22 *Crossmann*, 2011 WL 93716 at *4.

23 The following states adopt the minority rule. *See Fejes v. Alaska Ins. Co., Inc.*, 984 P.2d 519 (Alaska 1999); Col. Rev. Stat. § 13-20-808 (enacted 2010); *U.S. Fire Ins. Co. v. J.S.U.B.*, 979 So. 2d 871 (Fl. 2007); *Constr. Co., Inc. v. Cont'l Cas. Co.*, 935 N.E.2d 160 (Ind. 2010); *American States Ins. Co. v. Powers*, 262 F.Supp.2d 1245 (D. Kan. 2003); *Architex Assoc., Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148 (Miss. 2010); *O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. Ct. App. 1996); *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302 (Tenn. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007); *Am. Family Mut. Ins. Co. v. Am. Girl*, 268 Wis. 2d 16, 673 N.W.2d 65 (Wis. 2004).

24 *Crossmann*, 2011 WL 93716 at *4.

25 *Id.* 2011 WL 93716 at *6.

26 *Id.* (citing National Underwriting Co., Fire, Casualty & Surety Bulletins, Public Liability, A 3-14 (2001)).

27 *Id.* 2011 WL 93716 at *7.

28 2011 WL 93716 at *6.

ARTICLE

Crossmann Has Created Confusion in the Construction Industry

by Ned Nicholson *

The struggles of the South Carolina Supreme Court to define the parameters of an 'occurrence' under the standard CGL policy as applied to construction defects is hardly unique. One need only read the Court's opinions in *L-J*, *Newman*, and *Crossmann* to see it reach for policy interpretations and guidance from the thicket of other court opinions that address the issue. The fault lies not with the Supreme Court; the fault lies with the insurance industry that in 1986 adopted the previously existing broad form property damage endorsement (BFPDE) coverage (and premium) into the standard CGL policy through the "subcontractor exception" for "completed operations" to the "your work" exclusion. Since that time, thousands of courts have struggled with the meaning of these policies. While there certainly is difficulty in using contract language to provide financial safeguards against tort-based claims, the insurance industry has had ample time to clarify what it meant by the 1986 CGL policy form, but absent certain exclusions offered by special endorsements from a few insurers, there has been no uniform insurance industry response to the confusion. The consequences for its lack of clarity should fall on the insurance industry, not its customers.

Since the 1986 CGL policy form was issued, construction defect claims have been made based on whatever court's interpretation of the policy may be at that moment, and such claims have been paid by insurers as well. The construction industry, and those it serves, became dependent on construction defect coverage in many jurisdictions, sometimes rightly so, sometimes not. Regardless, over time, the sophisticated underwriting programs of insurance companies have come to analyze the risk of such construction defect claims and incorporate that risk into the premiums charged those insureds in the construction industry. Thus, insurers can hardly claim the high ground in this argument when (a) there are hundreds of differing court interpretations of the term "occurrence;" (b) insurers have been paying construction claims for decades; (c) insurers have underwritten the risk of such claims in their premium structure; and (d) insurers have had the opportunity to clarify any confusion with endorsements or a new CGL policy form but have chosen not to do so.

From a pure legal perspective, *Crossmann* has not addressed the South Carolina construction industry's question of *what is* as opposed to *what is not* covered by the 1986 CGL policy form. The examples cited by the Supreme Court in *Crossmann* suggest that only a sudden event like a fire or a collapse caused by a construction defect would be an 'occurrence,' even though the policy definition of occurrence includes "continuous or repeated exposure to substantially the same harmful conditions." Further, *Crossmann* specifically states that certain defective construction as a matter of law was a "natural and expected consequence" of construction and therefore was not an occurrence, which makes it impossible for the construction industry to predict what is or is not a "natural and expected consequence." For example, the Supreme Court noted that defective wiring (a construction defect) that causes a fire is not a "natural and expected consequence" and would be covered, but it held that water intrusion due to negligently installed siding (a construction defect) that caused damage to the work was a "natural and expected consequence" and was *not* covered. The simple question asked by the construction industry is: logically how can the fire damage from defective wiring not be a natural and expected consequence of defective construction yet the water damage from defective siding be a natural and expected consequence of defective construction? How is one more or less 'fortuitous' than the other? In either case, the contractor did not 'intend' for the work to be defective.

The construction industry does not argue that it should be excused from liability for shoddy construction; subcontractors who perform faulty work will ultimately be liable on subrogation claims to the insurer paying the claim, and contractors and subcontractors with excess claims will not be able to find insurance and will not be in business for long. However, the construction industry does argue that it should get what it paid for, and *Crossmann* defeats its bargain with the insurance industry.

** Ned Nicholson is a Partner at McNair Law Firm, P.A. and is Legal Counsel for the National Association of Home Builders and Home Builders Association of South Carolina.*

ARTICLE

Are Procedural Changes on the Horizon?

by William S. Brown [1]

Many practitioners in South Carolina State Court have entered a hearing with very limited understanding of the true arguments which will be made by the opposing party. In some cases, a substantive brief on the motions will be delivered at the hearing by opposing counsel. This can be a challenging situation for practicing attorneys and for judges. If the rule changes recently proposed by the South Carolina Supreme Court take effect, however, this could all change in the near future.

On January 27, 2011, the South Carolina Supreme Court issued Orders by which it submitted to the South Carolina General Assembly proposed changes to several rules within the South Carolina Rules of Civil Procedure. Under the South Carolina Constitution, these proposed rules will become effective ninety (90) calendar days after submission (April 27, 2011), unless disapproved by concurrent resolution of the General Assembly, and could become effective sooner if expressly approved by the General Assembly.[2] If they become effective, the rule changes could have a significant impact on practice in the South Carolina Courts.

Included in the proposed rules is a new Rule 7(b) which will dramatically alter how and when memoranda, affidavits, or other documents in support of or in opposition to a motion are submitted. The new proposed Rule 7(b)(2) provides that any supporting affidavits, memoranda, or other documents "**shall** be served and filed with the motion." If a return to a motion is to be made, the new Rule 7(b)(3) requires that the return be served within ten (10) days of service of the motion and that any supporting affidavits, memoranda or other documents be served and filed with it. The proposed Rule also notes that the court may require a party to submit a return and a supportive memorandum. Under 7(b)(4), the proposed Rule allows five (5) days for a moving party to submit any reply in support of the motion and provides that affidavits or supporting material must be served and filed with the reply. The proposed Rule further outlines that a motion and return to a motion should include five types of information: (A) a summary of the case; (B) a statement of the pertinent facts; (C) argument relating to the matter; (D) where a return opposes a motion for summary judgment, a statement of material facts in dispute; and (E) any special content required by rule or law based upon the nature of the motion.

To facilitate this briefing schedule, the proposed Rule specifically provides that, unless permitted by statute or order of the court, a hearing shall not be held on a motion until at least twenty (20) days after the service of the motion on the opposing party. Although this is a change from the current ten (10) day notice period, it will not have a significant practical effect in most counties.

Through this proposed rule change, the South Carolina Supreme Court is adopting a motions briefing procedure and schedule much more like that provided under the Local Rules for the United States District Court. Although this will provide most litigants and the Court with more information in advance of the hearing, it will be a significant change in the practice within Circuit Court.

Additionally, the Supreme Court has submitted proposed rules regarding electronic discovery and clarifying privilege protections for trial preparation material which will more closely align the South Carolina Rules of Civil Procedure with the Federal Rules in those areas. The proposed Rule 26(b)(5)(b) specifically provides for the return of inadvertently produced privileged material and sets the procedure for that process. The new proposed Rule 37(f) contains a presumption, similar to the one found in the Federal Rules, that the court will not impose sanctions on a party for failing to provide electronically stored information which is lost as a result of routine, good faith operation of an electronic information system. This protects against sanctions for companies that operate proper and routine document retention policies.

With these proposed changes, assuming they are not rejected by the General Assembly, the State Court system will move to a more organized motions practice and to an electronic discovery policy in greater uniformity with the Federal system. These changes should be a benefit to the practicing bar.

Footnotes

1 William Brown is a Partner in the Greenville, South Carolina office of Nelson Mullins Riley & Scarborough, LLP. He has a litigation practice focused on products liability, business litigation and general liability.

2 A full set of the Supreme Court's Orders and the proposed rules will be published once approved by the General Assembly or after the 90 day period runs.

ARTICLE

Limitations on the Duty to Warn in South Carolina Products Liability Law

By Brian A. Comer [1]

South Carolina law recognizes that many products cannot be made completely safe for use.[2] Therefore, "[i]n order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning on the product concerning its use."[3] If a product includes a warning that – if followed – makes it safe for use, then the product is not defective or unreasonably dangerous.[4]

However, a manufacturer or seller does not always have a duty to warn, and South Carolina warnings law includes certain limitations on this duty. Some of these limitations are included in comment j. to Restatement (Second) of Torts § 402A, which South Carolina has incorporated by reference into its strict liability statute as the legislative intent of the chapter.[5] Case law has also provided guidance on the extent of the duty to warn depending on the nature of the danger and the sophistication of the product user. This article surveys the various limitations on the duty to warn in South Carolina products liability law.

A. Common Allergies

The first exception to the duty to warn set forth in comment j. is that "the seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them."[6] Although this exception to the duty to warn may be straightforward when the consumer's conduct relates to avoiding individual food products, it becomes more problematic when these food products are ingredients in other dishes. Comment j. therefore qualifies this exception with additional language.

> Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of the presence of the ingredient and the danger.

For example, the Food Allergen Labeling and Consumer Act ("FALCA") went into effect in 2006 to require that packaged foods containing milk, eggs, fish, crustacean shellfish, peanuts, tree nuts, wheat and soy must display them prominently in the ingredient list.[7] According to FALCA, these "Big Eight" food allergens account for 90 percent of all food-allergic reactions, and federal law requires their disclosure on packaged foods.[8] Comment j. provides some of the rationale for this disclosure: a substantial number of the population is allergic to these ingredients, and the consumer may not know if one of the ingredients is in a food product without the disclosure.

Neither South Carolina state nor federal courts have interpreted this specific aspect of comment j. in the context of a food products failure to warn case. However, in *Vaughn v. Nissan Motor Corp.,* 77 F.3d 736, 738 (4th Cir. 1996), the court stated in dicta that the "ordinary consumer" standard for determining if a product is unreasonably dangerous does not necessarily apply in the case of products associated with allergic reactions in an appreciable number of consumers.

B. Products Consumed Over a Long Period of Time

Comment j. also carves out an exception to the duty to warn if the potential danger of a product relates to its use over a long period of time or in excessive quantities: "[A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized."[9] As examples, the comment cites to alcoholic beverages and foods containing substances such as saturated fats. A seller has no duty to warn about the risks associated with such products from extended or excessive consumption.

Neither South Carolina state nor federal courts have interpreted this exception in comment j. In *Aldana v. R.J. Reynolds Tobacco Co.*, No. 2:06-3366-CWH, 2008 WL 1883404, at *2 (D.S.C. Apr. 25,

Continued on next page

ARTICLE CONT.

2008), the court cited to this portion of comment j. to support that the warnings for a defendant's cigarette products were not required to make the product itself "safe," but the court did not otherwise apply it to excessive or extended use of cigarettes.

C. Obvious Risks and Matters of Common Knowledge

A seller is also not required to warn of dangers or potential dangers that are generally known and recognized by users.[10] This exception includes dangers that are open, obvious, or matters that should be "common sense" to the user.[11] The rationale for this exception is that the product is not defective or unreasonably dangerous because these dangers are contemplated by the ultimate user.[12] This exception applies where the obvious risk poses a danger to the user of the product or to others.

For example, operating an unlighted golf cart on a public highway at night has been held to present an open and obvious risk. In *Moore v. Barony House Restaurant, LLC*, the plaintiff brought negligence and strict liability claims against a golf cart manufacturer and claimed that the manufacturer failed to provide an adequate warning about operation of the cart at night and on public roads. The South Carolina Court of Appeals affirmed the circuit court's grant of summary judgment for both claims, finding that "operation of an unlighted golf car on a public highway at night presents an open and obvious risk."[13] Furthermore, the court stated that although questions of negligence are often for the jury, there is no duty to warn of an open and obvious risk as a matter of law.[14]

The threat of electrocution from placing a ladder in close proximity to power lines has also been held to be an open and obvious risk. *Anderson v. Green Bull, Inc.* involved a lawsuit by the personal representative of a roofer who was electrocuted when his aluminum ladder came in contact with overhead power lines. The ladder contained a red warning label that read, "KEEP ENTIRE UNIT CLEAR OF ALL UTILITY AND ELECTRICAL WIRING."[15] The trial court denied the manufacturer's motion for a directed verdict, the jury returned a $50,000 verdict in favor of the plaintiff, and the trial court denied the manufacturer's motion for judgment notwithstanding the verdict.16 However, the South Carolina Court of Appeals reversed the trial court's decisions. The Court of Appeals did not believe that there was any evidence from which the jury could have reasonably inferred that the ladder was defective because "the conductivity of an aluminum ladder is a condition commonly known and recognized."[17] "Any person of normal intelligence would know 'the risk posed by an aluminum ladder in close proximity to an energized high-voltage line.'"[18] The plaintiff also raised the issue of whether the ladder manufacturer should have provided a warning to users to shorten the length whenever the ladder's length would make it more dangerous because of surrounding conditions, such as overhead high voltage transmission lines.[19] Because the manufacturer was not required to warn users to stay clear of power lines in the first place, the manufacturer was not required to warn users to take specific measures to stay clear of the lines (i.e., by moving the ladder, shortening it, or actions).[20]

Moore and *Anderson* involved injuries to the users of the products at issue. However, this exception also applies where certain use of a product poses a risk to someone else. A manufacturer is not required to warn about certain uses that could pose a danger to someone else as a matter of common sense. For example, in *Dema v. Shore Enterprises, Ltd.*, the South Carolina Court of Appeals held that an Aqua-Cycle water recreational vehicle was not defective for failure to include a warning label cautioning the user to "watch out for swimmers" and to "avoid strong current, wind, or waves."[21] In reaching its conclusion, the court stated as follows:

> [U]sers of the Aqua-Cycle would be aware, as a matter of common sense, that they should be careful around swimmers in the surf. Because it is obvious that an Aqua-Cycle can cause injury to a swimmer, [the manufacturer] did not have a duty to warn Aqua-Cycle users of that risk.[22]

South Carolina courts have used similar analysis to determine that there is no duty to warn about overtightening of lug nuts so as to avoid cracking them.[23]

D. Sophisticated Users and Learned Intermediaries

In addition to limiting the duty to warn about certain dangers, South Carolina law also limits the duty to warn based on either a user's level of sophistication or if the warning is provided to an intermediary who is better situated to provide any direct warnings. These similar legal principles are known as the "sophisticated user" and "learned intermediary" doctrines.

The "sophisticated user" doctrine holds that "a manufacturer of a product has no duty to warn users of that product of all its potential shortcomings in safety and effectiveness where that person is sufficiently sophisticated in the operations of the device or the field in which it is used."[24] Simply put, where a user or employer has a certain level of sophistication about the dangers of a product, the manufacturer is relieved of a duty to provide a direct warning about those dangers.[25]

Similarly, the "learned intermediary" doctrine holds that manufacturers of prescription drugs and medical devices discharge their duty of care to patients by providing warnings to the prescribing physicians.[26] The justification for this rule is that consumers cannot buy prescription drugs or medical devices directly from a manufacturer, and therefore

the manufacturer discharges its duty to warn by providing the warning to a learned intermediary. As stated by the Fourth Circuit Court of Appeals in *Talley v. Danek Med., Inc.*, 179 F.3d 154, 163 (4th Cir. 1999):

> Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between manufacturer and consumer.

Although both of these doctrines are well-known in products liability law, there is no South Carolina state appellate court case that explicitly adopts either of them. Rather, *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) is the primary case that supports their application because one of the issues on appeal was whether or not the trial court had provided a correct charge of the law. The charge at issue was as follows:

> Now, ladies and gentlemen, under South Carolina law, a manufacturer has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, thereby, warn the ultimate user of any alleged inherent dangers involved in the product. Simply stated, the sophisticated user defense is permitted in cases involving an employer who was aware of the inherent dangers of a product which the, the employer purchased for use in his business. Such an employer has a duty to warn his employees of the dangers of the product. [27]

The South Carolina Court of Appeals concluded that the trial court properly charged the jury concerning the sophisticated user defense.[28]

From this explanation in *Bragg*, the sophisticated user and learned intermediary doctrines appear to enjoy acceptance in South Carolina courts. Federal courts have stated explicitly that South Carolina state courts would apply the learned intermediary rule in the drug and medical device context. In *Brooks v. Medtronic, Inc.*, 750 F.2d 1227 (4th Cir. 1984), the Fourth Circuit Court of Appeals heard an appeal of a pacemaker case from the District of South Carolina, and one of the issues on appeal was whether the pacemaker manufacturer had a duty to warn the consumer directly, or whether the warnings to the physician were sufficient.[29] The court stated that "[a]lthough the South Carolina Supreme Court has not addressed the issue, we conclude it would adopt the [learned intermediary] rule, generally accepted and supported by sound policy, restricting the manufacturer's duty to warn to the prescribing physician."[30] From reviewing South Carolina strict liability law, the court pointed out that other jurisdictions had adopted the learned intermediary rule, and it believed that South Carolina would as well.[31]

Since *Brooks v. Medtronic*, numerous federal court decisions interpreting South Carolina law have reached this same conclusion.[32] Other practitioners have stated unequivocally that South Carolina has adopted the learned intermediary defense, sometimes citing Bragg or Madison as support.[33]

E. Post-Sale Duty to Warn

South Carolina also limits a manufacturer's duty to warn after sale of the product. In *Bragg v. Hi-Ranger, Inc.*, the South Carolina Court of Appeals agreed with the trial court's charge that a manufacturer "has no duty to notify previous purchasers of its products about later developed safety devices or to retrofit those products if the products were nondefective under standards existing at the time of the manufacture or sale."[34] *Bragg's* language appears to apply to *improvements* in design after sale. Subsequent cases have also cited to *Bragg's* language and have indicated that South Carolina does not recognize a post-sale duty to warn.[35]

Although this is the current status of South Carolina law, recent opinions issued by the South Carolina Supreme Court have cited to the Restatement (Third) of Torts: Products Liability (1998) to support adoption of the risk-utility test as the exclusive test for a design defect claim.[36] Although this citation does not change South Carolina's lack of recognition of a post-sale duty to warn, it may have opened the door for plaintiffs to argue that South Carolina should adopt other sections of the Restatement (Third), and specifically section 10. Section 10 of the Restatement (Third) provides for "Liability Of Commercial Product Seller Or Distributor For Harm Caused By Post–Sale Failure To Warn," or a post-sale duty to warn.

Whether a manufacturer or seller has a duty to warn depends in large part on whether a product user realizes the potential dangers associated with the reasonably foreseeable uses of the product. *Gardner v. Q.H.S., Inc.*, 448 F.2d 238, 242-43 (4th Cir. 1971) (applying South Carolina law). However,

Continued on next page

South Carolina warnings law recognizes that certain product users and/or risks do not require a warning (i.e., either because of the user's level of knowledge or because of the nature of the risk). Therefore, any defense of a warnings claim should include careful analysis of the user and risk at issue to determine if South Carolina limits the duty to warn.

Footnotes

1 Brian A. Comer is a litigation attorney with Collins & Lacy, P.C. in Columbia. He practices in general products liability, business, pharmaceutical and securities litigation. He also authors the South Carolina Products Liability Law Blog at http://scproductsliabilitylaw.blogspot.com.

2 *Claytor v. General Motors Corp.*, 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982).

3 *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (1996); *see also Claytor*, 277 S.C. at 264, 286 S.E.2d at 132.

4 *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710; *Allen v. Long Mfg. NC, Inc.,* 332 S.C. 422, 427, 404 S.E.2d 354, 357 (Ct. App. 1998).

5 *See* S.C. Code Ann. § 15-73-30 (1976) ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.").

6 Restatement (Second) of Torts § 402A cmt. j.

7 *See* 21 U.S.C. § 201 et. seq.

8 *Id.* at § 201(2).

9 Restatement (Second) of Torts § 402A cmt. j.

10 *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 41, 674 S.E.2d 500, 504 (Ct. App. 2009); *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710.

11 *Id; Dema v. Shore Enterprises, Ltd.*, 312 S.C. 528, 435 S.E.2d 875 (Ct. App. 1993).

12 *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710 (citing Restatement (Second) of Torts § 402A cmt. g. (1965) for the principle that "a product is defective only 'where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.") (emphasis in original).

13 *Moore*, 382 S.C. at 42, 674 S.E.2d at 504.

14 *Id.*

15 *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710.

16 *Id.* at 269, 471 S.E.2d at 710.

17 *Id.* at 271, 471 S.E.2d at 711.

18 *Id.*, 471 S.E.2d at 710.

19 *Id.*. at 271 n.3, 471 S.E.2d at 711 n.3.

20 *Id.*

21 312 S.C. 528, 435 S.E.2d 875 (Ct. App. 1993).

22 *Id.* at 531-32, 435 S.E.2d at 876.

23 *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982).

24 *Jones v. Danek Medical, Inc.*, No. 4:96-3323-12, 1999 WL 1133272, at *7 (D.S.C. Oct. 12, 1999).

25 *See, e.g., Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985) (holding that corporations which supplied silica sand or related products used in casting process at foundry had no duty to warn foundry employees of risks and dangers of contracting silicosis where foundry had extensive knowledge of hazards associated with inhaling silica dust, disease of silicosis, proper dust control methods and duty to warn).

26 *See, e.g., Odom v. G.D. Searle & Co.*, 979 F.2d 1001 (4th Cir. 1992) ("Under this doctrine, the manufacturer's duty to warn extends only to the prescribing physician, who then assumes responsibility for advising the individual patient of risks associated with the drug or device.").

27 *Bragg*, 319 S.C. at 549, 462 S.E.2d at 331-32.

28 *Id; see also Madison v. American Home Prods. Corp.*, 358 S.C. 449, 595 S.E.2d 493 (1995) (("[S]trict liability is inconsistent with the learned intermediary doctrine, which places the duty to warn on the prescribing physicians, and not pharmacists....").

29 *Id.* at 1230.

30 *Id.* at 1231.

31 *Id.* at 1231.

32 *See Odom v. G.D. Searle Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992); *Tarallo v. Searle Pharmaceutical, Inc.*, 704 F. Supp. 653, 659 n.2 (D.S.C. 1988); *Jones v. Danek Medical, Inc.*, No. 4:96-3323-12, 1999 WL 1133272, at *7 (D.S.C. Oct. 12, 1999); *Sizemore v. Georgia-Pacific Corporation*, Nos. 6:94-2894 3, 6:94-2895 3, and 6:94-2896 3, 1996 WL 498410, at *6 (D.S.C. Mar. 22, 1996); *Pleasant v. Dow Corning Corp.*, No. 3:92-3180-17, 1993 WL 1156110, at *6 (D.S.C. Jan. 7, 1993).

33 *See, e.g.*, http://druganddevicelaw.blogspot.com/2007/07/headcount-whos-adopted-learned.html (visited Feb. 21, 2011) (citing to *Madison* as support that South Carolina has adopted the rule in the non-prescription medical product case); Lynn H. Gorod, "The Evolving Duty of Pharmacists: To Warn or Not to Warn?" 16 S. Carolina Lawyer 14, 16 (July 2004) ("The basis for not extending this duty has widely been premised on the 'learned intermediary doctrine.' This doctrine, which has been accepted in many jurisdictions, including South Carolina, provides that manufacturers of prescription drugs have a duty to warn prescribing physicians of a drug's known dangerous propensities.") (Emphasis added).

34 *Bragg*, 319 S.C. at 548, 462 S.E.2d 331.

35 *Ervin v. Continental Conveyor & Equip. Co., Inc.*, 674 F. Supp.2d 709, 725 (D.S.C. 2009); *Campbell v. Gala Indus., Inc.*, No. 6:04-2036-RBH, 2006 WL, at *4-5 1073796 (D.S.C. Apr. 20, 2006).

36 *See Branham v. Ford Motor Co.*, 390 S.C. 203, 223-24, 701 S.E.2d 5, 16 (2010) (citing to Restatement (Third) of Torts: Products Liability § 2b (1998) in support of adoption of risk-utility test); *Watson v. Ford Motor Co.*, 389 S.C. 434, 450, 699 S.E.2d 169, 177 (2010) (reiterating in footnote four its adoption of the Restatement (Third) approach for the risk-utility test in *Branham*).

ARTICLE

Restricting Restrictive Covenants

by Douglas W. MacKelcan

Restrictive covenants often create tension between the personal property rights of individual property owners and the interests of those same property owners in providing common services and protections to enhance the value of their neighborhood or condominium. What is an unreasonable restraint on the use of property to one property owner can be a necessary safeguard to another. Recent legislative developments and case law in South Carolina illustrate this tension and the challenges property owners associations, and their lawyers, face when determining how they govern themselves.

Transfer Fees

The hot topic in community association law for the past few years has been deed-based transfer fee covenants. Pending South Carolina House Bill H.3095, which would amend South Carolina Code Section 27-1-70 to prospectively prohibit transfer fees, defines a transfer fee covenant as:

> A provision in a document, whether recorded or not and however denominated, which purports to run with the land or bind current owners or successors in title to specified real property located in this State, and which obligates a transferee or transferor of all or part of the property to pay a fee or charge to a third person upon transfer of an interest in all or part of the property, or in consideration for permitting this transfer.

According to the Community Association Institute ("CAI"), a national organization that provides education and other resources to its more than 30,000 members, including volunteer and professional community leaders and managers, over half of CAI's member organizations rely on transfer fees as a way to generate revenue for their community association. While every property owners association has different restrictive covenants, all associations have limited options for generating revenue. The primary sources of revenue for property owners associations are annual and periodic assessments paid by the existing property owners. Depending on the association, these assessments pay for everything from security to maintenance and repair of common elements to providing recreational facilities, programs and staff. Transfer fees, which generally range from one quarter of a percent to one percent of the sale price of the property, have provided community associations a new revenue source, but they have been met with considerable opposition. Those in favor of the ban on transfer fees cite the burden the additional fee places on an already difficult real estate market and the public policy interest in promoting the free use and alienation of property.

The Federal Housing Finance Agency ("FHFA") began efforts in August 2010 to ban property transfer fees; however, it recently backed off of the proposal due in part to its potentially broad reach and negative impact on property owners associations. CAI and the community associations who rely on transfer fees for revenue have fought against Bills such as the one pending in South Carolina and the FHFA proposal due to the ever increasing costs of providing community services and the challenges associations face in collecting assessments when many properties have gone into foreclosure. Proponents of transfer fees in South Carolina appear to be losing the battle to those against it because Bill H.3095 passed almost unanimously in the House.

South Carolina House Bill H.3095 would only impact those transfer fee covenants not already recorded, thus, those associations that have already established a transfer fee covenant, either at the inception of the association or through an amendment to its governing document, would still be able to impose the fee. However, in addition to its impact on new communities and condominiums, the Bill would prevent existing communities and condominiums from amending their covenants to collect transfer fees.

Based on its overwhelming support in the House, it appears that this Bill will become law in South Carolina sometime in the near future. What is less clear is whether this is an isolated effort from the legislature specific to transfer fees, or whether it will lead to more legislation restricting the rights of community associations to establish and enforce restrictive covenants.

Two Step Analysis When Seeking to Prohibit the Use of Property

Although the transfer fee issue is one with such an impact and interest level that it developed into a legislative matter, the vast majority of controversies involving restrictive covenants are unique to a particular community. Typically, a condominium or

Continued on next page

ARTICLE CONT.

community developer creates and establishes the covenants in a governing document, such as a Master Deed or Declaration of Covenants and Restrictions, and files the document with the RMC office in the county in which the community or condominium is located. When a lot, home or condo is sold by the developer, it is done subject to the Master Deed or Declaration of Covenants and Restrictions, and it creates a contractual duty on both parties to follow the covenants identified in the governing documents. Every subsequent property owner, whether purchased from the developer or from a subsequent owner, is bound by the same restrictions that run with the land.

As one would expect, issues arise over time that were not anticipated by the developer and are not expressly addressed in the governing document. In such cases, the association or an individual property owner look to the Court for a determination of the language of the document as it relates to the particular issue, usually in the form of a declaratory judgment action. When interpreting governing documents, courts generally follow traditional rules of contract interpretation and make a legal determination as to the meaning of the documents as it relates to the specific issue presented. In addition, issues arise that were anticipated and addressed by the developer but a particular property owner or group of owners disagrees with the rule or the way the Board of Directors of the association has decided to interpret it. The South Carolina Supreme Court, in *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 680 S.E.2d 289 (2009), addressed the way Circuit Courts must handle cases that involve the interpretation of a restrictive covenant and request to enjoin a particular use.

In *Buffington*, residential landowners in the Forest Acres subdivision in Easley, South Carolina sought a declaratory judgment that neighboring landowners (T.O.E. Enterprises) operating a car dealership were in violation of the neighborhood's restrictive covenants and an injunction prohibiting commercial operation. The restrictive covenants in place provide that, "[n]o lot shall be used except for residential purposes," but the covenants only apply to 62 of the 110 lots in the subdivision. T.O.E. Enterprises' Toyota dealership borders the subdivision and is not subject to the restrictive covenants. However, it purchased four lots within the subdivision to provide additional parking for expansion of the dealership. The trial court found that three of the four lots were subject to the restrictive covenants as a matter of law; and, therefore could only be used for residential purposes. Further, the trial court ruled that T.O.E. Enterprises failed to show it was entitled to use the three (residential) lots for commercial purposes under an equity theory or that a change of conditions existed to warrant the release of the restrictive covenants. The trial court issued an injunction prohibiting Petitioners from using the land for commercial purposes, and the Court of Appeals affirmed the trial court.

Before the Supreme Court, T.O.E. Enterprises argued that the Court of Appeals erred in holding that the equities favored the enforcement of the restrictive covenants, while the residential property owners argued that a court is not required to balance the equities in deciding whether to enforce restrictive covenants, and, even if it was, equity required enforcement in this case. Although the Supreme Court ultimately affirmed the trial court's injunction against T.O.E. Enterprises, preventing the commercial activity on the residential lots, the Supreme Court disagreed with the Court of Appeals in determining that the trial court is required to balance the equities of enforcement of the covenant once it finds that the restrictive covenant has been violated. This distinction, while consistent with precedent, is important for practitioners because it requires preparation of arguments on two fronts – legal arguments related to the interpretation of the language of the restrictive covenant and equitable arguments supporting or opposing enforcement of the covenant.

In the *Buffington* opinion, the Supreme Court provides some guidance as to what factors might have tipped the scales of equity in favor of ignoring the restrictive covenants and refusing the injunction. It appears that had the lots been used for commercial purposes in the past, or had the residential owners waited until T.O.E. Enterprises was further along in the development process before opposing the use, the Court might have been more inclined not to enforce the use restriction. However, despite T.O.E. Enterprises having spent over $700,000 on improving the land, the Court found that financial loss in purchasing and improving the land was not enough to overcome T.O.E. Enterprises' notice of the covenants at the time of purchase. Further, the residential owners brought suit as soon as development of the lots began; thus, T.O.E. Enterprises had no argument that the right to enforce the covenants had been waived.

Although the injunction prohibiting commercial activity on the residential lots was upheld in Buffington, by requiring the equitable analysis of enforcement of the covenant, the Court places an additional burden on community association leaders to ensure that the enforcement of the covenants meets the fairness test, in addition enforcing their restrictive covenants as written. While time will tell whether Courts will refuse requests to enjoin certain property uses that violate the language of restrictive covenants on equitable grounds, *Buffington* appears to indicate a potential weakening of the ability of community associations to enforce restrictive covenants.

** Doug MacKelcan is an Associate in the Charleston, South Carolina office of Carlock Copeland. His practice involves the defense of professionals in legal, accounting, real estate, and medical malpractice lawsuits and directors and officers of homeowner associations.*

Developments in Defending Claims Arising Out of Real Estate Transactions

by Andrew W. Countryman [1]

A by-product of the economic downfall over the past couple of years has been an increase of claims by title companies against closing attorneys over title issues discovered after closings. Most closing lawyers serve as agents for title insurance companies for real estate transactions. In these situations, the lawyer and title insurance company enter into an agreement that allows the lawyer to write title commitments to buyers and lenders at closings. At each closing, the agent then accepts a premium from the purchaser/lender (a portion of which is forwarded to the title company, and a portion of which the lawyer retains), and the commitment is issued.

Almost all agency agreements between title companies and lawyers issuing title insurance contain provisions providing that the lawyer must indemnify the title company for expenses (including payments on title claims), attorneys' fees, and costs associated with title claims resulting from an error or omission of the lawyer. However, over the years, real estate lawyers and title companies have generated significant business for one another. As a result, in the past, when a title issue arose after a closing, and a purchaser/borrower made a claim on the title policy, the title company was likely to handle the claim and move forward, often without turning to the lawyer for indemnification, even when the title issue could have been blamed on the closing lawyer.

When the real estate market crashed though, the number of title insurance premiums collected slowed while the number of claims increased. As a result, title insurance companies have started turning to closing attorneys for indemnification following title claims more often. In fact, some title insurance companies have even started making claims against the lawyer before the title company even pays the claim, as opposed to paying the title claim and then seeking indemnification from the lawyer. While the increasing number of claims may make it difficult for defendant lawyers on one level, under these circumstances, the potential to resolve claims globally on the front end is usually something worth investigating.

Governing Law

South Carolina courts have identified five steps in a residential real estate closing that are considered the practice of law and therefore must be conducted by, or under the direct supervision of, a licensed lawyer. These include performing the title search/certifying title and recording the title and mortgage, preparing the closing documents, overseeing the transfer of closing funds and attending the closing.[2] Lawyers who fail to properly perform/supervise these steps have been sanctioned for assisting others in engaging in the unauthorized practice of law. Ethics opinions exist that discuss instruction, review, and correction of a non-lawyer's work as satisfying the supervision requirement, but the exact standard required could certainly use clarification.

Negligence

When bringing claims against closing lawyers pursuant to the agency agreements, title companies usually allege indemnification and negligence, as the title company is subrogated to the rights of the insured under the title commitment. Even if the title company only alleges indemnification, a negligence analysis still usually applies. Thus, the standard of care usually comes into play.

The preamble to the Rules of Professional Conduct states that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."[3] However, our Supreme Court has determined that a violation of an ethical rule may be relevant and admissible in determining whether a lawyer breached the standard of care in a legal malpractice action.[4] So, the first step for any closing lawyer seeking to defend against and/or avoid future claims related to title issues is to make sure to have a system of oversight of the five elements of closings the Supreme Court has identified in place.

The fact that a lawyer is incorrect as to the ultimate marketability of title to real estate does not establish that he or she was negligent.[5] Liability arises where the attorney *negligently* certifies title.[6] Unfortunately, little case law exists describing what a lawyer must do to meet the standard of care in certifying title. In light of the lack of specifics, the general negligence standard applies, which provides that the standard of care is what a reasonable lawyer would do under the same or similar circumstances. Further and again, ethical violations can serve as evidence of negligence in these situations.

Almost every real estate attorney hires title abstractors to perform the title work for closings.

Continued on next page

ARTICLE CONT.

The lawyer pays the abstractor a fee, and the abstractor goes to the courthouse for the title documents. This saves the lawyer a great deal of time and makes real estate closings profitable. Additionally, horn book law states that one who employs an abstractor is justified in relying upon the truth and accuracy of the abstract or report without making an independent investigation (unless the abstract itself makes it plainly apparent there has been an omission of mistake).[7]

Lawyers need to be careful though, as there is no certification required to be an abstractor or governing body overseeing the practice of abstracting title. Lawyers should only retain experienced abstractors with whom they are familiar and whose work they trust. It is also important to hire only abstractors with errors and omissions coverage. Lawyers should also review the title work the abstractor provides and be on the lookout for irregularities that might point to mistakes in the title work or title issues. Lawyers that take these steps (and oversee the other elements of closings) have a stronger argument that they met the standard of care in the certification of title if an issue arises down the road.

Agency Agreement

The foundation for any claim against a closing lawyer by a title company is the agency agreement. The first step in analyzing a lawyer's potential liability is dissecting the language of the agency agreement. These agreements almost always provide that the title company has the right to seek indemnification from the title agent (closing lawyer) for title claims the company pays resulting from an act or omission of the lawyer. However, the particular language of the agreement may be important, as it defines the relationship between the lawyer and title company and may limit or define the lawyer's duties to the title company in the event of a claim.

Expert Affidavit Statute

In recent years, the expert affidavit statute (S.C. Code Ann. § 15-36-100, *et seq.*), has been employed to defend against claims against lawyers for professional negligence. This provision requires plaintiffs filing malpractice claims against licensed South Carolina professionals to file an affidavit of an expert witness along with the complaint. It is not completely clear how this applies across the board to claims against closing lawyers by title companies, as judges handle it differently. However, it is something to consider when dealing with these types of claims.

Third-Party Claims

In South Carolina, the title company's claims are really only against the lawyer (title agent), as the title company is not usually in privity with the abstractor. As a result, even if the title issue is the result of a mistake by the abstractor or other third party, the title company has little reason, motivation, or even ability to seek recovery against that third party. The lawyer, however, usually is in privity with the abstractor and should consider bringing third-party claims as a result. *This is why it is very important for real estate lawyers to only use abstractors with errors and ommissions coverage.*

Resolution Road Map

When dealing with claims against lawyers arising out of title issues, it is important to gain an early understanding of the parties *and* potential parties involved. Even if the title company is not making a claim directly, it may be financing a named party's case. In that situation, the title company may have a claim for (at least) attorneys' fees against the lawyer who issued the title policy pursuant to the agency agreement. This needs to be considered from the beginning in order to accurately evaluate the claim from the defendant lawyer's perspective.

Sometimes a more efficient result can be achieved by orchestrating a global resolution early in the claims process that includes a combined payment to the title policy holder on behalf of the lawyer, title company, and/or abstractor or other third parties. Of course, it is very important to demand from the onset, when dealing with tile claims on behalf of closing lawyers, that participation in settlement negotiations will only happen if the title company agrees to release the lawyer for all present and future claims related to the closing (including indemnification pursuant to the agency agreement). This is true regardless of whether the title company is a party to the claim.

The coming years should be interesting from the perspective of monitoring claims against lawyers related to real estate closings. While some issues related to dealing with such claims are still being developed, some fundamental principals should hold true, including the importance of adhering to the applicable ethical rules and evaluating claims from a global perspective as early as possible. Staying in front of these issues should result in fewer claims against closing lawyers and more efficient resolutions of claims once they are made.

Footnotes

1 Andy Countryman is an Associate in the Charleston, South Carolina office of Carlock Copeland. He has a litigation practice focusing in legal and medical malpractice, general liability, and construction litigation.

2 *State v. Buyers Service*, 357 S.E.2d 15 (S.C. 1987); *Doe v. McMaster*, 585 S.E.2d 773 (S.C. 2003); and *Doe Law Firm v. Richardson*, 636 S.E.2d 866 (S.C. 2006).

3 Rule 407, SCACR.

4 *Smith v. Haynsworth, Marion, McKay & Geurard*, 472 S.E.2d 612, 322 S.C. 433 (1996).

5 *Bass v. Farr*, 434 S.E.2d 274, 315 S.C. 400 (1993).

6 Id. citing Cianbro Corp. v. Jeffcoat & Martin, 804 F.Supp. 784 (D.S.C.1992).

7 Larsen, Sonja, "Liabilities of Abstractors," Corpus Juris Secondum, 1 C.J.S. Abstracts of Title § 16.

ARTICLE

The Admissibility of Expert Testimony Post Watson

by James B. Hood, Brian E. Johnson, and H. Cooper Wilson, III [1]

Many high exposure cases turn on the strength and credibility of expert's testimony. Accordingly, attacking the admissibility of your opponent's expert's testimony has become one of the most important aspects of every case. South Carolina courts have consistently held that defects in an expert witness' education, experience, or testimony goes to the weight rather than the admissibility of the testimony. However, the South Carolina Supreme Court's recent opinion regarding expert testimony is a reminder for trial lawyers to review their strategy on excluding experts and preparing early in the case to challenge the admissibility of speculative or unreliable expert testimony.

In *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), the Court held that the trial court erred in allowing the Plaintiff's electrical engineering expert to testify regarding whether electromagnetic interference can effect a car's cruise control system. In reaching its decision, the Court analyzed its prior rulings on the admission of expert testimony and applied the reasoning to *Watson* through an in-depth analysis. Therefore, before one can fully appreciate the implications of *Watson*, it is necessary to review the prior South Carolina Supreme Court decisions on the admission of expert testimony as that precedent forms the substance of the *Watson* decision.

Pre *Watson*

A review of the pertinent South Carolina case law begins with the 1979 South Carolina Supreme Court case, *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120, where the Court rejected the federal *Frye* [2] standard of general acceptance. In *Jones*, the Defendant appealed his criminal conviction arguing "bite mark" testimony from the State's expert was unreliable as it did not meet the "general acceptance" standard from *Frye*.[2] The Court disagreed by holding that the admissibility of scientific testimony depends on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *Id.* at 124 (citing *People v. Marx,* 54 Cal.App.3d 100, 126 Cal.Rptr. 350 (1975)). The Court in *Jones* found "the expert did not rely on untested methods, unproven hypotheses, intuition or revelation," but rather "they applied scientifically and professionally established techniques." *Jones*, *supra*, at 125 (citing *People v. Marx*, 54 Cal.App.3d 100 126 Cal.Rptr. 350, 356 (1975)).

Our Supreme Court again rejected the *Frye* standard in its 1990 decision in *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781, where the Defendant appealed his convictions of conspiracy, kidnapping, and criminal sexual conduct. In affirming the admissibility of expert testimony, the Supreme Court noted South Carolina "has never specifically adopted the *Frye* test and has employed a less restrictive standard in regard to the admissibility of scientific evidence." *Ford*, 392 S.E.2d at 783.

In 1999, the Supreme Court addressed the *Daubert* [3] standard in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508. In *Council*, the State sought to introduce a mitochondrial DNA analysis to show a hair found at the crime scene most probably belonged to the Defendant. The trial judge found the evidence admissible under the South Carolina Rules of Evidence, *Jones*, and *Daubert*. The Defendant argued on appeal that it was error to admit the expert testimony because it had not gained general acceptability in the scientific community. The Supreme Court disagreed noting South Carolina never adopted the "general acceptability" standard from *Frye*.

Although Rule 702 of the South Carolina Rules of Evidence and Rule 702 of the Federal Rules of Evidence were identical at the time, the Supreme Court in *Council* declined to adopt *Daubert*. *Id.* at 518. The Court stated that "the proper analysis for determining admissibility of scientific evidence is now under the SCRE." "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." The Court opined that "the trial judge should apply the *Jones* factors to determine reliability"¬—these factors include: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Once the evidence is deemed admissible under Rule 702, SCRE, the trial judge should determine if

its probative value is outweighed by its prejudicial effect. *Id.* (citing Rule 403, SCRE). If the evidence is deemed more probative than prejudicial, "the jury may give it such weight as it deems appropriate." Finding the requirements of Rule 702 and the *Jones* factors were satisfied, the Supreme Court held the expert testimony was admissible.

Despite the Supreme Court's explicit rejection of the *Daubert* standard, the similarities between the *Daubert* and *Jones* factors are obvious. Nevertheless, our courts have consistently held that "[d]efects in an expert witness' education and experience go to the weight, rather than the admissibility, of the expert's testimony." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596, 598 (1997) (citing *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995)). However, the *Watson* decision, unlike *Gooding*, presents a situation where the Supreme Court held that defects in expert testimony were relevant to admissibility.

The *Watson* Decision

In *Watson*, the Supreme Court held that the Plaintiffs' designated expert on electromagnetic interference was not qualified to render expert testimony. Initially, the Court emphasized that trial courts serve as gatekeepers who must decide whether evidence submitted by a party is admissible pursuant to the Rules of Evidence. The Court confirmed that Rule 702, SCRE governs the admission of expert testimony. Using the framework of Rule 702, SCRE, the Court highlighted "three preliminary findings which are fundamental" to determining whether an expert may testify at trial. The Court emphasized that a party must meet all three requirements before their expert's testimony will be admitted. The requirements are: (1) the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury; (2) the proffered expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter; and (3) the expert testimony is reliable.

The Supreme Court applied the three factors set forth *supra* and held that the expert testimony was not reliable and should not be admitted. The Supreme Court reviewed the expert's testimony on alternative feasible design and held that the expert was not qualified to testify. The Court reasoned that the expert "had no experience in the automobile industry, never studied a cruise control system, and never designed any component of a cruise control system." The Court further explained that the expert's testimony was not reliable as he failed to support his testimony that his alternative design would have changed the outcome or was economically feasible.

The Court also reviewed the expert's testimony on electromagnetic interference. The Court again held that his opinions were not reliable and should not be admitted. The Court highlighted several issues with the testimony including: the expert had only recently learned of sudden acceleration; his theory on the issue had not been peer reviewed; he had never published papers on his theory; and he had never tested his theory. Based on these factors, the Court held that "… there [was] no evidence indicating that Dr. Anderson's testimony contained any indicia of reliability," and that the trial court erred in allowing him to testify.

Applying *Watson* To Trial Practice

On the heels of *Watson*, lawyers are more often considering whether to formally challenge the admissibility of the testimony from the opposing party's expert prior to trial. To this end, one must make the strategic decision to challenge expert testimony almost immediately after the opposing party names his expert. As a practical matter, the attorney should develop deposition questions that are associated with the *Jones* factors. The focus of these factors is essentially whether the methodology

is scientifically valid and whether it can be properly applied to the particular facts of the case. Conclusory questions and insufficient answers will not suffice for a thorough examination.

Using this framework, attorneys need to focus on the basis for the expert's testimony and whether he is qualified to render the same. For example, at almost every expert deposition, the attorney receives a copy of the opposing expert's CV. An attorney should spend time questioning the contents of the CV and working to develop the theme that the expert is not qualified. A review of *Watson* reveals that the Court gave considerable weight to the expert's background, or lack thereof, on electromagnetic interference. The Court seemed concerned that while the expert had experience analyzing the electrical wiring of generators, he was not experienced in the automotive industry and had not studied a cruise control system. To this point, simply because an expert's CV says he is an engineer does not mean that he is qualified on every issue regarding product defects or accident reconstruction. If you want to exclude the expert, you must challenge them on their background because that ultimately is what the expert leans on to show reliability.

In most depositions, experts are questioned on the areas in which they are and are not experts. We ask these questions to limit the scope of their testimony as the cumulative effect of the limitations becomes significant. As you eliminate areas of expertise, you also eliminate potential explanations for opinions. For example, if you have a seatbelt expert who has been retained to offer expertise on the design of the seatbelt, it is helpful to establish that he is not an expert in biomechanics. Biomechanics experts often testify about the seatbelt's role in the accident based on their review of medical records, pictures, and testing. Once you establish that the expert is not qualified to offer testimony on biomechanics, you may limit his ability to testify regarding how the injured party was positioned, whether his seatbelt was used, and how it affected the accident.

Experts often try to avoid the specifics by reinventing themselves—i.e. is a systems engineer qualified to testify about every aspect of safety in all products? If you ask him, he will say "of course." Why? These are professional experts whose incomes are derived from speculating about things of which they have only just learned. *Watson* represents a threat to their way of life and they are going to fight it. When experts are cornered either during depositions or trials, they will try to reshape the discussion to eventually get back to something they have studied or learned in their career which they believe makes them qualified. The lawyer's job is to refuse to accept that.

Even if the expert is qualified to render an opinion, *Watson* demands that you question the reliability of an expert's testing by examining the tests the expert performed to reach his conclusions. Attorneys must be prepared to attack certain aspects of the testing which can only be achieved with thorough preparation. For example, if the expert is opining that a product is defective based on their testing, you must initially get every piece of information you can about the test. Again, let the *Jones* factors be your guide. It is imperative that you determine not only the end result of the testing but also the steps the expert took to get there.

For example, an expert may testify that a certain car is defective because it has poor handling and stability. To reach this conclusion, the expert performed driving tests which showed that the car tipped while being operated in certain conditions. There is little doubt that the expert's testing shows a car tipping, but initially you must dive into the basics of how he reached his conclusion to include, inter alia, the model year of the car; the condition of the car; the condition of the tires; the speed he was driving; the conditions of the road; the type of tests he ran; and the results of every test. The last two issues may be the most important—experts often want to simplify their testing to show the most damning result possible. You cannot accept this simple conclusion without exploring the likely hundreds of other tests or scenarios that the expert analyzed. If you can work through the testing, you can potentially identify numerous other results which benefit your case and which you can use to counter one bad result. Testing can be used to reach almost any conclusion; however, the more information you can obtain to show inadequate testing or unreliable results, the more persuasive your eventual argument can be. If you do not succeed in having the expert's testimony struck, you will have laid the foundation for an effective cross-examination.

Issues To Consider Before Making Your Challenge

Once you have made your record, you must consider a host of substantive and procedural factors on when and how to present your challenge to the Plaintiff's expert. Lawyers must balance the perceived chances of winning the motion to exclude the expert against the risk of educating your adversary on the weaknesses of the expert's testimony. An unsuccessful challenge may prepare the opposition for cross-examination at trial and educate opposing counsel on the weaknesses in his case. But you should expect that your adversary appreciates the weaknesses of his expert's credentials so the decision should hinge on your expected chances to win. The decision to file a motion to exclude is similar to the decision to make a motion for summary judgment—how much trial strategy or how many cross-examination points have you given away in drafting the motion and arguing its merits? No motion to exclude should be made until you have analyzed these prac-

Continued on next page

DRI Update

by Sam Outten

There are a number of resources which DRI provides which we need to be aware of which may assist us. When you have a chance, take a look at the following:

1. **DRI Today –** www.dritoday.org is a legal portal designed specifically for the defense lawyer. It provides direct access to the DRI blog, previously published for the defense articles, and the latest in legal and business news. DRI Today is a one-stop resource with the most current information covering a wide range of topics and issues.
2. Social networking – Twitter, FaceBook and LinkedIn are all linked with DRI.
3. Mobile DRI apps – electronic applications for your PDA which put you in touch with fellow members with just a few clicks along with apps that enhance our seminars through personalized schedules, reminders, etc.

Upcoming events:

- **DRI Mid-Atlantic Regional Meeting**, May 6-7 in Asheville, North Carolina where we will have officers and State Representatives from Maryland, D.C., Virginia, North Carolina and South Carolina.
- **The DRI Annual Meeting** will be in Washington, D.C., October 26-30 and features Justice Antonin Scalia, as well as some other outstanding speakers.

ARTICLE CONT.

tical considerations.

If you make the decision to proceed with your motion, there are procedural considerations to analyze. You should begin with the scheduling order and determine the proper timing and method for challenging the opposing expert. The challenge should be made after the deadline for fact discovery and designation of expert witnesses in order to avoid the opposition from retaining a more qualified expert. In advance of trial, the attorney should file a Motion to Exclude under Rule 104(a) of the South Carolina Rules of Evidence. This rule provides that preliminary questions regarding the admissibility of evidence shall be determined by the court. "The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." *State v. White*, 372 S.C. 364, 642 S.E.2d 607, 612 (Ct.App. 2007) (citations omitted). Additionally, filing a motion prior to trial may avoid unnecessary trial expenses. In support of the motion, counsel should include affidavits and deposition transcripts identifying the specific testimony challenged and the basis for each objection. You need to give the trial court enough information to rule in your favor and a complete record for the appellate courts to affirm.

Conclusion

While our appellate courts continue to provide guidance on what will assist the trier of fact, whether a particular expert is qualified and whether the underlying science is reliable, you can rest assured the proliferation in the use of experts will continue. Experts are essential to most high exposure cases, and they always will be. While *Watson* does not drastically change the common law in South Carolina regarding the exclusion of experts, it does provide a roadmap for what evidence attorneys should present to the trial courts to have the best chance of succeeding with their motion to exclude an expert.

Watson should not be construed as an invitation to challenge each opposing expert in every case. Though Watson represented a "win" for the defense, it also represents a new challenge for all attorneys as you should expect the same scrutiny against your expert witnesses. To succeed, you must be cognizant of the challenge and have your experts prepared to satisfy the *Jones* factors. As attorneys begin to explore the reaches of Watson, it is essential that you and your experts are ahead of the curve.

Footnotes

1 James B. Hood is a partner with the Hood Law Firm in Charleston, and Brian E. Johnson and H. Cooper Wilson, III are associates with the firm, where they devotes much of their practice to litigation including products liability, personal injury, and medical malpractice.

2 *Frye vs. United States*, 293 F. 1013 (D.C. Cir. 1923).

3 *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Case Notes

Summaries prepared by Nicholas W. Gladd and Sam Sammataro

Funchess v.Blitz U.S.A., Inc.; Palmetto Distributors of Orangeburg, LLC; Express Lane, LLC; Joseph E. Carroll; and Foley's, Inc., 2010 WL 4780357 (Nov. 16, 2010 D.S.C.).

Plaintiff, while pouring gas into a chain saw from a plastic container, received catastrophic burn injuries when the vapor trail ignited and traveled back into the container and exploded. Plaintiff filed his product liability suit in Orangeburg County for negligent design of the gas container against the foreign manufacturer and against three resident defendants for strict liability for "selling" the container. Foreign manufacturer removed the action based on fraudulent joinder of sham defendants since two of the three non-diverse defendants were limited liability companies of which Plaintiff was the sole proprietor and owner. Regarding third resident defendant, manufacturer established that neither title nor ownership passed through him so he cannot be deemed a "seller" under § 15-73-10. The district court, sitting in diversity, rejected the fraudulent joinder arguments and remanded the action having found Plaintiff met the liberal "glimmer of hope" standard.

As an additional ground to remand the action, the district court found the notice of removal was invalid since the manufacturer had not received consent to removal from the fifth defendant, a foreign distributor. The district court rejected the contention that consent from the distributor was unnecessary since distributor had not appeared in action nor had service upon foreign distributor been proven by affidavit under §15-9-245(c) and Rule 4, SCRCP. Plaintiff had attempted service via the Secretary of State, but the certified letter was returned as "undeliverable", as opposed to "refused". Nonetheless, the district court held the foreign distributor was properly served and refused to excuse the manufacturer from obtaining consent from an unfound defendant.

John Douglas Butler, as Personal Representative of the Estate of Jon Trevor Butler, deceased, and William Michael Prince, Individually, v. Ford Motor Company, Continental General Tire Company, Continental Tire North America, Inc., and Snow Tire Company, 724 F.Supp.2d 575 (D.S.C.) (July 9, 2010).

In the summer of 2007, Plaintiffs and others who were members of the band Bottom of the Hudson were travelling through the southeast on a concert tour in a 1991 Ford E-350 fifteen-passenger van equipped with re-tread tires purchased from Defendant Snow Tire. The right rear tire experienced a de-treading July 26, 2007. Three days later, the left rear tire de-treaded while the band was traveling along Interstate 40 in Sampson County, North Carolina. As the driver responded to the tire event, the van rolled several times before coming to rest in the right shoulder of the highway. Two passengers were ejected, and one later died from injuries sustained in the accident. Plaintiffs filed this product liability suit in United States District Court for the District of South Carolina alleging a variety of tort and warranty claims against Ford, Snow Tire and other defendants. Ford moved to dismiss Plaintiff's claims against it on the basis that the North Carolina statute of repose in effect on the date of the accident prohibited product defect claims brought more than six years after the date of initial purchase of the product.

In granting Ford's motion, the court agreed North Carolina's statute of repose is substantive and, therefore, applicable to this diversity action where the accident occurred in North Carolina. Thus, because the Ford E-350 was manufactured in 1991 and placed into the stream of commerce nearly sixteen years prior to the accident – clearly longer than the six year period of repose permitted by North Carolina law – Plaintiffs' tort claims could not withstand a Rule 12(b)(6) motion to dismiss. Going further, the court rejected Plaintiffs' contention that application of the statute to South Carolina citizens proceeding in a South Carolina forum violated the public policy of this State. Turning to Plaintiffs' breach of warranty claims, the court found no reasonable relationship existed between the accident and South Carolina so as to warrant application of South Carolina law. Instead, the court found North Carolina, the location of the accident and the place where most key witnesses resided, bore the most appropriate relationship. Accordingly, the court likewise applied the North Carolina statute of repose, which has been held to apply to all product liability actions regardless of plaintiff's theory of recovery, to dismiss Plaintiffs' breach of warranty claim.

Verdict Report

Type of Action:
Medical Malpractice

Injuries alleged:
wrongful death

Name of Case:
Donald E. Marze, personally and as personal representative of the Estate of Darlene L. Marze v. Eastside Internal Medicine, P.A., and Pamela K. Wilson, M.D.

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

Case number:
08-CP-23-7753

Name of Judge:
The Honorable Edward W. Miller

Amount:
Defense Verdict

Date of Verdict:
November 18, 2010

Attorneys for defendant (and city):
Molly H. Craig, James B. Hood, H. Cooper Wilson, III, Charleston, South Carolina

Description of the case:
The Plaintiff filed a medical malpractice action against an internist and her practice who was treating a forty-eight year old woman for multiple medical conditions and taking approximately twenty-five medicines as a result of those co-morbidities. The Plaintiff alleged that the numerous medications caused a polydrug overdose and the Decedent suffered respiratory insufficiency resulting in a cardiopulmonary arrest. The coroner, toxicologist and the forensic pathologist involved in the case concluded the Decedent died as a result of respiratory insufficiency due to synergistic overdose. The Defendants however, were able to prove the medications prescribed for the Decedent were reasonable and appropriate, given her complex medical problems and conditions particularly since she was taking the same drug regimen for several years without incident. The jury returned a verdict for the Defendants.

2011

Spring

TRIAL ACADEMY

TBD

Summer

JOINT MEETING

July 28-30

The Grove Park Inn

Asheville, NC

Fall

ANNUAL MEETING

November 3 - 6

The Amelia Island Ritz Carlton

Amelia Island, FL

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

Address Service Requested