SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

South Carolina Chosen for Justice O'Connor's iCivics Project

See page 3

PRESIDENT'S MESSAGE

President's Message

by T. David Rheney

Malpractice? Really?

Several times in the past 10 years, Sam Outten (good friend, fine lawyer and SCDTAA past president) and I will have been talking about SCDTAA stuff, usually during a round of golf, when he'll stop in mid-sentence, change direction and the conversation will go something like this:

Sam: You know what?

David: No, but you're going to tell me aren't you?

Sam: Yes I am.

David: What, Sam?

Sam: If you are a defense lawyer in South Carolina and you aren't involved in the SCDTAA, you are committing malpractice!

David: That's a bit strong, don't you think?

Sam: No it isn't.

David: Malpractice? Really?

Sam: Absolutely.

Over the years I've decided Sam is right. And I'm not talking about just being a member of the SCDTAA, I'm talking about being involved in it. We have a lot of members who are knee deep involved in the SCDTAA, but like any organization we have many who aren't "involved" even though they are members. And I'm here to tell you that if you practice defense law in South Carolina, there simply is no organization better suited to help you professionally, personally and even socially from the day you begin the practice of law to the day you retire and even beyond.

Just over a third of the way through 2010 the SCDTAA has put on a construction law seminar, a corporate counsel seminar, a judicial and legislative reception attended by several members of the Supreme Court and the Court of Appeals, numerous circuit court judges and at least a couple dozen members of the Senate and House, a golf tournament to raise money for our PAC and an advanced deposition boot camp. By the time you read this we will have held the 20th Annual Trial Academy for young lawyers in Charleston, during which we will have our second judicial reception of the year and a young lawyers reception, and the 43rd Mid-Year Meeting with the South Carolina Claims Manager's Association at the Grove Park Inn in Asheville will be right around the corner. In early September we will have a deposition boot camp for younger lawyers in Columbia, and later that month another corporate counsel seminar followed by a judicial reception in Greenville. Finally, we'll cap off the year with three great days at our Annual Meeting in Pinehurst, North Carolina, to which we will invite the federal court judges from South Carolina, the members of the Supreme Court and the Court of Appeals and all circuit court judges. And if we think of anything else to do between here and there we will try that too!

In 1990 my wife Barbara and I attended our first joint meeting in Asheville and were both immediately hooked on the SCDTAA. Fortunately, my law firm in Florence at that time encouraged me to become more involved. In 1991 I attended the first Trial Academy in Columbia. Not too long after that I moved to my current firm in Greenville, Gallivan, White and Boyd, which also supported my involvement in the SCDTAA. I have immensely enjoyed the SCDTAA, not only because of how much it has helped me in the profession to attend events like those mentioned above, but even more so because of the relationships it has enabled me to develop over the years. I won't talk much more about that now because that will be a topic for later this year, but I will say it would be very difficult for me to count the number of lifelong friends I have made, both in and outside South Carolina, because of the SCDTAA.

All of this is to say that if you are reading this letter and you aren't involved in the SCDTAA, come join us. There is plenty of room for you to find something to do and plenty of room for new ideas. Most importantly you will benefit on every level of your practice. If you need more information, go to our website, www.scdtaa.com, or call our Executive Director, Aimee Hiers, at (800) 445-8629. Will you commit "malpractice" if you don't? Maybe, maybe not. Just be sure not to cancel your coverage.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

Letter From The Editors

by Alan Lazenby and John Kuppens

As its editors this year, Alan and I recognize that the *DefenseLine* can only be as good as our members make it through their contributions of articles, case notes, and reports on issues of interest to our practices. Thus, while we are very pleased to see the *DefenseLine* continue to improve in terms of the quality and quantity of its content, we give all the credit to our members, especially those involved in our substantive law committees. These committees have been extremely active, and their contributions to this issue make it what it is – a publication of which we can all be proud.

In this issue we have an entertaining glimpse of what the SCDTAA was once like, authored by Mr. Ruth (hint: not the author's real name), and we have a number of timely articles regarding recent developments in the courts and the legislature. We are all proud to see our members holding key positions in national organizations like Our Courts, FDCC, IADC, DRI, and others. These are interesting times to be a lawyer in South Carolina, and we are proud that so many of our members are providing leadership in key areas that affect us all. It is gratifying to see this publication reflect the energy and expertise of our organization. Thanks for all that you are doing.

P.S. Special thanks to Lucie Cohen for her assistance with this issue.

Alan Lazenby

John Kuppens

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 Chosen as National Pilot for Justice O'Connor's iCivics Project

The SCDTAA is honored to lead the nation in support of United States Supreme Court Justice Sandra Day O'Connor's project, iCivics. South Carolina started as the national pilot for the program that has now spread to over forty states. The SCDTAA, along with the South Carolina Judicial Department, provided the funds for the nation's first pilot program which was conducted at Gilbert Middle School this spring. iCivics is a web-based education project designed to reinvigorate civics teaching and learning by allowing students to play interactive computer games about the three branches of government, citizen and civic engagement, and origins of our constitutional system of government. The online resource provides free lesson plans, interactive modules, and games designed specifically for use in middle school classrooms. With these tools, iCivics is empowering the first generation of "digital natives" to become knowledgeable civic participants and leaders. This website is so popular among students that over half of the children exposed to the games at school played them, unprompted, at home the same afternoon. Teachers have commented that they have never seen middle school students so engaged for such a long period of time.

Through their work across the nation, two of SCDTAA's Board Members, Catherine Templeton of Ogletree Deakins and Molly Craig of the Hood Law Firm, were recently asked by Justice O'Connor to become her National Coordinators for iCivics. Catherine and Molly are traveling to various states to promote the program. They recently visited a middle school in Harlem, New York and will accompany Justice O'Connor when she speaks to the Conference of Chief Justices in Colorado this summer.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

Firm Announcements

Harry M. Lightsey III Joins MG&C to Lead the Firm's Business Practice Group

The law firm of McAngus Goudelock & Courie is pleased to announce Harry M. Lightsey III, former Southeast president for AT&T, has joined MG&C as the leader of the firm's Business Practice Group.

Lightsey's practice and team will focus on regulatory, administrative, technology, business and commercial counseling and litigation. He will also work with the firm's governmental affairs business, MG&C Consulting, on state, local and federal legislative lobbying, procurement and government relations issues.

Lightsey received his undergraduate degree from Princeton University and his law degree from the University of South Carolina School of Law. He has also served on the Princeton National Alumni Executive Board and on the Board of Trustees of the College of Charleston. He was a founding board member of both City Year Columbia and EdVenture Children's Museum.

Haynsworth Sinkler Boyd Adds New Associate Attorneys

With the recent addition of the new associate attorneys, Haynsworth Sinkler Boyd, P.A. now has 141 lawyers in its combined six office locations.

Charleston, SC Office – Charleston native **Stafford J. (Mac) McQuillin III** joined Haynsworth Sinkler Boyd's Charleston office as a litigator focusing on general defense litigation, with a concentration in premises liability, personal injury, products liability, and insurance coverage issues. McQuillin earned a J.D., cum laude, from the University of South Carolina (USC) in 2009, and a B.A., magna cum laude, in Political Science also from USC in 2005. Prior to joining the Firm, McQuillin clerked for South Carolina Governor Mark Sanford and South Carolina Senator George E. (Chip) Campsen III.

Columbia, SC Office –A native of Hopkins, SC, **Ashley V. Myers**, practices in Haynsworth Sinkler Boyd's Columbia office. She focuses her practice on bankruptcy matters and creditors' rights litigation and assists in the representation of lenders in commercial and consumer distressed debt actions. Myers received her J.D. from The University of Toledo College of Law in 2009, where she also served as a recruiter following graduation. A Lettie Pate Scholar, Myers received a B.A. in psychology from Spelman College in 2005.

S. Ross Shealy is a litigator in the Columbia office of Haynsworth Sinkler Boyd. Shealy focuses his practice on general civil litigation matters, including defense of products liability, premises liability, professional negligence, insurance, and construction cases. A native of Cayce, SC, Shealy received a B.S. in Economics from the United States Naval Academy in 1999. He received his J.D. magna cum laude, from the University of South Carolina in 2009. He earned a Master's degree in Engineering Management from Old Dominion University in 2003 and did graduate studies at the University of South Carolina School of the Environment.

Kristian M. Cross Joins Collins & Lacy, P.C.

Collins & Lacy, P.C. is pleased to announce that Kristian M. Cross has joined the firm as an associate practicing in workers' compensation law.

A cum laude graduate of Clemson University, Kristian received her undergraduate degree in Communication Studies. She went on to earn her Juris Doctor from the University of South Carolina. Prior to joining Collins & Lacy in 2010, Kristian worked as an attorney for a Columbia-based firm practicing in the areas of business, commercial, and insurance litigation.

McAngus Goudelock & Courie Welcomes Eric G. Fosmire to the Columbia Office

The law firm of McAngus Goudelock & Courie is pleased to announce that attorney Eric G. Fosmire has joined the firm's Columbia office. Mr. Fosmire's practice includes construction defects, premises liability and catastrophic losses. He graduated from Wofford College with a bachelor's degree in history and received his law degree from the University of South Carolina School of Law. After law school, Mr. Fosmire served as a law clerk for the Honorable Don S. Rushing of South Carolina's Sixth Judicial Circuit and as assistant solicitor for the Fifth Circuit Solicitor's Office in Columbia.

Mr. Fosmire is a frequent author and speaker on construction-related issues, most recently writing the South Carolina chapter of Toxic Mold Litigation, published by Lawyers & Judges Publishing Company, Inc. in 2009. He is a member of many legal associations, including the Defense Research Institute, Council on Litigation Management and the South Carolina Defense Trial Attorneys' Association.

Continued on next page

Nexsen Pruet Awards Diversity Scholarships

Nexsen Pruet is pleased to announce that the firm has awarded law school scholarships to three minority students from North and South Carolina:

Andrew Charles Cooper
University of South Carolina School of Law

Kenny Gardner
Charleston School of Law

Tiffany Rene Johnson
Wake Forest University School of Law

The awards are made possible through the Nexsen Pruet Diversity Scholarship Program. Each year, Nexsen Pruet awards scholarships to exceptional minority law school students who are planning legal careers in the Carolinas. In addition to the $3,000 award, the students may be considered for summer employment in one of the firm's eight offices.

"Our commitment to diversity has far-reaching benefits in the communities where we work and live," said John Sowards, chairman of the board of Nexsen Pruet. "But, we understand that a scholarship program alone can not fix all of the socioeconomic disparities that persist in our country."

Students who attend North Carolina Central University School of Law, the University of North Carolina at Chapel Hill School of Law, Wake Forest University School of Law, the University of South Carolina School of Law, and Charleston Law School are eligible to apply for the yearly scholarships.

1st SCDTAA PAC Golf Classic a Great Success!

Great weather, great golf, and great support. That is the best way to sum up the first ever SCDTAA PAC Golf Classic. On April 22, 2010, 44 players converged on Spring Valley Country Club in Columbia to participate in this inaugural event to raise money for the Association's political action committee. Eleven teams competed in a Captain's Choice tournament, with winners in the low gross and low net categories. Players also competed in hole-in-one contests that included an Audi convertible, as well as closest to the pins and long drive. We received tremendous support from numerous firms that sponsored teams, drink stations, holes, and other contests. We also benefited greatly from our tournament sponsor, Haynsworth Sinkler Boyd, P.A. Their generous contribution in sponsoring the tournament helped our fundraising efforts greatly. We thank all of our sponsors who sponsored teams, holes, drink stations and other contests: Murphy & Grantland; Ellis Lawhorne and Sims; Turner, Padgett, Graham and Laney; Aiken Bridges; McAngus Goudelock & Courie; Law Office of Tom Dougall; Nexsen Pruett; Nelson Mullins Riley & Scarborough; Collins & Lacy; Richardson Plowden & Robinson; Young Clement & Rivers; McKay, Cauthen, Settana and Stubley; SEA Ltd.; Womble Carlyle Sandridge & Rice; Gallivan White and Boyd; Hood Law Firm; Maybank Law Firm; IKON Office Solutions; AW Roberts Court Reporting; Carolina Court Reporting; Ogletree Deakins; Fisher & Phillips; Elmore and Wall; Garber Court Reporting; SmartPhone Medic; MGC Consulting, LLC; Sowell Gray; SC Civil Justice Coalition; Watkins Services, Inc.; and Harwood Financial Services. We also want to thank AW Roberts Court Reporting for donating tee gifts for all our players. Congratulations to Haynsworth Sinkler Boyd for winning the low gross category and SEA, Ltd. for winning the low net division. Thanks to this generous support we raised nearly $18,000 for our political action committee. The money raised by this tournament will help the Association tremendously in giving our member firms a voice with our General Assembly. Thanks also to Aimee Heirs for her assistance in supporting this tournament, as well as the management and staff at Spring Valley Country Club. We are looking forward to another great event next year. If you missed it this year, we hope you will join us then.

Members in the News

Madden to Serve on Faculty of Family Law Trial Institute

Tim Madden, a partner of Nelson Mullins Riley & Scarborough LLP, will join a distinguished group of family law litigators, judges, and financial and psychological experts from across the country as faculty on the Houston Family Law Trial Institute in May at South Texas College of Law.

The prestigious institute offers a proven method of instruction for family law attorneys seeking to advance their courtroom skills. The intense eight-day program ends with a trial in a Houston courtroom. The experience is assessed as the equivalent of six or more years of courtroom experience.

Ogletree Deakins' Catherine Brawley Templeton Named National Coordinator of Supreme Court Justice O'Connor's Our Courts Project

At the invitation of **United States Supreme Court Justice (Ret.) Sandra Day O'Connor**, **Catherine Templeton** of Ogletree Deakins and **Molly Craig** of the Hood Law Firm have been named as the two National Coordinators of her Our Courts project. Our Courts is the vision of Justice O'Connor and is a web-based education project designed to teach students civics and inspire them to be active participants in our democracy. For more information, visit OurCourts.org.

McAngus Goudelock & Courie Attorneys Named in 2010 S.C. Super Lawyers Magazine

The law firm of McAngus Goudelock & Courie, LLC is pleased to announce that attorneys **Rusty Goudelock, Erroll Anne Hodges, Amy Jenkins**, and **Hugh McAngus** have been named by *South Carolina Super Lawyers* magazine as some of the top attorneys in South Carolina for 2010.

Goudelock, a founding partner of the firm, received his law degree from the University of South Carolina School of Law. He practices workers' compensation defense in the firm's Columbia office.

Hodges received her law degree from the University of South Carolina School of Law and practices workers' compensation defense in the firm's Greenville office.

Jenkins received her law degree from the University of Virginia School of Law. She leads MG&C's Employment Law Practice Group and is a certified specialist in labor and employment law as well as a certified mediator. She practices out of the firm's Charleston office.

McAngus, a founding partner of the firm, received his law degree from the University of South Carolina School of Law. He is a certified mediator and practices workers' compensation defense from the firm's Columbia office.

S.C. Super Lawyers List Includes 29 from Nelson Mullins

Twenty-nine Nelson Mullins Riley & Scarborough attorneys have been selected by their peers to the 2010 list of South Carolina "Super Lawyers" in 13 practice areas. In addition, three attorneys are identified in the "Star Search" category on the publisher's Web site for a "high degree of peer recognition or professional competence."

Also, four Nelson Mullins attorneys were among the top 25 attorneys receiving the highest point totals in the nomination, research, and blue ribbon review process. They are **George Cauthen, David Dukes, Sue Erwin Harper, and Marvin Quattlebaum**. Mr. Cauthen and Mr. Quattlebaum also ranked in the top 10.

Super Lawyers names South Carolina's top lawyers as chosen by their peers and through independent research. The list is based on a survey of attorneys across the state who are asked to vote for the best lawyers they had personally observed in action.

Those based in Columbia and selected for the Super Lawyers list are:

Stuart M. Andrews Jr., Health Care
George S. Bailey, Estate Planning & Probate
C. Mitchell Brown, Appellate
George B. Cauthen, Bankruptcy & Creditor/Debtor Rights
Karen Aldridge Crawford, Environmental Litigation
David E. Dukes, General Litigation
Debbie W. Durban, Employment & Labor
Carl B. Epps III, Business Litigation
Robert W. Foster, Jr., Business Litigation
James C. Gray, Jr., Business Litigation
Sue Erwin Harper, Employment & Labor
William C. Hubbard, Business Litigation
Francis B.B. Knowlton, Bankruptcy & Creditor/Debtor Rights
John F. Kuppens, Personal Injury Defense: Products
Steven A. McKelvey, Business Litigation
John T. Moore, Bankruptcy & Creditor/Debtor Rights

Continued on next page

Stephen G. Morrison, Business Litigation
Edward W. Mullins Jr., Business Litigation
R. Bruce Shaw, Class Action/Mass Torts
B. Rush Smith III, Class Action/Mass Torts
Daniel J. Westbrook, Healthcare

In Greenville:

William H. Foster, Employment & Labor
Timothy E. Madden, Family Law
A. Marvin Quattlebaum Jr., Business Litigation

In Charleston:

Richard A. Farrier Jr., Business Litigation
John C. Von Lehe Jr., Estate Planning and Probate
Robert W. Pearce Jr., Business/Corporate
G. Mark Phillips, Personal Injury Defense: Products

In Myrtle Beach:

Thomas F. Moran, Business/Corporate

The three attorneys identified in the Star Search category are **Betsy Johnson Burn** (Columbia), Bankruptcy and Creditor/Debtor Rights; **Charles S. Verdin IV** (Greenville), Estate Planning and Probate and Tax; and **James F. McCrackin** (Myrtle Beach), Estate Planning and Probate and Tax.

Nexsen Pruet Attorneys Named as South Carolina Super Lawyers

Nexsen Pruet attorneys have been named to the 2010 list of South Carolina Super Lawyers®. The attorneys practice in the firm's Charleston, Columbia, Greenville and Myrtle Beach offices.

Charleston:

Brad Waring - Business Litigation

Columbia:

Gene Allen - Bankruptcy & Creditor/Debtor Rights

Greenville:

Grant Burns - Employment & Labor

Myrtle Beach:

Elbert Dorn - Personal Injury Defense: Products

Sam Mabry named to South Carolina Super Lawyers Top 25

H. Sam Mabry III, Shareholder of Haynsworth Sinkler Boyd, P.A., has been named to the "Top 25" list of 2010 South Carolina Super Lawyers®. This Top 25 list represents the South Carolina lawyers who received the highest point totals in the 2010 South Carolina Super Lawyers nomination, research, and blue ribbon review process.

Mabry, based in the Firm's Greenville office, is recognized for his broad trial experience in complex litigation and has been included in Super Lawyers since the publication's inception. He defends clients in class actions, business, commercial and financial services litigation, and product liability actions. He has practiced with Haynsworth Sinkler Boyd, P.A., and its predecessors since 1983.

Kennedy and Bobertz Elected

Catherine H. Kennedy and Shannon F. Bobertz of Turner Padget Graham & Laney, P.A. have been elected to represent the Fifth Judicial Circuit in the South Carolina Bar House of Delegates for the upcoming term. Shannon will be serving her first term, while Cathy has served since 2002. The House of Delegates establishes policy for the Bar and includes delegates from each judicial circuit. Meetings of the House of Delegates are held at least twice a year. The new term will begin July 1, 2010.

Cathy joined Turner Padget in 2009 as special counsel in Columbia, where she practices in the areas of estate planning, probate administration and litigation.

Shannon joined the firm in 2004, after clerking with Justice Costa M. Pleicones on the South Carolina Supreme Court. Shannon practices in torts and insurance and appellate law.

Bedenbaugh Graduates from Leadership South Carolina

Jody Bedenbaugh, an associate of Nelson Mullins Riley & Scarborough, graduated this spring from Leadership South Carolina, one of the oldest and most respected statewide leadership programs.

Each year, Leadership South Carolina selects approximately 50 gifted and highly motivated South Carolinians and provides them with an opportunity to advance their leadership qualities while broadening their understanding of issues facing the state.

Mr. Bedenbaugh works in the Firm's Columbia office and focuses his practice on banking, finance, and bankruptcy. He received his Juris Doctor, magna cum laude, from the University of South Carolina School of Law in 2003 and his Bachelor of Science in Business Administration, cum laude, from the South Carolina Honors College in 1999.

Legal Media Group Names Nelson Mullins' Dukes One of Top Five Product Defense Attorneys Worldwide

Legal Media Group has named Nelson Mullins Riley & Scarborough Managing Partner **David Dukes** as one of the world's top five product liability defense lawyers based on nominations received for its Best of the Best of 2010 Expert Guides.

Mr. Dukes was named for his product liability practice, which focuses on pharmaceutical and medical device litigation, business litigation, technology law and litigation, and coordination of national litigation.

Blincow to Head IADC Committee

John K. Blincow, Jr. has been appointed to chair the International Association of Defense Counsel's Medical Defense and Health Law Committee. IADC is an invitation-only professional association for corporate and insurance defense lawyers around the world. Members are dedicated to the highest standards of professionalism, service, upholding the rule of law and integrity of the court system.

The Medical Defense and Health Law Committee

serves all members who represent physicians, hospitals, and other healthcare providers and entities in medical malpractice actions, health law advisory and regulatory support such as in defense of Qui Tam actions, federal fraud and abuse claim evaluation and defense, peer review/quality improvement counseling, and licensure board appearances.

Haynsworth Sinkler Boyd Attorneys Named to South Carolina Super Lawyers

The law firm of Haynsworth Sinkler Boyd, P.A., is pleased to announce that 14 of its lawyers have been named to the 2010 edition of South Carolina Super Lawyers list, a leading attorney rating service for business and consumers. Super Lawyers magazine is published in all 50 states and reaches more than 13 million readers.

Haynsworth Sinkler Boyd's attorneys and respective practice areas include:

Charleston, SC Office:

Stephen E. Darling - Personal Injury Defense: Products

Charles H. Gibbs, Jr. - Personal Injury Defense: Products

Thomas C. Hildebrand, Jr. - Construction Litigation

Marvin D. Infinger - Business Litigation

John H. Tiller - Personal Injury Defense: Products

Columbia, SC Office:

William C. Boyd - Business/Corporate

Thomas R. Gottshall - Environmental Litigation

Stephen F. McKinney - Business Litigation

Greenville, SC Office:

Thomas H. Coker, Jr. - Construction/Surety

H. Sam Mabry III - Business Litigation

W. Francis Marion, Jr. - Business Litigation

Moffatt G. McDonald - Personal Injury Defense: General

G. Dewey Oxner, Jr. - Personal Injury Defense: Medical Malpractice

Matthew P. Utecht - Health Care

Turner Padget Attorneys Selected by Super Lawyers

Eleven Turner Padget attorneys have been included in the 2010 edition of Super Lawyers of South Carolina. Super Lawyers is a listing of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Super Lawyers magazine names attorneys in each state who received the highest point totals, as chosen by their peers and through the independent research of Law & Politics.

The attorneys included are:

Charleston Office:

John S. Wilkerson, III, General Litigation

Columbia Office:

Reginald W. Belcher, Employment & Labor

J. Kenneth Carter, Jr., Personal Injury Defense, Products

John E. Cuttino, Civil Litigation Defense

Catherine H. Kennedy, Estate Planning & Probate

Curtis L. Ott, Personal Injury Defense, Products

Steven W. Ouzts, Personal Injury Defense, Products

Thomas C. Salane, Insurance Coverage

Franklin G. Shuler, Jr., Employment & Labor

Florence Office:

Arthur E. Justice, Jr., Employment & Labor

Greenville Office:

Eric K. Englebardt, General Litigation

Josey Receives Gold Compleat Lawyer Award

Turner Padget is proud to announce that **J. René Josey**, a shareholder in our Florence office, has been chosen as one of three recipients of the 2010 Gold Compleat Lawyer Award presented by the University of South Carolina School of Law. The awards were established in 1992 by the University of South Carolina Law School Alumni Association to recognize alumni for outstanding civic and professional accomplishments. Each year the Alumni Association recognizes nine outstanding alumni at the Alumni Association Dinner. Nominees are chosen based upon their significant contributions to the legal profession and exemplification of the highest standard of professional competence, ethics and integrity. The Gold Compleat Lawyer Award is reserved for nominees who have practiced between fifteen and twenty-nine years. The awards were presented at the banquet held April 15, 2010, at the Columbia Marriott.

After serving President Clinton as United States Attorney for the District of South Carolina from 1996-2001, René began his practice with the firm in March of 2001. René has extensive trial experience focusing on trial and appellate litigation primarily in the federal courts. His broad range of litigation experience includes civil litigation, criminal prosecutions and domestic litigation. In addition, Rene has training and experience as a certified arbitrator and mediator.

S.C. Bar Installs Quattlebaum as President-Elect

On May 20, the S.C. Bar installed **A. Marvin Quattlebaum, Jr.**, managing partner in Nelson Mullins Riley & Scarborough LLP's Greenville office, as the 2010-2011 president-elect of the S.C. Bar during the Bar's House of Delegates meeting. Mr. Quattlebaum will advance to president for the 2011-2012 term.

Mr. Quattlebaum, a member of Nelson Mullins' Management Group, practices in the areas of business litigation, product liability litigation, and other complex civil litigation and regularly appears in juris-

Continued on next page

dictions throughout the Southeast. He has served on the South Carolina Bar Board of Governors, currently serves in the House of Delegates of the South Carolina Bar, and has recently been elected to serve as Secretary of the Board of Governors. He is also a member of the Society of Justice and a Life Fellow of the South Carolina Bar.

In 2009, the University of South Carolina honored Mr. Quattlebaum with its distinguished Compleat Lawyer award, which recognizes alumni for outstanding civic and professional accomplishments. He is listed in The Best Lawyers in America, South Carolina Super Lawyers, and is a Fellow of the Litigation Counsel of America. He currently serves on the South Carolina Lottery Commission.

Buist Moore Smythe McGee Attorneys Included in South Carolina Super Lawyers 2010

The attorneys of Buist Moore Smythe McGee P.A. are pleased to announce that attorneys in the Firm have been included in South Carolina Super Lawyers 2010. Super Lawyers lists outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

Those named were:

Charles J. Baker, III, Construction Litigation
William C. Cleveland, III, Business Litigation
C. Allen Gibson, Jr., Construction Litigation
James D. Myrick, General Litigation
Henry B. Smythe, Jr., Business Litigation

DRI Membership Incentives

Free Membership to State or Local Defense Organization (SLDO) Members

A defense lawyer who is a member of his or her SLDO qualifies for a free one-year membership in DRI. The defense lawyer must be a FIRST time member of DRI.

Seminar Attendee Promotion

A defense lawyer who has either attended a DRI seminar or the DRI Annual Meeting qualifies for a one year, half-price membership in DRI. The defense lawyer must be a FIRST time member of DRI.

Advocate Campaign: (a.k.a. "Member Get a Member")

DRI members (except Officers and Board members) who recruit new "full dues paying" members receive a $100 fully transferable discount certificate for each such member recruited. Certificates can be used towards the DRI Annual Meeting and/or seminar registration fees and DRI Products. Individual discount certificates are valid for two years from the date of issue. There is no limit to the number of certificates an advocate can accumulate. The advocate's name MUST appear on the "referred by" space provided on the application.

Young Lawyer Campaign

Young Lawyers receive a certificate for FREE attendance at a future DRI seminar or the Annual Meeting. The certificate is good for as long as the person is a member of the Young Lawyers Committee. The certificate is non-transferable, and the holder must surrender the certificate at the time of pre-registration for the seminar of his/her choice.

Law Student Membership

As a DRI law student member, you are afforded many unique opportunities. Your annual membership fee of $20 provides you benefits such as: The ability to join up to four of DRI's wide range of substantive law and practice area committees; 12 issues of For The Defense, the only national monthly magazine for defense lawyers, and The Voice, a weekly eNewsletter; Publishing opportunities in select DRI literary vehicles; Access to DRI's Website complete with a searchable membership database; Complimentary registration to attend all DRI seminars, including DRI's Annual Meeting.

Senior Membership

Continue to enjoy all the benefits of DRI Membership for just $50 per year! In order to qualify, individuals must be 65 years of age or older, meet general membership criteria and have maintained membership in DRI as an "Individual Member" for at least 10 consecutive years.

JOIN DRI TODAY!

Membership Applications can be accessed on www.dri.org

Get Involved in YLD

by Paul D. Greene

As a young lawyer fresh out of law school, it did not take me long to become keenly aware I knew nothing about how to be a lawyer. While internal mentoring and hands-on experience are great training tools, I needed something bigger that would give me a more expansive take on how to practice in South Carolina. Enter, the SCDTAA. I was told by the powers that be that this was THE group to show me how to be a defense lawyer. I was offered the opportunity to get involved in my first year of practice, and I took it because I knew the SCDTAA was a wonderful tool to develop professionally. And by "develop professionally," I mean "go to cool meetings and play lots of golf in great places like Asheville, Pinehurst, and Amelia Island." Since attending my first meeting in Asheville, however, I've learned that the SCDTAA is much more than exotic locales and golf tournaments. It is, simply put, the best professional resource for young lawyers in the entire state.

As much as your firm wants to send you and every other associate to Pinehurst each year, it's probably not going to happen. Fortunately, the opportunities for young lawyers extend well beyond the meetings. Each year the SCDTAA offers fantastic CLE programs for young lawyers. This year, for example, we are hosting two programs on effective deposition taking: a "boot camp" and an advanced deposition session. In addition, our annual Trial Academy continues, offering young lawyers the chance to learn trial techniques from accomplished practitioners and to try a case live, without a net, in front of a real judge and jury.

In addition to CLEs, there are numerous opportunities for service and writing. Each year, the young lawyers division organizes the silent auction for the Asheville meeting. The proceeds of the auction go to a great charity—this year it's the Our Courts program (www.ourcourts.org) organized by Justice Sandra Day O'Connor to foster civic and legal education in grade schools—and the YLD can always use volunteers to make calls and solicit gifts. We also recruit volunteers to serve as jurors and witnesses for the Trial Academy, another great opportunity to get involved. Also, our newly revamped substantive law committees are always in need of help writing, researching and presenting topics in their respective fields. These committees are a perfect way not only to get to know others in the same area of law, but also to develop expertise and share it with the legal community. Presenting a substantive law committee topic is also a great way to get to one of the meetings.

Get involved in the SCDTAA. Talk to the partners in your firm to find out who in your firm is active. Go to the website (www.scdtaa.com), login and get involved in the discussions on the blog and members-only message board. Email the chairs of the substantive law committee in which you're interested and tell them you want to help—you will not be turned away. If all else fails, give me a call and I'll be happy to get you plugged in. If you're reading this article, it means you are already a member. I encourage you to take the next step, get your money's worth, and explore all that you can get out of, and give to, the SCDTAA.

ADR COMMITTEE REPORT

C. Stuart Mauney and Phillip A. Kilgore

The ADR Committee, chaired by Phillip A. Kilgore of Ogletree, Deakins, Nash, Smoak & Stewart, and C. Stuart Mauney of Gallivan, White & Boyd, P.A., was formed to provide a forum for SCDTAA members who are mediators and arbitrators to exchange information in the field of alternative dispute resolution. The Committee contributes content to the continuing education portions of the joint and annual meetings, to this publication, and to the SCDTAA website. The overall goal is to increase the level of professionalism of our members in the field of alternative dispute resolution.

The Committee conducted a breakout session at the Annual Meeting on November 6, 2009. Jack Griffeth of Collins & Lacy and Stuart Mauney moderated a discussion of recent changes to the ADR rules and suggestions for conducting a successful mediation. The breakout session was well attended by the judiciary, defense practitioners, and attorneys who currently serve as mediators.

The Committee will conduct a breakout session at the Joint Meeting on July 23, 2010. Eric Englebardt of Turner, Padget, Graham & Laney will present a program, "A Neutral's Nifty Negotiating Nuggets." The Committee will also provide a brief summary of recent ADR developments at the Joint Meeting on July 24.

The Committee is also working on establishing a list of SCDTAA members who are also mediators and arbitrators to encourage the membership to retain those individuals for mediations and arbitrations. If you are interested in having your name included on the SCDTAA list of mediators and arbitrators, please contact Stuart Mauney or Phillip Kilgore.

The Way We Were

by T. Ruth

During the latter years of the 1970's, our organization was quite different from "the way we are!" In the Annual Report of 1977 for the then South Carolina Defense Attorneys' Association, our By-Laws defined our purpose to be, among other goals, to "…bring together…lawyers of South Carolina who devote a substantial amount of their professional time … handling litigated cases…primarily for the defense…" The President for 1977 was Jack Barwick. There had only been eight prior presidents. The other two officers were Mark Buyck (President-Elect) and Bruce Shaw (Secretary-Treasurer). In the picture of the officers, Bruce Shaw looks like he is almost 13 years old and wears one of the first pair of glasses with tinted lenses, Bobby Hood looks like his sons looked three years ago, and Dewey Oxner is actually thin! George Harmon was our Executive Director and had helped revive The Defense Line in its return to publication.

In his outgoing President's Letter, Jack mentioned that we had grown to 260 lawyers (46 new lawyers had been added during the year) and that we hoped to recruit some more before the Annual Meeting in Savannah. Fifty-six members had joined around fifty claims managers at the Tenth Annual Defense Conference (what we now call the Joint Meeting) in Myrtle Beach. The group was looking forward to a new venue for the meeting which was moving to The Grove Park in Asheville, North Carolina in 1978.

Bruce Shaw's Treasurers' Report listed a balance (or savings) of $10,403. Income had been $20,842 and Disbursements totaled $8,886. Those with mathematical backgrounds may question this math as I did, but that is in the report. We would need the balance for the Savannah Annual Meeting, which cost a whole lot of 1977 dollars!

Ed Mullins reported on the past legislative session stating that nothing of import passed except the removal of tort immunity against hospitals in malpractice cases. It also provided a cap of $1,000 in those cases. The Statute of Limitations was shortened to 2 years for malpractice cases against doctors with the statute starting to run against minors at age 8. The tremendous cost of liability premiums was keeping the plaintiffs' bar at bay and they had little power to support or pass legislation. In the Workers' Compensation area, permanent-partial disability was allowed for occupational diseases with a subsequent reduction in the average weekly wage. Medical board's findings were made less binding on the Commission.

The Annual Report included an article by a brilliant young defense lawyer titled "ASBESTOSIS – PRIZE DEFENSE ASSIGNMENT OR NIGHTMARE?" Quoting from the opening sentences of the article "Within the past year a growing number of our members have become entangled in a series of cases kindly referred to as the Asbestos Cases. These cases appear to be the crest of the wave of products liability litigation which is presently overwhelming our court system." At the time of publication, almost fifty asbestos cases had been filed in South Carolina. The preparation time that initially seemed like a boon to a defense lawyer was in danger of demanding so much time that it might disadvantageously impact the remainder of the lawyer's normal book of business. Within that first year of these cases, a number of novel practices had appeared such as consolidation of numerous cases, state and federal, for discovery purposes; the formation of a joint defense group known as the Asbestos Cases Defense Counsel (ACDC); the noticing of depositions for use in South Carolina and other states; and some of the earliest videotaping of depositions. An unusual motion was discovered by a perusal of Black's Law Dictionary, and Motions in Limine were becoming popular. "The defense attorneys (involved) definitely agree[d] that it is a case of taking the good with the bad" because of the [billable] time involved."

The Report ended with a roster of all members listed by city. Those familiar with our present membership might find it interesting that we had individual members in Aiken (2), Beaufort (3), Bishopville (2), Camden (1), Dillon (1), Easley (1) Greenwood (3), Hartsville (2), Newberry (1), Walhala (1) and Walterboro (2).

Some things have not changed in all those years. One of the featured speakers at the Tenth Annual Defense Conference spoke on "Overcoming Resistance to Change," there was a cocktail party with heavy hors d'oeuvres the first night, and Ed Mullins was pushing The Defense Research Institute, "your association's answer to the American Trial Lawyers' Association (ATLA)." Dewey Oxner was the state DRI chairman with Bobby Hood, Jack Barwick and Elford Morgan as area chairmen. Annual membership in that organization was $50.

And that was "the way we were…1977."

2010 Joint Meeting Asheville, NC July 22-24

by T. David Rheney

Please mark your calendars and plan to join us at the beautiful Grove Park Inn in Asheville July 22-24, 2010, for the 43rd Joint Meeting of the South Carolina Defense Trial Attorneys' Association and the Claims Managers' Association of South Carolina. The GPI is always a wonderful place to spend a few summer days with your family as well as old and new friends, and this year will be no different.

Catherine Templeton, Johnston Cox and Ed Lawson have put together an outstanding program, including interesting and informative continuing education topics and fun events for the entire family. On Thursday we will have our traditional welcome reception and silent auction. Young Lawyers President Paul Greene and his committee are hard at work gathering up items for the silent auction. This year's proceeds will be donated to Our Courts.org, a wonderful new civics program founded by United States Supreme Court Justice Sandra Day O'Connor and supported by the SCDTAA. I am sure the more you hear of Our Courts you will agree that it is a worthy cause for us to support. So be prepared to bid early and often!

The educational program kicks off Friday morning with well-known attorney Roger Dodd of Jacksonville, Florida speaking on every defense lawyer's and claims manager's favorite part of trial--cross examination. And given the title of his lecture, "Eviscerating the Other Side," this promises to be a great start to the meeting. David Kibler, Rick Lamar and Rick Adair will follow Roger with words of wisdom from clients to lawyers, and that will be followed by excellent litigation and workers' compensation breakout sessions.

Representative Jenny Horne and Merl Code have graciously agreed to be our ethics speakers on Friday. Jenny will speak on "Falls from Grace" and Merl will speak on "Positive Corporate Relations and Diversity." In between John T. Lay, Bre Walker and Barry Reynolds will discuss the pitfalls of bad witness preparation. We'll have another workers' compensation breakout that morning, and will close out the meeting with a presentation on fire explosion and investigation by Randy Watson of SEA, Ltd, our Platinum Sponsor this year.

There is plenty of "play" lined up to go along with all the "work" this year. On Friday afternoon attendees will have lots of options, including golf, white water rafting, a sporting clays outing, a Nantahala Gorge zip line canopy tour (a first for our meeting) or a wine tasting. The only problem is which one to pick. In addition, on Friday morning we are offering a spouse's tour (another first for our meeting) of shopping in Asheville. Or, if complete relaxation is what you need, there is always the incredible GPI Spa.

I mentioned above that Asheville is a great place to spend a few days with family and friends. We encourage you to bring your children along with you. We will have a professionally equipped children's program on Friday evening so you or your spouse won't have to rush back from the Bluegrass and Bluejeans Barbeque that night, and of course GPI can help with the children any other time while you are in Asheville.

Please be sure to make your room, spa and dinner reservations as soon as possible by either calling GPI at (800) 438-5800 or by visiting the website at www.groveparkinn.com.

Corporate Counsel Seminar is a Hit

by William S. Brown, Duncan McIntosh, and Kurt M. Rozelsky

The Second Annual SCDTAA Corporate Counsel Seminar was held in Columbia on April 21, 2010, and was a tremendous success. The Corporate Counsel Seminar is designed specifically for in-house counsel within South Carolina and is presented to corporate counsel at no charge. We are pleased to note that registration and attendance almost doubled from last year. Attendees came from many parts of the state, including Rock Hill, Aiken, Greenville, as well as Columbia.

The program included presentations on recent changes and developments in employment law by William H. "Bill" Foster and on important issues from the current South Carolina legislative session, including tort reform, by Eric Englebart. The program was headlined by a panel discussion presenting the candidates for South Carolina Attorney General. All of the announced candidates were invited and three were able to participate, Leighton Lord, Alan Wilson, and Robert Bolchoz. The attendees and the candidates engaged in an active exchange of ideas and information.

We received great praise from the attendees on the seminar and many thanked the SCDTAA for presenting the program. All new attendees received a complimentary one year membership to the SCDTAA. It is our hope that continuation and growth of this event will encourage more in-house and corporate counsel to join our organization. In this regard, several of the in-house counsels in attendance have expressed an interest in becoming active in the SCDTAA. Additionally, some of the in-house counsel joined us at the legislative/judicial reception at the Oyster Bar which followed the Corporate Counsel Seminar. We look forward to next year's Corporate Counsel Seminar and continuing our efforts to strengthen our membership through participation of in-house counsel.

2010 Annual Meeting

November 11-14, 2010 • Pinehurst, NC

The SCDTAA greatly looks forward to its 43rd Annual Meeting in picturesque Pinehurst, North Carolina, during November 11-14, 2010. On the CLE side, the agenda includes Andrew Urich who is the Peterbaugh Professor of Ethics and Legal Studies at the Spears School of Business at Oklahoma State University. Professor Urich is a dynamic and entertaining speaker who will share his wisdom regarding effective communication and ethics. Additionally, John Kuppens will moderate a panel of lawyers and federal judges to discuss changes to Rules 26 and 56 of the Federal Rules of Civil Procedure that become effective this December. Joined with a state court judges panel and the popular substantive law break-outs, our agenda promises timely, informative and interesting CLE credit.

For our social activities, Pinehurst in the fall provides the perfect venue. Besides its reputation as a world-class golf resort, Pinehurst will offer our members, guests and invited judges the chance to hunt quail, tour historic Pinehurst following afternoon tea, quench the need for speed at 130 mph in a NASCAR vehicle or experience the excitement of a wind tunnel. Chef demonstrations, wine tastings, a "Taste of North Carolina" dinner and our formal banquet with great food (and better dancing) round out the culinary experience.

Entertaining speakers, relaxed camaraderie, enjoyable activities, and great food all in a beautiful setting. What more could you want?

FEATURE ARTICLE

Motor Vehicle Sudden Acceleration: Trial Court as Gatekeeper of Expert Evidence

(*Watson v. Ford Motor Co.*, No. 26786, --- S.E.2d ---, 2010 WL 916109 (S.C. Mar. 15, 2010))

by Mary A. Giorgi

On March 15, 2010, the South Carolina Supreme Court reversed an $18 million jury verdict against the Ford Motor Company, finding that the trial court erred in admitting the testimony of two of the plaintiffs' experts and admitting evidence of prior sudden acceleration accidents. *Watson v. Ford Motor Co.*, No. 26786, --- S.E.2d ---, 2010 WL 916109 (S.C. Mar. 15, 2010). This decision is instructive on the duties of the trial court as a gatekeeper of the admission of evidence and vividly illustrates how plaintiffs may not simply rest on the mere fact that an accident happened to hold a defendant liable.

A. Background

The case involved the sudden acceleration of a vehicle -- a timely topic with the current influx of recalls of Toyota vehicles. On December 11, 1999, Sonya L. Watson was driving her 1995 Ford Explorer with Patricia Carter and two other passengers in the vehicle when she lost control, veered off the interstate, and rolled over four times. Carter did not survive the accident and Watson was rendered a quadriplegic. Watson and Carter filed a products liability action against Ford, claiming that the accident occurred because the cruise control system was defective, and that their injuries were enhanced because the seat belts were defective.

At trial in Greenville County, the plaintiffs presented and the trial court allowed three types of evidence that became the subject of Ford's appeal. First, the plaintiffs presented testimony of Dr. Antony Anderson, an electrical engineer from the United Kingdom. He opined that electromagnetic interference ("EMI") took hold of the vehicle's cruise control system, causing it to suddenly accelerate. Dr. Anderson further testified that Ford could have prevented the accident through an alternative design. Second, the plaintiffs presented the testimony of Bill Williams, a purported automotive industry veteran, as an expert on cruise control diagnosis. Finally, the plaintiffs offered evidence of similar accidents involving sudden acceleration in Ford Explorers.

The jury determined that Ford was liable to the plaintiffs on their claim that the Explorer's cruise control was defective and awarded Watson $15 million in compensatory damages and Carter's Estate $3 million in compensatory damages. Thereafter, Ford appealed, asserting the trial court erred in ". . . qualifying Bill Williams as an expert in cruise control systems[,] allowing Dr. Anderson's testimony regarding EMI and alternative feasible design[, and] allowing evidence of other incidents of sudden acceleration in Explorers." *Watson*, 2010 WL 916109, at *2.

On those grounds, the South Carolina Supreme Court heard Ford's appeal. In an opinion authored by Chief Justice Jean Toal, the Supreme Court agreed with Ford, finding that the trial court committed prejudicial error in allowing evidence at trial that did not meet the threshold admissibility requirements in South Carolina. South Carolina has not adopted the Daubert test and instead follows its own test set forth in *State v. Council*, 515 S.E.2d 508, 518 (S.C. 1999) and its progeny. Under that test, South Carolina courts have generally been fairly liberal in qualifying experts to testify at trial, and motions to exclude brought under *State v. Council* are not often granted.

B. Trial Court Gatekeeper Findings

As a preliminary matter, the *Watson* court set forth the three findings that all trial courts must make in South Carolina before a jury may consider expert testimony: (1) the subject matter is beyond the ordinary knowledge of the jury, (2) the expert has the requisite knowledge and skill to qualify as an expert in the particular subject matter, and (3) the substance of the testimony is reliable. See *State v. Douglas*, 671 S.E.2d 606 (S.C. 2009); *Gooding v. St. Francis Xavier Hosp.*, 487 S.E.2d 596, 598 (S.C. 1997); *Council*, 515 S.E.2d at 518.

Continued on next page

ARTICLE CONT.

C. South Carolina Supreme Court Findings

The Court first found that there was "no evidence to support the trial court's qualification of [Bill] Williams as a expert in cruise control systems" because Williams had no professional experience working on cruise control systems prior to litigation, had not conducted any comparison of the Explorer's cruise control system to any other system, and had not taught or published papers on cruise control systems. *Watson*, 2010 WL 916109, at *4.

Next, the Court found that the "trial court erred in admitting Dr. Anderson's testimony as to both an alternative feasible design and his EMI theory." *Id.* at *6. In so doing, the Court stated that Dr. Anderson was not qualified to testify on that subject matter because "[h]e had no experience in the automobile industry, never studied a cruise control system, and never designed any component of a cruise control system." *Id.* Further, the Court found his testimony unreliable because he provided no support for his conclusion that an alternative design would have cured the alleged defect. With respect to Dr. Anderson's EMI theory, the Court rejected his testimony because his theory had not been peer reviewed, his theory had not been tested, and Dr. Anderson stated he could not replicate the alleged EMI or tell where it originated or what parts it affected. *Id.*

Finally, the Court found that the plaintiffs had failed to show that the incidents of sudden acceleration presented were similar to the incident at issue: the Explorers were made in different years and were different models. Further, the Court found that the plaintiffs failed to "show a similarity of causation between the malfunction in this case and the malfunction in the other incidents." *Id.* at *8.

Since the only evidence that the plaintiffs presented to prove that the Explorer was defective was Dr. Anderson's testimony, the Court ruled that the trial court committed prejudicial error by admitting his testimony. Further, the Court found it highly prejudicial that the plaintiffs were allowed to present evidence of other incidents when they had not established a factual foundation to show substantial similarity. As a result, the Court reversed the jury's verdict against Ford.

D. Concurrence by Justice Pleicones

Justice Costa M. Pleicones concurred in the result only, agreeing with many of the points made by the majority but suggesting that he would have reached the same result by a different route. Specifically, he disagreed "with the majority's analysis of the expert witness issue involving Dr. Anderson, or its analysis of the admissibility of the evidence of other acceleration incidents." *Id.* at *9. Interestingly, Justice Pleicones disagreed with the majority's delineation of the trial judge's gatekeeper role and stated that it was their framework that was incorrect when the expert testimony was scientific. He stated that the proper gatekeeper role is provided in *State v. Council* as follows:

1. Is the underlying science reliable?
2. Is the expert witness qualified ?
3. Would the evidence assist the trier of fact to understand the evidence or to determine a fact in issue?

Id.

Contrary to the findings of the majority, Justice Pleicones found that Dr. Anderson was qualified as an expert on the subject and that the underlying science involving the impact of EMI was reliable. *Id.* The basis upon which he found that the trial court erred in admitting Dr. Anderson's testimony was that it would not assist a jury as a result of Dr. Anderson's failure to support his opinions.

On the issue of the majority's determination on admissibility of the evidence of other acceleration incidents, Justice Pleicones stated that he did not see an issue with the fact that the "other incidents" involved Explorers manufactured in different years or were different models. *Id.* at * 10. He, on the other hand, found this evidence inadmissible because the causal link between those accelerations and the one in *Watson* hinged on Dr. Anderson's EMI theory, which should not have been admitted. *Id.*

E. Conclusion

While both the majority and Justice Pleicones, concurring, came to the same result, the variation in their analyses was quite different. Perhaps this discrepancy shows that our courts may not be firm on the test to be employed when scientific evidence is at issue? While the varying analyses may not make a difference in all cases, it could have some effect. Thus, practitioners should be mindful of the analyses on the issue of admissibility of expert evidence in Council, as well as the majority and concurrence in Watson, making certain all bases are covered.

FEATURE ARTICLE

The Regulatory Avalanche from Washington

by Leigh Nason

The federal government has served notice that it will soon be launching an avalanche of new regulatory and enforcement actions from Washington which will place enormous new burdens on employers. Worse, several of the new regulatory strategies will mandate that employers demonstrate and document their compliance with employment laws and regulations to all employees, which then can lead to federal enforcement actions, private lawsuits, or union organizing.

DOL'S "PLAN/PREVENT/PROTECT" STRATEGY

One example is the U.S. Department of Labor's "Plan/Prevent/Protect" strategy, which is a cross-department regulatory and enforcement initiative. The new regulatory approach was announced as part of the Department's Spring 2010 Regulatory Agenda. As stated in the announcement: "The Department's goal is to foster a new calculus that strengthens protections for workers and results in significantly increased compliance."

The new regulatory strategy mandates that all employers prepare, implement, and share with employees a series of comprehensive compliance programs for wage-hour, safety and health, affirmative action, and pensions. In place of what the Department terms the traditional "catch me if you can" enforcement philosophy, where federal agents inspect workplaces either randomly or through complaints, the new "Plan/Prevent/Protect" strategy will place the onus on employers for, in effect, certifying their own compliance. As the Labor Department states in its Spring 2010 Regulatory Agenda: "With only a few thousand inspectors, the Department is charged with protecting 140 million workers in some 9 million workplaces. Unfortunately, in our current system, Labor Department enforcement personnel must intervene to assure compliance in too many cases. It is a "catch me if you can" system. . . . We are going to replace "catch me if you can" with "Plan/Prevent/Protect."

The new strategy will cover the laws and regulations of the Labor Department's Wage and Hour Division (WHD), Office of Federal Contract Compliance Programs (OFCCP), Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), and Employee Benefits Security Administration (EBSA).

Thus, not only will employers have to comply with the laws and regulations, as currently is the requirement, but they must also audit their own compliance, involve employees in the development of compliance plans, and provide the results of the audits to employees so that the employees can monitor implementation of the compliance plans.

While each of the five Divisions listed above will develop its own regulations or other mandates under the "Plan/Prevent/Protect" enforcement strategy, the Department has identified the following general components required of employers:

- **"Plan"**: The Department will propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations and other risks to workers — for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer or other regulated entity would provide their employees with opportunities to participate in the creation of the plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.
- **"Prevent"**: The Department will propose a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be a mere paper process. The employer or other regulated entity cannot draft a plan and then put it on a shelf. The plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.
- **"Protect"**: The Department will propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights.

As stated by the Department in its Spring 2010 Regulatory Agenda: "Employers and other regulated entities who fail to take these steps to address comprehensively the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law and, depending upon the agency and the substantive law it is enforcing, subject to remedial action."

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ARTICLE CONT.

SPECIFIC PROGRAM REQUIREMENTS UNDER "PLAN/PREVENT/PROTECT"

Wage and Hour: The Wage and Hour Division (WHD) has announced a "Public Classification Analysis" which will begin with the publication of a Notice of Proposed Rulemaking, planned for August 2010, to increase employers' recordkeeping obligations under the Fair Labor Standards Act (FLSA). At a minimum, the WHD has suggested that the new recordkeeping rule will include:

- "A requirement that employers provide workers with information about their employment, including how their pay is calculated."
- "A requirement that employers that seek to exclude workers from the FLSA's coverage perform a classification analysis, disclose that analysis to the employees, and retain that analysis for WHD enforcement personnel who might request it."

OSHA: Added to its existing Safety and Health Program Management Guidelines, OSHA is planning to propose adopting a new Injury, Illness, and Prevention Program (or I2P2) that likely will require employers to develop an injury and illness prevention program that includes a proactive and continuous process to address safety and health hazards. Stakeholder meetings regarding I2P2 are already scheduled for June 3 in East Brunswick, NJ; June 10 in Dallas, TX; and June 29 in Washington, DC.

OSHA has identified the following components of I2P2:

- Management duties (including items such as establishing a policy, setting goals, planning and allocating resources, and assigning and communicating roles and responsibilities).
- Employee participation (including items such as involving employees in establishing, maintaining, and evaluating the program; employee access to safety and health information; and the employee's role in incident investigations).
- Hazard identification and assessment (including items such as what hazards must be identified, information gathering, workplace inspections, incident investigations, hazards associated with changes in the workplace, emergency hazards, hazard assessment and prioritization, and hazard identification tools).
- Hazard prevention and control (including items such as what hazards must be controlled, hazard control priorities, and the effectiveness of the controls).
- Education and training (including items such as content of training, relationship to other OSHA training requirements, and periodic training).
- Program evaluation and improvement (including items such as monitoring performance, correcting program deficiencies, and improving program performance).

Employers' voluntary participation in developing safety and health programs would become mandatory under OSHA's forced compliance with the new I2P2. The program, in turn, could avoid the necessity for OSHA to engage in formal rulemaking or the lengthy promulgation of new safety and health standards, such as the failed OSHA ergonomics standard that Congress rejected under the Congressional Review Act. Instead, OSHA has required a new column for work-related musculoskeletal disorders (MSDs) on the OSHA 300 Log (reports of accidents and illnesses), which could be used for self-enforcement under I2P2.

MSHA: Reacting strongly to recent mine disasters, the Labor Department's MSHA has announced in the Spring 2010 Regulatory Agenda, as part of its "Plan/Prevent/Protect" strategy, the following regulatory initiatives:

- Pattern of Violation Regulation Review: "MSHA will review its existing Pattern of Violations regulation. The goal will be to assure that mine operators …with large numbers of serious and substantial violations of the Mine Act and its implementing regulations will be subjected to significantly enhanced enforcement activities. The regulation will simplify and improve consistency in the procedures and criteria for placing mine operators into the pattern of violations program. For example, MSHA is considering how it could use the pattern of violations process to require operators to implement effective comprehensive safety and management programs aimed at fixing problems before they occur. MSHA is also considering simplifying the procedures for applying the pattern criteria so that operators would be required to more quickly and effectively address systemic hazards and allow MSHA the flexibility to investigate different kinds of patterns."
- Safety and Health Management Programs for Mines: "MSHA currently requires development and approval of plans for control of specific hazards. For coal mines, the Mine Act requires unique mine plans for ventilation, roof control, dust control, and other mining issues in addition to mandatory and specific mine operator inspections designed to identify and correct hazards. MSHA will work on regulations to improve the effectiveness of these existing plans, but MSHA will also publish a Request for Information (RFI) about the possible imposition of a new requirement of a comprehensive health and safety management program for all mines. The RFI will solicit information in the areas of management commitment and employee involvement; work site analysis; hazard prevention controls; safety and health training; pre-shift inspection; violations of any mandatory safety or health standards and correction of those that are identified; and, program evaluation."

OFCCP: In a recent web chat, OFCCP Director Patricia Shiu pointed out that "[i]t's a new day at the OFCCP" and advised employers to "be proactive" in assessing possible discrimination issues in hiring, promotions, terminations, and compensation. Shiu warned that employers must "develop a culture where equal opportunity and diversity is valued."

OFCCP already requires covered contractors and subcontractors to develop written affirmative action programs (AAPs) which may be audited by the agency. To further support its mission of affirmative action and equal employment opportunity (and now, presumably, "diversity"), however, OFCCP has established the following goals:

- Continued focus on pay equity, likely focusing on individual pay differences rather than historically unsuccessful attempts to find systemic problems.
- Increased scrutiny of hiring decisions through both disparate treatment and disparate impact analyses, focusing on low-wage and entry-level jobs.
- Targeting recidivism of contractors entering into conciliation agreements, including greater scrutiny of progress reports and possible consideration of follow-up onsite reviews.
- Revamping and updating construction contractor regulations and increasing compliance reviews for these employers.
- Emphasizing outreach to and recruitment of veterans and individuals with disabilities.
- Developing a more robust statistical model to target alleged violators and determine which contractors to audit.

In addition, as part of the "Plan/Prevent/Protect" strategy, OFCCP has announced plans for a Notice of Proposed Rulemaking (NPRM) requiring that federal and federally-assisted contractors take steps to properly classify "independent contractors" similar to the initiative being developed by the Wage and Hour Division.

EBSA: In addition to the previously announced emphasis by the IRS and the Labor Department's Wage Hour Division calling for stepped-up enforcement of independent contractor classification, the Department's Spring 2010 Regulatory Agenda calls for the following initiative as part of its "Plan/Prevent/Protect" strategy:

"The Employee Benefits Security Administration (EBSA) will work with the WHD to ensure that employee benefit plan issues are addressed in settlements with employers regarding misclassification of employees as independent contractors. WHD will require settling employers to review their benefit plans, resolve the benefit rights of misclassified employees, and report related violations of plan provisions and ERISA to EBSA." This is on top of the Department's joint initiative with the IRS, as part of workplace investigations, to identify employees who are misclassified as "independent contractors."

OTHER REGULATORY INITIATIVES

The Labor Department's "Plan/Prevent/Protect" strategy is merely the "tip of the iceberg." Throughout the government, and inside Congress, there has been a major emphasis on promoting union-only Project Labor Agreements (PLA) in federal construction projects, especially for construction of nuclear power plants and so-called "green jobs." For example, the Final Rule implementing Executive Order 13502, which "encourages" the use of PLAs, was published in the Federal Register on April 13 and became effective on May 13.

Another rule, implementing Executive Order 13495 ("Non-displacement of Qualified Workers

Continued on next page

ARTICLE CONT.

under the Service Contract Act"), was published on March 18, with the deadline for filing public comments on May 18. The Executive Order requires contractors under the Service Contract Act to offer union employees of a contractor they displace the right of first refusal for continued employment.

Also, a rule implementing Executive Order 13497 ("Non-reimbursement of Labor Relations Costs") was proposed on April 14, with the deadline for filing public comments on June 14. The Executive Order prohibits contractors from seeking reimbursement of costs for communicating with employees during a union organizing campaign.

Another rule implementing Executive Order 13496 ("Notice of Employee Rights under Labor Laws") is pending final review at the White House Office of Management and Budget (OMB) following the end of the public comment period. The Executive Order, which was written by newly recess-appointed NLRB Member Craig Becker while he was employed by the SEIU, requires contractors to post a workplace notice of employee rights to organize and bargain collectively, and engage in other concerted activities. The proposed notice was heavily biased in favor of unions in its interpretation of the National Labor Relations Act.

"High Road" Government Contracting

The business community should carefully monitor development of a new federal regulation being considered within Vice President Biden's Middle Class Task Force. The "High Road" Government Contracting proposal, which is expected to be released as an Executive Order, will mandate the contractors pay a "living wage" (undefined), along with health insurance, retirement benefits, and sick leave. It also is expected to take into account a contractor's compliance record with labor and employment laws in determining a preference for the award of federal contracts. Finally, it is also anticipated that an additional requirement to receive a contracting "preference" will be an employer's "neutrality" in union organizing campaigns.

Equal Employment Opportunity Commission (EEOC)

The EEOC is finalizing several long-outstanding regulations. It has completed action on a final rule implementing the Genetic Information Nondiscrimination Act (GINA), and is finalizing a rule to implement the equal employment provisions of the Americans with Disabilities Act (ADA) Amendments Act. EEOC also has initiated rulemaking on the definition of "Reasonable Factors Other Than Age" under the Age Discrimination in Employment Act of 1967.

Newly sworn-in EEOC Chair Jacqueline A. Berrien testified on May 6 before the Senate HELP Committee in support of the "Protecting Older Workers Against Discrimination Act" (S. 1756), which would supersede the Supreme Court's 2009 decision in Gross v. FBL Financial Services. The Supreme Court in Gross held that "mixed-motives" claims are not cognizable under the Age Discrimination in Employment Act of 1967 (ADEA), and that older workers cannot prevail on a claim of age discrimination unless they prove that age was the "but for" cause of the employment practice at issue. Speaking for the EEOC, Chair Berrien stated that legislation is needed to restore and bolster the basic protections that applied to ADEA claims pre-Gross.

National Labor Relations Board Next?

Now that the NLRB has a full majority of former union lawyers, it is widely expected that many of the Board's precedents in recent years will be reversed through decision-making. However, it is also widely expected that the Board will engage in rulemaking to make it easier for unions to organize and attain first contracts.

Since the new majority has been seated, the first two areas in which the Board has invited amicus curiae briefs involve "compound interest" and electronic posting of Board orders. The former will determine whether the Board compounds interest on back pay awards on a daily, weekly, quarterly, or annual basis. Of course, compounding interest could greatly increase financial pressures on employers to settle unfair labor practice complaints.

The latter – electronic posting – could be a precursor to other uses of e-mail and the internet in matters involving labor relations, such as union organizing and even electronic ballots for union representation elections. At present, the issue is limited to whether employers may be required to post Board orders in unfair labor practice decisions on the employer's electronic equipment, and whether unions should be required to do the same on their websites when the union loses an unfair labor practice decision.

CONCLUSION

What unions, plaintiffs' trial lawyers, and others are unable to achieve through Congress, especially following the November mid-term elections, they will seek to achieve through federal agencies by rulemaking and new enforcement programs. Business must be engaged in the rulemaking process, challenging new regulations in court, as well as preparing for what will be the continuing avalanche of anti-business rules and regulations coming from Washington.

ARTICLE

Failing to Distribute a Dividend Alone Is not a Breach of Fiduciary Duty

by Carmen H. Thomas

A detailed opinion from the Richland County Business Court is a useful resource for corporate breach of fiduciary duty and derivative cases. In *Covan v. Blue Cross & Blue Shield of South Carolina*, Judge Michelle Childs dismissed plaintiff shareholders' first amended class action complaint against Blue Cross and Blue Shield of South Carolina ("Blue Cross") and members of the Blue Cross Board of Directors in which plaintiffs sought an order compelling distribution of a dividend from excess surplus, an accounting, imposition of a constructive trust over the excess surplus, and other equitable remedies. Order 2010-01-08-02, C.A. No. 2008-CP-40-5294 (Rich. Cty. Ct. Comm. Pleas Jan. 8, 2010) (Business Court). This article addresses several interesting points raised by the opinion, including the court's determination that the claim was exclusively derivative, the "requirement" of pre-complaint demand for a derivative suit, the distinction between strict versus lenient pleading requirements for demand futility, and other notable issues.

By way of background, when judges issue decisions on Rule 12 motions to dismiss or Rule 56 motions for summary judgment for cases in the South Carolina Business Court Pilot Program, written opinions are required. *See* Business Court Pilot Program Administrative Order 2009-09-07-01 (S.C. Sept. 7, 2009). This opinion is one of seven issued in Business Court cases since the pilot program began in October 2007. *See* Business Court Pilot Program, S.C. Judicial Department (last visited May 23, 2010), http://www.sccourts.org/busCourt/index.cfm In *Covan*, Howard Boyd, Luanne Lambert Runge, and Michael Pope represented defendants, and J. Preston Strom, Mario Pacella, and John P. Freeman represented plaintiffs.

Plaintiffs alleged direct claims for breach of fiduciary duty and oppression and unfair prejudice and derivative claims for breach of fiduciary duty and to compel declaration of dividends. *Covan*, Order 2010-01-08-02, at *3. The court decided to allow only a claim for breach of fiduciary duty because plaintiffs alleged a single wrong and sought a single recovery from a single course of conduct: failure to declare a dividend from the capital surplus. *Id*. at *3-4. As with several other key issues in the decision, the court relied on a Delaware case in which the plaintiff raised similar arguments. *See id*. at *3 (citing *Baron v. Allied Artists Pictures Corp.*, 337 A.2d 653 (Del. Ch. 1975)).

The court then decided that this claim for breach of fiduciary duty could only be brought derivatively. *Id.* at *4. The court pointed out that some rare claims can be either direct or derivative, but a claim for breach of fiduciary duty for failure to declare a dividend may only be pursued derivatively under Rule 23(b)(1), SCRCP. *Id.*

In analyzing the requirements for derivative suits, the court articulated the distinction between the strict pleading required for a plaintiff to show demand would have been futile versus a court's lenient decision of whether to excuse demand. *Id.* at *6. Plaintiffs argued against the interpretation in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), of two seemingly conflicting opinions, *Grant v. Gosnell*, 266 S.C. 372, 376, 223 S.E.2d 413, 415 (1976), and *DeHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970). However, as the court in *Covan* recognized, *Carolina First* already resolved the confusion by explaining that, without a doubt, the requirement of pleading sufficient facts to show futility is strict. *Covan*, 2010-01-08-02, at *6. However, once a court determines that sufficient facts are pled to establish futility, the court may exercise its discretion and excuse demand, a "lenient" decision. *Id.* Plaintiffs failed to allege futility with particularity, and the court ultimately decided that demand was not excused. *Id.* at *9.

In several instances, the court relied on cases from other jurisdictions in considering the demand requirement. *Id.* For example, the court considered Delaware, Minnesota, and Third Circuit Court of Appeals cases to articulate the Rule 23 demand requirements. *Id.* at *6-7. In addition, the court relied on cases from the U.S. Supreme Court, the Second Circuit Court of Appeals, the California Court of Appeals, and the District of Minnesota to decide that demand must be made before the complaint. *Id.* at *7. Thus, based on persuasive authority, plaintiffs' argument—that the directors' failure to declare a dividend in response to the first complaint established futility of demand—failed. *Id.*

Plaintiffs also creatively sought to use the judicial dissolution provision to compel declaration of the dividend. *Id*. at *9. The court faced an initial hurdle in defendants' argument that Blue Cross's status as an insurance company meant that plaintiffs could

Continued on next page

not seek dissolution under the Business Corporations Act provision allowing dissolution. *Id.* The court found that it could not hear an action for judicial dissolution of an insurance company because that claim was the sole jurisdiction of the Insurance Commission. *Id.* at *9. However, the court decided that plaintiffs were not required to seek judicial dissolution in order to proceed with the other equitable remedies allowed by the corporate dissolution statute. *Id.* at *10. To claim those remedies, plaintiffs must establish a ground for dissolution under S.C. Code Ann. § 33-14-300. *Id.*

Next, the court briefly addressed defendants' argument that the corporate dissolution provisions in S.C. Code Ann. §§ 33-14-300 and -310 apply only to closely held corporations; the court decided these sections apply to corporations generally, and are not limited to closely held corporations. *Id.* In determining whether plaintiffs established a ground for dissolution based on conduct that was unfairly prejudicial, the court then went on to distinguish the analysis of *Kiriakides v. Atlas Food Systems & Services, Inc.,* 343 S.C. 587, 603, 541 S.E.2d 257, 266 (2001), because it involved a closely held corporation. *Id.* at *11. The court again relied on several opinions from other jurisdictions—Montana, Oregon, Delaware, and North Carolina—to determine that plaintiffs did not allege sufficient facts to establish a ground for dissolution under section 33-14-300.

Plaintiffs also asserted a claim for breach of the directors' fiduciary duties under S.C. Code Ann. § 33-8-300. *Covan*, 2010-01-08-02, at *13. Although the court had given the Plaintiffs an opportunity to replead the claim from their original Complaint, plaintiffs again failed to allege sufficient facts. *Id.* The general conclusion that the Board should declare a dividend from excess surplus was not enough:

Plaintiffs make no allegation as to what specifically the Board did not consider in making decisions regarding the financial condition of Blue Cross, what information it should have but did not when making this decision, or ultimate facts to support the allegation that the Board did not have all relevant information in making the decision.

Id. at *14. The court relied on *Churella v. Pioneer State Mutual Insurance Co.*, 671 N.W.2d 125 (Mich. App. 2003), in analogy to the facts of Covan and decided that the facts as pleaded by plaintiffs did not overcome the business judgment rule. *Covan*, 2010-01-08-02, at *14.

The written opinions in South Carolina's Business Court are intended to develop the case law for business issues, and the *Covan v. Blue Cross* opinion effectively contributes to this goal by analyzing numerous issues in a detailed opinion. The court relied extensively on case law based on similar facts and developed in other jurisdictions that creates useful comparisons to the facts before it in South Carolina. *Covan* and the other Business Court opinions should be a resource for any lawyer handling a business issue for her clients.

Lawyer Mentoring Second Pilot Program

In December of 2008, the South Carolina Supreme Court issued an order establishing the Lawyer Mentoring Second Pilot Program. The program is mandatory for all new lawyers in South Carolina admitted between March 1, 2009 and December 31, 2010.

The program pairs new lawyers with more experienced lawyers to help with the transition from the academic world to the practice of law. In its design, the program is meant to help new lawyers learn the practical aspects of the profession, develop professional relationships within the legal community, and develop practical skills to be successful in the profession.

The mentor does not undertake to represent the new lawyer's clients or assume any responsibility for the quality of the work of the new lawyer. The expectation of the program is to help the new lawyer learn the practical aspects of the legal profession.

The Supreme Court Commission on Continuing Legal Education and Specialization (Commission) administers the mentoring program. While the new lawyer has the ability to ask a qualifying lawyer to serve as his or her mentor, the Commission has become aware that many new lawyers do not have mentors. Donette Welch, Assistant Director for the Commission, has been designated as the Mentoring Coordinator and is available to answer questions about the program and provide you with information needed to apply to be a mentor. She is also available to assist in making the arrangements establishing the mentor relationship with the new lawyer. She can be contacted at (803) 799-5578 or by email at commcle@bellsouth.net.

The need for mentors is critical, and through your participation in the mentoring program, you will be providing a great service to the Court, the legal community and the public. Not only will a lawyer's participation as a mentor serve as a mechanism to improve the quality of our profession but it will also automatically qualify the mentoring lawyer to receive four (4) hours of CLE credit to include two (2) hours of legal ethics, once the mentoring period is complete.

Thank you in advance for your consideration of this exciting project.

ARTICLE

Punitive Damages in South Carolina

by Virginia W. Williams

South Carolina's courts and legislature may seem at times like two bulls in a china cabinet – robustly charging the law, bound to butt heads and bound to break something in the tussle. Recently, the debate has been directed at the law of punitive damages in South Carolina. This article will examine the current state of punitive damages law in South Carolina and the potential changes being proposed by our legislature. As can be expected, their positions don't match up.

The Basics of Punitive Damages Law in South Carolina

In South Carolina, punitive damages are intended to "deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). Punitive damages are only permissible when a defendant's conduct is so shocking and offensive that punishment is justified. *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 545 S.E.2d 286 (2001), *Clark v. Cantrell,* 339 S.C. 369, 529 S.E.2d 528 (2000), *Laird*, 243 S.C. at 396, 134 S.E.2d at 210. Stated differently, they are allowed when a defendant has acted in a "reckless, willful, or wanton" manner." *See Clark*, 339 S.C. at 379, 529 S.E.2d at 534. One acts willfully or with reckless indifference to the rights of others when she acts in disregard of a high and excessive degree of danger about which she knows or which would be apparent to a reasonable person in her condition. *Camp v. Components, Inc.*, 285 S.C. 443, 330 S.E.2d 315 (Ct. App. 1985), *Carter v. R.L. Jordan Oil Co.*, 301 S.C. 84, 86, 390 S.E.2d 367, 368 (Ct. App. 1990). Mere gross negligence is not enough to trigger punitive damages. *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258, 263 (1958); *see also Longshore v. Saber Security Servs., Inc.*, 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005). An innocent mistake or error of judgment does not constitute the type of misconduct that will support an award of punitive damages. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). Furthermore, there must be a present consciousness of wrongdoing to justify the assessment of punitive damages against the wrongdoer. *Martin v. Martin*, 262 S.C. 168, 203 S.E.2d 385 (1974). Also, there must be no reasonable ground for the defendant's conduct to sustain a punitive damages award. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 & n.2 (1992); *see also Poston v. Nat. Fidelity Life Ins. Co.*, 303 S.C. 182, 188, 399 S.E.2d 770, 773 (1990).

The Mitchell Guideposts

Recently, South Carolina's Supreme Court made a significant decision, affecting the direction of punitive damages law. In *Mitchell v. Fortis Insurance Co.*, the insured, Mitchell, purchased insurance coverage a year before he was diagnosed with HIV. 385 S.C. 570, 686 S.E.2d 176 (2009). However, his insurer denied him coverage based on a clerical error that his diagnosis was prior to applying for insurance, which would have amounted to a misrepresentation on his application and grounds for denial. *Id.* at 579, 686 S.E.2d at 181. The insurer was later availed to the clerical error, but continued to deny him coverage. *Id.* Mitchell filed an action seeking actual and punitive damages. *Id.* at 580, 686 S.E.2d at 181. The jury awarded $150,000 in compensatory damages for the bad faith rescission of health insurance claim and $15 million in punitive damages. *Id.* at 582, 686 S.E.2d at 182. (disregarding other jury awards based on Mitchell's election of remedies). The trial court denied the insurer's post-trial motion to vacate or remit the punitive damages award. *Id.* Upon certification to the Supreme Court, the insurer asked the Court to consider whether the punitive damages award was excessive, violating the insurer's constitutional right of due process and whether the jury's verdict was a result of passion, caprice, or prejudice. *Id.* The Court affirmed the jury's compensatory damages award and reduced the punitive damages award pursuant to a 10:1 ratio. *Id.*

Aside from the overall holding, the Court made some notable preliminary findings. First, it changed the standard of review for the constitutionality of a punitive damages award. *Id.* at 582-83, 686 S.E.2d at 182-83. South Carolina courts have typically applied an abuse of discretion standard. *Id.* at 582, 686 S.E.2d at 182 (referencing *Gamble v. Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 314, 529 S.E.2d 45, 61 (Ct. App. 2000)). However, recent federal case law has held that a de novo standard of review is appropriate when a district court addresses the constitutionality of a punitive damages

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award. *Id.* (referencing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)). Cooper was based on the concept that a due process analysis is highly contextual in nature and cannot be separated from the specific facts in which the standards are being assessed. *Id.* at 583, 686 S.E.2d at 183 (referencing Cooper, 532 U.S. at 436). "The due process criteria acquire content only through application, and independent review is therefore necessary if appellate courts are to maintain control of, and clarify, the legal principles." *Id.* (citing *Cooper*, 532 U.S. at 436). Furthermore, de novo review tends to "unify precedent and stabilize the law." *Id.* (citing *Cooper*).

Next, the Court considered the criteria for evaluating a due process award post-judgment, holding that the Gamble factors were only relevant to give substance to the Gore guideposts. *Mitchell*, 385 S.C. at 586-89, 686 S.E.2d at 185-86. *Gore*, a United States Supreme Court decision, directs the courts to consider "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 586, 686 S.E.2d at 184. South Carolina also developed the Gamble factors in conducting a post-judgment due process review of any punitive damages award: "(1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate." *Id.* at 587, 686 S.E.2d at 185 (citing *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354). In the past, South Carolina courts required trial courts to consider both sets of factors, but now "considerations of judicial economy weigh in favor of a less burdensome and duplicative analysis." *Id.* Thus, the test in South Carolina for conducting a post-judgment review of punitive damages awards is that of *Gore*: (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Id. at 587-89, 686 S.E.2d at 185-86. *Gamble* is relevant in post-judgment due process analysis only where it adds substance to the *Gore* guideposts. *Id.* at 587, 686 S.E.2d at 185.

Lastly, the Court adopted another federal standard. South Carolina had applied the ratio guidepost to only compare the punitive damages award to the actual damages award; but in *Mitchell* the Court found that the ratio could be punitive damages in comparison to "potential harm" damages. *Mitchell*, 385 S.C. at 590-91, 686 S.E.2d at 187 (referencing *TXO Production Corp. v. Alliance Resources Corp*, 509 U.S. 443 (1993)). The United States Supreme Court held in *TXO Production Corp.* that "it is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." 509 U.S. at 443. *Mitchell* applied *TXO* to its facts: "although the Court did not designate a monetary value to the potential harm suffered by [*Mitchell*], it found that even the most conservative approximations…each falling within a single-digit ratio…did not 'jar one's constitutional sensibilities.'" *Mitchell*, 385 S.C. at 591, 686 S.E.2d at 187 (quoting *TXO Production Corp.*, 509 U.S. at 462). Based on the potential harm figure, the ratio of punitive damages to compensatory damages was 13.9 to 1. *Id.* at 592, 686 S.E.2d at 187. The court held under the third *Gore* guidepost that this ratio exceeds due process and reduced the punitive award to $10 million, resulting in a ratio of 9.2 to 1. *Id.* at 594, 686 S.E.2d at 188.

In our view, the conduct in this case was reprehensible enough to merit an award towards the outer limits of the single-digit ratio. Fortis willfully disregarded Mitchell's health and safety, and the jury so found in assessing this punitive damages award. In assessing this remittitur, we place great emphasis upon that consideration…a $10 million award will adequately vindicate the twin purposes of punishment and deterrence that support the imposition of punitive damages.

Id. at 593-94, 686 S.E.2d at 188.

In summary, *Mitchell* has changed the direction of South Carolina's punitive damages law in three ways: (1) a de novo standard is applied on post-judgment review of a punitive damages award, giving the appellate court discretionary review of facts developed at trial; (2) the *Gamble* factors have decreased in importance and the focus is back to the three basic guideposts of Gore; and (3) the *Gore* ratio is not only actual damages to punitive damages but can now be potential damages to punitive damages, creating the possibility of higher damages. Also, effectively, we now have the *Mitchell* guideposts: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See e.g. Austin v. Stokes-Craven Holding Corp.*, 2010 WL 760410 (S.C. Mar. 8, 2010) (referencing *Mitchell*, 385 S.C. at 587-88, 686 S.E.2d at 185-86). The degree of reprehensibility is determined by looking at (1) whether the injury was physical or economic, (2)

there was an indifference or reckless disregard for the health or the safety of others, (3) the target of the conduct was financially vulnerable, (4) the conduct was repeated or an isolated event; and (5) the injury was the result of intentional conduct rather than an accident. *Id.* (referencing *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185).

Potential Changes to Punitive Damages Law – Tort Reform 2010

This year's General Assembly session has been marked by comprehensive tort reform legislation. The move was sparked by South Carolina's Commerce Secretary Joe Taylor, and the debate started in the House on February 10, 2009, truly getting its wings in February of this year. H.B. 3489, 118th Leg. (S.C. March 3, 2010). By March 9, 2010 it had passed the House with 89 yeas and 10 nays. H.J. 77, 118th Leg. (S.C. 2010). The Senate has now been sitting on the bill for over a month. See H.B. 3489, 118th Leg. A similar bill was introduced in the Senate also in early 2009 and then referred to Committee on Judiciary, then to subcommittee where it began 2010. S.B. 350, 118th Leg. (S.C. Jan. 29, 2009). Although the versions of the bills have changed and are sure to undergo more changes, the provisions affect punitive damages awards generally in the same ways. They both propose the following: to limit noneconomic damages and punitive damages in all personal injury actions; reduce the liability of sellers and manufacturers for their products if such products comply with government standards; reduce the potential liability in tort cases based on violation of building codes; reduce liability of a seller or manufacturer when the product only damages itself; limit the ability to pierce the corporate veil of a corporation; and allow non-use of a seat belt to be admissible as evidence of comparative negligence or failure to mitigate damages. See H.B. 3489 (title), S.B. 350 (title).

Specifically, the House Bill limits an award of punitive damages to "three times the amount of the plaintiff's compensatory damages award or three hundred fifty thousand dollars, whichever is greater." H.B. 3489 (proposed §15-32-530)(A)). This cap does not apply when the fact finder determines the defendant pursued an intentional course of conduct that he knew or should have known would cause injury; the defendant pleads guilty or is convicted of a felony arising out of the same conduct complained of; or when the fact finder determines that the defendant's alleged conduct happened while the defendant was under the influence of alcohol, drugs, or other substance to the degree that the defendant's judgment was substantially impaired. *Id.* (proposed § 15-32-530(B)). Also, the House Bill provides that at the request of a defendant, a trial of issues including the allegation of punitive damages must be conducted in a bifurcated manner before the same jury. *Id.* (proposed § 15-32-520(A)). In the phase two of the bifurcated trial, presuming the evidence merits this phase, the jury is to consider all, but not only, the following factors: degree of defendant's culpability, severity of the harm caused, plaintiff's own contribution to the harm, duration of the conduct, defendant's awareness of the conduct, concealment by the defendant of the conduct, existence of similar past conduct, profitability of the defendant's conduct, defendant's ability to pay, the award as deterrence of future conduct by defendant and others, other awards for similar conduct, criminal penalties already imposed, and the amount of civil fines already assessed against the defendant for similar conduct. *Id.* (proposed § 15-32-520(E)). The Senate Bill reflects similar provisions. S.B. 350 (limiting even further a punitive damages award against a small business employer and products regulated by the Federal Food, Drug, and Cosmetic Act, among other minor differences).

The remaining parts of the proposed bill do not directly address punitive damages but their effect is to reduce the chance for a punitive damages award. Reducing overall potential liability right off the bat (i.e. the provisions regarding compliance with government standards and damage only to product itself) arguably lessens a defendant's culpability and thus lessens his exposure to punitive damages which are based on punishing a defendant for his culpable acts. Likewise, requiring that there be a judgment against a corporation before being able to pierce the corporate veil reduces the chance of more exposure to more punitive damages based on the reckless, willful, or wanton conduct by particular corporate individuals. Lastly, permitting evidence that an injured party failed to use a seat belt in an action based on a motor vehicle accident would reduce a defendant's potential exposure to liability in general and would have a filtering affect on the extent of a punitive damages award.

The *Mitchell* Case Versus Tort Reform

A major difference between the *Mitchell* case and the 2010 Tort Reform is the opposite treatment of the *Gamble* factors. *Mitchell* diminished their precedential value while the proposed legislation puts them right back at the forefront. Whether or not the *Gamble* factors are applied is important to what evidence a court will allow on punitive damages. For example, the *Gamble* factors include the defendant's ability to pay. This suggests that a plaintiff needs to show a defendant's available sources of money, not just their net worth, which often includes insurance coverage. Referencing insurance before a jury is a big no-no, and, given they are typically not well received by the general public such reference could greatly prejudice a defendant. In this sense the Tort Reform disadvantages a defendant where *Mitchell* favors a defendant.

Continued on top of page 34

ARTICLE CONT.

ARTICLE

Tips to Minimize Medicare Secondary Payer Reporting Liabilities

by Eli Poliakoff

As noted in the Spring 2010 issue of DefenseLine, Section 111 of the Medicare, Medicaid and SCHIP Extension Act ("Section 111") requires defendants to report to the federal government certain settlements with Medicare beneficiaries. This article suggests ways to mitigate potential liabilities associated with Section 111 reporting.

Section 111 Reporting

Non-compliance with the Section 111 reporting obligations can result in $1,000 per day, per claim penalties, regardless of the amount of settlement. Penalties can result from a variety of mistakes, such as a failure to timely register for the reporting program; confusion over whether the defendant or its insurer has the reporting obligation; an incorrect determination that a plaintiff was not a Medicare beneficiary or that a specific settlement arrangement was not reportable; or due to another entity's delay (for instance, a reporting vendor). Additionally, penalties could arise due to inaccurate reported information.

To reduce the likelihood of reporting mishaps, settling defendants and their insurers should identify which entity is legally responsible for reporting (the Responsible Reporting Entity, or "RRE"). As noted in the prior article, the RRE designation depends on the settlement amount and insurance arrangement. Insureds and insurers should also identify which entity will administer the reporting (RREs can contract with other parties to oversee their Section 111 submissions). The RRE remains responsible for reporting penalties regardless of such arrangements; accordingly, vendor contracts should allocate responsibility for reporting penalties.

Entities that have a reasonable expectation of reporting should register by September 30, 2010 to allow for the required calendar quarter of testing before reporting begins in the first quarter of 2011. The agency that administers Medicare and runs the Section 111 program (the Centers for Medicare and Medicaid Services, "CMS") has indicated that a good faith effort to comply with the registration, testing and reporting deadlines is a defense against a penalty assessment. However, CMS has suggested that little sympathy will be accorded to entities that ignore the deadlines or fail to make alternate arrangements.

Most importantly, RREs should integrate the reporting requirements into the claims evaluation and resolution process. CMS has provided an official form for use in obtaining Social Security and Medicare identification numbers, without which RREs cannot report. Discovery can also elicit certain information for reporting. Defendants may want to work with plaintiff's counsel to identify reportable information through fact sheets or other written agreements. Ultimately, the defendant/insurer is responsible for the content and timing of the report.

Plaintiff's counsel have incentive to cooperate with efforts to report accurate information. Section 111 reports include diagnosis codes that identify the injury or illness underlying the settlement. CMS will use the reported code (with other information) to connect the settlement to prior medical expenses made on behalf of the beneficiary (if any). If not accurately reported, CMS's recovery demand may inadvertently include past expenses that are unrelated to the injury covered in the settlement – thus hampering both parties' efforts to close out the case.

Section 111 Data Use Agreement

As discussed in the prior article, RREs must complete a Data Use Agreement ("DUA") when registering for the Section 111 program. The DUA imposes data security obligations and requires the RRE to protect the confidentiality of data and establish safeguards against unauthorized use and disclosure of information exchanged with CMS. Since the DUA alludes to "civil and criminal penalties for noncompliance contained in applicable Federal laws," RREs should revise information security policies and procedures to incorporate the DUA's requirements. The DUA holds RREs responsible for the acts of third party vendors; accordingly, RREs should ensure that vendor contracts address the DUA's requirements and penalties.

Medicare Secondary Payer Program

The Medicare Secondary Payer ("MSP") program is a voluminous combination of statutory provisions, federal regulations and private contractor guidelines. A thorough review of the MSP program is beyond the scope of the article. However, Section 111 reporting and the MSP program are intertwined processes. Section 111 reporting identifies settlements for the Medicare Secondary Payer Recovery Contractor's

Continued on middle of page 34

ARTICLE

Drakeford v. Tuomey Healthcare System, Inc.: The United States' Case Against a South Carolina Hospital

by Will Thomas and Walt Cartin

Introduction

Over the past few years, the federal government has increased significantly its fraud and abuse enforcement efforts. The government's crusade to discover, prosecute, and eliminate "fraud, waste, and abuse" in the Medicare program has been continually touted in its endeavors to implement healthcare reform. According to the U.S. Department of Justice, in 2009 alone the government added $2.5 billion to the Medicare Trust Fund as a result of the government's investigation and prosecution of healthcare related fraud and abuse. A South Carolina hospital, Tuomey Healthcare System ("Tuomey"), recently felt the full impact of the government's fraud and abuse enforcement efforts when United States prosecutors convinced a South Carolina jury that the hospital had violated a Medicare law governing financial relationships between physicians and Medicare providers. The United States' victory may have been pyrrhic because the jury concluded that the hospital did not violate the federal False Claims Act ("FCA"), and therefore Tuomey did not have to pay millions of dollars in fines and treble damages associated with the FCA. For the time being, Tuomey has avoided any monetary penalties associated with the jury's verdict. Even so, the United States' efforts have likely resulted in significant legal bills and the inevitable disruption and frustration caused by the government's investigation and prosecution of the case.

Background

Tuomey Healthcare System ("Tuomey") in Sumter, South Carolina, is the only acute care hospital in Sumter County. In 2001, a local urology group sought a certificate of need for the construction of an ambulatory surgery center ("ASC"). According to the government, the ASC represented the first significant competition for outpatient procedures that Tuomey had faced in its history. Tuomey estimated that it would lose a significant amount of money if certain specialists performed their outpatient procedures at the ASC, rather than at Tuomey. In response, Tuomey sought to develop employment relationships with many of the specialists in the community.

Although there were differences from contract to contract, the contractual arrangements had several common factors: (1) the contracts were part-time, encompassing only outpatient procedures; (2) the contracts were exclusive, preventing the physicians from performing outpatient procedures at any facility other than Tuomey; (3) the contracts were for an initial term of ten years, with a three-year non-compete post termination; and (4) the contracts provided full-time benefits to the part-time employed physicians, including the full payment of all medical malpractice premiums. Additionally, all the contracts contained the same basic cash compensation formula.

Under the contracts, cash compensation had three components: (1) base salary, (2) productivity bonus, and (3) incentive bonus. The "base salary" component was set using a scaled calculation based on the previous year's collections of personally performed service fees. The "productivity bonus" was 80% of the physicians' yearly collections for personally performed services. The "incentive bonus" was based on the physicians' meeting certain qualitative factors such as patient satisfaction, reduced wait times, and relationships with hospital employees. If a physician met the applicable criteria, then the incentive bonus could be up to 7% of the productivity bonus.

The Qui Tam and the Government's Intervention

Dr. Michael Drakeford, an orthopedic surgeon and the "relator"[1] in this case, was offered a part-time employment contract by Tuomey. While conducting a pre-employment contract review, Dr. Drakeford's lawyer raised numerous issues regarding compliance with federal law; most pertinently, he raised questions about whether the contracts offered to his client complied with the Stark law. Ultimately, Tuomey and Dr. Drakeford could not agree upon whether the contracts were legal. Despite the problems Dr. Drakeford's attorney noted with the contracts, 19 Sumter area physicians ultimately entered into part-time contractual relationships with Tuomey.

Dr. Drakeford filed the qui tam action under seal in 2005. In 2007, the United States formally joined the action by filing an amended complaint. The Government alleged (1) Tuomey violated the Stark law, and (2) by submitting claims to Medicare for services performed by physicians whose contracts

Continued on next page

ARTICLE CONT.

violated the Stark law, Tuomey violated the FCA. Alternatively, the government made a number of common law claims, including payment under mistake of fact, unjust enrichment, and constructive trust and accounting.

The Law

The Stark law, sometimes referred to as the self-referral law, prohibits a physician from referring patients (for certain designated services) to a medical facility with whom he or she has a "financial relationship." See 42 U.S.C. § 1395nn et. seq. The law also prohibits the medical facility from billing the Medicare program for the physician's provision of these services. The law contains a number of exceptions that can shield a provider from liability. The exceptions pertinent to this case depended upon Tuomey showing that the physicians' compensation (1) did not vary with or take into account the volume and value of referrals, (2) was fair market value for services rendered under the contract, and (3) was commercially reasonable, even without taking into account any referral revenues the physicians could generate for Tuomey.

The FCA, a statute which dates back to the Civil War, imposes liability upon a person who knowingly presents, or causes to be presented, a claim for payment to the United States government that the person "knows" is false or fraudulent. See 31 U.S.C. § 3729 et. seq. Knowledge can be shown in three ways: actual knowledge, reckless disregard, and willful blindness. The government, relying upon the prohibition for billing Medicare for services performed in violation of the Stark law, argued that Tuomey knowingly submitted false claims to Medicare. The government valued these "false claims" at approximately $45 million. Pursuant to the FCA, the government asked for treble damages and civil monetary penalties. The FCA imposes civil monetary penalties in the amount of $5,000–$10,000 per false claim. In this case, the government alleged that there were nearly 26,000 individual false claims.

The Government Attempts to Make its Case

United States District Court Judge Matthew J. Perry presided over the trial. The trial began in early March 2010 and consumed the bulk of the month. The government's case-in-chief itself lasted over eight days.

Because Tuomey employed the physicians, there was not much of a question that a "financial relationship" existed. Thus, the government turned its attention to attempting to show that Tuomey did not meet an applicable Stark law exception. In building its argument that Tuomey did not meet an exception, the government elicited testimony from a healthcare consultant who had conducted a fair market valuation of the compensation paid to the 19 physicians. Tuomey's healthcare consultant testified that sometime in 2004 she had, at the request of Tuomey's lawyers, calculated the "net present value" of the non-compete agreements under each contract. The government contended that this "net present value" analysis was an attempt to value the referrals that Tuomey would receive by employing the physicians—or, alternatively, to value the referrals it would lose if they performed the bulk of their outpatient procedures at the ASC. The healthcare consultant also testified that she had not conducted a "commercial reasonableness" analysis, another element of an exception claimed by Tuomey.

The government's expert witness testified that the compensation Tuomey paid to the physicians did not meet the definition of "fair market value," nor did it meet the definition of "commercial reasonableness." The expert concluded that some physicians' cash compensation alone was not fair market value and, for others, the benefits they received were not fair market value. Addressing commercial reasonableness, the government's expert concluded that paying the physicians far more than they collected for their personally performed services was not commercially reasonable. The expert testified that Tuomey's significant historical losses on the employment contracts—an average of $1.5 million per year—demonstrated that the arrangements were not commercially reasonable unless the value of referrals were taken into account. On cross-examination, the expert admitted that some hospitals never make money on certain employed physicians (e.g., emergency room doctors). Whether this reality was commercially reasonable, she opined, depended on the facts and circumstances of the particular situation.

Although the Stark law is a strict liability statute, a great deal of the government's case focused on trying to establish that Tuomey "knew" the part-time contracts violated the Stark law to prove the essential scienter element of its FCA claim. The government attempted to establish the knowledge element through two main avenues: live testimony from several Tuomey advisors and tape recordings of meetings held by Tuomey officers and its Board of Trustees.

Dr. Drakeford's lawyer testified that his initial review of the contracts raised some troubling issues. The lawyer testified that he communicated these concerns, both orally and in writing, to Tuomey's lawyers. He testified that he and Tuomey eventually reached an "impasse" regarding compliance with the Medicare laws. To break this impasse, his clients and Tuomey jointly retained Mr. Kevin McAnaney, former Chief of the Office of Inspector General's Industry Guidance Branch and Washington D.C. based attorney, to provide a substantive review of the proposed contracts. Mr. Smith testified that Mr. McAnaney raised numerous "red-flags" with the model. The Government presented documents and testimony to show that after Tuomey received his adverse opinion, Tuomey unilaterally terminated his representa-

tion and instructed him not to set forth his opinions in writing. Judge Perry did not allow Mr. McAnaney to testify about the representation, a ruling which is now part of the basis for the government's pending motion for a new trial.

Mr. Richard Kusserow, a former Inspector General of the Department of Health and Human Services, testified that he had reviewed the proposed part-time employment contracts on behalf of Tuomey. In an eleven-page letter, he outlined a "devil's advocate" view of the contracts, citing numerous perceived compliance problems. Significantly, although Mr. Kusserow was not asked to provide a Stark law analysis, he thought that the arrangements presented substantial Stark compliance issues and, therefore, included a Stark law discussion in his analysis. Mr. Kusserow testified that he sent this eleven-page letter directly to Tuomey's lawyer.

In addition to live testimony, the jury heard several hours worth of tape recordings. These tape recordings revealed frank discussions between Tuomey's officers, lawyers, trustees, and some of the physicians whose contracts were at issue in this case. In closing arguments, the government argued that these tapes proved Tuomey's agents knew the contracts posed a serious risk under the Stark law. Replaying portions of several tapes for the jury, the government highlighted certain comments made by Tuomey's lawyers and officers. The government interpreted these comments as showing that Tuomey knew the contracts were illegal.

Tuomey's defense consisted of live testimony from two witnesses: another healthcare consultant who had given Tuomey an opinion on fair market value in 2004–2005 (this consultant has supervisory authority over the consultant called as a witness in the government's case-in-chief), and its own expert witness. Although Tuomey had raised the defense of reliance on the advice of counsel, Tuomey chose not to have its lawyers testify. Instead, it relied upon the tape recordings played in the government's case as evidence establishing its reliance on the advice of counsel defense.

After a relatively short direct examination of Tuomey's healthcare consultant, the government conducted nearly a three hour cross-examination. The government attempted to undermine the credibility of Tuomey's consultant, questioning his expertise and valuation methodology. Ultimately, Tuomey's consultant admitted that the "losses" associated with the physician contracts were really "costs" because Tuomey would make money on the physicians from other sources, including facility fees. In closing argument, the government argued that this consultant's testimony proved that the arrangements were not commercially reasonable without taking into account the value of referrals, as facility fees paid by Medicare were undeniably value flowing from referrals.

Tuomey's expert worked to show that the government's expert had taken a myopic view of the contracts, failing to consider the environment in which Tuomey operated. He testified that Tuomey served a rural community with an adverse payor mix (i.e., relatively few privately insured patients and a disproportionate amount of patients whose healthcare is paid for by government programs). Tuomey's expert testified that when he analyzed the physicians' "whole practices," the physicians' compensation met the standard for fair market value. The expert's "whole practice" approach required him to analyze all of the physicians' work (inpatient, outpatient, and in-office), as well as compensation paid from all sources, including payment for services not performed under the part-time contracts. The government criticized this approach as taking into account criteria that are impermissible under the definition of "fair market value."

The Verdict

Ultimately, the jury concluded that Tuomey violated the Stark law, but had not violated the FCA. Thus, the jury awarded the government no damages. The government is continuing to pursue damages under its common law claims and will present these claims to the Court in early June. Moreover, the government has moved for a new trial, mainly based on the exclusion of key testimony relating to its FCA claim. Thus, even though Tuomey initially escaped imposition of the crushing damages and penalties requested by the government, it could still suffer stiff penalties or be forced to pay damages based upon the government's common law claims.

Based on the rarity of fraud and abuse cases going to trial (the vast majority of cases settle), this case has sparked considerable interest in the healthcare law community. Both Medicare providers and their lawyers should closely watch this case as it heads towards inevitable appeal. Many of the legal arguments asserted by Tuomey's trial attorneys will pose interesting questions for the Fourth Circuit. The Fourth Circuit's conclusions on these issues could have lasting impact on the way healthcare lawyers advise their clients in an increasingly hostile enforcement environment.

Footnote

1 The FCA allows private citizens to file complaints alleging FCA violations. These suits are called "qui tam" actions and the citizens filing the complaints are called "relators." The United States may choose to join the action or it may allow the relator to proceed on his or her own, albeit with some government oversight. A relator can recover anywhere from 15%–25% of the qui tam proceeds if the relator's action results in a victory at trial or a settlement.

* Since submission of this article to *The Defense Line*, Judge Perry awarded the government $44.8 million on its common law claims, along with prejudgment interest, and ordered a new trial on the False Claims Act cause of action on the basis that the Court improperly excluded crucial evidence.

ARTICLE

Court Grants Cert in Trucking Default Case

by C. Stuart Mauney

The South Carolina Supreme Court recently granted defense counsel's petition for writ of certiorari in a case, previously ruled upon in November of 2008 by the Court of Appeals, McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). The case has garnered significant attention within the trucking industry and among defense counsel across the state. The SCDTAA assisted in defense counsel's efforts to have the case reviewed by the Supreme Court with its submission of an amicus curiae brief in support of the defendant's petition for writ of certiorari. In August of 2002, Plaintiff was riding as a passenger in a car when it collided with a truck owned by New Prime and driven by Harrell Wayne Deaton. Zurich, as insurer of New Prime, received a letter of representation from Plaintiff's counsel shortly thereafter and subsequently entered into settlement negotiations with Plaintiff, whereby her counsel presented a demand to settle the claim in full in exchange for payment of $170,000. While Zurich was in the process of reviewing Plaintiff's submitted medical records, Plaintiff's counsel sent Zurich a letter in which he stated that if the demand was not met within the week, he would file suit and send Zurich a courtesy copy of the complaint. Thereafter, Plaintiff's counsel sent Zurich another letter indicating his intent to file suit and enclosing a copy of a draft complaint in which New Prime was the only named defendant. Zurich and Plaintiff's counsel were actively negotiating settlement when Plaintiff's counsel filed a summons and complaint naming only Deaton, who was no longer employed by New Prime, as the only defendant.

Plaintiff's counsel did not send a courtesy copy of the pleadings to Zurich and, notably, actively continued his settlement negotiations with Zurich without disclosing that he already had filed suit. Zurich and New Prime did not learn that suit had been filed until they received a letter from Plaintiff's counsel enclosing an order of default judgment that had been entered against Deaton in the amount of $800,000.

The South Carolina Court of Appeals held that Deaton and New Prime, which had intervened in the suit, met the surprise or excusable neglect requirements of SCRCP 60(b)(1) and, given the "serious concerns" the court had with regard to Plaintiff's counsel's actions, "quite possibly" satisfied the misrepresentation and misconduct envisioned by Rule 60(b)(3). However, the court affirmed the default judgment on the basis that New Prime had failed to raise a meritorious defense, an element required by South Carolina law for setting aside a default judgment.

In a spirited dissenting opinion, Chief Judge Hearn said that there was sufficient evidence of a meritorious defense relating to the amount of damages and that it was argued and ruled upon at the circuit court level and was thus properly before the appellate court for consideration. In addition, she joined the majority's "serious concern with the conduct of the McClurgs' counsel in the manner in which he pursued this case." Judge Hearn further noted that Plaintiff's counsel's actions compromised the "high ethical standards attaching to the practice of law" and violated the maxim that a lawyer's word is his bond. Based on the evidence of a meritorious defense on damages, and "counsel's actions in continuing to uphold the appearance of settlement negotiations while simultaneously pursuing a default judgment without notice to Zurich," Judge Hearn found that New Prime's motion to set aside the default judgment should have been granted.

There has been significant interest in this case throughout the industry, as evidenced by the fact that several organizations have submitted compelling amicus curiae briefs in support of New Prime's petition for writ of certiorari. In addition to the SCDTAA, other contributing organizations include the American Law Firm Association, South Carolina Trucking Association, American Trucking Association, Inc., and Trucking Industry Defense Association. These organizations have argued that the appellate court ruling, as it stands, encourages judicial inefficiency and duplicative proceedings, invites manipulation of the legal process and of the rules for service of process, denies motor carriers the right to defend cases on the merits, and ignores the equitable nature of the procedural rules.

Stay tuned for the South Carolina Supreme Court's decision on a case of interest to the trucking industry and the defense bar.

ARTICLE

Rolling Out CSA 2010:
The New Motor Carrier Safety Compliance and It's Impact on Trucking Litigation

by Jim Bryan and Dennis Lynch

The Federal Motor Carrier Safety Administration (FMSCA) has the "primary mission" of preventing "commercial motor vehicle-related fatalities and injuries." *See* A.P. Walsh and D.B. Hall, "Current and Emerging Issues to the Motor Carrier Industry," Transportation Lawyers Association 2010 Conference, *quoting* http://csa2010.fmcsa.dot.gov. The Federal Motor Carrier Safety Regulations (FMCSR), promulgated by the FMSCA, establish important minimum standards for motor carriers in key areas, including driver qualifications, safety, inspections, repair, maintenance, maximum hours of service for driver, drug and alcohol testing, and a motor carrier and driver's record-keeping obligations. *See* A.P. Walsh and D.B. Hall; *see also* 49 C.F.R. § 350.101 et seq. These regulations are typically at the core of truck wreck litigation. Plaintiffs will introduce violations of a FMCSR minimum standard "to establish or support a common law claim for negligence or wantonness, or negligent or wanton entrustment, training, supervision, or retention as to a motor carrier." Conversely, driver and motor carrier defendants "rely upon their compliance with FMCSR requirements to dispute allegations of liability and wrongdoing." *See* A.P. Walsh and D.B. Hall.

In keeping with its "mission" of motor-vehicle safety and accident prevention, the FMCSA also has programs in place to monitor and evaluate a motor carrier's regulatory compliance and safety performance – and "intervene" where necessary to, *e.g.*, correct safety problems and levy fines for non-compliance. As part of their punitive damages case against a defendant motor carrier, Plaintiffs often attempt to introduce a carrier's record of non-compliance and poor safety performance to establish a pattern of wanton neglect – and broadly paint the carrier as a "rogue company." Beginning in late 2010, the FMSCA is planning to rollout its Comprehensive Safety Analysis 2010 (CSA 2010). CSA 2010 will introduce significant changes to how the FMSCA monitors and evaluates motor carrier compliance and safety performance, *and* to how and what degree the FMSCA intervenes to investigate, rate, and penalize motor carriers for non-compliance. Motor carriers and trucking defense attorneys need to be aware of these changes, as they will undoubtedly create a new regulatory environment of more aggressive and comprehensive investigation into safety violations and intervention by the FMCSA – and may provide additional ammunition to Plaintiffs attempting to portray the motor carrier defendant as a rogue company. This note summarizes and outlines CSA 2010's key changes from FMCSA's current method of safety/compliance analysis and intervention/investigation.

In 2008, the FMCSA began field testing CSA 2010; it is currently being field tested in nine states – Colorado, Delaware, Georgia, Kansas, Maryland, Minnesota, Missouri, Montana, and New Jersey – and is scheduled to be rolled out nationwide by the end of 2010. According to the FMCSA, implementation of CSA 2010 is the result of a "rate of crash reduction" that has "slowed," prompting the FMCSA "to take a fresh look at how the agency evaluates the safety of motor carriers and drivers and to explore ways to improve its safety monitoring, evaluation, and intervention processes." http://csa2010.fmcsa.dot.gov. The FMCSA has identified "limitations" in its current compliance review program and its program for measuring a carrier's safety performance (called SafeStat), with regard to "both how safety is measured and how unsafe behaviors, once identified, are corrected." *Id.*

SafeStat vs. CSA 2010.

In terms of how the FMSCA performs its evaluation, CSA 2010 will be significantly broader in scope than its predecessor program SafeStat.

Safestat is organized around four categories, or Safety Evaluation Areas (SEAs): Accident, Driver, Vehicle, and Safety Management. CSA 2010, however, is organized around the following seven specific Behavior Analysis Safety Improvement Categories (BASICs), which are used to measure and score a carrier for safety and compliance:

- Unsafe Driving (e.g., traffic violations, reckless driving, improper lane changes);
- Fatigued Driving (hours of service violations, crash reports);
- Driver Fitness (CDL violation, medical reason for crash, use of unqualified drivers, etc.);
- Controlled Substances/Alcohol (e.g., driver impairment or intoxication, positive test results);
- Vehicle Maintenance (e.g., mechanical defects, violations concerning maintenance records);
- Cargo-Related (e.g., load securement, Hazmat

Continued on next page

ARTICLE CONT.

handling, spilled/dropped cargo);
- Crash Indicator (histories or patterns of high crash involvement).

SafeStat identifies motor carriers for compliance review by focusing on out-of-service and moving violations. CSA 2010, however, first identifies safety problems for determining who to investigate and where/how the investigation should be focused. Further, CSA 2010 focuses on on-road safety performance using every safety-based roadside inspection violation.

While the identification process and compliance review under SafeStat does not affect a motor carrier's safety rating, the new process under CSA 2010 can be used to propose an adverse safety fitness determination based on a motor carrier's current on-road safety performance.

Further, unlike SafeStat, as part of its evaluation CSA 2010 weighs violations in relation to crash risk. Finally, where as under SafeStat only motor carriers are measured/rated for violations, CSA 2010 uses two safety measurement systems – one for the motor carrier and one for the individual driver (although the driver would still not be assessed by FMCSA for violations).

Compliance Review vs. CSA 2010.

In terms of how the FMSCA intervenes to implement corrective action, CSA 2010 also marks a significant departure from the current compliance review (CR) process. Client carriers targeted for investigation/intervention will need to be advised on the new scope, types, and phases of intervention implemented under CSA 2010.

The current CR program is a one-size fits-all investigation – i.e., the extent or scope of safety deficiencies do not have an impact on the extent or scope of the FMSCA's investigation of a motor carrier. Under CSA 2010, however, the FMSCA's choices of interventions can be shaped in response to the size, nature, severity, and/or extent of the safety deficiencies. There is some mutual benefit, as such "tailored" investigations are less resource-intensive for the FMSCA and less time consuming for motor carriers. This "tailored" approach, however, will also likely mean that more motor carriers are contacted by the FMSCA than under the current CR program.

The focus of the current CR is on broad compliance; current CR investigations are focused on discovering acute/critical violations in existence – with major safety violations leading to fines. Moreover, the focus of the investigation and intervention is on the carrier. Under CSA 2010, the focus is on improving any and all behaviors that are deemed to be connected to crash risk and is expanded to include investigation of drivers.

How are carriers "identified" for intervention under CSA 2010? Carriers will be measured/scored using the BASICs categories (discussed above) as criteria. The measurement results will be used to identify carriers for CSA 2010 interventions. Carriers will have access to their BASICs scores, "as well as the inspection reports and violations that went into those results." http://csa2010.fmcsa.dot.gov.) It will be important for carriers to monitor this data, as they can challenge their score and underlying reports and violations for accuracy through FMCSA's DataQs system:

https://dataqs.fmcsa.dot.gov/login.asp.

Types of Investigation and Intervention under CSA 2010.

As more fully described at http://csa2010.fmcsa.dot.gov, in contrast to CR, CSA 2010 offers a variety of levels of investigation and intervention as measured responses to specific BASICs deficiencies. Depending on the number/severity of the deficiencies, an investigation can range from a "warning letter" regarding the deficiency (with "identified" carriers also being subject to targeted roadside inspections), to offsite review of a carrier's records, to on-site investigations focusing on the reported deficiency – or to a comprehensive on-site investigation in cases of 3 or more BASICs deficiencies. What FMCSA calls "Follow-on" corrective interventions can take the form of a self-imposed safety plan to correct the problem (which the carrier would enter into in cooperation with the FMCSA); to formal notices for violations, a challenge to which would require the carrier to submit evidence refuting the asserted violation. The new intervention process also allows for formal "Settlement Agreements" between the carrier and the FMCSA, which, e.g., might set forth the parties' compromise in settlement of a notice of violation or claim and enforcement proceedings.

Proposed New Rules for Safety Fitness Determination.

Plaintiffs in truck wreck cases will almost invariably seek discovery of a defendant motor carrier's fitness-rating history in an attempt to introduce and establish a pattern of wanton safety neglect (or – as Plaintiff "safety experts" might phrase it in discovery and at trial – a "poor safety culture" within the company). Although still in the rule-making phase, the proposed new rules for Safety Fitness determination will potentially mean significant changes to how motor carriers are rated for safety fitness.

Currently, in rating a motor carrier's safety fitness, the FMCSA only uses vehicle out-of-service violations found during roadside inspections and acute/critical violations detected during compliance review; an adverse rating of a carrier generally will only issue where multiple deficiencies are found. Under the proposed new rules, the FMCSA can use

Continued on page 34

ARTICLE

Tweeting and Friending and Following… Oh, My!

(and Other Scary Things on the World Wide Web)

by Rob Tyson

The Law Firm Management Committee seeks to provide meaningful input to law firms across South Carolina. In today's society, law firms have been challenged with a variety of issues, ranging from personnel issues to technology. This article addresses potential issues raised by a firm's or a firm's employees' use of social media.

Have you ever walked down the hall and seen your fellow employees on Facebook? What about LinkedIn or some other form of social media? Obviously, in today's world, not only are our fellow workers participating in social media, but also our clients, friends, and opposing counsel are communicating via alternative media modes. Has your firm thought about the implications of an employee spending too much time on one of these social media sites? What about the potential for an employee to discuss confidential information via Facebook? If the firm has not, then the time is ripe to think about implementing a policy or guidelines concerning social media.

As we all know, with today's technology, any and all things written on the Web can be traced back to the writer very easily. Given that, our firms should educate by providing information on the perils of the Internet. Furthermore, the line between our work life and personal life seems to be more blurred today. Given the code of ethics with which lawyers must comply, there must be an attempt to distinguish these two lives such that a potential breach of an ethics rule is minimized.

As a firm considers a social media policy, these following items should be analyzed. First and foremost is to include language in the policy not to post any confidential or proprietary information concerning the law firm or its clients. Also, the policy should prohibit any statements or materials that are defamatory, mean-spirited, detrimental to the firm, or inappropriate. Given the potential to copy other sources of information, the policy should state that any post referencing an online site should include a link to the original story or post. Also, the policy should warn a lawyer or employee about over-promoting his or her self. Recommendations or testimonials should not be allowed because they could potentially violate the ethics rules. Furthermore, this policy should prohibit lawyers or employees from appearing to offer legal advice.

Addressing related concerns, the law firm should include a provision stating that the Internet is not necessarily anonymous nor does it allow an author to "take back" the material he just posted. A policy should be clear about setting parameters; however, it should be flexible such that one can make decisions about whether certain uses of social media stay between the two goal posts.

Since confidentiality is paramount in an attorney/client relationship, it is essential for firms to educate attorneys and employees about the pitfalls of releasing confidential or proprietary information. Since Tweeting, updating one's status or writing on one's wall has become so commonplace, there is the potential for someone unintentionally to write or disclose confidential information. Clearly, this poses potential hazards for the law firm. Further, the informality and casual nature of Facebook and Twitter should raise a red flag. Since it is easy for us to think of these posts as only going to a few friends or acquaintances, we lose sight of the high ethical standards by which we must abide. As you can see, a law firm should think about implementing policies to potentially prevent these mishaps. Having a policy will ensure that your firm comprehends the potential risks of social media. For additional information, interestingly enough, the Web, along with law firm consultants have a wealth of information concerning these policies.

ARTICLE CONT. FROM PG. 25

Punitive Damages in South Carolina cont.

On the flip side, *Mitchell* seems to favor a plaintiff as well. For example, in *Mitchell*, potential damages are now a possible multiplier in fixing a punitive damages award, meaning a great deal more money can be awarded. In contrast, the Tort Reform threatens to top a punitive damages award off at a cap, rendering the multiplier and ratio guidepost moot points. The proposed legislation also reduces the overall liability a defendant can be exposed too, which means less compensatory damages and consequently a lesser punitive damages award if the issue is even reached at all. Yet, the Tort Reform is not all negative for a plaintiff. It does bring back the *Gamble* factors making it easier for a plaintiff to introduce evidence in support of a punitive damages award. Also, *Mitchell* adds an additional obstacle between a plaintiff and a punitive damages award by changing the post-judgment review to the de novo standard instead of just abuse of discretion.

Conclusion

In short, our courts and legislature are introducing significant change to the law of punitive damages in South Carolina. We will know by the end of this year's Session which side will have its way – the *Mitchell* Court or the 2010 Tort Reform. As it stands now, the Tort Reform will determine the fate of the *Gamble* factors, the multiplier, and the overall ability to recover larger punitive damages awards, but it will not affect *Mitchell's* de novo standard. Whatever the change, neither the plaintiffs nor defendants will be spared.

ARTICLE CONT. FROM PG. 26

("MSPRC") review. If applicable, the MSPRC will assert the "Medicare lien" on the settlement proceeds.

In general, Medicare will first seek to recover its expenses from the beneficiary/plaintiff. Under MSP regulations, if the beneficiary does not reimburse the government within 60 days of settlement, the government can recoup its payments from any entity that funded the settlement (for example, defendants or insurers) or received the settlement. The latter category most commonly includes beneficiaries and plaintiff's counsel, but might include defense counsel if settlement funds are conveyed to counsel for disbursement.

If the government does not have to file a recovery lawsuit, the settling defendant may be liable for the lesser of the lien amount or the settlement (both of which can be further reduced to reflect the plaintiff's costs of procuring the settlement). However, if the government files a recovery lawsuit, the primary payer is liable for double the amount of the lien – regardless of the amount of the settlement.

While the MSP regulations suggest that a settling defendant's liability may accrue as soon as 60 days after settlement, MSPRC procedures for identifying the reimbursable amount can take several months. Under the latest MSPRC guidelines, it is unlikely that a defendant's liability would accrue sooner than approximately 150 days after settlement.

Interested parties should follow recent legislation introduced in Congress (the Medicare Secondary Payer Enhancement Act, H.R. 4796) that would significantly revise the MSP recovery process.

ARTICLE CONT. FROM PG. 32

all safety-based violations found during roadside inspections to formulate a carrier's safety rating (as well as continuing to use violations found in investigations); and, significantly, an adverse rating can issue based on only one deficient area. Currently, the three rating labels are Unsatisfactory, Conditional, and Satisfactory. The three new proposed labels – Unfit, Marginal, and Continue to Operate – especially the two more adverse of the three ratings, are arguably terms loaded with even more negative connotations for a fact finder. Also of note, while a carrier's fitness ratings are currently updated only when a compliance review is conducted, under the proposed rules a fitness rating will be updated monthly. While it is currently not anticipated that the new fitness determination and rating rules will be promulgated with the roll-out of CSA 2010, carriers and practitioners need to be aware that changes, whether in the current proposed form or as further modified in the rule-making process, are likely on the horizon.

Conclusion.

In sum, CSA 2010 provides for a much more expansive program in monitoring carrier compliance and safety. The wide-ranging investigation and intervention processes under the CSA 2010 will require more on-line monitoring by carriers of their BASICs scores, underlying reporting, and data – and trucking defense attorneys likely will have a corresponding increased role in evaluating and responding to governmental assertions of regulatory violations and claims. Moreover, BASICs data, the underlying reporting, and documentation of investigations/interventions will no doubt provide new areas of discovery and potential fodder for plaintiffs in trucking cases. It will be important for trucking defense practitioners to gain an early understanding of the changes wrought by CSA 2010, so as to best advise clients with regard to compliance and the new landscape of investigation/intervention – as well as to best anticipate the role CSA 2010 will undoubtedly play in truck wreck litigation.

Recent Orders

Trial Court Follows *Watson v. Ford Motor Co.* in Granting Summary Judgment

by Clarke W. DuBose

Following on the heels of the South Carolina Supreme Court's ruling in *Watson v. Ford Motor Co.*, Op. No. 26786 (March 15, 2010), Judge James Williams has issued an order granting summary judgment to a medical device manufacturer after finding the plaintiffs' experts' testimony was inadmissible under Rule 702, SCRE. The order in the case of *Graves v. CAS Medical Systems, Inc.*, C/A/ No. 2008-CP-38-826, which was venued in Orangeburg County, also addresses the issue of other product complaints that had not been shown to be relevant as well as the issue of contradictory expert affidavits.

Background

This case involved the death of an infant while on a home breathing/heart-rate monitor. CAS manufactures the AMI Plus infant breathing and heart rate monitor for home use. The monitor is operated by software written for the monitor when it was developed in the mid-1990's. The monitor includes both a primary and a back-up audible alarm designed to sound when the infant's breathing or heart rate goes out of pre-set bounds. The alarm is quite loud. The monitor also contains a logging function that, among other things, registers abnormal breathing and heart rate patterns and, through use of a microphone, indicates whether the monitor heard the alarm when it should have sounded.

The deceased child, India Graves was a premature triplet. After nearly two months in the Palmetto Richland Memorial Hospital neonatal intensive care unit, India and her two sisters came home on CAS monitors. After being at home for about two months with no significant problems, India declined and died over the period of about one hour, during the early hours of the morning. A post mortem diagnosed SIDS, which is a diagnosis of exclusion, meaning no other cause of death could be found. India did have many of the risks for SIDS death, among them prematurity, multiple birth, minority, and recent upper airway infection.

In their suit based on strict liability, breach of warranty, and negligence, India's parents alleged that the monitor failed to audibly alarm as it should have as India declined. The monitor log reflected India's decline by showing graphs of her decreasing heart and breathing rates. The monitor log also registered that the microphone had heard the alarm sound every time it should have sounded and only when it should have sounded.

Plaintiffs retained three technical experts and one medical expert for the case. Plaintiffs' software experts were Dr. Walter Daugherity, a computer science instructor, and Dr. William Lively, a computer science professor, both at Texas A&M University. Plaintiffs also offered as an expert Frank Painter, who is a biomedical engineer. Plaintiffs retained as a causation expert Dr. Donna Wilkins, an Indiana neonatologist.

Exclusion of Plaintiffs' Technical Experts

At deposition, Daugherity and Lively opined that the software in the monitor was so poorly written as to constitute a defect. They conceded, however, that the poor structure of the code was not the defect that caused the monitor to malfunction. To find that defect, they said they would have to find the line or lines of code that had been miswritten. This they had not done. To excuse this they asserted that the poor structure of the code made it essentially impossible to test for the defect. Plaintiffs' case of defect was a construct that could not be disproved because there was no specific alleged defect to disprove. In addition to not finding a defect that caused the monitor to fail, Daugherity and Lively were unable to make the monitor malfunction. At deposition, the experts were unaware of and thus could not explain the log entries showing that the sound of the alarm had been detected by the monitor's internal microphone. Despite all of this, they concluded that the monitor could malfunction because of the "defec-

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tive" code and the fact that there had been other complaints of alarm failures. They concluded the alarm failed in India Graves' case for these reasons and because the Graves said it did.

CAS moved for summary judgment on the basis that plaintiffs had not identified the defect that caused the injury and moved to disqualify the computer expert opinions as unreliable. Plaintiffs countered with affidavits from the technical experts that offered new opinions. CAS then moved to strike these affidavits.

The court relied on W*atson v. Ford Motor Co., State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), *State v. Council,* 335 S.C. 1, 515 S.E.2d 508 (1999), and *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 677 S.E.2d 612 (Ct. App. 2009), in rejecting the computer experts' opinions as unreliable under Rule 702, SCRE. The opinions failed all of the *State v. Council* tests of reliability. The court noted that the experts failed to show authoritative support for their claim that the software could not be tested and that they failed to show that their methodology for determining a software defect, essentially analyzing anecdotal evidence and a making superficial code review, had any validity. The court also noted the lack of quality control in opinions that failed to take the entire record into account. The court found that the opinions, having not been confirmed by testing, were merely unproven hypotheses. The court also based its ruling on the fact that the experts, by relying on the plaintiffs' allegations of failure, started with the assumption of a failure rather than determining whether, and if so, how a failure could occur. The court further found, based on *Watson v. Ford Motor Co.*, that these experts' reliance on other alleged software complaints, in the form of Medical Device Reports to the FDA, was improper where the validity or reliability of the complaints had not been shown.

The role of plaintiffs' biomedical expert, Frank Painter, was to say that the software was likely defective based on the MDRs and because the Graves said that the monitor failed to alarm. Judge Williams ruled that Painter's opinion too was unproven hypothesis. His reliance on the MDRs without a showing of substantial similarity or reliability did not meet muster under *Watson v. Ford Motor Co.* and *Jamison v. Morris*, 385 S.C. 215, 684 S.E.2d 168 (2009). The court also rejected his methodology on the same basis that it rejected the methodology of the computer experts.

Exclusion of Plaintiffs' Medical Expert

CAS moved to exclude plaintiffs' expert medical opinion as both unqualified and unreliable. Plaintiffs needed to prove not only that the monitor was defective, they had to prove proximate cause, that India would have survived had the monitor alarmed, assuming the parent responded to the alarm. Plaintiffs' proximate cause expert, Dr. Donna Wilkins, testified at deposition that India had been revived from prior episodes when stimulated so likely would have responded favorably on this occasion. The court found that Dr. Wilkins was not qualified since she admitted in deposition that she was not an expert in SIDS and had done no study or consultation in the area before coming to her opinion. The court also excluded her opinions as unreliable based on the *State v. Council* factors, since Dr. Wilkins was able to offer no medical research or personal professional experience in support of her opinions. In fact, there is no medical evidence that an infant will more likely than not recover from a SIDS event with timely intervention. Moreover, the medical evidence was that India had not experienced prior episodes of slow heart rate or breathing, so that the factual underpinning for Dr. Wilkins' opinion was also erroneous.

The Court struck the computer experts' subsequent affidavits

Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004), provides this state's test for whether an affidavit offered to defeat summary judgment may be stricken by the court. *Cothran* came into play here when, faced with the argument that Daugherity and Lively's opinions were insufficient because they had failed to identify the defect that caused the injury, plaintiffs filed affidavits from these two experts offering new opinions. The new opinions contradicted the original opinions in several instances. Most importantly, they claimed the causative defect was in structure of the code rather than in a miswritten line of code. Where before the experts said they could not comment on the reliability of the log, in his affidavit, Daugherity stated that the log was almost certainly unreliable. The experts offered no excuse for their changes in direction, instead claiming they were further explaining their deposition opinions. The court applied *Cothran v. Brown* to exclude the new opinions, thus leaving plaintiffs with the experts' insufficient opinions given at deposition.

Summary Judgment

The court granted summary judgment based on the absence of evidence of the defect that caused the injury and the absence of evidence of proximate cause.

Denial of Rule 59 Motion

The court also denied plaintiffs' motion to alter or amend under SCRCP 59. That motion primarily argued that the case could be proved by circumstantial evidence based on the Restatement (Third) of Torts. The court's order pointed out that the Restatement (Third) has not been adopted in South Carolina, that proof of a defect by circumstantial evidence is inconsistent with existing South Carolina law, and that several of the facts plaintiffs relied on for their circumstantial evidence case were unproven or inadmissible.

Summary Judgment Granted to Insurer as to Its Right to Control Defense and Settlement of Underlying Construction Defect Lawsuit

Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc., Civ. Action No. 2:08-2043-MBS (D.S.C.)

by Graham P. Powell

FACTS

Liberty Mutual Fire Insurance Company and Employer's Insurance of Wausau (collectively "Liberty Mutual") issued six CGL policies to J.T. Walker Industries, Inc. ("J.T. Walker"), the parent company of MI Windows and Doors, Inc. ("MI Windows"). Liberty Mutual filed a declaratory judgment action in the United States District Court for the District of South Carolina, Charleston Division, seeking a declaration of the rights and obligations of the various parties with respect to the defense and settlement of five underlying state court construction defect lawsuits.

Liberty Mutual settled each of the five underlying state court lawsuits. However, MI Windows objected to the settlements contending that Liberty Mutual should have taken the cases to trial. MI Windows argued that there were additional lawsuits pending against it and that it expected additional lawsuits to be filed due to the prevalence of construction defect lawsuits. The Defendants answered the complaint and MI Windows asserted a claim for breach of contract and bad faith against Liberty Mutual.

Liberty Mutual filed a motion for summary judgment arguing that it had the authority to control the settlement decisions at its discretion because Liberty Mutual had a duty and a right to control the defense and settlement once MI Windows tendered the underlying state court actions. Liberty Mutual also argued that it could not be required to defend each underlying lawsuit based on one of six CGL policies because all of the policies subsequent to the policy applicable to the time period where the injury in fact occurred were triggered by progressive damages claimed in the underlying suits pursuant to *Joe Harden Builders, Inc. v. Aetna Casualty & Surety Co.*, 486 S.E.2d 89 (S.C. 1997) and *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 561 S.E.2d 355 (S.C. 2002). Further, Liberty Mutual argued that it could compel contribution from MI Windows' successive insurers where the allegations in the underlying state court cases alleged progressive damages occurring during subsequent policy periods covered by subsequent insurers. Liberty Mutual argued that it had the right to seek allocation of payments from those insurers pro rata based on the time on risk.

MI Windows moved for partial summary judgment arguing that if Liberty Mutual was permitted to allocate a portion of litigation costs to a subsequent insurer, that MI Windows would only be responsible for a portion of its deductible. Finally, Liberty Mutual argued that it was entitled to summary judgment on MI Windows' counterclaim for bad faith based on the absence of any genuine issue of material fact and the applicable statute of limitations.

ORDER

Summary

After substantial briefing and oral argument on February 3, 2010, the Honorable Margaret B. Seymour issued an order on March 30, 2010, granting Liberty Mutual's motion for summary judgment as to its right to control the defense and settlement of the underlying lawsuits and Liberty's right to defend the claim under multiple policies consistent with Joe Harden. The court found that Liberty Mutual had the right to seek allocation from subsequent insurers. The court held in abeyance MI Windows' motion for summary judgment as to allocation of its deductible and subsequently certified the question to the South Carolina Supreme Court. The court denied Liberty Mutual's motion for summary judgment as to MI Windows' counterclaim for bad faith, finding that the claim was not barred by the applicable statute of limitations and that there was a genuine issue of material fact taking the evidence in the light most favorable to MI Windows.

Motions For Summary Judgment

(1) Failure to Settle Claim Against MI Windows In Its Sole Discretion Under The Policies

The court cited the familiar maxims that interpretation of an insurance policy is a legal issue and that contracts must be given their "plain, ordinary, and popular meaning." The court also cited Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Association, 557 S.E.2d 670 (S.C. 2001), a case where the South Carolina Supreme Court found that an insurer unambiguously had the authority to settle claims arising under its policy based on the language contained therein. Examining the Liberty Mutual policies, the Court noted that the

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language in the policies at issue stated that "We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." Additional policy language also supported this proposition.

MI Windows argued that Special Servicing Instructions ("SSIs") required that Liberty Mutual not only discuss settlements with MI Windows, but made the policies ambiguous as to whether Liberty Mutual had sole discretion to settle tendered cases. The court found that the SSIs did not contradict Liberty Mutual's settlement authority. Further, the SSI requirement that Liberty Mutual discuss any settlement with MI Windows did not also require that MI Windows approve any settlement.

(2) Whether A Single Insurance Policy Must Cover Property Damage That Spans Multiple Policies

The Court agreed with Liberty Mutual that all of the policies that were triggered by a progressive damage claim provided coverage and that MI Windows could not force Liberty Mutual to defend a claim under a single policy. First, the court noted that the Joe Harden opinion held that South Carolina adopted a "modified continuous trigger" approach when an insurance policy contemplates coverage of progressive damages. Under this approach, the policy in effect at the time of the injury-in-fact covers ensuing damages as well as policies in effect during the progressive damage period. The court found that the Liberty Mutual policies contemplated coverage of progressive damages resulting from an injury-in-fact that occurred during the applicable policy period and subsequent policy periods. Therefore, the court held, the Liberty Mutual policy that was in effect at the time of the injury-in-fact covered full settlement of each claim as did all other policies covering the risk during the progressive damages period.

(3) Whether Liberty Mutual Has The Right To Request Allocation Of Payments Made To Defend And Settle Each Claim Against MI Windows From MI Windows' Other Insurers

Again citing Joe Harden, the court found that the modified continuous trigger approach would allow for allocation of risk among insurers with more than one insurance policy in effect during the progressive damage period. Therefore, the court found that case law established the right of Liberty Mutual to seek allocation of payments where MI Windows' successive insurance carriers had time on the risk. Noting that the allegations of the underlying lawsuits determine whether progressive damages occurred, the court found that Liberty Mutual had the right to seek allocation of payments from successive insurers.

(4) Defendants' Motion For Partial Summary Judgment

MI Windows argued that it was only responsible for a proportionate amount of its deductible if Liberty Mutual was permitted to allocate its litigation costs to MI Windows' subsequent insurers. Both parties agreed that this was an unsettled area of South Carolina law and the court stated that it would certify the question to the South Carolina Supreme Court. [1]

(5) Liberty Mutual's Motion For Summary Judgment As To Bad Faith

The court's order denied Liberty Mutual's motion for summary judgment as to MI Windows' counterclaim for bad faith, finding that there was a genuine issue of material fact. Further, the court found that the bad faith claim was not barred pursuant to the statute of limitations found at S.C. Code § 15-3-530. [2]

CONCLUSION

First, it should be stressed that this order is not a final decision. The order is provided for information purposes only.

Practitioners may find the order useful if prosecuting or defending a coverage action where the right or obligation of the insurer to settle an underlying construction defect lawsuit is at issue. Further, practitioners in construction defect lawsuits may find the order useful if faced with an argument by counsel, claims representative, or coverage counsel in the context of mediation or otherwise that a contractor/insured cannot meaningfully participate in settlement because of the unwillingness of the contractor/insured to permit its insurer to settle the case. Further, the order may serve to highlight the importance in the discovery process of obtaining CGLs from multiple parties so that counsel may be prepared to address the policy language contained therein pertaining to the authority of insurers to settle a case.

Morgan S. Templeton and J. Mark Langdon serve as counsel for Plaintiff Liberty Mutual, and William H. Morrison serves as counsel for Defendant MI Windows.

Footnotes

1 By subsequent order dated May 5, 2010, the court certified this question to the South Carolina Supreme Court pursuant to SCACR 244.

2 Liberty Mutual subsequently filed a motion for interlocutory appeal pursuant to 18 USC § 1292(b) requesting that the Fourth Circuit address this novel issue under South Carolina law, i.e. whether MI Windows has the right to assert a bad faith action against an insurer for deciding to settle a case pursuant to the settlement clause of a policy.

Plaintiffs Compelled to Respond to Discovery Regarding Their Use of Certain Social Networking Websites

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2009-CP-10-4172
ORDER GRANTING
MOTION TO COMPEL

Claudio Rafael Martinez, Individually and as the next friend of his minor children, Franco Martinez and Bruno Martinez,

Plaintiffs,

vs.

South Carolina Electric & Gas Company and Lewis Tree Service, Inc.,

Defendant.

The parties appeared before this Court on December 3, 2009 on Defendant Lewis Tree Service, Inc.'s ("Defendant") motion to compel the Plaintiffs to respond to discovery regarding their use of certain Social Networking Sites ("SNWs"). For the reasons stated herein, the Court finds good cause exists for such an Order, and compels the Plaintiffs to respond in accordance with this Order.

FACTS

Plaintiffs filed this personal injury action on July 6, 2009. According to the allegations in the Amended Complaint, Plaintiff Franco Martinez was injured when he received an electrical shock due to the negligence of the Defendants. Plaintiffs claim Franco suffered "severe and debilitating injuries, including but not limited to" permanent burns and scars on various parts of his body, including his hands; permanent back injury resulting in the inability to lay straight on a bed, walk long distances, and exercise; neck and ankle pain, and frequent headaches. In responding to discovery, Plaintiffs add that Franco suffers from "extreme tiredness to his eyes after extended periods of looking at books, the television, or a computer screen."

The Amended Complaint additionally alleges that Franco's brother, Plaintiff Bruno Martinez, witnessed the accident and suffered "severe emotional distress manifested by physical symptoms including, but not limited to, separation anxiety, nightmares, and behavioral problems requiring medical care and treatment."

After initiation of the instant lawsuit, Defendant served Plaintiffs with initial discovery requests, including Interrogatories and Requests for Production. Included in the Interrogatories was the following request:

List every "Social Networking Website" (SNW) utilized or accessed by the party for the past three years. For any SNW identified in response to this or any other interrogatory, provide the following information:

(a) name, physical address, and internet address of the SNW;

(b) name, address, social security number, and date of birth of the SNW account subscriber, and if different, the individual financially responsible for the SNW account;

(c) each and every user name, screen name, email address, or alias affiliated with the SNW account; and

(d) password for accessing the SNW account.

Plaintiffs refused to respond, objecting on the grounds that "the requested information is irrelevant and not likely to lead to the discovery of admissible evidence." Defendant subsequently withdrew the request for Plaintiffs SNW passwords.

ANALYSIS

The subject Interrogatory inquires into whether the Plaintiffs maintain social networking accounts (such as Facebook or MySpace) and, if so, requests their usernames and email addresses. It is important to note that the Plaintiffs have not objected to the request on the basis of a privilege. Instead, they claim that their use of social networking sites is "irrelevant and not likely to lead to the discovery of admissible evidence." At the hearing, Plaintiffs raised the application of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 et seq., as an additional ground for denial of the motion, suggesting that it protected the Plaintiffs from having to respond to the Interrogatory. The Court concludes that the requested information is relevant and that the Stored Communications Act has no bearing on the Plaintiffs' obligations to respond to Interrogatory No. 15.

Relevancy

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it

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relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Rule 26(b), SCRCP. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E.2d 747, 749 (1996). "In South Carolina the scope of discovery is very broad and 'an objection on relevance grounds is likely to limit only the most excessive discovery request.'" *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.F.2d 213, 215 (Ct. App. 1997).

"Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting." *Bass v. Miss Porter's School*, 2009 U.S. Dist. LEXIS 99916 (D. Conn. Oct. 27, 2009). Such social networking sites also allow users to post and share a wide range of information regarding their activities, interests, and social situations as well as photographs depicting their physical conditions. In most instances, these sites allow others to gain a better understanding of the user. *See* Advisory Committee on Standards of Judicial Conduct, Advisory Opinion No. 17-2009, October 2009 ("Allowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge.")

In the case at bar, Plaintiffs claim they suffered physical and emotional injuries that continue to the present time. The Court finds inquiry into Plaintiff Franco's involvement in social networking sites is relevant to the issue of his alleged damages, including his claim of inability to sit in front of a computer for long periods, his inability to fully use his hands, and his claims of emotional injuries. Inquiry into Plaintiff Bruno's involvement in social networking sites is also relevant to the issue of his claims of "severe emotional distress" and "separation anxiety." The information and photographs the Plaintiffs share on these sites will provide a relevant and accurate depiction of the Plaintiffs' states of mind, their emotional and physical states, and the affect these alleged injuries have on their everyday lives. Plaintiffs' position regarding relevancy, if accepted, would allow Plaintiffs to be the sole arbiter of what is deemed relevant. *See Bass, supra* ("relevance of the content of Plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations, and production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence.'"). Particularly in the context of a narrowly tailored request such as this, and in light of the relatively low bar set by Rule 26, Plaintiffs' objection based on relevance fails, *Samples, supra*.

Stored Communications Act

At the hearing, Plaintiffs' counsel raised the application of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 et seq., as an additional ground for denial of the motion, suggesting that it prohibited discovery of the Plaintiffs' social networking activities. The Court finds this argument has no merit.

The Stored Communications Act prohibits a "person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). The pertinent portion of the statute reads:

> (a) Prohibitions.— Except as provided in subsection (b) or (c)—
>
> (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
>
> (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—
>
> (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;
>
> (B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing;
>
> 18 U.S.C. § 2702.

The clear language of the statute indicates that it applies only to service providers, rather than private individuals. Moreover, the statute prevents service providers from disclosing communications and electronically stored information. The statute contains no provisions prohibiting a party from responding to discovery regarding the maintenance of social networking sites or the specific account information for such sites. Interrogatory No. 15 seeks information which is certainly within the bounds of Rule 26 and the Plaintiffs are obligated to respond.

Furthermore, in the course of supplemental briefing requested by the Court, Defendant indicated that an affirmative response to the Interrogatory would not end its line of inquiry. According to the Defendant, confirmation that the Plaintiffs maintain social networking accounts would result in the service of targeted Requests for Production under

Rule 34, SCRCP, requesting tangible and electronically stored information from these accounts "which is relevant to the claims and defenses in this matter (inclusive of evidence relating to the Plaintiffs' alleged ongoing injuries)." Since that time, Plaintiffs' counsel has confirmed that the Plaintiffs maintain such accounts. After careful consideration of the claims in this case and the nature of the information contained on such social networking sites, the Court finds that certain information from the Plaintiffs' accounts is properly discoverable. Therefore, the Plaintiffs are ordered to produce documents containing the following information from any Facebook or MySpace accounts, either in tangible or electronic form: (1) all Profile pages; (2) all Wall Postings, including status updates and comments from or to the Plaintiff; (3) all photographs depicting the Plaintiffs, including all mobile uploads and photographs in which the Plaintiffs are "tagged;" and (4) all information reflecting the "fan pages" and groups in which Plaintiffs are members. Plaintiffs are ordered to produce these documents/information placed or reflected on the site accounts for the time period beginning on the day of the accident (May 26, 2008) and continuing through the present.

The Court anticipates that the Plaintiffs may claim they are not able to gather all such responsive material by simply logging into their accounts. Further, the Court recognizes that the SCA arguably prevents the social networking sites from providing most information from the Plaintiffs' accounts via subpoena. However, the SCA does permit the disclosure of otherwise protected communications if the subscriber, or the author or the intended receiver of such communications gives his consent. 18 U.S.C. § 2702(b)(3); 18 U.S.C. § 2702(c)(3). As the language of Rule 34 makes clear, and as the courts have confirmed, a request for production need not be confined to documents or other items in a party's possession, but instead may properly extend to items that are in that party's "control." Rule 34(a)(1), SCRCP. In interpreting the identical provision of the Federal Rule, the Sixth Circuit and other courts have held that documents are deemed to be within the "control" of a party if it "has the legal right to obtain the documents on demand." *In re Bankers Trust Co.,* 61 F.3d 465, 469 (6th Cir. 1995); *Mercy Catholic Medical Center v, Thompson*, 380 F.3d 142, 160 (3d Cir. 2004); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).

The case of *Flagg v. City of Detroit. et al.,* 252 F.R.D. 346 (E.D. MI. 2008) is particularly instructive in this regard. In *Flagg*, the defendant city moved to prevent Plaintiff from discovering communications exchanged among certain city officials and employees via city-issued text messaging devices. While the defendant did not store copies of these communications, the city's non-party service provider, SkyTel, purportedly did have records of these communications. The plaintiff filed a third-party subpoena directed at SkyTel, which objected, claiming that the SCA did not recognize an exception for civil subpoenas and barred Skytel from divulging the emails to the plaintiff. The court addressed the issue by directing the plaintiff to instead submit a FRCP Rule 34 request for production upon the defendant city, along with a form the city could execute granting its consent to disclosure under the SCA. *Flagg*, 252 F.R.D. at 352. Rule 34(a) permits parties to request the production of documents and other items that are "in the responding party's possession, custody, or control." Id. quoting Fed. R. Civ. P. 34(a). The court reasoned that "if the City can block the disclosure of SkyTel messages by withholding its consent, it surely follows that it can permit the disclosure of these communications by granting its consent," and that this acknowledged power constituted the requisite "control." *Flagg*, 252 F.R.D. at 355.

As a result, in the event the Plaintiffs cannot produce all material this Order requires them to produce, Plaintiffs are instructed to execute a Consent Form, to be provided by the Defendant, granting the social networking sites permission to disclose the information to both the Plaintiffs and the Defendant. Defendant shall bear responsibility for all costs associated with such a request to the social networking sites.

For the reasons set forth herein, the Plaintiffs' use of social networking sites, and certain information contained on those site accounts, is relevant to the subject matter involved in the pending action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, within 45 days of entry of this Order, the Plaintiffs shall:

(1) provide a full and complete response to Interrogatory No. 15, with the exception of the withdrawn inquiry into account passwords;

(2) produce documents containing the following information from any Facebook or MySpace accounts, either in tangible or electronic form: (a) all Profile pages; (b) all Wall Postings, including status updates and comments from or to the Plaintiff; (c) all photographs depicting the Plaintiffs, including all mobile uploads and photographs in which the Plaintiffs are "tagged;" and (d) all information reflecting the "fan pages" and groups in which Plaintiffs are members. Such production shall include all documents/information placed or reflected on the site accounts from the date of the accident through the present; and

(3) in the event the Plaintiffs cannot produce all material this Order requires them to produce, Plaintiffs are instructed to execute a Consent Form, to be provided by the Defendant, granting the social networking sites permission to disclose the information to both the Plaintiffs and the Defendant.

AND IT IS SO ORDERED!

The Honorable Roger M. Young, Sr.

Dated: February 9, 2010

Charleston, South Carolina

Case Notes

Summaries prepared by John D. Hudson

Following are summaries prepared of selected South Carolina cases from February 1, 2010 through May 11, 2010

Featured Case Note

Hoard v. Roper Hosp., Inc., Op. No. 26813 (S.C. Sup. Ct. Filed May 3, 2010) (Shearouse Adv. Sh. No. 17, at 15)

Plaintiffs filed this medical malpractice claim against Defendants after an umbilical vein catheter (UVC) inserted into Plaintiff daughter's (Daughter) right atrium allegedly caused her to go into cardiac arrest, resulting in brain damage and paralysis. Plaintiffs settled with all Defendants except the on-call radiologist (Radiologist). Plaintiffs alleged that had Radiologist included in his report the fact that the UVC was "malpositioned," Daughter may not have suffered the cardiac arrest.

The trial court granted summary judgment for Radiologist on the basis that Plaintiffs failed to prove proximate causation between Radiologist's alleged negligence and Daughter's alleged injury. The court of appeals reversed, holding that a genuine issue of material fact existed as to proximate cause. In so holding, the court of appeals concluded that a jury could have chosen to disregard the testimony of Daughter's treating physician, who testified that he was aware of the applicable standard of care for UVC placement and that he made an intentional and independent decision not to move the UVC.

Although the supreme court acknowledged it is within the power of the jury to disregard uncontroverted evidence such as the testimony of the treating physician, the court held that a party cannot create a genuine issue of material fact by speculating that the jury may choose to disbelieve a witness. Rule 56(e) of the South Carolina Rules of Civil Procedure specifically states that a party opposing a summary judgment motion "may not rest upon mere allegations or denials of his pleadings [but] must set forth specific facts showing there is a genuine issue for trial." An adverse party cannot therefore seek to avoid summary judgment with mere conjecture or speculative hypotheticals, but rather must come forward with affirmative evidence indicating the existence of a genuine issue of material fact. The court reasoned that to hold otherwise would subvert the purpose of summary judgment and effectively render it obsolete. Consequently, the supreme court reversed the court of appeals' decision and reinstated the decision of the trial court.

Partain v. Upstate Auto. Group, 386 S.C. 488, 689 S.E.2d 602 (2010)

Plaintiff sued automobile dealership alleging the dealership violated the South Carolina Unfair Trade Practices Act (SCUPTA) by performing a "bait and switch" when he purchased his vehicle. Plaintiff alleged this violation entitled him to treble damages plus interest, costs and attorneys' fees. Defendant argued that the entire matter was subject to arbitration pursuant to an arbitration agreement signed by Plaintiff.

The supreme court held that although the factual allegations fell within the scope of the arbitration agreement, Plaintiff's "bait and switch" theory constituted "illegal and outrageous" acts which were not in contemplation of the parties at the time they entered into the arbitration agreement. Because the alleged "bait and switch" was unforeseeable in the general course of business dealings, the parties could not have intended to submit this type of claim to arbitration and the agreement was therefore inapplicable to Plaintiff's claim.

Zurich Am. Ins. Co. v. Tolbert, Op. No. 26798 (S.C. Sup. Ct. filed April 12, 2010) (Shearouse Adv. Sh. No. 14, at 34)

Defendant Tony Tolbert was injured in an automobile accident while driving his Honda Accord on a personal errand. Defendant had declined underinsured motorist coverage (UIM) on his Honda, but had UIM coverage on a BMW he leased from his employer.

Plaintiff Zurich American Insurance Company filed this declaratory judgment action seeking a determination that coverage from the BMW did not extend to the Honda Accord Defendant was operating at the time of the accident based on the "Drive Other Car" endorsement to the policy. Defendant argued he should recover UIM benefits from Plaintiff under the BMW policy because the Honda Accord constituted a "temporary substitute" for the BMW due to the fact that the BMW was "in need of service." The trial court granted summary judgment in favor of Plaintiff and the court of appeals reversed, finding a genuine issue of material fact as to whether Defendant's Honda Accord qualified as a "temporary substitute" for the BMW.

The South Carolina Underinsured Motorist endorsement extends coverage to "a temporary

substitute for a covered 'auto' [provided t]he covered 'auto' [is] out of service because of its breakdown, repair, servicing, 'loss' or destruction." The supreme court held that the covered "auto" need only be "out of service" due to one of the factors listed and did not require that the auto actually be completely disabled. Thus, the supreme court agreed with the court of appeals' conclusion that the affidavit submitted by Defendant stating that he had driven the Honda because the BMW needed service and an oil change provided a scintilla of evidence that the Honda constituted a "temporary substitute" so as to survive Plaintiff's motion for summary judgment.

Herron v. Century BMW, Op. No. 26805 (S.C. Sup. Ct. filed April 19, 2010) (Shearouse Adv. Sh. No. 15, at 14)

Plaintiffs brought this class action suit alleging Defendants violated the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Act) by charging illegal administrative fees. Defendant sought to compel arbitration pursuant to the arbitration agreement entered into by the parties. The terms of the agreement included a waiver by Plaintiffs of their right to bring or participate in any class action lawsuit.

The supreme court found that although the agreement was a contract of adhesion, it was not unconscionable so as to be unenforceable. Specifically, the court found that there was not an absence of meaningful choice due to the fact that the agreement appeared on a separate sheet and was clearly labeled as an arbitration agreement. Additionally, the court found that the terms of the contract were not oppressively one-sided because some terms benefited the consumer over the dealership, such as the choice of venue and the dealerships obligation to pay certain fees.

Though the agreement as a whole was not unconscionable or unenforceable, the court found that the provision prohibiting involvement in class action lawsuits was unenforceable. The court noted that the Act expressly provided Plaintiffs with the right to bring class action lawsuits, and the Act also stated that any portion of a contract subverting a provision of the Act should be deemed void and unenforceable as against public policy.

Although unenforceable provisions would normally be severable from the enforceable provisions of a contract, here, Defendants expressly waived the invocation of severability at oral argument. Thus, the supreme court held the issue of severability to be abandoned and consequently affirmed the trial court's denial of Defendants' motion to compel arbitration.

Nationwide Mut. Ins. Co. v. Rhoden, __ S.C. __, 691 S.E.2d 487 (Ct. App. 2010)

Defendant Rhoden held a policy with Plaintiff Nationwide Mutual Insurance Company which included underinsured motorist (UIM) coverage. Defendant and her two daughters were injured in an automobile accident while in a vehicle owned and operated by one of her daughters (Driver). Defendant's policy listed herself and both daughters as either insureds or resident relatives. Driver's vehicle was also insured by Plaintiff, but her policy did not include UIM coverage. Plaintiff filed this declaratory judgment action seeking a determination that the UIM coverage under Defendant's policy did not cover Defendant or her daughters because the accident occurred in a vehicle belonging to Driver (i.e. one of Defendant's daughters).

UIM coverage is generally regarded as personable and portable, but the supreme court has held that public policy is not offended by limiting UIM portability in situations where an insured is injured in a vehicle she owns and insures under another policy. First addressing the portability of the UIM coverage as to Driver, the court of appeals held that because Driver was operating her own vehicle which was separately insured, public policy was not offended by excluding Driver from UIM coverage. As to Defendant and her other daughter, the court of appeals held that Defendant's UIM coverage extended to both. The court of appeals noted that this instance was the type for which UIM coverage was intended. In particular, UIM coverage is designed to insure individuals in situations where they would otherwise have no control over the amount of coverage on a vehicle in which they are a passenger. Here, Defendant had no control over the provisions of the insurance elected by Driver in covering the automobile involved in the accident, and therefore her UIM coverage was held to extend to this incident.

Austin v. Stokes-Craven Holding Corp., __ S.C. __, 691 S.E.2d 135 (2010)

Plaintiff purchased a used truck from Defendant. Plaintiff eventually began experiencing problems with the truck and ultimately discovered the truck had previously been involved in an accident in which it sustained extensive damage. Plaintiff sued Defendant, and a jury returned a verdict in his favor for actual and punitive damages on his claims for negligence, fraud and constructive fraud. The jury also found that Defendant violated the Dealer's Act and Federal Odometer Act, but found that Defendant did not violate the South Carolina Unfair Trade Practices Act (SCUPTA). Both parties appealed.

On cross appeal, Defendant argued that the trial court erred in admitting testimony of two of Plaintiff's expert witnesses. As to the auto body repair expert, Defendant argued that the witness was

Continued on next page

not qualified to opine as to potential safety issues that arose from the previous collision or as to whether it would be clear to anyone that the truck had been repaired. The supreme court found that the statements made by the witness were not unduly prejudicial as his testimony was brief and he was subjected to rigorous cross-examination by Defendant. As to the retail valuation expert, the court found that he was properly qualified as an expert because he had extensive experience in the automotive industry, including in the specific area of vehicle appraisal. Additionally, the court noted he had been qualified as an expert several other times.

The supreme court also disagreed with Defendant's contention that Plaintiff had failed to properly prove that the fair market value of the truck was zero. The court noted that in typical contract disputes, the item contracted for is returned and damages are then sought. Here, however, Defendant repeatedly refused to take back the truck in exchange for the purchase price, and the court reasoned that Plaintiff should therefore not be prejudiced for still being in possession of the truck. Additionally, the court found there was sufficient evidence to support the finding that the truck had zero retail value given Plaintiff's testimony that he would not have paid anything for it had he been aware of the previous damage it had sustained. Additionally, Plaintiff's retail valuation expert also testified that that truck had zero retail value at the time of sale.

Defendant also alleged error in the finding that it had violated the Federal Odometer Act. The supreme court agreed and held that Defendant did not act with the requisite intent to defraud. A violation of the Federal Odometer Act requires a specific showing that Defendant intended to defraud as to the mileage of the vehicle and cannot be satisfied by demonstrating fraud generally. However, the supreme court disagreed with Defendant's contention that the jury's finding for Plaintiff on the issue of common law fraud was inconsistent with its finding for Defendant as to the claim for violation of the SCUTPA. The supreme court noted that the level of proof required to establish the two claims is different, such that the burden of proof on one claim (i.e. the SCUPTA claim) could be met without the burden being met on the other one (i.e. fraud).

The supreme court also held that the jury's award of punitive damages was not excessive or unconstitutional. In determining the reasonableness of an award for punitive damages, the court relied on the following guideposts illuminated in the relatively recent decision of Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009): (1) the reprehensibility of the misconduct, (2) the disparity between the punitive award and the actual damages, and (3) the disparity between the civil remedies authorized in similar instances and the punitive damages award. Addressing the first factor, the court noted that although the harm was purely economic, the misrepresentations involved in selling this potentially unsafe automobile indicated a reckless disregard for the health and safety of Plaintiff and the public. As to the second and third guideposts, the court found that the ratios of the punitive damages award to both the actual damages and other civil remedies were not grossly excessive so as to violate the Due Process Clause of the Fourteenth Amendment.

Plaintiff, on his appeal, argued that the trial court erred in requiring him to elect his remedy between damages for fraud, negligence, constructive fraud, and the violation of the Dealer's Act. In particular, Plaintiff argued that in choosing to recover for fraud, he was denied the statutorily authorized attorneys' fees and costs. Although the notion of election of remedies is designed to address circumstances such as this where there is but one loss and several forms of recovery are available, the supreme court observed that a recovery for attorneys' fees does not allow double recovery where Plaintiff has also recovered punitive damages. The court noted that statutorily authorized attorneys' fees are intended to allow private citizens to bring claims that would otherwise not be economically viable whereas punitive damages are meant to punish and deter misconduct. Thus, the supreme court held Plaintiff should be allowed to recover the attorneys' fees authorized under the Dealer's Act in addition to the damages awarded for fraud. Although recovery of fees should be limited to the costs incurred pertaining to the statutory claim, the court found that such delineation would be difficult and thus held that Plaintiff should be awarded the entire amount of attorneys' fees requested.

Finally, the supreme court affirmed the trial court's denial of prejudgment interest on the basis that Plaintiff, at the inception of his claim, could not with certainty have determined the monetary amount of damages he had sustained.

Burnett v. Family Kingdom, Inc., __ S.C. __, 691 S.E.2d 170 (Ct. App. 2010)

Plaintiff's husband (Husband) was injured while driving a go-cart at Defendant's amusement park when other patrons of the park intentionally collided with his go-cart. Husband sued Defendant for negligence, and after the close of Plaintiff's case, the trial court granted Defendant a directed verdict on the basis that Plaintiff failed to establish that Defendant owed him a duty of care.

The court of appeals reversed, holding that the South Carolina Amusement Rides Safety Code (Act) created a statutorily imposed duty upon Defendant. The intention of the Act is to "guard against personal injuries in the . . . use of amusement devices at . . . amusement parks to persons . . . attending . . . amusement parks." S.C. Code Ann. § 41-18-20(A) (Supp. 2008). Thus, the court found the Act created an affirmative legal duty in this type of circumstance where an individual "attending" the amusement park

was injured while using an "amusement device."

The court of appeals also disagreed with Defendant's contentions that even if a duty existed, no breach of the duty occurred, proximate cause was lacking, and Husband's negligence outweighed any possible negligence on the part of Defendant. The court, in summary fashion, held that the issues of breach, proximate cause, and comparative negligence were all questions for the jury in light of the existence of a legal duty owed by Defendant.

Workers' Compensation Case Notes

Summaries prepared by Brian G. O'Keefe and Andrew Luadzers

Pierre v. Seaside Farms, Inc., Op. No. 26777 (S.C. Sup. Ct. filed February 16, 2010) (Shearouse Adv. Sh. No. 7, at 93).

Claimant, a migrant farm worker from Haiti, injured his right ankle after a slip and fall on a wet sidewalk outside the employer's housing facility. Claimant alleged he sustained an injury by accident arising out of and in the course and scope of his employment. The Hearing Commissioner denied the claim and held Claimant was under no requirement to live in the employer-provided housing pursuant to his contract for employment and his work did not require he be on continuous call. In addition, he was not engaged in activities at the time of the injury that were calculated to further, either directly or indirectly, the business of his employer. Finally, the wet sidewalk was not different in character or design from other sidewalks, and the risk associated with slipping on the sidewalk was not one uniquely associated with his employment; rather, it was one he would have been equally exposed to apart from his employment.

The Circuit Court held Claimant's proposed common law theory of the "bunkhouse rule" was not applicable, as it does not apply when the employee is not required to reside in the employer-supplied housing. The "bunkhouse rule" applies when an employee is required to live on the premises, either by his contract of employment or by the nature of his employment, and is continuously on call. However, if the employee has fixed hours outside of which he is not on call, compensation is awarded only if the injury was a risk associated with the conditions under which claimant lived because of the requirement of remaining on the premises.

In reversing and remanding the Circuit Court ruling, the Supreme Court recognized the novel application of the "bunkhouse rule" in South Carolina jurisprudence. The Court concluded the Commission's findings that Claimant was not required to live on his employer's premises and that his presence did not further, either directly or indirectly, the interest of his employer were not supported by substantial evidence. The record demonstrated Claimant was required, not by contract, but by the nature of his employment, to live on-site near the packing facility as there was no reasonable alternative and virtually all of the workers at Seaside Farms lived in the housing provided by their employer. The employer absorbed the expense of housing the workers as the cost of doing business. Moreover, but for the fact that Claimant's work essentially required him to live on his employer's premises near the farm, he would not have been exposed to the wet sidewalk that caused his injury. Although simply being on an employer's premises, without more, does not automatically equate to compensability of an injury, the circumstances of Claimant's accident establish the requisite work connection and compel a finding that Claimant's injury arose out of and in the course of his employment at Seaside Farms.

James v. Anne's Inc., 386 S.C. 326 (2010) (reh'g granted)

The Supreme Court held in a decision dated January 25, 2010, that without an express legislative grant, the Worker's Compensation Commission is without the legislative power to prorate a lump sum award over Claimant's life expectancy without consent of both parties (Utica-Mohawk Mills v. Orr, 277 S.C. 226 (1955), is often cited in orders along with statutory law when prorating lump sum payments). The authority of the Commission is statutorily derived; therefore, the Commission cannot exceed the scope of the legislature's grant of authority. Petition for Rehearing granted on April 8, 2010 in an unpublished opinion.

State Accident Fund v. South Carolina Second Injury Fund, Op. No. 4684 (S.C. Ct. App. filed May 5, 2010) (Shearouse Adv. Sh. No. 18, at 53).

The State Accident Fund (Carrier) sought reimbursement from the South Carolina Second Injury Fund (Fund) for monies the Carrier paid to the Claimant for a stroke he suffered during surgery for a work-related back injury. The Carrier initially denied the stroke as causally-related to the admitted back injury. During the period of denial, the Carrier entered into an agreement with the Fund, whereby the Fund agreed to reimburse monies paid for the Claimant's back surgery, and the agreement specified the language "for the lumbar spine only." One month following the agreement, the single Commissioner issued an Order finding the stroke causally-related to the Claimant's back injury and the Carrier paid benefits accordingly. Nearly two years later, the Carrier requested reimbursement from the Fund under the previous agreement for

Continued on next page

monies paid to the Claimant for the stroke as causally-related to the Claimant's back surgery. The Fund denied reimbursement monies as they were not part of the original agreement entered into by the parties.

The Court of Appeals found the Carrier and the Fund executed an agreement that clearly set forth the contours of their compromised settlement. Furthermore, despite having knowledge of the expenses and ample opportunity to request their inclusion, the Carrier failed to seek inclusion of the stroke expenses in the terms of the agreement. Furthermore, the Court of Appeals held that the terms of the agreement were clear and unequivocal, and an ambiguity originating not in the terms of the agreement, but in the Carrier's observations of the Fund's behavior in other, unrelated matters is not a legal basis for declaring the agreement void. Lastly, the Court of Appeals held that the Carrier failed to prove all necessary elements of this claim for estoppel.

Products Liability Case Notes

Summaries prepared by Brian Comer and Lucie H. Cohen

In re Bausch & Lomb, Inc. Contact Lens Solution Prods. Liab. Litig., MDL No. 1785, 2010 LEXIS 13786 (D.S.C. Feb. 17, 2010) (Norton, J.); In re Bausch & Lomb, Inc. Contact Lens Solution Prods. Liab. Litig., MDL No. 1785, 2010 LEXIS 41404 (D.S.C. Apr. 26, 2010) (Norton, J.).

The district court granted summary judgment in favor of the defendant on all claims asserted by many of the "non-Fusarium" plaintiffs (i.e., those plaintiffs who claim that Bausch & Lomb's MoistureLoc caused eye infections by fungi other than the fungus Fusarium). The non-Fusarium plaintiffs' only general causation expert had been previously excluded because she did not identify, or even suggest, a threshold level of microbes necessary to cause an onset of non-Fusarium infection, a level that was critical in the litigation, and her opinions also failed to satisfy any of Daubert's core reliability factors. With the exclusion of the plaintiffs' general causation expert, the plaintiffs had no admissible evidence to prove causation.

The plaintiffs argued that they could prove general causation through differential diagnoses. The court explained, however, that generally it is not appropriate to rely on a differential diagnosis to prove general causation; differential diagnosis may be permitted to prove specific causation, but such evidence satisfies the Daubert standard only if general causation has already been established. According to the court, to permit the non-Fusarium plaintiffs to rely on differential diagnoses to establish general causation "would amount to allowing an impermissible end-run around the general causation requirement."

Brunson v. Louisiana-Pacific Corp., No. 2:07-3186-PMD, 2010 LEXIS 10779 (D.S.C. Feb. 8, 2010) (Duffy, J.).

The plaintiffs sought class certification for their breach of express and implied warranties claims, alleging a defect in TrimBoard, an exterior building product, because it prematurely deteriorated. The district court had previously granted certification to plaintiffs with the same claims living in Charleston County in Thomas v. Louisiana-Pacific Corp., 246 F.R.D. 505 (D.S.C. 2007). The plaintiffs in Brunson sought to certify a putative class comprised of members who have the same claims as those presented in Thomas, but who live in certain South Carolina counties other than Charleston. The district court granted class certification, finding that, as with the Thomas plaintiffs, the Brunson plaintiffs had satisfied the class certification requirements of FRCP 23(a) and (b)(3).

Verdict Reports

Type of Action: Medical Malpractice

Injuries alleged: Permanent Movement Disorder

Name of Case:

Trudy Murdaugh, as the appointed Guardian Ad Litem of her sister, Gretta Terry, a mentally incapacitated adult over the age of eighteen (18) v. Developmental and Behavioral Pediatrics, Doris M. Greenberg, M.D. and Bernice Terry

Court: Circuit Court – Hampton County

Case number: 07-CP-25-223

Tried before: Jury

Name of Judge: The Honorable Carmen T. Mullen

Amount:
Mistrial-Settled for $60,000 per Plaintiff juror

Date of Verdict: Mistrial-March 17, 2010

Demand $950,000 prior to trial

Attorneys for defendant:
Robert H. Hood,
Robert H. Hood, Jr.
Chilton G. Simmons
Hood Law Firm, LLC, Charleston.

Description of the case, the evidence presented, the arguments made and/or other useful information:

The Plaintiff claimed medical malpractice against a pediatrician who specializes in patients with behavioral and developmental problems. The physician gave the patient, who has a genetic abnormality, a neuroleptic medication called Abilify, and Plaintiff alleged that the Abilify caused the patient to incur a permanent movement disorder. The case was tried for a week and a half, with the Plaintiff asking for $10 million in their closing argument. The jury deliberated for over 10 hours, over two days. When it became apparent that the jury would not reach a unanimous verdict, and after an Allen charge, an arrangement was reached whereby the defendants would pay $60,000 for each juror in favor of the plaintiff. The jury was polled via an anonymous ballot by the judge. Four of the jurors indicated on their ballots that they were in favor of the plaintiff. The case was settled and dismissed with prejudice based on a payment of $240,000.

Type of Action Medical Malpractice

Injuries alleged: Development of CPM and neurological deficits

Name of Case:

Geoffrey Holt v. James C. Ravenel, M.D., Cary S. Hickman, M.D., and Theodore Gourdin, M.D.

Court: Circuit Court – Charleston County

Case number: 06-CP-10-4178,Charleston CP

Tried before: Jury

Name of Judge: The Honorable J. Michael Baxley

Amount Defense Verdict

Date of Verdict: April 27, 2010

Demand: $950,000 prior to trial

Attorneys for defendant:
Robert H. Hood,
Robert H. Hood, Jr.
Elizabeth Ballentine
Hood Law Firm, LLC, Charleston.

Description of the case, the evidence presented, the arguments made and/or other useful information:

The Plaintiff alleged medical malpractice against several physicians who were consulted to treat Plaintiff after his arrival at the emergency room on February 13, 2002. Plaintiff was suffering from alcohol abuse, depression, confusion, seizure activity, and metabolic derangement, including acute hyponatremia and hypokalemia. Plaintiff's extremely low sodium and potassium levels required correction but he then developed Central Pontine Myelinolysis ("CPM") and deterioration in neurological function. The Plaintiff contended the Defendants' actions caused Plaintiff to develop CPM and rapid deterioration in neurological function and that the CPM resulted in his neurological deficits, paralysis, and respiratory failure. The Defendants argued they were treating two potentially lethal presenting conditions, severely low sodium and potassium levels, that their care was appropriate and the development of CPM and neurological deficits were not the result of any alleged negligence by the Defendants. Plaintiff presented a life care plan totaling $4.6 million. Dr. Ravenel was dismissed on the first day of trial. The case was tried as to the remaining two physicians for a week and a day, and the jury returned a defense verdict after deliberating for less than an hour.

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