THE DefenseLINE

Past Presidents Gather to Celebrate Our History 1968 - 2009

www.scdtaa.com

President's Message

by T. David Rheney

First of all, let me welcome the new members of the Executive Committee, Josh Howard, Mac White and Graham Powell. We are excited to have them on board and look forward to working with them this year. I also want to congratulate Sterling Davies on his selection as Secretary for 2010.

In addition to Sterling, I also want to recognize our other officers this year, Gray Culbreath and Molly Craig, along with our Executive Director Aimee Hiers. All of these folks keep things running smoothly day-to-day, which leaves very little for me to do. They have made my first few months as President very easy and it is sincerely appreciated.

I am always proud to see our members involved in the several national defense organizations. Many of our members have taken leadership roles in these organizations over the years, and 2010 is no different. At the risk of omitting some who should be recognized, I want to congratulate Molly Craig on her recent election as a vice president of the International Association of Defense Counsel and also John Cuttino on his election to the Board of Directors of the Defense Research Institute.

As for the SCDTAA, we have hit the ground running this year and I would like to thank all of the members of the various committees for all of their hard work thus far. We are going to have a great year in 2010.

In his last President's message of 2009 John T. Lay mentioned the crown jewels of our organization, the Trial Academy, Joint Meeting and Annual Meeting. I am pleased to announce we are going to add another jewel to the crown this year with a combination corporate counsel CLE, judicial and legislative reception and PAC golf tournament in Columbia April 21-22. We got off to a terrific start with our first corporate counsel CLE last year. Attendance was even better than hoped for and we expect another great turnout this year. By combining it with the reception and golf tournament we now have another big event for our members during the early part of the year. Please mark your calendars and make plans to join us in Columbia in April. Many thanks to William Brown, Duncan McIntosh and Kurt Rozelsky for their work on the corporate counsel meeting, Anthony Livoti, Sam Outten and Steve Mitchell on PAC golf and Bill Besley, Eric Englebardt and Jeff Thordahl on the judicial and legislative reception.

The Trial Academy is returning to Charleston this year for the first time in quite a while June 2-4. This will be the 20th SCDTAA Trial Academy. I was lucky enough to attend the first SCDTAA Trial Academy in Columbia in 1991 and know from firsthand experience how beneficial this can be for our young lawyers, not only for what they will learn but for the opportunity to meet other young lawyers from around the state, along with judges and many of our more "experienced" members. We all owe special thanks to Charleston Clerk of Court Julie Armstrong and Court Manager Supervisor Don Michel for allowing us to use the Charleston County Courthouse for mock trials on Friday. Glenn Elliott, Jay Davis and Anthony Livoti are finalizing the topics, speakers and judges and this promises to once again be a wonderful experience for the participants and also for those that will be assisting. In addition, Bill Besley and Jamie Hood are planning a reception for Charleston area judges on June 3, and we look forward to that event as well. As with our reception in Columbia, all of our members are invited to attend, and you will receive more information about this in the near future.

Please also mark your calendars for the Joint Meeting in Asheville July 22-24 at The Grove Park Inn and the Annual Meeting at Pinehurst November 11-14. You will receive much more information as we get closer to these events.

We all know that our members wrestle with tight budgets and limited time. The turn of the calendar to 2010 didn't magically change the economic struggles of 2009 or the demands on our time. Our goals this year, as they are every year, are to provide our members with benefits they cannot get through any other organization. I am confident that the events noted above and the many others you will hear about during the course of the year help us to meet those goals. I encourage you to become more involved with the SCDTAA and look forward to seeing you throughout the coming year.

Letter From The Editors

by Alan Lazenby and John Kuppens

We are very excited to be co-editors of *The DefenseLine* this year. We hope to continue the great work of Erin Dean and Wendy Keefer. During their tenure, *The DefenseLine* added sections for Verdict Reports, Member News, and Case Notes. We will continue these informative sections and seek to add new content as well. One of our primary goals this year is to focus on delivering great content. We will involve the Substantive Law Committees to help accomplish this goal.

In this issue you will find articles and information from our Health Care Law and Products Liability Committees. Julie Overstreet and Will Thomas have written an informative and timely article on the application of the Wage Payment Act to prospective unearned wages. This issue was the subject of arguments before the South Carolina Supreme Court on March 16, 2010. In addition, Eli Poliakoff has written an article on the reporting of settlements involving Medicaid and Medicare recipients.

On the Products side we have included an article from Curtis Ott and Sam Sammataro involving the *Sapp* decision which gives new life to the economic loss rule. We also included an article involving the learned intermediary doctrine and selected case notes prepared by Brian Comer.

Another goal we have this year is to explore alternative ways to deliver our content and communicate with our members outside of the traditional print version of *The DefenseLine*. We will use Facebook and Twitter and encourage everyone to visit our newly designed web site. In addition to having the full content of the current and last five issues of *The DefenseLine*, SCDTAA members can log-in to the "Members Only" section and participate in our on-line discussion forum.

Alan Lazenby

John Kuppens

Have news about changes in your firm, promotions, memberships and organizationd 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

Past Presidents Dinner

by Matthew H. Henrikson

Wednesday night before the 2009 annual meeting at the Westin Savannah the Association honored our past presidents with a dinner and speaker presentation. Fittingly, a moment of silence was held for our deceased past presidents, H. Grady Kirven, James W. Alford, C. Dexter Powers and Robert R. Carpenter. With twenty-five of our thirty-six living past presidents in attendance and against a backdrop of photographs from Association meetings and events of the last forty-two years, Ed Mullins, Bruce Shaw, Mark Wall, Mills Gallivan, and Mark Phillips interacted with the audience and recalled the history of five decades of the Association in what was essentially a hilarious roast of our fine past presidents. Numerous additional photographs, old meeting materials, and other Association memorabilia were on display. In what we hope will become a tradition, the evening was a long overdue recognition of all of the hard work of these leaders that went into building the Association from a handful of defense lawyers with a good idea in 1968 to the 1000+ member Janata Award winning organization that serves the state's defense bar today and is recognized as a national leader in state defense organizations. Many thanks to Ed, Bruce, Mark, Mills and Mark for a lot of work preparing their remarks, and as always, many thanks to Aimee Hiers and her staff without whom little of what we do would be possible.

OFFICERS

PRESIDENT
T. David Rheney
Post Office Box 10589
Greenville, SC 29503
(864) 241-7001 FAX (864) 271-7502
drheney@gwblawfirm.com

PRESIDENT ELECT
Gray T. Culbreath
1330 Lady Street, Ste. 601
Columbia, SC 29211
(803) 255-0421 FAX (803) 771-4484
gculbreath@collinsandlacy.com

TREASURER
Molly H. Craig
P.O. Box 1508, 172 Meeting Street
Charleston, SC 29401
(843) 577-4435 FAX (843) 722-1630
molly.craig@hoodlaw.com

SECRETARY
Sterling G. Davies
P.O. Box 12519
Columbia, SC 29211
(803) 779-2300 FAX (803) 748-0526
sdavies@mgclaw.com

IMMEDIATE PAST PRESIDENT
John T. Lay, Jr.
Post Office Box 2285
Columbia, SC 29202
(803) 254-4190 FAX (803) 779-4749
jlay@ellislawhorne.com

EXECUTIVE COMMITTEE

Term Expires 2010
Hugh W. Buyck
A. Johnston Cox
D. Jay Davis, Jr.
E. Mitchell Griffith
D. Alan Lazenby
Stephen C. Mitchell
Catherine B. Templeton

Term Expires 2011
William G. Besley
William S. Brown
Erin D. Dean
Ryan A. Earhart
Wendy J. Keefer
John F. Kuppens
W. Edward Lawson
Curtis L. Ott

Term Expires 2012
David A. Anderson
E. Glenn Elliott
Eric K. Englebardt
Joshua L. Howard
Anthony W. Livoti
Graham P. Powell
W. McElhaney White
Ronald K. Wray, II

PAST PRESIDENT COMMITTEE MEMBER
William S. Davies, Jr.

CORPORATE COUNSEL CHAIRPERSON
Duncan S. McIntosh

DRI REPRESENTATIVE
H. Michael Bowers

YOUNG LAWYERS PRESIDENT
Paul D. Greene

EXECUTIVE DIRECTOR
Aimee Hiers

EDITORS
D. Alan Lazenby
John F. Kuppens

THE DefenseLINE

PRESIDENT'S MESSAGE
T. David Rheney — 2

LETTER FROM THE EDITORS
D. Alan Lazenby and John F. Kuppens — 3

SCDTAA DOCKET: MEMBER NEWS — 5

RECAP OF THE 2009 ANNUAL MEETING — 10

SCDTAA TRIAL ACADEMY: JUNE 2-4
E. Glenn Elliott — 11

2010 JOINT MEETING — 12

JUDICIAL PROFILE:HONORABLE JOHN C.FEW
Brooke C. Hammond — 13

THE SOUTH CAROLINA SUPREME COURT REAFFIRMS THE ECONOMIC LOSS DOCTRINE
Curtis L. Ott and Sam Sammataro — 15

TRIAL COURT'S ORDER FINDING THAT THE WAGE PAYMENT ACT APPLIES TO PROSPECTIVE UNEARNED WAGES
Julie Overstreet and William R. Thomas — 17

MMSEA "SECTION 111" MANDATORY REPORTING UPDATE: UNANSWERED QUESTIONS, PART 1
Eli A. Poliakoff — 20

THE STATUS OF THE LEARNED INTERMEDIARY RULE IN SOUTH CAROLINA
Brian A. Comer — 21

THE CONTROVERSY OVER SOUTH CAROLINA'S JUDICIAL MERIT SELECTION PROCESS
Stephanie R. Lamb — 23

RECENT ORDERS — 25

LEGISLATIVE UPDATE — 29

CASE NOTES — 31

VERDICT REPORTS — 37

The SCDTAA Docket

Turner Padget Elects J. David Johnson, IV Shareholder

J. David Johnson, IV has been elected a shareholder with the law firm of Turner Padget Graham & Laney, P.A. David is based in the firm's Florence office and practices in various aspects of business transactions including business entity planning and organization, mergers and acquisitions, employee benefits and ERISA matters, estate planning and probate administration, and business valuations. David also has a tax controversies practice and has significant experience in negotiating settlements with the Internal Revenue Service and the South Carolina Department of Revenue.

Nelson Mullins Elects Six to Partnership in South Carolina

The partners of Nelson Mullins Riley & Scarborough LLP have elected attorneys **Betsy Johnson Burn, Amanda Kitts, and Ronnie McMahan** to partnership in Columbia; **Andrea St. Amand** in Charleston; and **Ben Barnhill** and **Giles Schanen** in Greenville. The six formerly were associates.

Ms. Burn is a Certified Specialist in Bankruptcy/Debtor-Creditor Law, a distinction awarded by the Supreme Court of South Carolina. She practices in Creditor's Rights in the areas of bankruptcy, commercial foreclosures, and workouts.

Ms. Kitts practices in the areas of pharmaceutical and medical device litigation, product liability, toxic torts, and business litigation.

Mr. McMahan practices in Columbia in the areas of business litigation, franchise law and litigation, and appellate practice, with an emphasis on automobile franchise litigation.

Ms. St. Amand handles a wide range of complex business litigation matters, concentrating on financial and accounting fraud. She routinely represents companies and individuals in cases involving allegations of improper conduct in business transactions, including claims of securities fraud, Ponzi schemes, false or misleading promotion of financial products and tax shelters, breach of commercial contracts, shareholder and partnership agreements.

Mr. Barnhill focuses his practice on corporate securities, mergers and acquisitions, bank regulatory, and executive compensation matters, with an emphasis on community banks and established private companies headquartered in South Carolina.

Mr. Schanen practices in the areas of business litigation, product liability, and employment litigation.

Lazenby Law Firm

D. Alan Lazenby announces the formation of Lazenby Law Firm, at 215 Magnolia Street in Spartanburg, SC. Mr. Lazenby was formerly a Member of Wilkes Bowers, P.A. and an associate at the Ward Law Firm, P.A. He will continue his practice of civil defense litigation including insurance defense, construction and business litigation. Mr. Lazenby graduated *cum laude* from Wofford College and the University of Georgia School of Law.

Turner Padget Elects Sam Sammataro Shareholder

Sam Sammataro has been elected a shareholder with the law firm of Turner Padget Graham & Laney, P.A. Mr. Sammataro is based in the firm's Columbia office where his practice focuses primarily on the defense of product liability lawsuits. Sam's practice also includes defense of professional negligence claims and workers' compensation appeals.

Mr. Sammataro received his J.D. from the University of South Carolina in 2001 and clerked for the Honorable C. Weston Houck, United States District Judge, following graduation. He currently serves as Treasurer for the South Carolina Chapter of the Federal Bar Association and is a member of the South Carolina Defense Trial Attorneys' Association and DRI.

McAngus Goudelock & Courie Elects New Members

The law firm of McAngus Goudelock & Courie is pleased to announce that attorneys **Mark Allison, Mary Margaret Hyatt, and James H. Lichty** have been elected as members of the firm. **Weston Adams III** has been elected as an equity member of the firm.

Columbia, S.C. Office:

Weston Adams III leads MG&C's environment, energy and natural resources practice group and the firm's appellate law practice group in the Columbia, S.C. office. He joined the firm in 2005.

James H. Lichty practices workers' compensation defense in the firm's Columbia, S.C. office. He joined MG&C in 2003.

Myrtle Beach, S.C. Office:

Mary Margaret Hyatt practices workers' compensation defense in the firm's Myrtle Beach, S.C. office. She joined MG&C in 2002.

Charleston, S.C. Office:

Mark Allison practices workers' compensation defense in the firm's Charleston, S.C. office. He joined MG&C in 2002.

Continued on next page

Collins & Lacy Welcomes Logan M. Wells

Collins & Lacy, P.C. is pleased to announce that **Logan M. Wells** has joined the firm as an associate in the practice areas of Premises Liability, Retail/Hospitality, and Insurance Coverage.

Logan graduated from Furman University with a B.A. in History/Political Science in 2006. She received her Juris Doctor from the University of South Carolina School of Law in 2009. While in law school, Logan was a member of Phi Delta Phi and served as both the Articles Editor and Member Editor for the South Eastern Environmental Law Journal.

Turner Padget Adds Four New Associates

Stephanie R. Lamb, Sarah G. Verstraten, T. Hudson Williams and **Virginia W. Williams** have joined Turner Padget Graham & Laney, P.A. as associates. Lamb practices in the area of workers' compensation; Verstraten practices in the areas of general litigation and personal injury defense. Hudson Williams practices in the area of commercial real estate and business transactions and Virginia Williams practices in the specialty litigation group.

Stephanie R. Lamb is an associate in the Greenville office practicing in the area of workers' compensation. Stephanie graduated from the University of South Carolina, *cum laude*, in 2000 with a degree in French, and received a subsequent degree from the University of North Carolina-Pembroke, *magna cum laude*, in elementary education.

Sarah G. Verstraten is a resident in the Charleston office. Sarah practices primarily in the areas of general litigation and personal injury defense. A 2001 *cum laude* graduate of the College of Charleston, Sarah received her Juris Doctor, *cum laude*, from the Charleston School of Law in May of 2009.

T. Hudson Williams is a resident in the Columbia office practicing in the area of commercial real estate and business transactions. He obtained a B.A. degree from Wake Forest University in 2006 and received his Juris Doctor, *cum laude*, from the University of South Carolina School of Law in 2009.

Virginia W. Williams is an associate attorney in the Columbia office. Mrs. Williams practices in the area of products liability, professional malpractice, and torts. She graduated from the University of South Carolina *magna cum laude* with a degree in Spanish and History. After her undergraduate degree, Mrs. Williams received a masters in Bilingual Legal Interpreting from the Graduate School at the College of Charleston. She then attended the University of South Carolina School of Law where she received her Juris Doctorate in 2009.

Rachel Flynn Joins Nelson Mullins in Columbia

Rachel M. Flynn has joined Nelson Mullins Riley & Scarborough LLP as an associate in the Columbia office, where her business litigation practice focuses on the area of franchise and distribution litigation.

Prior to joining Nelson Mullins, she was selected to serve as a law clerk to The Honorable Karen J. Williams, Chief Judge of the United States Court of Appeals for the Fourth Circuit. She earned her Juris Doctor, *magna cum laude*, in 2009 from Washington and Lee University School of Law, where she interned for The Honorable James C. Turk, United States District Judge for the Western District of Virginia. She earned her Bachelor of Science in Business Administration and Risk and Insurance Management, *magna cum laude*, in 2006 from the Honors College at the University of South Carolina.

Phillip Florence, Jr. Joins Turner Padget

Turner Padget Graham & Laney, P.A. is pleased to announce that **Phillip Florence, Jr.** has joined the firm as Of Counsel in its litigation group. Mr. Florence is based in Turner Padget's Charleston office and will focus his practice in the areas of General Litigation, Construction Law, Employment Law and Personal Injury Defense.

Mr. Florence graduated from The Citadel in 1990 and completed his Juris Doctor degree from the University of South Carolina School of Law in 1994. He has extensive experience litigating cases involving issues such as general liability, premises liability, negligence, fraud, personal injury, and employment disputes. Prior to attending law school, Mr. Florence was a wide receiver for the Minnesota Vikings.

Construction Law CLE

by Graham P. Powell

The construction law committee presented a CLE on December 16, 2009 at the Charleston School of Law.

The attendees learned about life safety/building code and related engineering issues; received an insurance coverage update addressing recent case law, including the *Newman* opinion in depth; learned about difficulties in practical application of pre/post July 1, 2005 contribution rules and undecided issues related to setoffs; were updated on new mechanic's lien provisions and pitfalls with liens; heard from plaintiffs' counsel about means and methods from the owner perspective with a lengthy discussion pertaining to declaratory judgment actions; obtained a semester's worth of psychology related to negotiation that occurs in mediation; learned about the advantages and disadvantages of tri-party agreements and the ConsensusDOCS; and heard from Judge Newman on frequently litigated issues, effective trial presentation, and observations of construction cases tried on the multi-week docket in 2009.

The CLE was well attended. The construction law committee would like to thank all of the presenters and the Charleston School of Law.

Members in the News

Former SCDTAA President Recipient of South Carolina Bar Foundation's 2009 Durant Distinguished Public Service Award

G. Dewey Oxner Jr., a noted trial attorney and Shareholder Emeritus of Haynsworth Sinkler Boyd, PA, received the 2009 DuRant Distinguished Public Service Award at the South Carolina Bar's Annual Convention's plenary luncheon on Friday, January 22, 2010, at the Kiawah Island Golf Resort.

Oxner served as President of the South Carolina Bar (2001-2000). He has served as a trial lawyer for more than four decades and successfully has tried more than 100 cases to jury verdict. He has been listed in The Best Lawyers in America® since its inception and was recognized as the "Senior Statesman" among all South Carolina litigators by Chambers USA – The Client's Guide. He was included in the 2009 and 2008 editions of South Carolina Super Lawyers™ – Personal Injury Defense: Medical Malpractice.

A former board member and treasurer of The Defense Research Institute, Inc., and former President of the South Carolina Defense Trial Attorneys' Association, Oxner served as Managing Partner (1995-1998) of Haynsworth Marion McKay & Guérard, LLP, a predecessor of Haynsworth Sinkler Boyd, PA, in Greenville.

Richard Riley Joins Distinguished Group in S.C. Hall of Fame

The South Carolina Hall of Fame inducted former Governor and U.S. Education Secretary Richard Riley into membership February 9.

He said he is proud as a student of S.C. history to join people such as Robert Smalls, who also was inducted February 9, in the Hall of Fame, located in Myrtle Beach. A former U.S. Secretary of Education (1993-2001) and a former Governor of South Carolina (1979-87), Dick Riley, with full support of the Firm, remains an ambassador for improving education in the state, nation, and abroad.

Secretary Riley is a Distinguished Professor of Education at the University of South Carolina and a Distinguished Professor of Government, Politics, and Public Leadership at the Richard W. Riley Institute at Furman University. The College of Education at Winthrop University bears his name, as does the College of Education and Leadership at Walden University.

John E. Cuttino Inducted Into Litigation Counsel of America and Named to DRI's National Board of Directors

Turner Padget Graham & Laney, P.A. is pleased to announce that John E. Cuttino, a shareholder in the firm's Specialty Litigation Practice Group, has been inducted into the Litigation Counsel of America. The Litigation Counsel of America is an honorary society of trial lawyers composed of less than one-half of one percent of American lawyers. Fellowship in the Litigation Counsel of America is highly selective and by invitation only. Additionally, Mr. Cuttino has been elected to the national Board of Directors of the Defense Research Institute (DRI). Mr. Cuttino's three-year term commenced at the organization's annual meeting and 50th anniversary celebration in October.

Gray T. Culbreath Receives the 2009 Civic Star Award

Collins & Lacy, P.C. proudly announces that Gray T. Culbreath has been selected to receive the 2009 Civic Star Award of the Richland County Bar Association. Recipients of the Civic Star Award are selected by the Executive Committee of the Richland County Bar Association in recognition of their exceptional and meritorious service to our community. Gray was presented with the award at the annual meeting of the association on December 10th, 2009.

Gray is the managing partner for Collins & Lacy. His practice focus includes products liability, class action litigation, transportation litigation, business and commercial litigation, and professional negligence claims. Additionally, he conducts an active appellate practice for his regional and national clients.

Kay Gaffney Crowe Re-Appointed to Chief Justice's Commission on the Profession

Kay Gaffney Crowe has been re-appointed to the Chief Justice's Commission on the Profession. The Commission, which was created in recognition of the need for the emphasis upon and encouragement of professionalism in the practice of law, ensures that the practice of law remains a high calling which serves clients and the public good. Commission members are nominated by the Board of Governors of the South Carolina Bar and appointed by the Chief Justice. Ms. Crowe's new term will run through December 31, 2012.

Continued on next page

Eight Collins & Lacy Attorneys Selected for Inclusion in The Best Lawyers in America 2010

Collins & Lacy, P.C. is pleased to announce that, Joel W. Collins, Stanford E. Lacy, Gray T. Culbreath, Jack D. Griffeth, Ellen M. Adams, Peter H. Dworjanyn, L. Henry. McKellar, and Donald Van Riper have been selected for inclusion in the 2010 edition of The Best Lawyers in America.

Joel Collins, founding shareholder, is being recognized for his work in White Collar Criminal Defense. Stan Lacy, founding shareholder is being recognized for his work in Workers' Compensation law, along with fellow shareholders, Pete Dworjanyn and Ellen Adams, along with Donald Van Riper, who is Of Counsel to Collins & Lacy. Gray Culbreath, managing shareholder, is being recognized for his work in Commercial Litigation, Products Liability Litigation, and Bet-the-Company Litigation. Henry McKellar, Of Counsel, is being honored for his work in Banking Law. Jack Griffeth, also Of Counsel, is being honored for his work in Alternative Dispute Resolution.

Ellen Adams Selected for Council on Litigation Management

Collins & Lacy, P.C. is pleased to announce that Ellen M. Adams has been selected to serve as a member of The Council on Litigation Management. The Council is a nonpartisan alliance dedicated to furthering the highest standards of litigation management. Selected attorneys and law firms are extended membership by invitation only, based on nominations from CLM Fellows. Ellen is a shareholder practicing in the areas of premises liability, general litigation, professional liability, workers' compensation, defense litigation, contract disputes, and insurance. Ellen is a member of the South Carolina Defense Trial Attorneys' Association, the South Carolina Workers' Compensation Educational Association, and the Defense Research Institute. Ellen has been selected for inclusion in Best Lawyers in America each year since 2008, for her work in the workers' compensation practice area.

'Best Lawyers' Guide Lists 50 South Carolina Nelson Mullins Attorneys

Fifty Nelson Mullins Riley & Scarborough attorneys based in South Carolina have been selected for inclusion in the 2010 edition of The Best Lawyers in America.

Charleston

Michael T. Cole, Product Liability Litigation

Richard A. Farrier, Jr., Bet-the-Company Litigation, Commercial Litigation

John B. Hagerty, Corporate Law

Cynthia B. Hutto, Health Care Law

Elizabeth Scott Moise, Insurance Law

Thomas F. Moran, Tax Law

G. Mark Phillips, Product Liability Litigation

Newman Jackson Smith, Environmental Law, Government Relations Law, Water Law

John C. von Lehe, Jr., Appellate Law, Tax Law

Columbia

Stuart M. Andrews, Jr., Health Care Law

George S. Bailey, Tax Law, Trusts and Estates

C. Mitchell Brown, Appellate Law, Commercial Litigation

George B. Cauthen, Bankruptcy and Creditor-Debtor Rights Law

Karen A. Crawford, Environmental Law

Christopher J. Daniels, Personal Injury Litigation, Product Liability Litigation

William S. Davies, Jr., Product Liability Litigation, Workers' Compensation Law

Gus M. Dixon, Corporate Law, Mergers & Acquisitions Law, Securities Law

Dwight F. Drake, Government Relations Law

David E. Dukes, Bet-the-Company Litigation, Commercial Litigation, Personal Injury Litigation, Product Liability Litigation

Mark C. Dukes, Intellectual Property Law, Technology Law

Carl B. Epps III, Personal Injury Litigation

Robert W. Foster, Jr., Personal Injury Litigation, Product Liability Litigation

Daniel J. Fritze, Corporate Law, Mergers & Acquisitions Law, Securities Law

James C. Gray, Jr., Administrative Law, Insurance Law

Sue Erwin Harper, Labor and Employment Law

Bernard F. Hawkins, Jr., Environmental Law

P. Mason Hogue, Jr., Corporate Law, Mergers & Acquisitions Law, Securities Law

William C. Hubbard, Commercial Litigation

S. Keith Hutto, Commercial Litigation, Franchise Law

Kenneth Allan Janik, Employee Benefits Law, Tax Law

Frank B.B. Knowlton, Product Liability Litigation

D. Larry Kristinik III, Commercial Litigation

John F. Kuppens, Commercial Litigation, Product Liability Litigation

James K. Lehman, Commercial Litigation

Steven A. McKelvey, Jr., Franchise Law

John T. Moore, Banking Law

Stephen G. Morrison, Bet-the-Company Litigation, Commercial Litigation, Product Liability Litigation

Edward W. Mullins, Jr., Bet-the-Company Litigation, Commercial Litigation, Personal Injury Litigation

R. Bruce Shaw, Mass Tort Litigation, Personal Injury Litigation, Product Liability Litigation

B. Rush Smith III, Bet-the-Company Litigation, Commercial Litigation

David G. Traylor, Jr., Mass Tort Litigation, Personal Injury Litigation, Product Liability Litigation

Ralston B. Vanzant II, Real Estate Law

Daniel J. Westbrook, Health Care Law
George B. Wolfe, Government Relations Law

Greenville

William H. Foster, Labor and Employment Law
Neil E. Grayson, Securities Law
Leo H. Hill, Construction Law, Energy Law
John M. Jennings, Securities Law
Timothy E. Madden, Family Law
A. Marvin Quattlebaum, Jr., Commercial Litigation, Insurance Law

Two Nelson Mullins attorneys recognized in "Best of the Year" categories

Nelson Mullins Riley & Scarborough South Carolina-based partners Stephen G. Morrison and John C. von Lehe, Jr., have been recognized in Best Lawyers in America's inaugural "Best of the Year" categories:

Mr. Morrison, based in Columbia, was recognized as the "Columbia, S.C., Bet-the-Company Litigator of the Year" for 2010 by Best Lawyers, a peer-reviewed publication on the legal profession. Mr. Morrison practices in the areas of technology law and litigation, business liability, product liability, and securities litigation.

Mr. von Lehe, Jr., based in Charleston, has been named as the inaugural "Charleston, S.C., Tax Lawyer of the Year." Mr. von Lehe practices in taxation, estate planning and appellate law. A Certified Public Accountant in South Carolina, Mr. von Lehe's practice includes local, state, and federal tax issues, the preparation of wills and trusts, and matters of probate. He concentrates a significant portion of his practice in matters of property tax (including fee-in-lieu of property tax), sales tax, state income tax, and economic and tax incentives for new and existing businesses. Mr. von Lehe is a Certified Specialist in Estate Planning and Probate Law and a Certified Specialist in Taxation Law, distinctions awarded by the Supreme Court of South Carolina.

Catherine Kennedy Elected as Fellow of the American College of Trust & Estate Counsel

Turner, Padget Graham & Laney, P.A. is pleased to announce that Catherine H. Kennedy was recently elected as a Fellow of the prestigious American College of Trust and Estate Counsel. The American College of Trust and Estate Counsel is a professional association consisting of approximately 2,700 lawyers and professors from throughout the United States and other countries. Ms. Kennedy is special counsel in the Columbia office where she practices in the areas of estate planning, probate administration and litigation. She is also a certified civil court mediator and arbitrator and has an active alternative dispute resolution practice.

Wolfe Assists in Economic Development Initiative and Named to S.C. Chamber Board

Nelson Mullins Columbia partner George Wolfe recently was appointed by S.C. House Speaker Bobby Harrell to a new group developed to examine economic development and suggest legislative solutions to the General Assembly. The group's work and recommendations were drafted into legislation and introduced in January in the House. Mr. Wolfe has also been named to the board of directors of the S.C. Chamber of Commerce.

Eric K. Englebardt Elected to the Board of Directors for The Wings of Hope Foundation

Turner, Padget Graham & Laney, P.A. is pleased to announce that Eric K. Englebardt was recently elected to the Board of Directors for The Wings of Hope Foundation in Greenville, S.C. Mr. Englebardt, a shareholder in the Greenville office, is a member of the Litigation Practice Group and is a certified court mediator. The Wings of Hope Foundation works to transform families and children struggling with alcohol or drugs.

Riley, Wilkins to Co-Chair State Council of Global Initiative

Nelson Mullins Riley & Scarborough partners Richard Riley and David Wilkins will serve as co-chairs of the U.S. Global Leadership Coalition's new State Advisory Council.

The coalition is a broad-based influential network of 400 businesses and non-government organizations; national security and foreign policy experts; and business, faith-based, academic and community leaders in all 50 states who support a "smart power" approach of elevating diplomacy and development alongside defense in order to build a better, safer world.

Ken Carter Elected to Board of Directors of Business Counsel, Inc.

Turner Padget Graham & Laney, P.A. is pleased to announce that J. Kenneth Carter, a shareholder in the firm's Specialty Litigation Practice Group, has been elected to the Board of Directors of Business Counsel, Inc. Business Counsel, Inc. is a network of law firms based in the United States who are engaged in business law representation, including transactional law, regulatory and litigation. Mr. Carter is a resident in the Columbia office and concentrates his practice in the area of product liability.

Nelson Mullins' McElwaine appointed to Web board

Charleston partner John McElwaine has been appointed by the Intellectual Property Constituency (IPC) of ICANN to sit on an expert advisory group to study and develop proposed solutions for ICANN on establishing a high security top level domain name verification program. ICANN is a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet's unique identifiers.

Seminar News

2009 Annual Meeting Recap

by Catherine B. Templeton

Special Thanks to our 2009 Annual Meeting Sponsors

Silver Level

Burkett, Burkett & Burkett

CompuScripts, Inc.

Ellis, Lawhorne & Sims

Robson Forensic, Inc.

SEA, Limited

Patron Level

IKON Document Services

The 42nd Annual Meeting of the SCDTAA was held on November 5-8, 2009, at the Westin Savannah Harbor Resort in Savannah, Georgia. Members of the federal and South Carolina judiciaries joined SCDTAA members and their guests for educational programs, recreation, and social activities. The programs featured an award winning author, a panel of state and federal judges, a motivational presentation from former Chief Justice of the Fourth Circuit Billy Wilkins, a practical and entertaining trial tactics talk from a distinguished member of the Alabama Defense Trial Lawyers, and a gubernatorial debate moderated by former Ambassador to the Court of St. James, Phil Lader, and an eye opening conversation from Professor John Freeman about judicial selection in South Carolina. The federal and state judges, gubernatorial candidates, and speakers all joined members for an oyster roast at Old Fort Jackson in Savannah and a black tie dinner on property at night. During the day the guests socialized over football, golf, wine tastings, and historical tours.

Congratulations to Sterling Davies on his appointment to Secretary and to the following people elected to the SCDTAA Executive Committee for a three year term: David A. Anderson, E. Glenn Elliott, Eric K. Englebardt, Joshua L. Howard, Anthony W. Livoti, Graham P. Powell, W. McElhaney White and Ronald K. Wray, II.

The 2010 Annual Meeting will be held in Pinehurst, North Carolina on November 11 - 14. It promises to provide members with the same fellowship and education as the incredibly well attended Savannah meeting.

SCDTAA Trial Academy Charleston, SC June 2-4

by E. Glenn Elliott, Trial Academy Chair

Every year the SCDTAA Trial Academy provides 24 young lawyers from across the state with three days of intensive, "nuts and bolts" training in the actual handling of a trial. Trial Academy begins with two days of lectures on various aspects of trial from some of the top trial lawyers in the state and culminates in their actually having to try a case from opening statement through jury verdict. The 24 students are divided into two-person teams, assigned either the roles of plaintiff counsel or defense counsel, and then they must prepare to handle opening statements, evidentiary motions, direct and cross-examination of witnesses, and closing statements in the mock trial of a fact pattern modeled after the *Buoniconti v. The Citadel, et al.* case. Each trial is presided over by a sitting state or federal court judge who, along with two experienced lawyers as trial observers, provides constructive criticism to the participants at the conclusion of the trial. Volunteers are recruited to serve as jurors and to play the roles of various witnesses (with whom the attorneys have no contact prior to trial) so the students must be prepared to handle witnesses they have never met as well as properly conduct themselves in the presence of a jury.

This year the SCDTAA Trial Academy will be held on June 2 – 4 in Charleston, South Carolina. Eight hours of lectures will take place on June 2nd and 3rd and the mock trials will be held on June 4th in courtrooms located in the Charleston County Courthouse. On Wednesday night, June 2, there will be a Welcome Reception for Trial Academy participants sponsored by SCDTAA Young Lawyer Division. Thursday evening we will have a Judicial Reception (all sitting State and Federal Court Judges are invited) which will double as a cocktail party and dinner for all Trial Academy participants and volunteers. All SCDTAA members are welcome to attend the Thursday night event.

The mock trials of Trial Academy would not be possible without efforts and assistance of many volunteers. Because we have six trials running simultaneously, seventy-five to one hundred volunteers are needed to play the scripted roles of various witnesses and to serve as jurors. Volunteer witnesses and jurors need only be in Charleston on Friday, June 4, the day of the mock trials. Volunteers will need to report to the courthouse at 8:30am and the trials should be completed around 1:00pm. If you are interested in serving as a witness or juror please contact Trial Academy Committee Members Anthony Livoti or Jay Davis, or Young Lawyers Division President Paul Greene. SCDTAA members from the Charleston area are encouraged to allow their associates, paralegals, and support staff to serve as volunteers for Trial Academy.

Trial Academy is an excellent opportunity for young lawyers to get both valuable advice from seasoned trial attorneys and the "hands on" experience of preparing and trying a case. Every year the 24 spots fill up fast and we have a waiting list. If you are a young lawyer looking for valuable training in trial techniques (and a year's worth of CLE hours), or if you are a senior partner with an associate to train, I suggest you return your completed registration materials to Aimee Hiers as soon as possible.

2010 Joint Meeting

by Catherine B. Templeton

This year's meeting with the Claims Managers Association at the Grove Park Inn in Asheville, North Carolina will be a great value to the members of the South Carolina Defense Trial Attorneys' Association. David Kibler of SCANA Services is the President of the CMASC and is bringing his members in for a panel discussion to educate us on exactly what the clients like and dislike in a lawyer. We will also enjoy the mock preparation and cross (gone bad) of a claims manager that promises to be instructive and entertaining. Our ethics presentation will consist of lessons on diversity from Merl Code and falls from grace by S.C. Representative Jenny Horne, member of the Judicial Committee and ad hoc subcommittee on the impeachment of Governor Sanford. We hope to present technology on the Interactive Trial and the federal court will provide necessary training.

As always, we will have updates on the recent decisions and upcoming issues that should be on your radar, as well as specialized committee presentations. The Construction, Trucking, Insurance Defense, Torts, ADR, and Workers' Compensation committees will meet. We expect to enjoy the company and insights of the South Carolina Workers' Compensation Commissioners throughout the weekend. Please join us on Thursday night, July 22nd to socialize with clients, present and potential, Commissioners, speakers, and fellow members of the SC Bar. Our CLE program will begin Friday morning, July 23rd and conclude at noon on Saturday, July 24th. The agenda and registration will be online at www.SCDTAA.com soon. Reservations for the Grove Park Inn can be made by calling 1-800-438-5800 and asking for the SCDTAA rate.

And then . . . there's the golf course, spa, whitewater rafting, hiking, Bele Chere . . . .

SCDTAA Calendar

Corporate Counsel Seminar
April 21, 2010
Columbia, SC

Advanced Deposition Boot Camp
May 13, 2010
Columbia, SC

Trial Academy
June 2-4, 2010
Charleston, SC

Joint Meeting
July 22-24, 2010
The Grove Park Inn
Asheville, NC

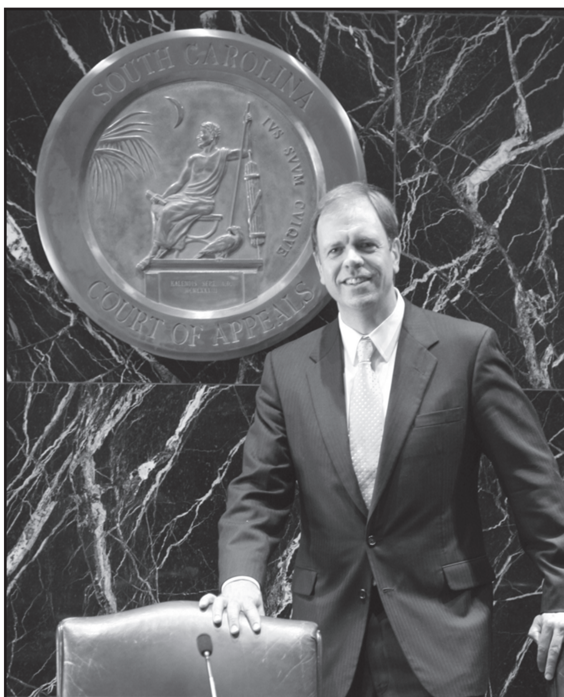
Beginners Deposition Boot Camp
September 2, 2010
Columbia, SC

Annual Meeting
November 11-14, 2010
Pinehurst Resort
Pinehurst, NC

Judicial Profile: The Honorable John C. Few

by Brooke C. Hammond

When I was offered a judicial clerkship with Judge Few, I anticipated learning anything and everything I could absorb about the practice of law. I expected to witness and observe the Rules of Evidence in action. I was eager to study many of the great South Carolina attorneys vigorously advocating for their clients. I was determined to make my clerkship with Judge Few a catalyst for the development of my legal career. These expectations were realized and most certainly surpassed.



However, it is the tidbits of knowledge I did not foresee on which I reflect the most. Judge Few is a South Carolinian through and through. His love for this State, from the lowcountry of Beaufort to the mountains of Walhalla, was immediately evident to me as he and I traveled from county to county holding Court. Judge Few never used a map on our trips. The locations of County lines were simply etched in his mind according to the rivers…many of which I was quizzed on during our travels.

It was important to Judge Few that I respect and appreciate not only the geography of where we happened to be, but also the rich history of its people. As I think back, one particular tutorial on Mr. Vardy McBee, often referred to as the Father of Greenville, stands out. The lesson launched as a result of my mispronunciation of Mr. McBee's name. Judge Few immediately corrected me and when I argued I had actually gotten it right, we embarked on a field trip to Mr. McBee's grave site located at the historic Christ Church in downtown Greenville. I have pronounced Mr. McBee's name properly ever since and promptly correct others in my presence when they do not.

Judge Few did venture away from his life in South Carolina one time, and like all aspects of his life, he embarked on that journey with great gusto. Judge Few attended college at Duke University where, during his junior year, he served as Duke's athletic mascot, the Blue Devil. After receiving a Bachelor of Arts degree in English and Economics, Judge Few came back to his roots and attended the University of South Carolina School of Law. While in law school, Judge Few was a member of The Order of Wig and Robe, The Order of the Coif, and the South Carolina Law Review, on which he served as Student Works Editor.

After receiving his Juris Doctor degree in 1988, Judge Few served as law clerk to The Honorable G. Ross Anderson, Jr., United States District Judge, in Anderson. Following his clerkship, Judge Few planted roots in Greenville, where for the next eight years he practiced law with his father, J. Kendall Few. Then, in 1998, Judge Few undertook a solo practice of his own, where he remained until taking the Circuit Court bench on July 1, 2000. After serving nearly ten years as a Circuit Court Judge, Judge Few has now been elected Chief Judge of the Court of Appeals.

Judge Few has been active in not only practicing law, but in teaching law as well. He has been a member of the Faculty at the National Judicial College in Reno, Nevada, since 2005. As many of you may already know, Judge Few has a certain affinity and knack when it comes to the Rules of Evidence. In September 2009, Judge Few had the opportunity to teach a week of evidence to New Mexico Judges in Albuquerque through the National Judicial College and the New Mexico Judicial Education Center. In 2008, he was named an Adjunct Professor of Law at the Charleston School of Law, where "Professor" Few taught Advanced Evidence and where he will be teaching evidence again this coming summer. Judge Few has also given

Continued on next page

and moderated numerous Continuing Legal Education Seminars in South Carolina, and several other states. Additionally, Judge Few is a Fellow in the Liberty Fellowship Class of 2008.

In 1996, Judge Few gave a speech entitled "Citizen Participation in the Legal System," for which he was awarded First Place in the American Bar Association's nationwide Edward R. Finch Law Day speech contest.

When I sat down with Judge Few and asked him the following questions he exuded optimism and enthusiasm about his new position and goals. He was willing to answer almost every question I posed. Apparently whether there is a special lady in his life will just have to stay a mystery for the time being.

What are you looking most forward to as an appellate judge and what will you miss most about the trial level?

I will miss most the direct interaction with great lawyers in a high-intensity trial. I have had the privilege of trying cases with most of the best lawyers in South Carolina. Being able to watch them work, and work with them, is a highlight of my legal career.

What are the advantages and/or disadvantages of beginning your appellate career as Chief Judge?

The primary disadvantage is that I must lead the Court while learning the practical challenges associated with doing so.

The primary advantage is that coming from outside of the Court allows me to see opportunities for the Court's future that are less apparent from the inside.

Who or what has been the biggest influence on your legal career?

J. Kendall Few; G. Ross Anderson, Jr.; looking into the eyes of real people from the chair of a Circuit Judge; and teaching law.

Now that you will be spending a majority of your time in Columbia, how will you balance work and family?

I will be making frequent trips back to Greenville to spend time with my children. Now that one of my daughters is in college and the younger is almost there, my interaction with them is less likely to be face-to-face anyway. The flexibility of my court schedule will allow me time to travel to Duke, and to wherever Anna goes, more frequently. I will be carving out large blocks of my time to do with my son the things he loves to do, such as hunting, fishing, and athletic sports.

Hemphill Award: Call for Nominations

Eligibility: The candidate must be a member of the South Carolina Bar and a member or former member of the SCDTAA. He or she may be in active practice, retired from practice or a member of the judiciary.

Criteria: The award should be based upon distinguished and meritorious service to the legal profession and/or the public; and one who has been instrumental in developing, implementing, and carrying through the objectives of the SCDTAA. The candidate should also be one who is or has been an active, contributing member of the Association.

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

Nominations due to Aimee Hiers at SCDTAA Headquarters by June 25, 2010
SCDTAA • One Windsor Cove, Suite 305 • Columbia, SC 29223
For more information contact Aimee at aimee@jee.com

The South Carolina Supreme Court Reaffirms the Economic Loss Doctrine

by Curtis L. Ott and Sam Sammataro

Everyone is familiar with the proverbial exception that swallowed the rule. On December 21, 2009, the South Carolina Supreme Court authored a significant opinion that rescued the economic loss doctrine from just such an exception previously enunciated in *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 666 S.E.2d 247 (2008). The court's decision in *Sapp v. Ford Motor Company*, ___ S.E.2d ___, 2009 WL 4893648 (2009), affirmed the traditional formulation of the economic loss rule – that there is no tort remedy where damage is limited to the product itself – and sent the clear message to manufacturers doing business in our State that the rule is alive and well outside of the residential construction arena.

Underlying Facts

In these appeals, plaintiffs filed product liability actions in state court after engine fires damaged their 2000 model year Ford F-150 pickup trucks. In *Sapp*, plaintiff purchased his used truck "as is" with 190,000 miles and well outside the original warranty of 3 years or 36,000 miles. Instead, he purchased comprehensive insurance coverage for the truck. At the time of the fire, the truck's odometer registered more than 200,000 miles. After the fire, plaintiff's insurer paid to have the truck repaired, and it was still in service when plaintiff gave his deposition more than a year after the fire.[1] In fact, plaintiff testified the truck traveled roughly 20,000 additional miles after the fire.

Plaintiffs in both cases were not injured, and no other property was damaged as a result of the fires. Nevertheless, they pursued tort causes of action in addition to their warranty claims. Ford asserted that the economic loss rule barred the tort causes of action and moved for summary judgment in *Sapp* and for partial judgment on the pleadings in *Smith.*[2] Plaintiffs opposed Ford's motion, arguing that the economic loss rule does not apply in situations where a manufacturer breaches a duty that arises independently of any contract, relying on the exception to the economic loss rule announced in *Kennedy v. Columbia Lumber and Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989), and applied in subsequent cases. Secondly, plaintiffs argued that the Federal Motor Vehicle Safety Standards in effect create a "statutory duty" exception to the economic loss rule because the standards are intended to protect the motoring public. Following a hearing, the Honorable John C. Few granted Ford's motion in *Sapp* on the basis that the economic loss rule barred plaintiff from recovering in tort. Judge Few also ruled that plaintiff could not recover under his breach of warranty claim because Ford's limited written warranty expired long before the date of the fire. In *Smith*, the Honorable Jackson S. Kimball, Special Circuit Judge, agreed that the economic loss rule barred plaintiff's recovery in tort and granted Ford's motion for partial judgment on the pleadings.

Appellate Proceedings

Plaintiffs appealed separately to the South Carolina Court of Appeals. Following submission of final briefs, the South Carolina Supreme Court certified both cases for review pursuant to Rule 204(b), SCACR, and shortly thereafter published its opinion in *Colleton Prep*. There, the court held "the economic loss rule will not preclude a plaintiff from filing a products liability suit in tort where only the product itself is injured when the plaintiff alleges breach of duty accompanied by a clear, serious, and unreasonable risk of bodily injury or death." Ford moved to argue against this new precedent, asserting that *Colleton Prep*.[3] was distinguishable from the facts presented in these two insurance subrogation actions wherein plaintiffs did not sustain physical injury, did not plead breach of a legal duty accompanied by the clear, serious, and unreasonable risk of bodily injury or death, and where the only damage sustained was to the products themselves. The court granted Ford's motion and the subsequent motion by the South Carolina Defense Trial Attorneys' Association to appear and file its *amicus curiae* brief in support of Ford's position. In its brief, the SCDTAA argued that *Colleton Prep.* fashioned an exception that swallowed the economic loss rule and created an unworkable framework that should not be extended to all product manufacturers.

At oral argument, appellants once again pressed the court to apply the exceptions crafted by *Kennedy* and its progeny and argued that to do otherwise unfairly permits manufacturers to use the economic loss rule as a shield against tort liability even when they have knowledge that a product will fail after

Continued on next page

limited warranty coverage has expired – particularly where that failure is accompanied by a serious risk of physical harm. Chief Justice Toal, joined by Justice Pleicones, expressed concern that such an expansion of the *Kennedy* exception would subsume the economic loss rule and permit a purchaser to pursue recovery in tort irrespective of the nature of his damages or his contractual standing. The Chief Justice also rejected outright appellants' policy-based argument that the court should step in to protect consumers because it thrusts the courts into the untenable position of introducing doctrines that ignore the parties' contractual positions.

Consistent with its position throughout the proceedings, Ford pointed out that the contractual process worked exactly as intended in these cases and that the economic loss rule should be retained to uphold the parties' contractual expectations – particularly where a consumer like Sapp purchases a product "as is" and protects himself by purchasing comprehensive insurance coverage. Simply put, Ford urged the court to hold that the further extension of the exception to the economic loss rule announced in *Colleton Prep.* would render manufacturers indefinite warrantors of their goods in perpetuity.

The Decision

Consistent with the concerns she expressed at oral argument, chiefly that the exception recognized in *Kennedy* had become almost unrecognizable, Chief Justice Toal, writing for the majority, affirmed the dismissals below and overruled *Colleton Prep.* "to the extent it expand[ed] the narrow exception to the economic loss rule articulated in *Kennedy*. . . ." Recognizing the distinctions between the policy goals of contract versus tort recovery, the court emphasized that "consumer expectancy" is best served by contract law while "safety interests" are best served by permitting tort recovery in situations involving personal injury. The court explained that *Kennedy* was "directed toward protecting consumers only in the residential home building context. . . ." Therefore, the extension of the *Kennedy* exception to situations involving "breach of a duty accompanied by a clear, serious, and unreasonable risk of bodily injury or death" was misguided because the "traditional economic loss rule provides a more stable framework and results in a more just and predictable outcome in products liability cases." Consistent with the reasoning employed by the *Colleton Prep.* dissenters, the *Sapp* Court declined to impose liability "merely for the creation of risk when there are no actual damages" because to do so "changes the fundamental elements of a tort action, makes any amount of damages entirely speculative, and holds the manufacturer as an insurer against all possible risk of harm." In light of these sound justifications underlying application of the economic loss rule in situations like the one presented on appeal, the court strictly limited the scope of the holding in *Kennedy* to residential real estate construction and clarified that no exception to the rule will be applied in a product liability action where damage is limited to the product itself.

Going Forward

In his concurring opinion, Justice Beatty expressed concern that holding of *Kennedy* was not clearly limited in its application only to residential construction. Further, he argued the court's attempt to limit *Kennedy ex post facto* ignores the negative treatment of the economic loss rule in other areas such as professional negligence; thus, the court's "inconsistent treatment of the economic loss rule . . . does not provide the bench and bar [with] guidance in the proper application of the doctrine." Justice Beatty may have legitimate grounds to question whether earlier cases addressing the duties owed by professionals clearly delineate the boundaries of the economic loss rule in non-product liability cases.[4] Going forward, however, manufacturers, insurers, and consumers faced with prosecuting or defending product liability lawsuits have a very clear, workable framework for application of the economic loss rule where the sole damage is to the product at issue.

Footnotes

1 The subrogated insurer for both plaintiffs pursued these cases in the names of its insureds.

2 The authors represented Ford before the trial and appellate courts.

3 Interestingly, the make up of the *Colleton Prep.* Court was much different by the time *Sapp* was decided. In *Colleton Prep*., Justice Beatty wrote for the majority, joined by Acting Chief Justice Moore and Justice Waller. Justice Pleicones, joined by Burnett, concurred in part and dissented with regard to the majority's extension of the *Kennedy* exception. Chief Justice Toal did not participate. By the time *Sapp* and *Smith* were argued, Justice Burnett had retired, replaced by Justice Kittredge. This time, Chief Justice Toal wrote the opinion, joined by Justices Kittredge and Pleicones. Justice Beatty, the author of *Colleton Prep.*, concurred in the result only and wrote a separate opinion, discussed post. Retired Justice Waller concurred in result only.

4 Appellants elected not to file a petition for rehearing. Thus, this decision is now final.

Trial Court's Order Finding That the Wage Payment Act Applies to Prospective Unearned Wages:
Implication for Healthcare Employers if Decision Stands

by Julie Overstreet and William R. Thomas [1]

Not every case considered by the South Carolina Supreme Court is a "landmark" case. In terms of practical implications for the citizens of this State, some decisions create barely a ripple while others have the effect of a legal tsunami. Currently on the Supreme Court's docket for March 2010 is the case *Mathis v. Brown & Brown of South Carolina*, Case No.: 2006-CP-42-2070 (Appeal from Spartanburg County Court of Common Pleas). A Supreme Court decision upholding *Mathis* would have serious, widespread implications for employers in this State, especially healthcare employers whose employees, such as physicians, are highly compensated. The Supreme Court certified *Mathis* for review before a Court of Appeals decision was rendered, indicating the issue at stake is one of great importance and deserving of the Court's and employers' careful attention.

The Mathis Decision

Mathis v. Brown & Brown of South Carolina arose from an alleged breach of contract. Pursuant to a series of emails from his employer, Mathis claimed that he had entered into a two-year employment agreement with Brown & Brown of South Carolina ("Brown & Brown") for a guaranteed salary of $120,000 per year.[2] According to Mathis' Complaint, filed in the Court of Common Pleas in Spartanburg County, Mathis began working for Brown & Brown in September 2004. Over the course of his employment, Mathis claimed his salary was repeatedly reduced, and he was eventually terminated in April 2006. In addition to breach of contract and other causes of action, Mathis alleged that Brown & Brown had violated the South Carolina Payment of Wages Act (S.C. Code Ann. § 41-10-10 to -110) ("Wage Payment Act" or "Act"). In May of 2008, the trial court agreed and issued an order finding, among other things, that Mathis was entitled to recover treble damages for the amount of wages he would have received, pursuant to his employment agreement, had he continued working for Brown & Brown. In essence, the trial court interpreted the Wage Payment Act to apply to prospective, unearned wages.

Implications for Healthcare Providers

If upheld, the trial court's interpretation and application of the Wage Payment Act will have serious implications for all employers in this State who enter into fixed-term employment agreements with their employees and will have particularly devastating effects on hospitals and other healthcare providers who routinely enter into employment agreements with physicians, often for significant amounts of compensation.

Since the late 1990s, the general nationwide trend for physicians has been to opt for employment at hospitals and other healthcare institutions rather than to open a private practice. This development has been driven primarily by work-life balance issues, medical malpractice insurance premiums, and the frustration of dealing with regulations and red-tape associated with private and public health-care insurers. Hospitals have been employing more physicians to ensure that there is ample primary, specialty and ancillary inpatient and outpatient care for their patients, as well as adequate call coverage for the emergency room.

Long-term employment agreements are essential to a hospital's ability to recruit and employ physicians, especially in rural areas. The ability to offer physicians long-term employment contracts ensures that South Carolina hospitals are able to attract the best and the brightest to provide high quality care for their patients. Both the South Carolina Hospital Association ("SCHA") and the South Carolina Chamber of Commerce recognized the potential serious consequences if the *Mathis* decision were to stand on appeal, and both moved and were granted leave to file *amicus curiae* briefs with respect to the Wage Payment Act issue. SCHA takes the position that contractual relationships between hospitals and physicians will be significantly chilled if the Court were to uphold the trial court's decision in *Mathis*. If the *Mathis* decision stands, hospitals will be reluctant to enter into long-term employment agreements with highly-compensated physicians out of fear that

Continued on next page

they may be leaving themselves open to treble damages if a contract dispute arises in the future. In turn, absent any long-term guarantee of employment, physicians likely would be unwilling to relocate from other states, which do not have similar draconian Wage Payment Acts, to work in South Carolina as an employee for a healthcare provider.

Healthcare providers are already experiencing a recruiting crisis. For instance, it is well known that there has been and continues to be a nursing shortage in South Carolina and throughout the nation. Limiting South Carolina hospitals' ability to recruit physicians would only serve to make a bad situation worse and could have serious detrimental effects on health care in the State. Small, rural hospitals would likely suffer the most. Not only would it be much more difficult for small, rural hospitals to recruit physicians, but these hospitals would be hardest hit by breach of contract actions that include claims for violating the Wage Payment Act. Smaller hospitals, many of which barely generate enough revenue to keep their doors open, simply would not have the resources necessary to pay large settlements and judgments that could result from such claims.

No Legal Reasoning Provided

Strangely, despite the patent serious implications, neither the trial court's original May 2008 Order nor its May 2009 Order, denying defendant Brown & Brown's Motion to Alter or Amend the Judgment, addresses the court's reasoning for interpreting the Wage Payment Act as applying to prospective, unearned wages. Certainly, no one would dispute that the Wage Payment Act is designed to protect employees from employers who wrongfully withhold wages due an employee. However, an examination of the plain language of the Act, South Carolina jurisprudence regarding the Act, and other jurisdictions' interpretations of similar statutes simply does not support the trial court's decision.

The South Carolina Payment of Wages Act

The Wage Payment Act mandates that "when an employer separates an employee from the payroll for any reason, the employer **shall pay all** **<u>wages due</u>** to the employee within forty-eight hours of time of separation or the next regular payday which may not exceed thirty days." S.C. Code Ann. § 41-10-50 (Supp. 2008) (emphasis added). The Act defines "wages" as

> all amounts at which **<u>labor rendered</u>** is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

S.C. Code Ann. § 41-10-10(2) (Supp. 2008) (emphasis added). The words "labor rendered" indicate that wages, by definition, are limited to amounts due for work performed, not work which would have been performed at some point in the future had the employee not been terminated. The fact that the definition specifically delineates other types of benefits an employee may receive and establishes whether those benefits are included in the definition of "wages" supports the argument that prospective, unearned wages, which would have been due under an employment contract, are not, and were never meant to be, included in the definition of wages. If the General Assembly meant for the Act to cover prospective wages, it would have included prospective wages in the list with vacation, holiday, and sick leave payments.

The Act's definition of wages has been relatively unchanged since the 1942 South Carolina Code. Prior to 1942 there was no definition of wages included in the Act, but the Act's provisions still contemplated that only payment for services actually rendered by an employee fell within the scope of the statute. Section 7034 of the 1932 South Carolina Code states,

> When any corporation carrying on any business in this State in which laborers are employed, whose wages under the business rule or custom of such corporation are paid monthly or weekly on a fixed day beyond the end of the month or week in which the **<u>labor is performed</u>** shall discharge any such laborer, the **<u>wages which have been earned</u>** by such discharged laborer shall become immediately due and payable.

S.C. Code § 7034 (1932) (emphasis added). The phrase "labor rendered," which appears in the current Act, is simply an abbreviated way to state, "in which the labor is performed," which appeared in the 1932 Code. Thus, since its inception, the Act contemplated that an employee would be recompensed only for services rendered up until the time of discharge, and pursuant to its plain language, the Act in its present form continues to contemplate that only recompense for services actually rendered fall within its scope.

Prior to the *Mathis* decision, South Carolina courts have never interpreted the Wage Payment Act as applying to prospective, unearned wages. South Carolina case law addressing the Act has been limited to payment of wages earned for labor already performed. *See, e.g., McKinnon v . S.C. Dept. of Health & Envtl. Control*, 2008 WL 2066408 (D.S.C.) (claim for back wages); *Gaud v. Havana Tropical Café*, 2008 WL 1744565 (D.S.C.) (claim for back wages); *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 518 S.E.2d 591 (1999) (claim for back wages); *Ross v. Ligand Pharms. Inc.*, 371 S.C. 464, 639 S.E.2d 460 (Ct. App. 2006) (claim for commission already earned); *O'Neal v. Intermedical Hosp. of S.C.*, 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003) (claim for back wages and already accrued time off);

Dumas, 320 S.C. 188, 463 S.E.2d 641 (claim for back wages).

Other Interpretations of Wage Payment Statutes

In support of his claim that the Wage Payment Act should apply to prospective wages, *Mathis* cited only a single Louisiana case, *Saacks v. Mohawk Carpet Corporation*, 855 So.2d 359 (La. Ct. App. 2003). A review of case law from other jurisdictions indicates that Louisiana represents the minority position with respect to this issue. The prevailing view is that wage payment statutes do not encompass unearned, future wages. *See, e.g., Martin v. Pomeroy Computer Res., Inc.*, 87 F.Supp.2d 496, 504 (W.D.N.C. 1999) ("The wording of the complaint is ambiguous and Pomeroy accurately notes that *Martin* appears to allege the right to recover future unearned wages. However, there is no cause of action under the Wage and Hour Act which applies only to earned wages and benefits."); *Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032, 1034 (Colo. Ct. App. 1989) ("The wage statute applies only to those wages and compensation that are 'earned and unpaid' at the time of the employee's discharge . . . . It does not require the payment of compensation 'not yet fully earned' under the employment agreement."). *See also City of Clinton v. Goldner*, 885 N.E.2d 67, 76 (In. Ct. App. 2008); *McClure v. Int'l Livestock Improvement Servs.*, 369 N.W.2d 801, 804 (Iowa 1985); *Battaglia v. Clinical Perfusionists, Inc.*, 658 A.2d 680, 685 (Md. Ct. Spec. App. 1995); *Quinn v. T.M. Sayman Prods. Co.,* 296 S.W. 198, 199 (Mo. Ct. App. 1927); *Weingrad v. Fischer & Porter Co.*, 47 Pa. D. & C.2d 244, 250 (Ct. C.P. Pa. 1968); *Tennyson v. Sch. Dist. of the Menomonie Area*, 606 N.W.2d 594, 605 (Wis. Ct. App. 1999).

Not only does *Saacks* represent the minority view with respect to this issue, the *Saacks* case is also highly distinguishable from *Mathis*. The *Saack's* decision was based on both Louisiana's wage payment statute and on a provision of the Louisiana Civil Code, providing that

> [i]f, without any serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, <u>he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived.</u>

La. Civ. Code Ann. art. 2749 (2005) (emphasis added). See *Saacks*, 855 So.2d at 364. Thus, there was a specific statutory provision that allowed the Louisiana Court of Appeals to determine that its wage payment statute encompassed unearned, future wages due under a fixed-term employment agreement. The Louisiana statute is, therefore, vastly different from South Carolina's Payment of Wages Act, which contains no similar provision or reference whatsoever.

Contract Damages Are Not Wages

Employees employed pursuant to a fixed-term contract already have an avenue to recover monies due pursuant to the contract. If wrongfully terminated, the employee can file a breach of contract action. Future earnings due pursuant to an employment agreement are contract damages, not wages. *See Bruce v. S.M. Motor Co., Inc.*, 724 P.2d 911, 912 (Or. Ct. App. 1986) (Damages plaintiff sought were 'for breach of an employment contract. Although his damages were measured by the sum he would have received had defendant not terminated his employment, that does not convert that sum into wages."). Yet, the trial court's decision in Mathis has essentially created a new special class of damages for employees suing for breach of an employment contract. It does not take an expansive imagination to predict that henceforth from a Court's decision upholding the *Mathis* trial court, every breach of contract action that arises in an employment setting will include a cause of action for violation of the Wage Payment Act as well in the hopes of securing treble damages, or at least using the claim to force settlement. Indeed, employees are already alleging these claims based on the trial court's order in *Mathis*, despite the fact that the Supreme Court has not yet ruled on the *Mathis* case.

The *Mathis* decision stands to have a considerable impact on every employer in this State who enters into fixed-term contracts with its employees. The *Mathis* decision will particularly impact hospitals and other employers whose employment contracts cover highly-compensated employees. The Payment of Wages Act was created as a shield to protect employees from employers who withhold wages earned for services rendered, but if the *Mathis* decision stands, the Wage Payment Act will be used as a sword to punish employers for failing to pay an employee wages not yet earned for services not yet rendered.

The Supreme Court was scheduled to hear oral arguments in the *Mathis* case on March 16, 2010. Should the Court uphold the trial court's decision in *Mathis*, it will not only cause a flood of claims for violation of the Act (every complaint for breach of an employment contract will have a claim for violation of the Wage Payment Act), the Court will be embracing an interpretation of the Act that has been rejected by every state that has a wage payment statute similar to South Carolina's.

Footnotes

1 Mr. Thomas is a partner at the law firm of Parker Poe Adams & Bernstein, LLP, and he practices healthcare law. Ms. Overstreet is an associate at Parker Poe and her practice focuses on healthcare law.

2 Interestingly, after beginning work, Mathis entered into a written employment agreement that stated he was an "at-will" employee.

ARTICLE

MMSEA "Section 111" Mandatory Reporting Update: Unanswered Questions Part I

by Eli A. Poliakoff

Defendants that settle certain claims with Medicare beneficiaries after October 1, 2010 must report details of the settlement to the federal government, as required by Section 111 of the Medicare, Medicaid, and SCHIP Extension Act ("MMSEA"). Failure to report accurately and timely can result in $1,000 per day, per claim penalties. Unfortunately, the agency that administers Medicare and runs the reporting program (the Centers for Medicare and Medicaid Services, “CMS”) has left several important aspects of the reporting program unresolved. Reporting for liability settlement begins in January 2011. Many questions will remain even after additional guidance is issued, because the reporting requirements impact a large number of claims, clients and settlement scenarios.

Why report?

Congress enacted Section 111 to help CMS identify lawsuit settlements and other payments to Medicare beneficiaries. In the liability context, the reporting notifies CMS when a Medicare beneficiary receives a settlement related to injuries for which Medicare has paid medical expenses. Under existing “Medicare Secondary Payer” provisions Medicare can recover its expenses from anyone who receives the settlement (plaintiff or plaintiff's counsel) or pays the settlement (settling defendants). The “Medicare lien” permits the federal government to pursue the defendant even after the settlement is paid to the claimant. In certain situations, Medicare can recover double damages from these parties. Section 111 requires defendants to self-disclose settlements to CMS so the government can pursue the beneficiary – or the defendant itself – to recoup medical expenses.

Regulatory “clarity”

Confusion surrounds the reporting program. CMS issued a 250 page “User Guide” and several additional alerts in late February 2010. Additional guidance has been offered in dozens of informal and non-binding CMS-hosted teleconferences. CMS is expected to issue supplemental instructions in the coming weeks on additional topics. Therefore, practical guidance for complying with the reporting rules is somewhat fluid - if available at all.

Who must report?

Rules issued in February 2010 would reduce the regulatory burden on most insured defendants by placing the reporting duty on the insurer in the typical liability settlement scenario. In general, where an insured defendant's settlement share is limited to its deductible, the insurer has the reporting obligation. The insured has the reporting obligation if it finances the settlement without recourse to insurance. Multiple defendants (or their insurers) that are subject to joint and several liability must each report the full settlement. Alternate rules apply to re-insurance, fronting policies, excess and umbrella insurance, self-insurance pools, and payments by entities in liquidation and bankruptcy.

No exemptions are currently provided for small businesses or isolated settlements (such as one reportable even per year). According to the User Guide, entities that have a "reasonable expectation of having claims to report" must register in enough time to allow full calendar quarter for testing prior to reporting.

Report what?

Generally, settlements, judgments, payments and “other awards” that meet the Section 111 criteria are reportable. CMS has repeatedly suggested that healthcare providers may also need to report write-offs, no-bills and other risk management or patient goodwill gestures. CMS interprets write-offs as an indication of payment responsibility analogous to a settlement. Such write-offs would need to be reported even if Medicare did not pay, or was not billed, for a certain procedure. This expansive interpretation of Section 111's reporting requirements imposes substantial burdens on healthcare providers and is a significant unresolved aspect of the reporting program. The February 2010 rules note that write-offs do not need to be reported "until forthcoming guidance" is issued. However, such claims or payments should be identified and tracked so that they "can be reported as prescribed by the general Section 111 requirements and the further guidance."

Continued on bottome of page 22

Article

The Status of the Learned Intermediary Rule in South Carolina

by Brian A. Comer

One of the most important concepts in drug and medical device litigation is whether or not a state has adopted the "learned intermediary" doctrine. This doctrine provides that manufacturers of prescription drugs and medical devices discharge their duty of care to patients by providing warnings to the prescribing physicians. Restatement (Third) of Torts: Products Liability § 6 cmt. d, reporters' note (1997). The justification for this rule is that consumers cannot buy prescription drugs or medical devices directly from a manufacturer, and therefore the manufacturer discharges its duty to warn by providing the warning to a learned intermediary.

As stated by the Fourth Circuit Court of Appeals in *Talley v. Danek Med., Inc.*, 179 F.3d 154, 163 (4th Cir. 1999):

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

The status of the law in South Carolina with regard to the learned intermediary rule is not entirely clear. South Carolina's state courts do not appear to have explicitly adopted the learned intermediary doctrine in the drug and medical device context. In fact, only two state court cases cite to the rule at all: *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) and *Madison v. American Home Prods. Corp.*, 358 S.C. 449, 595 S.E.2d 493 (1995). *Madison* only mentions the rule in dicta. *Madison*, 358 S.C. at 455, 595 S.E.2d at 496. ("[S]trict liability is inconsistent with the learned intermediary doctrine, which places the duty to warn on the prescribing physicians, and not pharmacists...."). In *Bragg*, one of the issues on appeal was whether or not the trial court had correctly charged the jury on the "sophisticated user defense." The charge at issue was as follows:

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

Bragg, 319 S.C. at 549, 462 S.E.2d at 331-32 (emphasis added). The South Carolina Court of Appeals concluded that the trial court properly charged the jury concerning the sophisticated user defense. *Id.*

However, the federal courts have been more explicit about the issue and have predicted that South Carolina state courts would apply the learned intermediary rule in the drug and medical device context. In *Brooks v. Medtronic, Inc.*, 750 F.2d 1227 (4th Cir. 1984), the Fourth Circuit Court of Appeals heard an appeal of a pacemaker case from the District of South Carolina, and one of the issues on appeal was whether the pacemaker manufacturer had a duty to warn the consumer directly, or whether the warnings to the physician were sufficient. *Id.* at 1230. The court stated that "[a]lthough the South Carolina Supreme Court has not addressed the issue, we conclude it would adopt the [learned intermediary] rule, generally accepted and supported by sound policy, restricting the manufacturer's duty to warn to the prescribing physician."

Continued on top of page 22

ARTICLE CONT.

Id. at 1231. From reviewing South Carolina strict liability law, the court pointed out that other jurisdictions had adopted the learned intermediary rule, and it believed that South Carolina would as well. *Id.* at 1231. Since *Brooks v. Medtronic*, numerous federal court decisions interpreting South Carolina law have reached this same conclusion. *See Odom v. G.D. Searle Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992); *Tarallo v. Searle Pharmaceutical, Inc.*, 704 F. Supp. 653, 659 n.2 (D.S.C. 1988); *Jones v. Danek Medical, Inc.*, No. 4:96-3323-12, 1999 WL 1133272, at *7 (Oct. 12, 1999, D.S.C.); *Sizemore v. Georgia-Pacific Corporation*, Nos. 6:94-2894 3, 6:94-2895 3, and 6:94-2896 3, 1996 WL 498410, at *6 (Mar. 22, 1996, D.S.C.); *Pleasant v. Dow Corning Corp.*, No. 3:92-3180-17, 1993 WL 1156110, at *6 (Jan. 7, 1993, D.S.C.).

In addition, other practitioners have stated unequivocally that South Carolina has adopted the learned intermediary defense, sometimes citing *Bragg* or *Madison* as support. *See,* e.g., http://druganddevicelaw.blogspot.com/2007/07/head-count-whos-adopted-learned.html (visited January 22, 2010) (citing to *Madison* as support that South Carolina has adopted the rule in the non-prescription medical product case); Lynn H. Gorod, "The Evolving Duty of Pharmacists: To Warn or Not to Warn?" 16 S. Carolina Lawyer 14, 16 (July 2004) ("The basis for not extending this duty has widely been premised on the 'learned intermediary doctrine.' This doctrine, which has been accepted in many jurisdictions, *including South Carolina*, provides that manufacturers of prescription drugs have a duty to warn prescribing physicians of a drug's known dangerous propensities.") (Emphasis added).

There is no question that *Bragg* supports that South Carolina has adopted the learned intermediary doctrine (perhaps relabeled as the sophisticated user defense), and South Carolina's federal courts have reached this same conclusion. However, there is very little South Carolina case law in comparison to other states on this issue, and any "adoption" of the doctrine at the state level is likely to be subject to greater argument than in other states, where adoption in the drug and medical device context is often more explicit. *See, e.g. Stone v. Smith, Kline & French Laboratories*, 447 So. 2d 1301 (Ala. 1984); *Hawkins v. Richardson-Merrell, Inc.*, 249 S.E.2d 286 (Ga. Ct. App. 1978); *Pittman v. Upjohn Co.*, 890 S.W.2d 425 (Tenn. 1994) (all explicitly adopting the learned intermediary doctrine in the prescription drug context).

www.scdtaa.com

ARTICLE CONT. FRIM PAGE 20

Confidentiality

Section 111 reports include plaintiff's name, date of birth, medical information, Social Security number, and the amount of the settlement. Accordingly, both plaintiff and defendant have an interest in keeping the report confidential. CMS contends that it is entitled to the settlement information (including amount) regardless of any confidentiality agreement between the parties because the report helps to coordinate Medicare benefits.

Reporting entities must sign a Section 111 "Data Use Agreement" with the federal government. The Agreement requires reporting entities to implement administrative, technical, and physical safeguards against unauthorized use, access and disclosure of the reported information; train personnel on the confidentiality obligations; and grant CMS access for security inspections, among other duties. The Data Use Agreement also references criminal and civil penalties for violation of federal privacy laws, among other obligations.

Reporting entities must ensure that any vendors hired to assist with reporting duties also fulfill these obligations. Accordingly, contracts with vendors should reflect the Data Use Agreement's requirements, and allocate responsibility for Section 111 penalties.

Defendants, insurers and their counsel should also be aware of the privacy and breach notification laws that may apply to the reportable information, such as the Health Insurance Portability and Accountability Act ("HIPAA"), the Health Information Technology for Economic and Clinical Health Act ("HITECH Act"), and state-specific statutes. Vendor contracts should address responsibility for obligations and penalties under these statutes.

Part II of this article will discuss options to minimize Section 111 reporting liabilities.

Eli Poliakoff practices healthcare law in the Charleston office of Nelson Mullins Riley & Scarborough LLP.

The Controversy Over South Carolina's Judicial Merit Selection Process

by Stephanie R. Lamb, Esq.

It is pretty fair to say that six months ago at this time, South Carolina's 9th Circuit Family Court Judge F.P. "Charlie" Segars-Andrews had no idea she would find herself at the center of one of South Carolina's biggest news stories. That is, however, exactly where she finds herself. Judge Segars-Andrews was first elected to the family court bench in 1993 and has remained there for the past sixteen years. When she submitted her re-election application package, she found herself unopposed and facing what is usually a rubber stamp qualification process. However, to Judge Segars-Andrews' surprise, what is usually a rubber stamp turned into anything but that. The South Carolina Judicial Merit Selection Commission has placed a roadblock in Judge Segars-Andrews' way to re-election, a roadblock that whether fairly or unfairly placed may just turn South Carolina's judicial selection process on its head. What follows is a summary of the events concerning Judge Segars-Andrews' re-election and a discussion as to where the matter now stands.

On November 4, 2009, the Judicial Selection Merit Commission held a public hearing to review Judge Segars-Andrews' fitness for re-election. Judge Segars-Andrews had one complaint filed against her by William R. Simpson, Jr., who had been a former litigant in her court. Mr. Simpson testified before the Commission, as did his attorney Steven S. McKenzie, who the Commission had subpoenaed.

Mr. Simpson testified concerning his loss of faith in the judicial system. In a family court case between Mr. Simpson and his wife, Judge Segars-Andrews informed the parties at the end of the trial that she needed to recuse herself because of her husband's past fee sharing relationship with Mrs. Simpson's lawyer. However, after reviewing a brief submitted by the wife's lawyer, with an accompanying affidavit from Professor Nathan Crystal, the judge determined she had a duty to hear the case and made a ruling. Importantly, though not well publicized, is the fact that the only reason why Judge Segars-Andrews heard the Simpsons' case in the first place was because a settlement agreement between the Simpsons had been set aside by another family court judge. Mr. Simpson, the one who testified concerning Judge Segars-Andrews' ethical fitness, had induced his wife to sign a settlement agreement whereby she would receive roughly $40,000 of an $800,000 estate. Ironically, however, this man's single complaint concerning a judge's ethical fitness has perhaps single-handedly derailed the career of a judge who has been seated for sixteen years, as well as elicited questions concerning the constitutionality of the entire South Carolina judicial selection process.

After the November 4th hearing, the Commission, in a 9-1 vote, found Judge Segars-Andrews unqualified for re-election. On December 2, 2009, the Commission reconvened to determine whether it should reopen the hearing regarding Judge Segars-Andrews' qualifications. Professor John P. Freeman, a member of the Commission, made a motion to do so, but the motion failed for lack of a second. However, the Commission heard testimony from the judge and considered four affidavits, concerning the facts of the Simpson case. Nevertheless, the Commission held a vote at this meeting and by a majority of 7-3, the Commission found Judge Segars-Andrews unqualified for the second time. According to the Commission, this was based on the "one complaint filed against her by Mr. William R. Simpson, Jr.[,]" a complaint which the Commission on Judicial Conduct and the South Carolina Court of Appeals both determined was unfounded.

In the past, findings of "unqualified" have gone unchallenged as there is no current method of appeal. However, Judge Segars-Andrews elected to file suit against the Judicial Merit Selection Commission, and requested the South Carolina Supreme Court hear the case in its original jurisdiction. She alleged that the existence of legislators on the Commission, and the Commission's determination she was unfit, violate the South Carolina Constitution. She based the latter argument on the fact that the judicial branch had already decided in her favor on the issue in the underlying ethical complaint, and that the Rules for Judicial Disciplinary Enforcement forbid allegations in a dismissed complaint to be used for any purpose. In fact, to support her contention, Judge Segars-Andrews' brief quotes a former judge of the South Carolina Court of Appeals who has said that this case presents a "constitutional crisis."

On January 21, 2010, the Judicial Merit Selection

Continued on next page

Commission issued a press release informing the public that in light of the litigation concerning the constitutionality of the composition of the Commission, “the Commission has suspended all screenings for judicial seats until this issue is resolved.” This means that the candidates who were screened by the Commission prior to this date could proceed to election before the South Carolina General Assembly, but that no additional, potential candidates would be screened until resolution of the underlying case. On January 22, 2010, the South Carolina Supreme Court determined it would hear Judge Segars-Andrews’ case.

On February 3, 2010, a judicial election took place for candidates who previously had been found qualified by the Commission. Nine judges were elected by the General Assembly on that day. However, the decision by the Commission to suspend further judicial screenings has left several judicial seats vacant and has potential candidates sitting on the edge of their seats.

What happens next? The Commission’s brief was due to the Court on February 11, 2010, and Judge Segars-Andrews had five days to file a reply brief. The South Carolina Supreme Court will hear oral arguments for the case on March 2, 2010. In the mean time, the Judicial Merit Selection Commission has halted screening, and when and if they reconvene, they will be screening for Judge Segars-Andrews’ seat and Chief Judge John Few’s former seat. When exactly this screening takes place depends on how quickly the Supreme Court issues its opinion in the Segars-Andrews case. However, it is fully expected that the Supreme Court will handle this case rather expeditiously.

For more information concerning the content of this article, please see:

http://www.scstatehouse.gov/judicialmeritpage/FinalSegarsAndrewsCharlie.pdf

http://www.judicial.state.sc.us/whatsnew/SegarsAndrewsWebsite.pdf

http://www.scstatehouse.gov/judicialmeritpage/1-21-2010PressRelease.docx

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 access on www.dri.org

Application of Affidavit of Merit Statute to Indemnity Claims

Defense attorneys who represent design professionals welcomed South Carolina's enactment of an Affidavit of Merit statement codified at S.C. Code Ann. §15-36-100, et seq. Under these statutes, a plaintiff who asserts a negligence claim against certain professionals must file an affidavit of a qualified professional. This affidavit must be filed with the Complaint and must allege at least one negligent act by the defendant. Although seemingly simple, there are numerous situations where there is no clear guidance on whether the affidavit requirement applies. One such example is where a defendant seeks to assert an indemnity claim against a design professional.

Following are two Circuit Court Orders on this subject. In the first Order, Judge Young held that the affidavit requirement did not apply to such a claim. In the second Order, Judge Newman held that the affidavit requirement did apply to an indemnity claim.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS
C/A NO.: 2007-CP-32-0619

ORDER ON MOTION TO DISMISS
(GRANTING IN PART/DENYING IN PART)

Russell Dawson and Debbie K. Werth, Plaintiffs,
vs
Laurel Hill Development Co., LLC and Lake Frances Development, Inc., Defendants.
****
Lake Frances Development, Inc.,
Third-Party Plaintiff,
vs.
Peritus Civil, Inc., F&ME Consultants, and U.S. Group, Inc., Third-Party Defendants.

This matter comes before me upon motion of Third-Party Defendant Peritus Civil, Inc. pursuant to Rule 12(b)(6) SCRCP asking that the causes of action asserted against it be dismissed. For the reasons set forth herein, the motion is granted in part and denied in part.

A hearing on this matter was held before me on November 12, 2009, at the Lexington County Courthouse. Present and participating in the hearing were Rick Pierce for Third-Party Defendant Peritus Civil, Inc. and Glenn Elliott for Defendant/Third-Party Plaintiff Lake Frances Development, Inc.

It appears that this case arises out of the failure of an earthen dam and spillway and the rush of flooding water that resulted. Plaintiffs own land downstream of the dam which abuts the creek bed and they allege that as a result of the rushing floodwaters that personal property was damaged and/or lost and the land itself has been harmed or otherwise devalued. At the time of the incident, Defendant/Third-Party Plaintiff Lake Frances Development, Inc. (hereinafter "Lake Frances") was in negotiations with Defendant Laurel Hill Development Co., LLC (hereinafter "Laurel Hill") for purchase of land, which included the earthen dam and spillway, for development as a subdivision. As part of its due diligence for the project, Lake Frances retained Third-Party Defendant Peritus Civil, Inc. (hereinafter "Peritus") and other engineers to inspect the earthen dam and spillway for purposes of making recommendations as to any needed repairs and to provide a design and repair estimate for any such repairs. Although the details of the inspection efforts have yet to be confirmed for the record of this case, it is known that after some portion of the inspections, but before the engineers completed any designs or recommendations, the earthen dam and/or spillway failed on March 6, 2006.

It further appears that Plaintiffs initially filed suit against Laurel Hill but later amended their Complaint to also sue Lake Frances, alleging ownership and maintenance of an earthen dam and spillway as an ultra hazardous activity and also alleging negligence for failure to properly maintain the dam and spillway. In addition to denying Plaintiffs' allegations and asserting affirmative defenses, Lake Frances also issued a Third-Party Complaint against Peritus and the other engineers alleging causes of action for negligence, breach of the implied warranty of workmanlike service, and equitable indemnification. In response to the Third-Party Complaint, Peritus filed its Motion to Dismiss.

§15-36-100 *Code of Laws of South Carolina* (1976, as amended) which went into effect on July 1, 2005, as part of the "South Carolina Non-Economic

Continued on next page

Damages Awards Act of 2005," reads, in pertinent part, as follows:

> **§15-36-100. Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.**
>
> …
>
> (B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional license by or registered with the State of South Carolina and listed in Subsection (G) or against any licensed healthcare facility alleged to be liable based upon the action or inaction of a healthcare professional licensed by the State of South Carolina and listed in Subsection (G), the plaintiff must file as part of the Complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.
>
> ….

The type of affidavit required by §15-36-100 has been labeled as an "Affidavit of Merit." Lake Frances did not file such an affidavit with its Third-Party Complaint. Peritus takes the position that because Lake Frances did not file such an affidavit with its Third-Party Complaint (nor did it provide such an affidavit within forty-five days of filing the Third-Party Complaint as is also allowed under the statute), that the Third-Party Complaint in its entirety should be dismissed. However, Lake Frances argues that an Affidavit of Merit is not required for a Third-Party Complaint.

As noted above, §15-36-100 is relatively young and as of this writing no South Carolina Appellate Court has issued a written opinion interpreting this statute.

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the Legislature. In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers. If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. *Cowan v. Allstate Insurance Co*., 351 S.C. 626, 571 S.E.2d 715 (S.C. App. 2003) (internal citations omitted).

As quoted above, one of the opening phrases of Subsection (B) of the statute states, "…in an action for damages alleging professional negligence…." Peritus argues that the Third-Party Complaint is an "action" and that Lake Frances' claims for negligence, breach of the implied warranty of workmanlike services, and equitable indemnification are all based on the underlying allegation that Peritus committed some act or omission of professional negligence. In response, Lake Frances acknowledges that a Third-Party Complaint is an "action" as that term is used in legal parlance but the statute goes on to state, "…the **plaintiff** must file as part of the **complaint** an affidavit of an expert witness…." (emphasis added). Lake Frances further argues that the words "plaintiff" and "complaint" are plain, simple words that have definite meanings in the law and that in the present case Lake Frances is not the "plaintiff" and it did not file the "Complaint." Lake Frances further points out that had the Legislature intended for the requirements of this statute to apply to participants in a lawsuit other than the "plaintiff" then the Legislature could have used the word "party." Further, had the Legislature intended the statute to apply to any type of legal claim asserted against a profession covered by the statute that it could have used the word "pleading" instead of the word "complaint." For example, had the Legislature intended the interpretation asserted by Peritus it could have worded this part of the statute to read, "…a **party** must file as part of its **pleading** an affidavit….". Lake Frances therefore argues that because the words used by the Legislature in this statute are plain and unambiguous that the Court does not need to turn to the rules of statutory construction and that the statute should be interpreted exactly as it is written and not with the broader interpretation asserted by Peritus.

Additionally, Lake Frances brings to this Court's attention the case of *Diocese of Metuchen v. Prisco & Edwards*, AIA, 374 N.J. Super. 409, 864 A.2d 1168 (Sup. Ct. of N.J., App. Div. 2005) which is based upon facts very similar to those at issue this case. In that case, the Court, interpreting the New Jersey "Affidavit of Merit" statute, which included the language, "In any action for damages…the plaintiff shall…provide each defendant with an affidavit of an appropriate licensed person….", did not require a third-party plaintiff to provide an Affidavit of Merit to support its Third-Party Complaint which alleged only a cause of action for equitable indemnification. In coming to that conclusion, in its written opinion the New Jersey Court made the following statements or observations which this Court feels are pertinent to its interpretation of the South Carolina statute:

> …[since] we are reminded to look beyond the label used in the pleading to the substance of the matter, we decline here to conclude that [third-party plaintiff] must serve the Affidavit of Merit merely because the word "plaintiff" appears as part of its party designation.
>
> We conclude that the third-party complaint filed here…seeks only to direct the claims

made by plaintiff from the only named defendant to the party at fault rather than…to raise a new affirmative claim.

864 A.2d at 1173.

In *Diocese of Metuchen* the New Jersey Court also noted the practical problem and resulting unfairness that would be created if it was to interpret the statute to require a third-party defendant to present an Affidavit of Merit under these circumstances. In that case, the building owner chose to sue its architect for the alleged improper design of certain mechanical engineering portions of the building (including hearing, ventilation, and air conditioning system) but plaintiff did not sue the consulting engineer that actually designed those systems. The architect was therefore forced to add the consulting engineer to the case via Third-Party Complaint. In ruling that the New Jersey Affidavit of Merit statute did not require the filing of such an affidavit for a Third-Party Complaint alleging equitable indemnification, the court also stated

…we decline to hold that the named defendant, while asserting that neither it nor its consultants were negligent, should be required to make a better case against the professional consultants it adds to the litigation as third parties than plaintiff did for itself.

864 A.2d at 1173.

This Court finds the *Diocese of Metuchen* case to be both instructive and persuasive on this issue.

After review of the Motion to Dismiss, the pleadings at issue, the submissions of counsel, the statute in question, the *Diocese of Metuchen* case identified above, and after considering the arguments of counsel, this Court makes the following findings:

a) The wording of §15-36-100 Code of Laws of South Carolina (1976, as amended), especially the Legislature's use of the words "plaintiff" and "complaint," is plain, unambiguous, and this Court need not resort to the common law rules of statutory construction to determine the intent of the Legislature;

b) In the context of §15-36-100, the phrase "action for damages" does not include a Third-Party Complaint for either contractual or equitable indemnification which does not seek damages in addition to those asserted by the "plaintiff";

c) In the context of §15-36-100, the word "plaintiff" should not be defined to include a third-party plaintiff asserting only claims for either contractual or equitable indemnification and who is not seeking damages in addition to those asserted by the "plaintiff";

d) In the context of §15-36-100, the word "complaint" should not be defined to include a third-party complaint alleging only claims for either contractual or equitable indemnification and which does not seek damages in addition to those asserted by the "plaintiff."

DUE TO THE FOREGOING, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion to Dismiss of Third-Party Defendant Peritus is granted as to the causes of action asserted by Lake Frances for negligence and breach of implied warranty of workmanlike services and those causes of action are hereby dismissed without prejudice. However, the Motion to Dismiss is denied as to the cause of action asserted by Lake Frances for equitable indemnification.

IT IS SO ORDERED!

Sumter, South Carolina

December 4, 2009

WILLIAM JEFFREY YOUNG

CIRCUIT COURT JUDGE

****

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS
C.A. No.: 2007-CP-07-2706

ORDER GRANTING ADC ENGINEERING, INC.'S MOTION TO DISMISS HARDEN FRASER CONSTRUCTION INC. A/K/A FRASER CONSTRUCTION INC.'S FOURTH AMENDED THIRD PARTY COMPLAINT

NORTH SHORE PLACE HORIZONTAL PROPERTY REGIME AND NORTH SHORE PLACE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiffs,

vs.

NORTH SHORE PLACE DEVELOPMENT COMPANY, INC., GRAVES CONSTRUCTION COMPANY, INC. a/k/a GRAVES COMMERCIAL BUILDERS, INC., HARDEN FRASER CONSTRUCTION, INC., a/k/a FRASER CONSTRUCTION, INC., and GROUP 3 ACHITECTURE INTERIORS PLANNING, LTD.,

Defendants,

HARDEN FRASER CONSTRUCTION, INC., a/k/a FRASER CONSTRUCTION, INC.,

Third-Party Plaintiffs,

vs.

Continued on next page

ABG CAULKING CONTRACTORS, INC., CONRAD CONSTRUCTION COMPANY, INC., PARADIGM ENTERPRISES, INC., BATISTA ENTERPRISES d/b/a PANA ROOFING, CONE CAULKING COMPANY, CENTER BROTHERS, INC., GALE INDUSTRIES, INC. d/b/a GALE INSULATION OF THE LOWCOUNTRY and/or GALE INSULATION, SOUTHERN STATES REBAR OF SOUTH CAROLINA, INC., B&B MASONRY, RODNEY BATISTE d/b/a B&B MASONRY, CALVIN MITCHELL; CALVIN MITCHELL d/b/a HANDI CONCRETE FINISHING, INC., K CONSTRUCTION, INC. a/k/a K CONSTRUCTION COMPANY, INC., RILEY CONCRETE CONSTRUCTION, DEPENDABLE PLUMBING COMPANY, WHITAKER LABORATORY INC, BUNTON CONSTRUCTION, INC. n/k/a ROBBIE BUNTON CONSTRUCTION, LLC, CLELAND CONSTRUCTION CO., INC., ALAN ULMER, individually, and ULMER BROTHERS, INC., PIEDMONTE PAINTING AND POWER WASHING, PIEDMONTE PAINTING, INC., BONITZ OF GEORGIA, INC., SOUTHEASTERN FIRE PROTECTION, INC., DULOHERY, WEEKS AND GAGLIANO, INC., AND ADC ENGINEERING, INC.,

Third-Party Defendants,

CONRAD CONSTRUCTION COMPANY, INC.,
Fourth-Party Plaintiffs,
vs.
YEAR ROUND POOL CO.,
Fourth-Party Defendants.

This matter came before the Court on April 13, 2009, on ADC Engineering Inc.'s ("ADC") Motion to Dismiss Harden Fraser Construction Inc. a/k/a Fraser Construction Company Inc.'s ("Harden Fraser") Fourth Amended Third Party Complaint. For the reasons set forth below, ADC's Motion is GRANTED.

FACTUAL BACKGROUND

ADC is a full service professional engineering firm with locations in Hanahan and Irmo, South Carolina. As a consultant to Group III Architecture Interiors Planning, LLC ("Group III"), ADC provided certain engineering design services for the construction of the North Shore Place Condominium project located in Hilton Head, South Carolina ("the Project"). Plaintiffs' complain of myriad problems with the Project, including elements related to ADC's services. Harden Fraser was the general contractor for the construction of the Project. In its Fourth Amended Third Party Complaint, Harden Fraser alleges that ADC provided services in conjunction with design, development and/or construction of the North Shore complex, and Harden Fraser asselts indemnity claims against ADC.

HARDEN FRASER'S FOURTH AMENDED THIRD PARTY COMPLAINT

Harden Fraser's Fourth Amended Third Party Complaint asserts indemnity claims against ADC based on the following:

1. In the event that Plaintiffs establish that the materials and/or selvices of ADC were not in compliance with the relevant contract documents, industry standards and/or building code requirements, and Harden Fraser is held liable to Plaintiffs for ADC's wrongful acts, omissions, negligence and/or representations, Harden Fraser is entitled to common law or equitable indemnification (Harden Fraser's Fourth Amended Third Party Complaint ¶¶ 72-77).
2. In the event that Plaintiffs establish that ADC beached implied warranties of workmanlike services in connection with design, engineering, construction and/or development of the Project, and Plaintiffs obtain judgment against Harden Fraser for breach of implied warranties of workmanlike services, Harden Fraser is entitled to judgment against ADC in that amount (Id. ¶¶ 78-81).
3. In the event that Plaintiffs establish that ADC failed to exercise due care in the provision of materials or services in connection with design, engineering, construction and/or development of the Project, and Plaintiffs obtain judgment against Harden Fraser as a direct, foreseeable and proximate result of ADC's negligence, Harden Fraser is entitled to judgment against ADC in that amount (Id. ¶¶ 82-85).
4. In the event that Plaintiffs prove that the Harden Fraser contract was breached due to improper or inadequate materials or services provided by ADC, and in the event that ADC beached its contract by failing to adequately provide materials and services in connection with design, engineering, construction and/or development of the Project, Harden Fraser is entitled to judgment against ADC in that amount (Id. ¶¶ 86-89).

In support of each of these indemnity claims, Harden Fraser alleges that it may be subject to liability to Plaintiffs because of ADC's "services in conjunction with the original design, development and/or construction" of the Project. (Id. at ¶ 75 (emphasis added).) Harden Fraser further alleges that the breach of implied warranties of workmanlike services, duty of care in providing services and materials, and contractual responsibility for provision of adequate materials and/or services arise "in connection with their respective undertakings regarding design, engineering, construction and/or development." (Id. ¶¶ 79; 87; See also ¶ 83 (emphasis added).)

Continued on bottom of page 30

Legislative Update

Workers' Compensation Commission

Governor Mark Sanford has nominated Lewis Creel to the Workers' Compensation Commission. He is nominated to serve in the seat currently being held by Commissioner Bryan Lyndon whose term expires on June 30, 2010. Lewis Creel was formerly the human resources manager for ALCOA-Mt. Holly and served as the Chairman of the Governor's Workers' Compensation Task Force. Also, Governor Sanford nominated Commissioner Susan Barden for reappointment to a new six year term. This would be her second full term. The nominations must be confirmed by the Senate.

Tort Reform Legislation

The last round of Tort Reform occurred almost 5 years ago and included reform of joint and several liability and venue. The South Carolina Civil Justice coalition, comprised of business and industry groups, corporations and the healthcare community, worked to have Tort Reform bills introduced in the House and Senate in early 2009 (S. 350 and H. 3489) to begin to address some issues not included in the previous reform bill. As introduced the bills contained the following provisions:

Admissibility in Civil Actions of Nonuse of Seat Belt

• Allows the non-use of seat belts to be admissible in civil cases to reduce damages if injury was caused by failure to wear a seat belt.

Appeal Bond Waiver

• Limits an appellant surety bond to $25 Million

• Limits an appellant surety bond to $1 Million for small businesses

Class Actions Reform

• Models Federal Court Rule 23

• Immediate appellate review of certification of classes

Noneconomic Damages

• Provides for a limit of $350,000 award per entity, allowing for total of $1.05M to be awarded.

Private Attorney Retention

• Provides for accountability and standards for the hiring of outside legal counsel by the State of South Carolina.

Punitive Damages

• Limits awards to 3 times compensatory damages or $250,000 whichever is greater

• Limits awards to 3 times compensatory damages or $250,000 whichever is less for small businesses

Regulatory Compliance Congruity with Liability

• Under the act, if a product or service is in compliance with regulatory standards or approved by a government agency, the manufacturer is not subject to claims provided the product or service was in line with pertinent government regulations.

Statute of Repose

• The bill has a clarifying clause to be added to Section 15-3-670 stating that a possible building code violation is not deemed gross negligence or recklessness per se.

Piercing the Corporate Veil

• The bill provides that no claim or discovery may seek to pierce the corporate veil until the plaintiff has obtained a judgment against a company.

Consumer Protection Act

• Amends the Consumer Protection Act to include a compliance exemption relating to the Federal Trade Commission, limiting damages to out-of-pocket losses, and clarification of the causation and proof requirements in recovering damages.

Fast forward to the 2010 tort reform movement. The Senate tort reform subcommittee has held several hearings on the provisions to hear testimony from all interested parties on the bill. No decisions have been made as to what issues will be included as the subcommittee considers its deliberations. Across the statehouse complex in the House office building, there has been no progress on the House bill. There have been several meetings with House leadership and the SC Civil Justice Coalition and the SC Association for Justice (formerly the SC Trial Lawyers Association) - the two main opposing parties – have been meeting to try to reach a compromise. Given this is the second year of a two-year session, the legislation will need to pass both bodies by the first Thursday in June or it will need to start over in January of 2011.

Over the period of time since the bills were introduced and negotiations have been ongoing, the SC Supreme Court ruling in Sapp v. Ford Motor Co., the Economic Loss Rule issue has been resolved. Beyond that, as might be imagined, the greatest disagreement centers on non-economic damage limits. That is not to say there is agreement on the other issues. Leaving aside non-economic limits, the most widely discussed issues where there is a chance of compromise among the parties are punitive limits, appeals bonds, class action reform, attorney retention, Statute of Repose reform, piercing the corpo-

Continued on top of page 30

Legislative Update Cont.

rate veil and possibly admissibility of seat belt use. As is typical, the devil is in the details on these issues.

It is expected that the Senate Judiciary Committee will report a bill out to the floor of the Senate this year. Given the Senate rules that allow one Senator to keep the bill from being debated barring procedural maneuvering to set it for special order, it remains to be seen if a compromise is struck that allows the bill to be passed by the full Senate this year. On the House side, it is expected that a bill – although content uncertain at this point – will not only pass out of the House Judiciary Committee but will also pass out of the full House. If the legislation fails this year, the Civil Justice Coalition likely will have the legislation reintroduced next year with much the same provisions.

Recent Orders cont. from page 28

FINDINGS

The Court finds that ADC is a professional engineering firm which provided professional services on the Project. The Court finds that Harden Fraser's indemnification claims are predicated upon ADC's preparation of design documents and provision of engineering services. Therefore, the Court holds that the provisions of S.C. Code § 15-36-100 apply to the claims asserted by Harden Fraser against ADC. Harden Fraser failed to comply with the requirements of S.C. Code § 15-36-100, because it failed to file an Affidavit specifying at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence. Therefore, Harden Fraser's claims against ADC shall by and are hereby DISMISSED for failure to state a claim upon which relief may be granted.

Harden Fraser argued that S.C. Code § 15-36-100 should be strictly construed to apply to only the negligence cause of action, because the statute refers only to "professional negligence." Therefore, Harden Fraser argued that the statute does not apply to its breach of warranty and breach of contract claims against ADC. The Court does not find this argument compelling. Our courts have specifically held that to prove both negligence or breach of warranty claims against a design professional, a plaintiff must present expert testimony to establish the standard of care and the professional's deviation from the standard of care. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 204 (S.C. Ct. App. 2002). Professional negligence is a predicate act or omission upon which various causes of action could be alleged against a design professional. The Court holds that S.C. Code § 15-36-100 is not limited to a particular legal or equitable cause of action against a design professional, but applies to any cause of action against a design professional predicated upon a breach of that professional's standard of care. In this case, all of Harden Fraser's claims against ADC are based on allegations of the breach of ADC's standard of care as an engineer. Therefore, the provisions of S.C. Code § 15-36-100 apply, and Harden Fraser's claims against ADC shall be and hereby are DISMISSED.

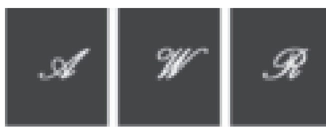
AND IT IS SO ORDERED,
May 14, 2009
Conway, SC
Clifton Newman

A. William Roberts, Jr. and Associates
Court Reporting, Videography, and Videoconferencing

Because tomorrow isn't fast enough.

- View the proceedings in realtime on your laptop simultaneously with our Certified Realtime Court Reporters.
- Also ask about our revolutionary, case-winning *Visionary* trial presentation software.

24/7 Worldwide scheduling
www.scheduledepo.com
(800) 743-DEPO



Case Notes

Summaries prepared by Van Horger and Alan Lazenby

Following are summaries of selected State Court decisions from November 1, 2009, through February 1, 2010.

Featured Case Note

Barbour v. International Union, *No. 08-1740, 2010 U.S. App. LEXIS 2389 (4th Cir. February 4, 2010)*

The Fourth Circuit recently issued an opinion modifying its approach to the timing of consent necessary for removal. The Fourth Circuit now follows what has been termed the "last-served defendant rule," meaning that a subsequently served defendant may remove a case to federal court even if earlier served defendants failed to remove within the thirty-day period so long as those defendants joined the removal within thirty days of service on the later-served defendant. *Barbour v. Int'l Union*, No. 08-1740, 2010 U.S. App. LEXIS 2389, 29-30 (4th Cir. February 4, 2010).

Previously, removal in the Fourth Circuit had been largely interpreted as controlled by footnote 3 in *McKinney v. Bd. of Tr. of Mayland Cmty. Coll.*, which states:

> [W]here B is served more than 30 days after A is served, two timing issues can arise, and the law is settled as to each. First, if A petitions for removal within 30 days, the case may be removed, and B can either join in the petition or move for remand. *See* 28 U.S.C. § 1448. Second, if A does not petition for removal within 30 days, the case may not be removed.

955 F.2d 924, 926 (4th Cir. 1992). While *McKinney* involved multiple defendants served at different times, the first-served defendants in *McKinney* had timely filed a removal petition. Therefore, the issue in *McKinney* was whether later-served defendants could join in the removal petition after the expiration of thirty days from the date the first defendant was served (but within the individual defendant's thirty-day window after service).

The *Barbour* court was faced with the question of whether removal is timely when a first-served defendant fails to file a removal petition within thirty days of service, but joins in the petition of a later-served defendant within thirty days of service on the later-served defendant. *Barbour* at 29-30. In finding that removal is timely in this situation, the *Barbour* court concluded in a 2-1 decision that footnote 3 of *McKinney* was non-binding precedent. *Id*. The Court reasoned that the language of the footnote was not necessary to the holding of that case and therefore must be considered *dicta. Id*. at 19.

The *Barbour* court then proceeded to discuss the merits of the "last-served defendant" rule. The Court found "[i]t would be an odd and seemingly unjust result for a federal court's (removal) jurisdiction to rest upon a first-served co-defendant's deliberate or careless inaction." *Id.* at 27. Thus, the Barbour court adopted the last-served defendant rule and held that "in cases involving multiple defendants, each defendant, once served with formal process, has thirty days to file a notice of removal pursuant to 28 U.S.C. § 1446(b) in which earlier-served defendants may join regardless of whether they have previously filed a notice of removal." *Id.* at 29-30.

The decision is considered a win for defendants, as it removes the possibility of unfair forum shopping by plaintiffs through deliberate staggering of service of process on defendants so that removal is difficult or unlikely. -VH

Csae Notes continued on next page

Auto Accident – Evidence of Insurance to Show Bias – Medical Record Exception to Hearsay Rule

Plaintiff in Todd v. Joyner, Op. No. 26722 (S.C. Sup. Ct. Filed November 2, 2009) (Shearouse Adv. Sheet No. 47 at 11) appealed the amount of the jury's verdict in this admitted liability wreck case. The jury returned a verdict for the amount of Plaintiff's claimed medical ills only. Defendant's expert testified that Plaintiff suffered no permanent impairment and that any treatment Plaintiff received more than 4 months after the accident was not reasonably related to the accident.

Plaintiff sought to introduce evidence that Defendant's retained medical expert had previously been retained by Defendant's insurer to consult and offer testimony in litigation involving other insureds. According to Rule 411, SCRE, evidence that a party was or was not insured is not admissible to prove negligence. This rule will not apply to exclude evidence of insurance "when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." *Id*. In *Yoho v. Thompson*, 548 S.E.2d 584 (S.C. 2001), the Court held that if Rule 411 does not exclude evidence of insurance, the Trial Court should perform a Rule 403 analysis to consider whether the probative value of the evidence substantially outweighs the danger of unfair prejudice and potential confusion of the jury.

The Court in *Yoho* adopted the "substantial connection" analysis to determine whether evidence of an expert's connection to an insurer is sufficiently probative to outweigh any unfair prejudice. If the expert has a substantial connection to the insurance company, then evidence of insurance should be admitted. Here, Plaintiff presented evidence that the expert worked on eighteen different matters for the insurer and was paid approximately $60,000 for this work during a three-year period. This was not sufficient to establish a "substantial connection." The Court noted that the expert was paid a fee rather than having an employment relationship. Furthermore, there was no evidence of the expert's total earnings during the three-year period, so there was no basis for the Trial Court to determine what percentage of the expert's income was paid by the insurer.

Plaintiff also appealed the Trial Court's decision to allow the expert to read from Plaintiff's medical records during his testimony because this was inadmissible hearsay. The Court noted that most of the portions of medical records referred to Plaintiff's own statements or complaints to her doctors. Therefore, the testimony fell under the exception to the hearsay rule regarding statements for the purpose of medical diagnosis or treatment. Rule 803(4), SCRE. – AL

Promissory Estoppel

Craft v. South Carolina Commission for the Blind, Op. No. 4628 (S.C. Ct. App. filed November 3, 2009) (Shearouse Adv. Sh. No. 48 at 61).

Plaintiff was licensed by the Commission as a self-employed vendor at the county square in Greenville. In 2005, Plaintiff submitted a bid for a vending position at Perry Correctional Institution ("Perry"). According to the bid notice, the plaintiff was scheduled to begin work at Perry in November 2005 or March 2006. Plaintiff's counselor with the Commission offered him the position at Perry which Plaintiff accepted. Pursuant to the Commission's rules, a vendor can only operate one vending location at a time. The Commission thereafter notified the manager at county square that Plaintiff would be opening a vending position at another location and therefore could not maintain his position at county square. The property manager subsequently closed the canteen at county square, effective December 31, 2005, without providing any reason. Plaintiff resigned from his position as vendor at the county square, effective December 29, 2005. On January 4, the Commission sent Plaintiff a proposed, but unsigned, contract between the Commission and the Department of Corrections. The Commission never entered into the contract with the Department of Corrections, and Plaintiff has not worked since the vendor position at the county square was canceled. Plaintiff sued the Commission based on promissory estoppel. After a bench trial, the Circuit Court found Plaintiff failed to establish the elements of promissory estoppel.

Promissory estoppel is equitable in nature. In order to recover under a theory of promissory estoppel a claimant must demonstrate: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance on the promise; (3) the reliance was expected and foreseeable; and (4) injury and reliance on the promise. The applicability of the doctrine of promissory estoppel depends on whether the refusal to apply it would virtually sanction the perpetration of fraud or would result in other injustice. Here, the Court found the plaintiff had reasonably relied on the defendant's promise. However, because there was no evidence in the record to explain why the vendor position at county square was canceled, the plaintiff failed to demonstrate he suffered injury in reliance on the promise. Accordingly, the trial court's decision of finding the plaintiff had not demonstrated the elements necessary to recover under a theory of promissory estoppel was affirmed. – VH

Tort Claims Act – Evidence of Gross Negligence - JNOV

***Brinkley v. South Carolina Department of Corrections*, Op. No. 4629 (S.C. Ct. App. filed November 10, 2009) (Shearouse Adv. Sh. No. 49 at 42).**

Plaintiff sued the Department for injuries he allegedly received during an institutional lock-down. The jury returned a verdict for Plaintiff in the amount of $600,000. The Trial Court granted Defendant a new trial absolute.

The grant or denial of a new trial is a discretionary matter, and it "will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Id*. at 44. Because there was some evidence to support the Trial Court's ruling, the Court of Appeals affirmed. The Court of Appeals noted that apart from the testimony of Plaintiff and two other inmates who claimed to witness the assault, there was no evidence of Plaintiff's damage claims. Plaintiff submitted no medical records substantiating the alleged assault, Plaintiff admitted that he suffered no scars or marks from the alleged assault, and a doctor who treated Plaintiff four days after the alleged assault testified he saw no signs of any assault and Plaintiff did not report any assault. Finally, there was evidence that the jury considered punitive damages – which is not allowed in a Tort Claims Act case. Plaintiff's attorney argued during his closing argument that "in order to get somebody's attention you've got to make them pay money. . . ." *Id.* at 45. Therefore, the Trial Court's decision was supported by evidence and the decision is affirmed. – AL

Insurance Coverage – Personal Jurisdiction

***Leggett v. New York Mut. Fire Ins. Co.*, Op. No. 4630 (S.C. Ct. App. filed November 10, 2009) (Shearouse Adv. Sh. No. 49 at 48).**

In this Declaratory Judgment action, the Trial Court determined that the defendant insurer was subject to personal jurisdiction in South Carolina, and, applying New York law, the Trial Court determined that the defendant insurer provided coverage for the subject accident.

The insurer claimed that it was based in New York, was not licensed to provide insurance in South Carolina, and had no contacts with South Carolina. The Court of Appeals analyzed cases from other jurisdictions involving a "territory of coverage" provision. This type of provision provides that the insurer will defend and indemnify the insured for accidents which occur within a defined territory. Because many accidents lead to litigation, the insurer is on notice that it may be haled into court in multiple jurisdictions. Here, personal jurisdiction was proper because the policy contained a "territory of coverage" provision, the accident occurred in South Carolina, and the insurer was on notice that the vehicle was garaged in South Carolina. -AL

Equitable Tolling – Statute of Limitations

***Hooper v. Ebenezer Senior Services*, Op. No. 26748 (S.C. Sup. Ct. filed December 14, 2009) (Shearouse Adv. Sh. No. 54 at 18).**

Plaintiff commenced this action as a result of Defendant's alleged negligent care for the decedent. The decedent died May 15, 2003 and the statute of limitations unquestionably expired May 15, 2006. On February 8, 2006, Plaintiff's attorney forwarded the pleadings to the Richland County Sherriff's office for service upon Defendant's registered agent listed with the South Carolina Secretary of State. However, service was unsuccessful as the agent had moved to an unknown address. The attorney then hired an investigator who found a personal address for the agent. On March 21, 2006, Plaintiff's attorney attempted to have the Richland County Sheriff's Office serve the agent at a personal address but received an Affidavit of Non-Service because the address was in Lexington County. Next, Plaintiff's attorney attempted to have the Lexington County Sheriff's Office serve the registered agent, but received an Affidavit of Non-Service from the Lexington County Sheriff's Office after the statute of limitations had run. On June 15, 2006, Plaintiff effected service on Defendant by service upon a business with which Defendant was affiliated.

Defendant then moved to dismiss the lawsuit on the basis service was not completed before the expiration of the three year statute of limitations nor within the time limits of Rule 3(a)(2) which requires that service be made within the statute of limitations or if made thereafter be made within 120 days of the filing of the summons and complaint. The trial court granted the defendant's motion for summary judgment and the Court of Appeals affirmed, but the Supreme Court reversed the Court of Appeals. The Supreme Court held the plaintiff was entitled to rely upon public records and the defendant's failure to name a viable registered agent with the South Carolina Secretary of State as required by state law thwarted the plaintiff's repeated attempts to effect service. Under the circumstances the Supreme Court holds it would be inequitable for Defendant to be allowed to benefit from its conduct by obtaining a complete dismissal of Plaintiff's claims. Defendant's failure to properly list its registered agent for service with the Secretary of State as required by state law hindered Plaintiff's pursuit of service. Although Defendant argues it is entitled to dismissal of Plaintiff's lawsuit because Plaintiff should have

Continued on next page

pursued alternative means of service such as publication or service upon the Secretary of State, no where in Defendant's arguments does it acknowledge the obvious fact that the need for alternative means of service was caused by Defendant's own failure to supply the correct information regarding its agent to the Secretary of State as required by law. Plaintiff was entitled to rely on public records and she diligently pursued service on what turned out to be a non-existent agent. Thus it is not equitable that Defendant be the beneficiary of the drastic consequence of a dismissal. Under the unique circumstances of this case the Supreme Court concludes it is appropriate to equitably toll the Statute of Limitations for the time Plaintiff spent in pursuit of Defendant's non-existent agent. The Statute of Limitation's purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law. – VH

Workers' Compensation

***Ervin v. Richland Memorial Hospital*, Op. No. 4636 (S.C. Ct. App. filed December 8, 2009) (Shearouse Adv. Sh. No. 54 at 29).**

Claimant alleged she sustained an accident arising out of and in the course and scope of her employment when she was exposed to perfume fragrances. Claimant argued this exposure aggravated and exacerbated a pre-existing condition such that she became permanently and totally disabled. The Court of Appeals disagreed. To be entitled to compensation for an injury a claimant must show she suffered an injury by accident which arose out of and in the course of the claimant's employment. Thus, to be compensated there must be an injury by accident and such an injury must occur out of and in the course of the employment. The question of whether the compensability of a particular event qualifies as an injury by accident is a question of law. However, the question of whether an accident arises out of and in the course and scope of employment it largely a question of fact for the appellate panel, subject to the substantial evidence standard of review. The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Rather, both parts must exist simultaneously before recovery is allowed.

The phrase "arising out of" refers to the injuries origin and cause. For an injury to "arise out of" employment the injury must be proximately caused by the employment. Therefore, before an injury is deemed to arise out of employment a causal connection must exist between the conditions under which the work is required to be performed and the resulting injury. The causative danger must be peculiar to the work and not common to the neighborhood. Here, the causative danger, the perfume, was exceedingly common. The claimant suffered numerous reactions outside of her employment and under these facts the appellate panel did not commit reversible error in determining that the claimant's accident did not arise out of and in the course and scope of her employment. Having concluded the injury did not arise out of the claimant's employment it is not necessary to consider whether her injury was the result of an accident. - VH

Construction – Private Right of Action on Bond Claim

***Shirley's Iron Works v. City of Union*, Op. No. 4637 (S.C. Ct. App. filed December 9, 2009) (Shearouse Adv. Sh. No. 54 at 35)**

The Subcontractors and Suppliers Payment Protection Act provides that, where a governmental body is a party to a contract to improve real property in excess of fifty thousand dollars, it must require a contractor to provide a labor and material payment bond on a contract. Furthermore, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued. In this matter, the plaintiff subcontractors were not paid by the general contractor and subsequently sued the City of Union for failing to comply with this statute.

The Court of Appeals held that a private right of action exists under the relevant portions of the Suppliers Payment Protection Act ("the Act"), and the claim should be brought under the Act as a tort claim in negligence for breach of the duty the Act creates. It is improper to assert that right by bringing a claim pursuant to the Tort Claims Act for failure to enforce a statute because such claims are clearly barred under the Tort Claims Act. The Act establishes both an affirmative duty on the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond. However, in a tort or contract action under that statute the government's liability is limited to the unpaid balance on the contract. – VH

Auto Accident – Coverage for Multiple Accidents

***Johnson v. Hunter*, Op. No. 4637 (S.C. Ct. App. filed January 11, 2010) (Shearouse Adv. Sh. No. 2 at 39).**

Plaintiff was initially hit by a car traveling in the opposite direction, turning his truck sideways in the road. Plaintiff's airbags deployed, and he unbuckled his seatbelt to exit the vehicle. Before he could exit, another car struck his vehicle a second time causing him serious injury. Plaintiff's UIM coverage set limits for "each accident" and the issue here is what constitutes a single accident in the context of this policy.

Most courts in jurisdictions that have addressed this issue have concluded the question of whether

one or more accident occurred should be evaluated under the causation theory. Under the causation approach the insured's single act of negligence is considered the occurrence from which all claims flow. Courts applying the "cause" theory uniformly find a single accident if cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event. When one negligent act or omission is the sole proximate cause, there is but one accident even though there are several resultant injuries or losses. Taken in its usual sense the word "accident" means a single, sudden, unintentional occurrence and is used to describe the event, no matter how many persons or things are involved. An accident or occurrence in this context should be viewed from the perspective of cause and not effect.

Plaintiff emphasized that the time between the first and second impacts were according to the plaintiff at least 1 ? to 2 minutes. Plaintiff claims the trial court erred in finding one accident without even making a determination of how much time passed between the two collisions. The Court held the plaintiff places too much emphasis on the timing of the impacts. Most cases discussing the causation theory do not rely solely on the timing of events in determining whether or not two accidents occurred. While timing is frequently part of the analysis, the courts place the most emphasis on whether or not one source of negligence set all the subsequent events in motion. The question of whether a single accident occurred under the causation theory will turn on the particular facts of each case and courts will be required to look at all circumstances, including timing, in its analysis. Based upon the record in this matter, the Court held that the collisions resulted from a single act of negligence by the person who caused the first impact. – VH

Workers' Compensation

James v. Anne's, Inc., Op. No. 26762 (S.C. Sup. Ct. filed January 25, 2010) (Shearouse Adv. Sh. No. 4 at 17).

Claimant was injured when she fell down the steps working for Defendant. When plaintiff sought workers' compensation benefits, the Commission found that she was totally and permanently disable and entitled to 500 weeks of compensation. The Commission also found that a lump sum payment was in plaintiff's best interests. The plaintiff requested, over the objection of the defendant, that the Commission include in the order language prorating the award over her life expectancy. The Commission found that it lacked authority to include the language over the Defendant's objection.

The Supreme Court held the Worker's Compensation Commission was not able to extend its powers beyond the scope of expressly authorized actions. Without an express grant from the legislature, the Worker's Compensation Commission is without the power to prorate a lump sum award over plaintiff's life expectancy without consent of both parties. The authority of the Commission is statutorily derived and, therefore, the Commission cannot exceed the scope of the legislature's grant of authority. – VH

Auto Accident – Evidence of Failure to Wear Seat Belt

Sims v. Gregory, Op. No. 4649 (S.C. Ct. App. filed January 28, 2010) (Shearouse Adv. Sh. No. 5 at 65).

Minor was a passenger in a vehicle being driven by her father – Defendant in this action. Plaintiff is the GAL and mother of Minor. Minor was injured in a collision when a third party crossed the center line of the highway and struck Defendant's vehicle head-on. Minor suffered a brain injury because of the accident. Plaintiff alleged that Defendant did not properly secure Minor in violation of the seat belt law and a common law duty to use due care in securing minors. The Trial Court granted Defendant's Motion for Summary Judgment finding that Defendant was not negligent, that the accident was caused by the fault of a third party, and that South Carolina law does not recognize a cause of action for a violation of the seatbelt statute.

The Court of Appeals affirmed the Trial Court. It held that the language of the seatbelt statute clearly provides that evidence of a violation of the statute cannot be used as evidence of negligence. The Court also dismissed Plaintiff's argument that evidence of failing to wear a seatbelt is admissible in support of a common law negligence claim. The Court held: "The South Carolina Supreme Court has held that absent a statutory duty, there was no common law duty to wear a safety belt." *Id*. at 68. - AL

Product Liability Case Notes

Summaries prepared by Brian Comer

Following are summaries of Cases from November, 2009, through January, 2010.

FOURTH CIRCUIT

Pugh v. Louisville Ladder, Inc., No. 08-2141, 2010 U.S. App. LEXIS 131 (4th Cir. Jan. 5, 2010) (on appeal from M.D.N.C.) (Davis, J.).

Plaintiff purchased a ladder from the store and fell while standing on its sixth step. Plaintiff filed this products liability action in North Carolina state court, and Defendants removed it on grounds of

Continued on next page

diversity jurisdiction. At trial, the jury returned a verdict in Plaintiff's favor. The three issues on appeal related to (1) denial of the defendant manufacturer's motion to exclude Plaintiff's experts, (2) exclusion of testimony regarding the absence of end-user complaints about any "cracking" of the manufacturer's ladders with the same model number, and (3) the district court's decision to allow one of Plaintiff's experts to serve as a rebuttal witness. Despite the fact that the case involved North Carolina substantive law, the Fourth Circuit Court of Appeals provided extensive commentary concerning the admissibility of expert testimony and the admissibility of product complaints (or the absence thereof).

First, the appellate court disagreed with the manufacturer that the district court improperly shifted the expert admissibility burden to the manufacturer. The court pointed out that the manufacturer's *Daubert* arguments focused on the conclusions of Plaintiff's experts, as opposed to the principles and methodology used to reach those conclusions (i.e., the primary focus of a *Daubert* inquiry). The court even recognized portions of the transcript where the district court attempted to redirect the manufacturer's focus during the hearing so that the questioning related to the experts' principles and methodology, instead of their conclusions. On these grounds, the court held that the district court did not impose an improper burden on the manufacturer or abuse its discretion in the conduct of the *Daubert* hearing. The court also found that Plaintiffs' experts sufficiently supported their opinions through destructive and non-destructive testing relating to cracking propensity and buckling upon impact.

With regard to the admissibility of the absence of end-user complaints concerning cracking by the manufacturer, the court agreed with the district court's exclusion of this evidence. Federal Rule of Evidence 803(7) allows introduction of the absence of a business record to prove the nonoccurrence of an event, but the rule also requires that such evidence be trustworthy. The court agreed that the testimony proffered by the manufacturer was untrustworthy. The court also upheld the exclusion of testimony relating to "non-cracking" complaints because the manufacturer did not have the supporting business records to document them.

Finally, the court agreed with the district court's application of Federal Rule of Evidence 611(a) so as to allow the Plaintiff to reserve one of his expert witnesses as a rebuttal witness.

DISTRICT OF SOUTH CAROLINA

***Sanders v. Norfolk Southern Corp.*, No. 1:08-2398-MBS, 2010 U.S. Dist. LEXIS 4270 (D.S.C. Jan. 20, 2010) (Seymour, J.).**

Plaintiffs sought to certify a class of persons who were inconvenienced or deprived of the free use of their property located within a five-mile radius of the release of chlorine gas, which resulted from a train derailment. The case was removed to federal court pursuant to the Class Action Fairness Act, and the defendant railroad moved to dismiss the matter for failure to state a claim. One of the claims brought by Plaintiffs was that the Defendants were strictly liable with regard to their transportation of hazardous materials. The district court dismissed this cause of action on grounds that strict liability causes of action relating to transportation of hazardous materials are preempted by the Hazardous Materials Transportation Act and Federal Railroad Safety Act. The district court also dismissed Plaintiffs' nuisance and negligence claims.

***Ingram v. ABC Supply Co., Inc.*, No. 3:08-1748-JFA, 2009 WL 5205970 (D.S.C. Dec. 23, 2009) (Anderson, J.).**

Ingram was injured while using a tar kettle to transfer hot tar to a roof. Central to Ingram's claims was whether the flow valve of the tar kettle, manufactured and sold by Defendants, was defective. Ingram moved for partial summary judgment on the defendant manufacturer's alleged breach of its duty to test the flow valve. The district court denied the motion, explaining that although the defendant manufacturer may not test each new tar kettle's flow valve by running tar through the product, there was sufficient evidence that the manufacturer tested and inspected its tar kettles and their flow valves to submit the issue to the jury.

The defendant manufacturer moved for summary judgment on a number of grounds, including, inter alia, that Ingram could not establish that the tar kettle was defective, that Ingram's own comparative negligence far outweighed any alleged negligence on the part of the manufacturer, and that Ingram's breach of implied warranty for fitness for a particular purpose must fail because Ingram could not establish that the buyer of the tar kettle purchased the product for a particular purpose. Judge Anderson denied the manufacturer's motion for summary judgment on all grounds, with one exception: he agreed Ingram had not established that the buyer of the tar kettle purchased it for a particular purpose and so granted summary judgment on Ingram's claim for breach of warranty for fitness for a particular purpose.

The defendant manufacturer and supplier also filed a motion in limine to exclude a videotape demonstrating the movement of the flow valve. Citing the Fourth Circuit's rule that videotaped evidence purporting to recreate events at issue in a case must be "substantially similar to the actual events to be admissible," Judge Anderson granted the defendants' motion and held that the conditions in the videotape were not sufficiently close to those of the accident to make its probative value outweigh its prejudicial effect. Specifically, the valve in the videotaped demonstration "stuck" every single time, whereas testimony in the case showed that the valve functioned properly at least 60% of the time.

Verdict Reports

Type of Action: Products Liability

Injuries alleged:
Cervical fracture at C6-C7 resulting in quadriplegia.

Name of Case:
Freddie Bartley, as PR for the Estate of Rachel D. Bartley v. Ford Motor Company

Court: South Carolina Court of Common Pleas, Edgefield County

Case number: 2005-CP-19-244

Tried before: Jury (12 members)

Name of Judge: William P. Keesley, Circuit Judge

Amount: $0

Date of Verdict: October 28, 2009

Demand: N/A

Highest offer: N/A

Most helpful experts:

Geoffrey Germane, Ph.D.
Germane Engineering
5314 North 250 West, Suite 310
Provo, Utah 84604

Dr. Germane was qualified and offered expert opinion testimony regarding his reconstruction of Mrs. Bartley's accident. He addressed conditions at the accident scene, damage to the vehicle, and the forces acting upon the vehicle during the accident sequence, including vehicle speeds at various points in the accident sequence, roll rates and the vehicle's final rest position.

Thomas McNish, Ph.D.
Biodynamic Research Corporation
5711 University Heights Boulevard, Ste 100
San Antonio, Texas 78249

Dr. McNish was qualified and offered expert opinion testimony in the areas of biomechanics, occupant kinematics, occupant protection, injury causation, accident severity, statistical injury analysis and injury mechanism. He also testified regarding forces acting on the vehicle occupant during the accident, as well as her response to those forces.

Garry Bahling
Vehicle Assessment Consulting, Inc.
2975 Bullock Drive
Metamore, MI 48455

Mr. Bahling was qualified and offered expert opinion testimony regarding the design of the subject vehicle, including but not limited to crashworthiness issues, particularly as they relate to the vehicle's roof design. Mr. Bahling also testified regarding the design and testing of the roof of the subject vehicle and that the subject vehicle was reasonably safe, crashworthy, and compliant with all governing codes and standards, including Federal Motor Vehicle Safety Standards. Mr. Bahling reviewed the subject vehicle's roof performance in the Federal Motor Vehicle Safety Standard ("FMVSS") 216 Quasi-Static Load Testing and testified that the 2001 Ford Explorer met the demands of that roof strength standard. Mr. Bahling also addressed field and test data demonstrating that roof strength greater than that specified in FMVSS 216 does not benefit belted or unbelted occupants who are at the point of impact in rollover accidents nor does roof strength greater than FMVSS 216 prohibit the potential for partial ejection. Furthermore, Mr. Bahling testified that roof strength greater than that specified in the version of FMVSS 216 that applied to the 2001 Explorer does not appear to reduce roof intrusion in real world accidents.

Attorneys for defendant (and city):
William J. Conroy, Esquire
Campbell Campbell Edwards & Conroy
690 Lee Road, Suite 300
Wayne, Pennsylvania 19087

J. Kenneth Carter, Jr.
Carmelo B. "Sam" Sammataro
Turner Padget Graham & Laney, P.A.
1901 Main Street
Columbia, SC 29201

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

This automotive crashworthiness case arose from the single-vehicle collision that occurred November 8, 2002. On the day of the accident, Plaintiff's Decedent Rachel Diane Bartley was driving her 2001 Ford Explorer eastbound on Pen Creek Road near the town of Saluda, South Carolina. While traveling at approximately 45 to 51 miles per hour, Mrs. Bartley lost control of the vehicle and exited the paved surface of the roadway to her right. She then over-corrected the vehicle to the left and re-entered the roadway before engaging in a counter-clockwise

Continued on next page

yaw and exiting the road to the driver's left. Thereafter, the vehicle wheels dug into the soft earthen shoulder, tripped, and began rolling over into a wooded area and down an approximately three foot embankment adjacent to Pen Creek Road before coming to rest on its roof. Following the accident, but prior to the arrival of emergency response personnel, members of a timber harvesting crew working nearby used a logging skidder to right the vehicle back onto its wheels. Plaintiff's decedent sustained a cervical fracture and was rendered a quadriplegic as a result of the accident. She died approximately two years later as the result of respiratory arrest and hypoxic brain injury.

Proceeding under strict liability and breach of implied warranty causes of action, Plaintiff alleged the 2001 Ford Explorer was defective and unreasonably dangerous to the extent that its roof system was not sufficiently rigid or strong to prevent inward intrusion during a rollover accident and thereby prevent the types of injury allegedly sustained by Plaintiff's decedent. Because rollover accidents can and do occur for a wide variety of reasons and under a wide array of dissimilar circumstances, Ford disputed that the subject vehicle was defective or unreasonably dangerous or that the subject vehicle's roof, as designed, failed to comply with applicable governmental and industry standards governing vehicle roof strength at the time the subject vehicle was manufactured in December of 2000.

Plaintiff's experts criticized the Explorer's roof as unreasonably weak and took the position that a stronger roof prevents roof intrusion into the interior occupant survival space. Armed with a 2005 study released by the Insurance Institute for Highway Safety, as well as the federal government's increased roof strength standard (effective May 2009), Plaintiff's experts opined that increased roof strength would have prevented roof intrusion in this accident and prevented Mrs. Bartley's injuries. Through its experts and scientific testing, Ford demonstrated that the 2001 Explorer met or exceeded the roof strength standard that applied as of the date of manufacture. Further, Ford demonstrated that, given the severity of the accident and the alignment of Mrs. Bartley's head, spine, and torso as the driver's side roof rail struck the ground, an infinitely stronger roof would not have prevented her injuries.

After less than two hours of deliberation, the unanimous 12-member jury returned a verdict in Ford's favor.

Type of Action: Legal Malpractice.

Injuries Alleged:

Foreclosure of 224-acre commercial properties in Chester County

Name of Case:

Moffatt Blair White v. Gaston, Gaston & Marion, P.A. and William L.D. Marion

Court: Chester County Court of Common Pleas

Case #: 2005-CP-12-0492

Tried before: Jury (12 members)

Name of judge: John C. Hayes, III

Amount: Defense Verdict

Date of verdict: September 4, 2009

Demand:

Approximately $500,000.00 in actual damages, plus punitive damages

Highest Offer: N/A

Most helpful experts: (name, title and city)

Jim Sheedy, Attorney at Law, Rock Hill, SC

Attorney(s) for defendant (and city):

Robert F. Goings and Joel W. Collins, Jr., Collins & Lacy, P.C., Columbia, SC

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

This legal malpractice action was filed against a real estate closing attorney and his firm concerning a 1999 land transaction in Chester County. Plaintiff, a retired cattle farmer/truck driver and volunteer fireman, sold a 224 acre tract of unimproved commercial property in Chester, South Carolina to Mr. and Mrs. Lee Faile. Mr. and Mrs. Faile secured financing from Rock Hill Bank and Trust in the amount of $480,000.00 and Plaintiff also provided seller financing in the amount of $286,000.00. At the closing, Plaintiff obtained a second mortgage in the amount of $286,000.00, behind a first mortgage from Rock Hill Bank and Trust in the amount of $480,000.00. Several years later, Carolina First Bank (successor of Rock Hill Bank and Trust) foreclosed on the property and in 2005, the property was sold at public auction.

Plaintiff subsequently brought this legal malpractice action alleging that Attorney William L.D. (Bill) Marion concealed or failed to advise Plaintiff that he was taking a second mortgage in this transaction. Plaintiff claimed he was supposed to be in the first mortgage position and he would have never agreed to sell this property if his interests were subordinate to a bank, or any encumbrances or liens. He maintained he was never informed that a bank was a party to this transaction. He recalled the closing lasting approximately 10-15 minutes and that during the

closing Mr. Marion failed to explain any documents to him, and even concealed the portions of the documentation related to the bank's interest in the property.

Plaintiff alleged Attorney Marion violated his professional duty by failing to competently represent Plaintiff and engaging in a non-waivable conflict of interest by representing all parties (the lender, seller, and purchaser) at the closing. Additionally, Plaintiff alleged that Mr. Marion should have never closed this loan because it was under collateralized, Plaintiff's interest in the property was subordinated to approximately $800,000 in liens, and that this Plaintiff's mortgage was worthless. To support these theories of liability, Plaintiff retained Attorney Dave Whitener, Jr. as a liability expert witness.

In defense of these claims, Defendants showed that Plaintiff clearly understood the nature of this transaction and knew or should have known that he was taking a second mortgage. The second mortgage and terms of the transaction were clearly noted on the documentation Plaintiff signed a closing. Additionally, Mr. Marion testified that he meet with Plaintiff and the borrowers several days before the closing to discuss the terms of the transaction and to advise Plaintiff that he was taking a second mortgage interest behind a $480,000.00 first mortgage to the bank. Mr. Marion further advised all parties to seek separate representation. Based on Mr. Marion's clear understanding that the parties knew and understood the terms of the transaction and the parties desire for common representation in this closing, Mr. Marion agreed to serve as the closing attorney. Plaintiff denied this meeting took place.

Throughout the trial, Defendants presented substantial evidence to corroborate Mr. Marion's testimony that this meeting took place and that the closing did occur in the hasty manner Plaintiff alleged. Defendants were able to discredit Plaintiff's allegations and show that he failed to accurately remember events. For example, Plaintiff testified the closing took place in the firm's downstairs conference room. Defendants showed this was impossible because Defendants did not even own or occupy the downstairs portion of their building until several years after the closing. Defendants also presented phone records, appointment books, and other evidence, including testimony of the law firm's former employees, to refute Plaintiff's recollection of the facts.

Defendants refuted the testimony of Plaintiff's expert Attorney David Whitener through Defendant's expert Attorney Jim Sheedy. Through the opinions of Attorney Sheedy, Defendants demonstrated that it was not the closing attorney's obligation or duty to advise clients or refuse to close a loan based on (1) value of the property; (2) if the transaction is financially sound; (3) loan to value ratio; or (4) the creditworthiness of the borrower. This constitutes business advice, not legal advice. Additionally, Defendants presented inconsistent testimony of Attorney Whitener from a prior legal malpractice case wherein Mr. Whitener testified that these matters fell outside the scope of the closing attorney's duty.

Defendants also argued Plaintiff's claims were barred by the statute of limitations. Defendant argued Plaintiff knew or should have known that he was obtaining a second mortgage in November 1999 at the time of closing, thus barring this claim filed 2005. Plaintiff argued the statute of limitations did not apply because he first learned he held a second mortgage when he was served with a foreclosure summons in 2003.

After several hours of deliberation, the jury unanimously returned a verdict that Plaintiff knew or should have known that he was obtaining a second mortgage on the date of the closing in November 1999, thus barring these claims under the statute of limitations. Additionally, the jury also found that the Defendants did not commit legal malpractice or breach any fiduciary duties.

ATTENTION SCDTAA MEMBERS

The SCDTAA is relying more and more on email to communicate with the membership. Prime examples are the email information sharing system and announcements about SCDTAA events.

A number of emails are being returned as "undeliverable" or "blocked." If you have changed your email address or if you aren't sure the SCDTAA has the correct address please notify the SCDTAA office today.

If you firm is "blocking emails" or if you do not want to receive email communications, please contact the SCDTAA office at (803) 252-5646 or (800) 445-8629.

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

Address Service Requested

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE PAID
Columbia, SC 29201
PERMIT NO. 383