THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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SUMMER 2011
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ISSUE 2
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MARK YOUR CALENDARS

44th Annual SCDTAA
Joint Meeting
July 28th - 30th 2011
Grove Park Inn
Asheville, NC

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

President's Message

by Gray T. Culbreath

"The world is run by those who show up". Though this quote allegedly dates back to 1999, the concepts behind it have been a guiding principal to me for most of my life. In my case, I have been able to successfully mask many of my flaws by working hard and showing up everyday. I frequently remind my daughters of this life lesson and how far it will take you. While the author of the quote is subject to debate, it vividly describes what all of us should observe in our personal and work lives; people tend to fall into two groups: either those who are disengaged from the world around them or those who are active participants in trying to shape the future.

In the South Carolina Defense Trial Attorneys' Association, we count as members many talented defense lawyers from across South Carolina. However, not all of those lawyers are engaged or active in the organization. However, that lack of participation is not because there is no opportunity available for someone to participate. Over the years, the SCDTAA has evolved to provide many leadership and participatory opportunities to our members beyond the executive committee. There are substantive law committees that need chairs, speakers and authors, as well as various committees of the executive committee which annually solicit participation from the membership at large. Each year in December we solicit volunteers for committees in our annual survey. However, like most surveys, we only receive responses from fifteen (15) to twenty (20) percent of the entire membership. Once we get those responses, the leadership works to plug those individuals into their roles. That's the first place you and your firm can show up.

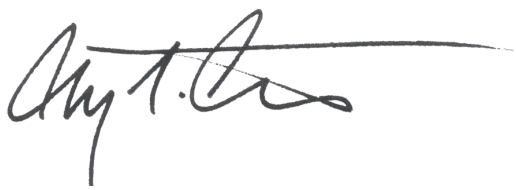
We provide opportunity early with our Young Lawyers section, headed by its president Jared Garraux, which actively solicits the involvement of young defense lawyers. Thus far in 2011, we have had one Young Lawyers' happy hour in Columbia and will have others in Charleston and Greenville before the end of the year. Encourage young lawyers in your firm to show up for these events. They can meet their peers, learn more about the SCDTAA and get a free drink too. I really want to grow our Young Lawyers section, our future, to develop a strong bench where the future leaders of this organization will learn. To do that, all of our firms, mine included, need to encourage our young lawyers to show up to the events they are able. This does not necessary mean they have to attend the Joint or Annual meeting (although we would love to have their attendance) but there are a number of opportunities for them to contribute and become involved. If you want yourself or your young lawyer involved in the SCDTAA, all you need to do is pick up the phone and call me or one of the other officers to make that happen.

Several weeks ago I attended the DRI Mid Atlantic Regional meeting in Asheville. During the course of the meeting, the attendees talked about succession planning and leadership development. One of the other State Association leaders pointed out that they often have trouble looking around their board room during a meeting and seeing the next three (3) or four (4) presidents of their organization. Luckily, we do not have such a problem in South Carolina. However, in order to insure that we always have that depth of leadership, we need to develop young leaders in our firms and encourage them to show up. We also need to make sure that older members of the SCDTAA show up as well.

Several opportunities to "show up" are ahead of us this summer. The first is our trial academy set for July 6-8 in Greenville. Many of you know I had very much hoped to have the trial academy in Spartanburg, the home of my alma mater Wofford College. While that vision did not work out, Ron Wray and his committee have put together a wonderful program and would welcome involvement from your firm. We need breakout leaders, witnesses, jurors and of course attendees. If you are interested in participating, please contact Ron or Aimee Hiers and they will find a spot for you and/or members of your firm.

Later in July we will have the 44th annual Joint Meeting with the Claims Association at the Grove Park Inn in Asheville July 28-30. This has become a meeting that focuses not only on younger lawyers but also the workers compensation practitioner. However, we have programming for more seasoned attorneys like me. The program is wonderful, the venue is cool and I hope to see all of you there. If in the meantime there is some way that we can get you or your firm involved, just get in touch with me and I will find a place for you.

Remember, all you need to do is show up.



Letter From The Editors

by William Brown, Ryan Earhart, and Breon Walker

A renowned politician was once asked, about a time prior to her national prominence, "What newspapers and magazines did you regularly read . . . .?" The frequently maligned response was "I read most of them, again with a great appreciation for the press, for the media. . . . All of them, any of them that have been before me all these years . . . ."

For our work on *The DefenseLine*, this exchange brings to mind two lines of thought. First, when the SCDTAA members are deciding what legal periodicals to read, we hope you read "all of them." However, if you have to choose from among the various legal magazines and publications to enhance your understanding of issues related to the law, we believe *The DefenseLine* should be among your selected reading.

As the editors of *The DefenseLine*, we are seeking to provide useful information, and astute legal insight regarding issues that are of concern and importance to members of the South Carolina Defense Bar and Judiciary. We are continuing our efforts to ensure that the material is timely and will assist defense lawyers in their practices. As we move forward with *The DefenseLine*, we will continue to seek to make slight changes to the format and style to make the publication more useful and easier to read. If you have any suggestions or would like to provide us with comments, we are always open to suggestions on how to improve the style, content or any aspect of *The DefenseLine*.

The second relevant aspect of this politician's response about reading material relates to an "appreciation for the press" or lack thereof. Some may say that we have an "appreciation for the press," but few of us truly do understand or appreciate the effort required to put together a quality publication. We, as defense attorneys, think primarily in terms of billable hours. However, the hours spent in putting together *The DefenseLine* are hours well spent. The ability to communicate current issues and important notices from our firm members will enhance our membership as a whole. We, as editors, work to put in the time needed to create a top quality publication. We must praise our Executive Director, Aimee Hiers, for her tireless efforts and gratefully acknowledge all the time provided by the authors of our articles. We continue to be amazed and impressed at the quality of analysis in these pieces. We also appreciate the time taken by members of the South Carolina Defense Trial Attorneys' Association to read and learn from *The DefenseLine*. Although we cannot claim to have seen the publications of all state defense organizations, we expect that *The DefenseLine* compares favorably to any one of them.

The DefenseLine, and the SCDTAA as a whole, are successful because many people come together to dedicate their time and efforts. If you are interested in being a contributor to *The DefenseLine* by writing an article, or any other submission, please contact us. Additionally, we hope you will review the information retained in this issue regarding upcoming meetings and events of the SCDTAA. The very fine programs which are planned will be both informative and entertaining. We look forward to seeing many old friends at these events, as well as new faces of those becoming more involved in the SCDTAA for the first time.

William Brown

Ryan Earhart

Breon Walker

Submissions Wanted!

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

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

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

SCDTAA Docket

Four Collins & Lacy Attorneys Selected for South Carolina Super Lawyers 2011 List

Four Collins & Lacy, P.C. attorneys have been named to the 2011 list of *South Carolina Super Lawyers*®. Joel W. Collins, Jr., Stanford E. Lacy, Gray T. Culbreath and Jack D. Griffeth were among those attorneys recently selected for inclusion in the publication. *Super Lawyers* is a listing of attorneys who are recognized by their peers and have a high degree of professional achievement. Selections are made on an annual, state-by-state basis, and selection is based on a rigorous three-step process that includes peer nominations, independent research and review by peer attorneys in the same practice area. Joel Collins, founding shareholder of the firm, is being recognized for his work in Civil Litigation Defense; founding shareholder Stan Lacy is being recognized for his practice in workers' compensation. Collins & Lacy managing shareholder Gray Culbreath is being recognized for his work in Personal Injury Defense: Products Liability.

Six Ellis Lawhorne Shareholders Selected as 2011 *South Carolina Super Lawyers*

Ellis Lawhorne is pleased to announce that six of its shareholders have been selected as 2011 *South Carolina Super Lawyers* ®. Three of the firm's practice groups are represented in the annual, peer-reviewed publication designed as a credible, comprehensive and diverse listing of attorneys to assist attorneys and consumers looking for legal counsel. F. Earl Ellis, Jr. and Ernest G. Lawhorne were selected from Ellis Lawhorne's Workers' Compensation Practice Group. John F. Beach, Wesley D. Few, John T. Lay, Jr. and John L. McCants were selected from Ellis Lawhorne's Litigation and Dispute Resolution Practice Group.

Walker Named Co-chair of the Richland County Bar Young Lawyers Division

Ellis Lawhorne's Breon C. M. Walker has been named co-chair of the Richland County Bar's Young Lawyers Division. The Richland County Bar is the largest voluntary Bar in South Carolina, with more than 1,900 members. It was established to promote the common business and professional interests of lawyers practicing and/or residing in Richland County, South Carolina. As co-chair of the Richland County Bar's Young Lawyers Division, Walker will work to engage young attorneys in the Bar's activities, which strive to promote effective communications between members and between members and the judiciary, foster friendships among members through social activities and sporting outings, and provide activities that promote education, community awareness, volunteerism, and civic responsibility. Walker is a member of the Ellis Lawhorne Litigation and Dispute Resolution Practice Group, where she focuses her practice on commercial litigation, motor vehicle liability, premises liability, and product liability.

Howard Boyd Elected to Chair United Way of Greenville County Board of Trustees

The law firm of Gallivan, White & Boyd, P.A. announced that Howard Boyd has been elected as Chairman of the Greenville County United Way Board of Trustees. Boyd has a long history of leadership with the United Way of Greenville County, including serving as Vice-Chair of the Board in 2010 and Campaign Chair in 2009. He also serves as Chair of the Upcountry History Museum Board of Directors and as a member of the Board of Trustees of the Blue Ridge Council of Boy Scouts.

Howard Boyd Named as 2011 Leadership in Law Honoree

South Carolina Lawyers Weekly has presented Gallivan, White & Boyd, P.A. attorney Howard Boyd with a 2011 Leadership in the Law award in recognition of his outstanding professional accomplishments, leadership and community involvement. Boyd was one of only 15 South Carolina attorneys to receive a Leadership in Law Award this year. Winning attorneys were nominated by peers and colleagues and selected by the publisher and staff of South Carolina Lawyers Weekly.

Gallivan, White & Boyd, P.A. Attorney Invited to Join Council on Litigation Management

Gallivan White & Boyd PA is pleased to announce that Phillip E. Reeves has been invited to join the prestigious Council on Litigation Management. The Council is a nonpartisan alliance comprised of thousands of insurance companies, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals and attorneys. Through education and collaboration the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows. Phillip E. Reeves, a Shareholder with Gallivan, White & Boyd, P.A., has over 30 years of experience and focuses his

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litigation and trial work in the insurance, products liability and transportation industries, with particular emphasis on first party and bad faith claims.

Gallivan, White & Boyd, P.A. Attorneys Named to Super Lawyers 2011

The law firm of Gallivan, White & Boyd, P.A. announced that seven Gallivan, White & Boyd, P.A. attorneys have been selected for inclusion in *South Carolina Super Lawyers 2011*: W. Howard Boyd, Jr., Business Litigation; H. Mills Gallivan, Alternative Dispute Resolution; C. Stuart Mauney, Alternative Dispute Resolution; Phillip E. Reeves, Insurance Coverage; T. David Rheney, Personal Injury Defense: General; Daniel B. White, Personal Injury Defense: Products; Deborah Casey Brown, Workers' Compensation. Super Lawyers selects attorneys based on peer nominations and evaluations combined with third party research. Each candidate is evaluated on both peer recognition and professional achievement. Selections are made on an annual, state-by-state basis.

Erin M. Farrell Selected for Childrens Law Committee

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

The McKay Firm Welcomes Brandon P. Jones

McKay, Cauthen, Settana & Stubley, P.A. ("The McKay Firm") is pleased to announce that Brandon P. Jones has joined the firm as an associate practicing in civil litigation, trucking and transportation law, insurance law and medical malpractice defense. A Greenville native, Brandon is a *cum laude* graduate of Clemson University. He went on to receive his Juris Doctor from the University of South Carolina. During his time at the University of South Carolina, Brandon was the Articles Editor of *The ABA Real Property, Trust and Estate Law Journal*.

McKay Workers' Comp Attorney Featured in Local Legal Publication

Marcy J. Lamar, workers' compensation attorney for McKay, Cauthen, Settana & Stubley, P.A., was recently interviewed by *South Carolina Lawyers Weekly*. In the article, Paralegals Have a Tougher Job; Deserve More Respect, Ms. Lamar outlines the important role paralegals play at The McKay Firm and in the legal arena. "Paralegals must know all the particulars of the rules and procedures of the field of law in which they are working. They are responsible for knowing every deadline… they must be on our timeline in terms of getting filings and other court documents out the door."

Workers' Compensation Attorney to Address Key Issue at Statewide Seminar

One of The McKay Firm's key Workers' Compensation attorneys, Peter P. Leventis, IV, will address association and industry leaders at the One Day Seminar being conducted by the South Carolina Workers' Compensation Educational Association. The Workers' Compensation Team at The McKay Firm consists of Mark D. Cauthen, M. Stephen Stubley, Marcy J. Lamar and Peter P. Leventis, IV. Peter practices exclusively in the areas of workers' compensation defense, workers' compensation appeals, subrogation and civil litigation.

Hood Law Firm, LLC Attorney Honored

Molly H. Craig recently received the Gold Compleat Lawyer Award from the University of South Carolina School of Law Alumni Association. The Compleat Lawyer Award recognizes attorneys for their civic and professional accomplishments. Each year, the Alumni Association requests nominations, and recipients are chosen by a committee consisting of the Chief Justice of the South Carolina Supreme Court, the Chief Judge of the South Carolina Court of Appeals, the President of the South Carolina Bar, the President of the Alumni Association, and the Dean of the Law School.

USC Law School Honors Two Nelson Mullins Partners With Compleat Lawyer Awards

Nelson Mullins Riley & Scarborough's Charleston partner Elizabeth Scott Moïse and Columbia partner Thad Westbrook were honored Thursday with the University of South Carolina School of Law's 2011 Compleat Lawyer awards. The awards were established in 1992 by the University of South Carolina Law School Alumni Association to recognize alumni for outstanding civic and professional accomplishments. Each year the Alumni Association recognizes nine outstanding alumni at the Alumni Association Dinner. Nominees are individuals who have made significant contributions to the legal profession and exemplify the highest standard of professional competence, ethics, and integrity. Ms. Moïse earned a Juris Doctor in 1989, where she was awarded the law school's Claud M. Sapp Award for leadership, scholarship, and industry. She practices in the areas of insurance coverage and bad faith, consumer finance, class action litigation, and product liability defense. Mr. Westbrook earned his Juris Doctor in

1999. He practices in Columbia in the areas of business litigation, consumer finance litigation, and class action defense. Mr. Westbrook is a member of the South Carolina Supreme Court's Committee on Character and Fitness and on the Board of Trustees for the University of South Carolina, having been elected to the position by the S.C. Legislature in 2010.

Soouth Carolina Lawyers Weekly honors Ed Mullins

South Carolina Lawyers Weekly has honored Edward W. Mullins, Jr., senior partner in Nelson Mullins Riley & Scarborough LLP, with its Leadership in Law Award. The award spotlights those within the legal community who are working to better the legal profession through mentoring and involvement within their community as well as going above and beyond in their everyday job. Throughout his 52 years of practice, Mr. Mullins has mentored many young lawyers who have become leaders in the firm and other legal organizations and the community as well as several who left his firm and established well-known firms in Columbia. As the liaison member for the firm on the Advisory Board of the Nelson Mullins Center for Professionalism Board at USC's Law School, he has been instrumental in its national mentoring conferences and in its development of a model mentoring program for the American Inns of Court. He assisted the South Carolina Chief Justice's Commission on Professionalism in the establishment of mentoring programs in law firms in the Midlands. Mr. Mullins also serves on the Board of the American Inns of Court, the Board of the National Center for State Courts, and by appointment of the governor, he represents the state of South Carolina on the National Uniform Law Commission.

South Carolina *Super Lawyers* List Includes 26 from Nelson Mullins

Twenty-six Nelson Mullins Riley & Scarborough attorneys have been selected by their peers to the 2011 list of South Carolina "*Super Lawyers*" in 11 practice areas. Also, three Nelson Mullins attorneys were among the top 25 attorneys receiving the highest point totals in the nomination, research, and blue ribbon review process. They are George Cauthen, Sue Erwin Harper, and A. Marvin Quattlebaum. Mr. Cauthen also ranked in the top 10. *Super Lawyers* names South Carolina's top lawyers as chosen by their peers and through independent research. The list is based on a survey of attorneys across the state who are asked to vote for the best lawyers they had personally observed in action. The top point-getters are selected for the *Super Lawyer* list, honoring the top 5 percent of licensed attorneys in the state.

Those based in Columbia and selected for the *Super Lawyers* list are: Stuart M. Andrews Jr., Healthcare; George S. Bailey, Estate Planning & Probate; C. Mitchell Brown, Appellate; George B. Cauthen, Bankruptcy & Creditor/Debtor Rights; David E. Dukes, General Litigation; Debbie W. Durban, Employment & Labor; Carl B. Epps III, Business Litigation; Robert W. Foster, Jr., Business Litigation; James C. Gray, Jr., Business Litigation; Sue Erwin Harper, Employment & Labor; William C. Hubbard, Business Litigation; Francis B.B. Knowlton, Bankruptcy & Creditor/Debtor Rights; John F. Kuppens, Personal Injury Defense: Products; Steven A. McKelvey, Business Litigation; John T. Moore, Bankruptcy & Creditor/Debtor Rights; Stephen G. Morrison, Business Litigation; Edward W. Mullins Jr., Business Litigation; R. Bruce Shaw, Class Action/Mass Torts; and Daniel J. Westbrook, Healthcare.

In Greenville: William H. Foster, Employment & Labor; Timothy E. Madden, Family Law; and A. Marvin Quattlebaum,Jr., Business Litigation.

In Charleston: Richard A. Farrier Jr., Business Litigation; John C. Von Lehe Jr., Estate Planning: Probate; and G. Mark Phillips, Personal Injury Defense: Products.

In Myrtle Beach:
Thomas F. Moran, Business/Corporate.

Nexsen Pruet Recognized as One of America's 250 Largest Law Firms

Nexsen Pruet is pleased to announce that the firm remains on *The National Law Journal's* list of the 250 largest law firms in America. Results of the publication's 2011 survey were announced on Monday. The numbers are based on a January survey which showed 178 attorneys in Nexsen Pruet's eight offices. That makes it the 220th largest firm in the country. Since then, the firm has grown significantly in North Carolina. Five attorneys have joined the firm's Raleigh office in the past three months. Those are: Former N.C. Supreme Court Chief Justice Beverly Lake, Gene Boyce, Dan Boyce, John Mabe and Robin Vinson.

Steven J. Pugh of Richardson Plowden Honored with 2011 Leadership in Law Award

Richardson, Plowden & Robinson, P.A. is pleased to announce that managing shareholder and attorney Steven J. Pugh was recently recognized with a 2011 Leadership in Law Award, given by *South Carolina Lawyers Weekly*. Each year, *South Carolina Lawyers Weekly* bestows this prestigious award to a handful of attorneys throughout South Carolina who have demonstrated excellence in leadership within the legal profession and their community. The winners were nominated by their peers and colleagues and selected by the publisher and staff of *South Carolina Lawyers Weekly*. Pugh has made a difference within the legal profession in more ways than one. Not only does he adhere to the upmost ethical standards and guidelines when practicing law, but he expects and encourages those within their Firm to do the same. For the last two decades, Pugh has proven to be a successful litigator, focusing his

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efforts on defense of product liability claims, toxic torts, commercial disputes, and transportation cases. Beyond his own practice, Pugh has demonstrated a true willingness to mentor future attorneys in law and in management in an effort to continue to better the legal profession and the next generation of attorneys.

Three Richardson Plowden Attorneys Named 2011 South Carolina Super Lawyers

Richardson Plowden & Robinson, P.A., is pleased to announce that three of its attorneys, Eugene H. Matthews, Franklin J. Smith, Jr., and S. Nelson Weston, Jr., have been selected to the *2011 South Carolina Super Lawyers*. *Super Lawyers* is a national listing of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The magazine is published in all 50 states and features articles about attorneys named to the *Super Lawyers* list. Matthews was recognized as a *Super Lawyer* in Employment and Labor Law. He is a shareholder in the firm and focuses his practice on employment law, administrative and regulatory law, civil rights litigation, and appellate litigation. Smith was recognized as a *Super Lawyer* in Construction Litigation. He is a shareholder in the firm and focuses his practice on construction law, including construction litigation, contract drafting and negotiation, claims resolution and avoidance, design professional malpractice, fidelity and surety law, coverage issues, and insurance defense. Weston was recognized as a *Super Lawyer* in Bankruptcy and Creditor/Debtor Rights Law. He is a shareholder in the firm and focuses his practice on banking, bankruptcy and creditors' rights, business and commercial law, collections law and real estate.

Turner Padget To Be Recognized as a Leading Litigation Firm in South Carolina

Turner Padget Graham & Laney, P.A. is pleased to announce that it will be recognized as a leading litigation firm in South Carolina in the 2012 edition of *Chambers USA: America's Leading Lawyers for Business*. Known for its independent and objective research process, *Chambers USA* is considered to be a cornerstone directory of America's leading lawyers for business. The guide, whose listings are given much weight among business leaders selecting legal counsel, will be published in June.

Dooley Appointed to Workers' Compensation Committee

Turner Padget Graham & Laney, P.A. is pleased to announce that Cynthia C. Dooley has been appointed to the 2012 South Carolina Workers' Compensation Educational Association's Medical Seminar Committee. Cindy is a shareholder in the Columbia office and concentrates her practice in the areas of workers' compensation and mediation and arbitration. The committee will help plan the annual seminar, which focuses on current medical issues and the South Carolina workers' compensation system, for the entire SCWCEA.

Turner Padget Shareholders Named Among South Carolina *Super Lawyers*

Turner Padget Graham & Laney, P.A. is pleased to announce that 11 of the firm's shareholders have been named by *Super Lawyers* magazine as top attorneys in South Carolina for 2011. The Columbia-based shareholders honored are: Kenneth J. Carter, Jr. – Product liability; John E. Cuttino – Civil litigation defense; Catherine H. Kennedy – Estate planning and probate; Curtis L. Ott – Product liability; Thomas C. Salane – Insurance coverage; Franklin G. Shuler, Jr. – Employment and labor; The Charleston-based shareholder honored is: John S. Wilkerson III – General litigation. The Florence-based shareholders honored are: René J. Josey – Criminal defense and Arthur E. Justice, Jr. – Employment and labor. The Greenville-based shareholders honored are: Erik K. Englebardt – General litigation and William E. Shaughnessy – Workers' compensation. The selections for *Super Lawyers* are made by a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by Law & Politics' attorney-led research staff, a peer review of candidates by practice area, and a good-standing and disciplinary check.

Two of the Wyche Firm's Members Named to South Carolina Super Lawyers List

Two of the Wyche Firm's lawyers were named in the 2011 edition of South Carolina Super Lawyers. Super Lawyers is a rating service that identifies outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Only five percent of the total lawyers in the state are selected for inclusion in Super Lawyers. Wyche attorneys included in the 2011 edition of Super Lawyers are: Wallace K. Lightsey, Business Litigation and Troy A. Tessier, General Litigation

Robert M. Willcox
Dean, University of South Carolina School of Law

by Reid T. Sherard

On April 14, 2011, the University of South Carolina announced the appointment of Rob Wilcox as the dean of the School of Law effective July 1, 2011. Dean Wilcox is a South Carolina native son, born in Charleston. He graduated cum laude from Duke University with a B.A. in economics and history in 1978 and magna cum laude from the USC law school in 1981.

After law school, Dean Wilcox entered private practice with Dow, Lohnes, and Albertson, working in their Washington and Atlanta offices. In 1986, he returned to the law school as an assistant professor of law. He was promoted to associate professor in 1991, professor in 2001 and associate dean in 2006. Dean Wilcox has taught courses on ethics and professionalism, property, and trusts and estates over the course of his time teaching at the law school. From 2003 through 2008, he also directed the Nelson Mullins Riley & Scarborough Center on Professionalism, a law school-based clearinghouse of information and research pertaining to improvement of the character, competence, and conduct of legal professionals.

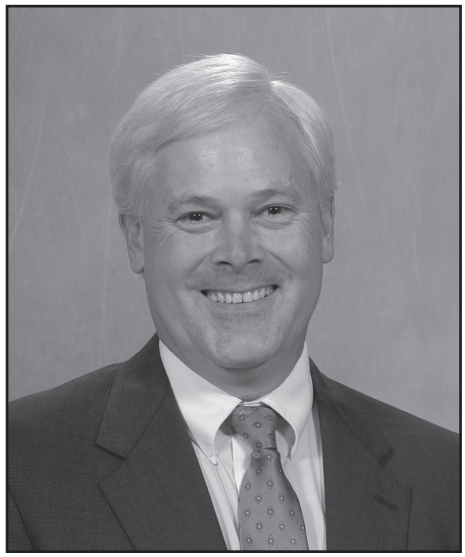
In addition to his teaching career, Dean Wilcox is an accomplished writer, having co-authored Annotated South Carolina Rules of Professional Conduct, published by the South Carolina Bar, and served as editor, managing editor and resident editor of The Real Property, Probate and Trust Journal, published by the American Bar Association.

Dean Wilcox and his wife, Lisa, have three sons: Ted, a resident of Washington, D.C.; Robbie, who lives in Columbia; and Alex, a student at Northwestern University.

Despite being busy with the end of the semester, exams, and two weeks out from taking the responsibility of dean of his alma mater, Dean Wilcox agreed to answer questions about his new endeavor with his trademark blend of intellect, humor, and humility.

Q: You have been a professor at the law school since 1986 and have taught several thousand individuals who are now lawyers in South Carolina. Tell me something I don't know about Rob Wilcox.

A: That's a hard question to answer because I have told everyone the two or three interesting stories that I have about my life. Actually, while it might surprise some who picture me as always talking in front of a class, I have a fairly reserved person-



ality by nature. By having the chance to be a bit of a performer each day in class, I have overcome some of that, but I understand fully when a student in class freezes the first time they are asked to speak in public. Nothing helps overcome stage fright as effectively as just getting back up and doing it again. Pretty soon you realize that you can do whatever you are being asked to do as well as, or even better than, the next person, and your self-confidence soars.

Q: What is the most significant challenge facing the School of Law?

A: As the success of our graduates shows, USC has always been a good law school and that hasn't changed. But the profession is changing, and the education that graduates need when they start practice is changing. We have to be certain that we put and keep South Carolina at the forefront in ensuring that our graduates are as well prepared as possible to become excellent lawyers in the modern legal profession.

Q: You graduated from the USC School of Law, and not since Harry Lightsey 25 years ago has the dean been a graduate of the school – is this an advantage to addressing the challenges?

A: First of all it is a special honor to be named the dean of my alma mater. I know Harry felt that way, because his pride shone through every time he talked about the Law School. I certainly hope that

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my love for the school will show through just as strongly and help to reassure our friends and alumni that we are going to work as hard as we can to ensure that a South Carolina law degree symbolizes excellence and achievement in every aspect of professional education. One thing that I know has resonated with the students is the realization that, as an alumnus, I have as much of an investment in the Law School's success as they do. I think it also helps that, although I have lived much of my life in South Carolina, I can point out that my degree from here opened doors for me to practice early in my career in Washington and Atlanta. I can talk with some credibility both about the value that having an excellent state law school will bring to South Carolina and about the doors that a South Carolina education can open for our graduates.

Q: What is an immediate change you will make?

A: There is not just one change to make. We all want this school to be the first school of choice for excellent students, and the first school of choice for employers who are seeking to hire well-prepared lawyers. We also want the Law School to be a valued source of expertise to be drawn upon whenever important issues of law and public policy arise. To achieve those goals we have to constantly improve our educational product by adding depth and breadth to our course offerings as we hire ten additional faculty members over the next several years. It is a process we will start immediately. We will hire another professional staff person to provide advice and assistance in our career services office. We will provide new opportunities for lawyers and judges to interact regularly and meaningfully with students. We will also design new third-year experiences in the curriculum that will allow our students to work together, to apply the theory they have learned in a variety of subjects, and to be exposed to the advanced cutting edge issues in at least one field of practice. The goal is to have our graduates truly ready for the realities of modern practice, not only reducing the training costs that their employers must bear, but more importantly launching them into fulfilling and enjoyable careers. At the same time, we will encourage our faculty to be visible sources of expertise to state and national government and to professional organizations that are working on law reform.

Q: Will you still teach?

A: Teaching is the reason I became a law professor, and I need to keep teaching in order to recharge my batteries. I have decided that it would not be wise to teach in the first semester that I am dean because I will need to have a flexible schedule for travel and meetings. I am scheduled to resume teaching in the Spring of 2012, but am still trying to decide if that is wise. Certainly in the following years, I will be in the classroom. I love the rapport that a teacher develops with students, and it's more important now than ever for me to have that connection.

Q: One of the things young lawyers often hear is that law school "taught you how to think but not how to practice" – do you think that is true and if so what steps can the law school take to prepare graduates to "hit the ground running"?

A: I understand the sentiment, although like most generalizations I think it understates the preparation that Law School can and does provide for practice. I remember that I had practiced law for several years before I became aware that, because of law school, I approach problem resolution in a way that is different from someone who does not have legal training. Our development in law school is sufficiently gradual that law students and new lawyers may not fully appreciate, at first, how much they have learned that is useful to them in practice. What I think has changed in recent years is the training many lawyers receive in the first few years of practice after law school. Because of increased costs and reduced legal staffs, law firms may not be as patient as they once were in developing their new lawyers. That pressure makes new lawyers feel even more like law

school has left them unprepared. Law schools need to step in and find ways, especially in the third year of school, to shorten the learning curve between law school and practice, essentially making our graduates more "practice ready." We also have to recognize that many law students come to school with little understanding of what lawyers actually do. Their lack of understanding of the profession feeds discontent later when they enter practice and find it to be unfamiliar and unexpected. Law schools can better ensure that students receive a more complete and accurate picture of what they will encounter in practice, as well as what skills they will need to succeed.

Q: One of your areas of expertise is legal ethics/professional responsibility – what one issue confronting practitioners do you believe is the most difficult to navigate?

A: Substantively, conflicts of interest are by far the most common source of ethical concerns for lawyers. Loyalty has so many facets to it that we struggle to decide when loyalty to one interest may compromise impermissibly our loyalty to another. It's an area that seems simple in the abstract, but may not be as obvious in a practice setting. Speaking more broadly, I think the proliferation of electronic communications methods may cause lawyers the most headaches, as they try to decide what is the right thing to do. Whether we are dealing with discovery duties, communications with other parties, marketing of services, ex parte contacts, or simply civility, the form of electronic medium that we are working with is often one that was not specifically contemplated by those who wrote the rules. We are left trying to interpret how a court might apply an outdated rule to our situation, often with fairly little specific guidance. Electronic communication also presents particular professionalism concerns as well as ethical issues. For whatever reason, when we communicate electronically, whether in a tweet or an e-mail, we all too often fail to turn on our natural filtering system, and we express ourselves in ways that create problems, when we should, instead, be resolving problems.

Q: If I was admitted to School of Law, but also to other law schools in the region, what would you say to me to convince me to come to USC?

A: I would tell you that you need look no further than the success of our alumni to know that South Carolina offers the education you need to succeed wherever you might want to go in your career. Our graduates have recently been judges on major courts, not only in South Carolina and the Fourth Circuit, but in Delaware, Texas, and Georgia for example. Our graduates have reached the highest levels in the military legal system; they regularly hold critical national leadership posts in the most important professional organizations; they practice law in New York, Washington, London, and Europe, as well as all across South Carolina and the southeast. We have recently made that education even better, with more attention than ever to developing legal writing and research skills. We have developed externships programs to provide students with an accurate understanding of the practice of law and will soon supplement our third-year curriculum with new courses that immerse students in an environment where they must apply their understanding and resolve problems working as a team. Perhaps most importantly, the University of South Carolina offers a learning environment that values respect and civility. At South Carolina, students are expected to embrace the expectations of professionalism and to commit themselves to excellence.

Young Lawyer Update

by Jared H. Garraux

Summer is upon us, and many great events are just on the horizon for the South Carolina Defense Trial Attorneys' Association. April and May were busy months for the SCDTAA. I appreciate all of the young lawyers who have actively participated during the first part of the year, as well as those who have offered assistance.

In April, the SCDTAA hosted its Legislative/Judicial Reception at the Oyster Bar in Columbia and followed it up the next day with its Annual PAC Golf Tournament at the Spring Valley Country Club in Columbia. Both events were a great success. In May, the SCDTAA hosted the first of two deposition boot camps for 2011. The boot camp focused on deposing experts and was well attended by lawyers from around the state. After the boot camp, the YLD hosted a happy hour in conjunction with Document Technologies, Inc. We are looking forward to additional YLD Happy Hours in Charleston and Greenville in the coming months.

Looking ahead, we have several great events taking place during the summer months, and I welcome any young lawyer looking to get involved to contact me about opportunities. On July 6th-8th, the SCDTAA will be hosting its annual Trial Academy. This year's Trial Academy will take place in Greenville, SC. If you are not a participant in this year's Trial Academy, I would still encourage you to be involved in the Mock Trials scheduled for Friday, July 8th, at the Greenville County Courthouse. As you know, we need individuals to serve as witnesses and jurors for the trials. The Mock Trials are a great opportunity for you to meet fellow attorneys from around the state, chat with Judges and receive free CLE credits. If you would like more information about participating as a juror or witness, please contact me, or Melissa Nichols (mnichols@wilkeslaw.com).

On July 28th-30th, the SCDTAA will hold its Annual Joint Meeting at The Grove Park Inn in Asheville, NC. Every year the Young Lawyers Division is responsible for organizing the silent auction at the Joint Meeting. This year's silent auction will be held on Thursday evening, July 28th. We are currently in the process of gathering items for the silent auction. If you would like to contribute an item to the auction, or if you know of someone who may be willing to contribute, please let me know. As always, proceeds from the silent auction will benefit local charities. I have already contacted many of you about assisting with the silent auction. However, we are always looking for good help, so please contact me if you would like to be a part of this event.

The Advanced Deposition Boot Camp has been scheduled for September 8, 2011 in Columbia, SC. Though the agenda for the boot camp has not been finalized, I can assure you the camp will be educational and beneficial to any lawyer, young or seasoned. Keep a look out for registration information. As always, I will send an e-mail reminder to all young lawyers prior to the event.

Rounding out the year, the SCDTAA will hold its Annual Meeting from November 3rd-6th. This year's Annual Meeting will take place in Amelia Island, Florida. I encourage all young lawyers to consider attending the Annual Meeting. It is a wonderful event and always well attended by our Judiciary. If you would like additional information about the Annual Meeting, please contact me, or Aimee Hiers.

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

PAC Golf Tournament is a Smashing Success

by A. Johnston Cox

The second annual SCDTAA PAC Golf Classic at Spring Valley Country Club was a tremendous success thanks to all of our participants and sponsors. For the second straight year, the weather could not have been more perfect. Over 50 players on 13 teams competed in a Captains Choice Tournament, with winners in the low gross and low net categories. Players also competed for hole-in-one contests that included a BMW convertible, as well as closest to the pins and long drive. While there were some close calls, the BMW survived the day. We received tremendous support from numerous law firms, court reporting and engineering firms that sponsored teams, drink stations, holes, and other contests. We also benefited greatly from our tournament sponsor, EveryWord, Inc. Their generous contribution in sponsoring the tournament helped our fundraising efforts significantly. We thank all of our sponsors who sponsored teams, holes, drink stations and other contests.

Thanks to this incredible support, we raised over $17,000 for our political action committee. The money raised by this tournament will help greatly aid the SCDTAA in expressing our views and concerns to the General Assembly on legislative issues that affect our membership. Thanks also to Aimee Hiers for her assistance in supporting this tournament, as well as the management and staff at Spring Valley Country Club. We are looking forward to another great event next year. If you missed it this year, we hope you will join us then.

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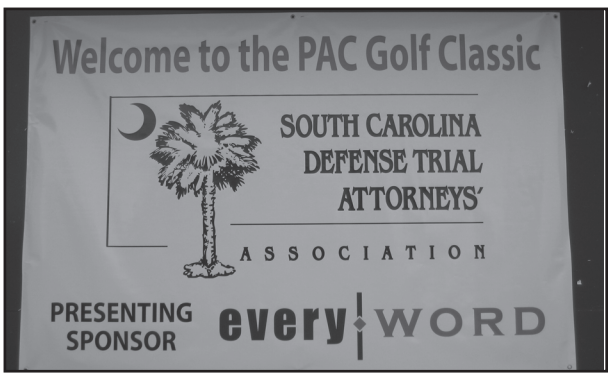


Trial Opportunities are Invaluable

by William Brown and Ron Wray

The 21st Annual South Carolina Defense Trial Attorneys' Association Trial Academy is scheduled for July 6, 7, and 8 in Greenville, South Carolina. We are looking forward to lawyers from across the state coming in for three days of intense training on courtroom and trial skills. The Wednesday and Thursday of this three-day event are focused on classroom training of many skills used for trial. The participants will have the opportunity to hear from some of the leading lawyers in South Carolina, as well as distinguished members of the judiciary, in providing insightful and useful tips on how to handle all aspects of a trial from opening statements, presentation of evidence, examination of witnesses, and closing arguments. We are also planning a segment on appropriate use of alternative dispute resolution and effective communication during ADR by trial counsel.

On Wednesday evening, a Young Lawyers' reception will allow the participants to relax, meet other young lawyers, and take part in a networking opportunity. Trial skills are very important, but also knowing other lawyers around the state who may be able to provide you insight and assistance regarding your trials and juries is a valuable asset to a trial lawyer.

On Thursday evening, a judicial reception will provide members of the SCDTAA and the participants of the Trial Academy an opportunity to get to know members of our distinguished judiciary in a less formal setting. It is always a benefit to know your judges and have the opportunity to speak with them in a social setting.

Friday of the Trial Academy, as always, brings the excitement of the mock trials. Actual time on your feet in a courtroom as a lawyer is something for which there is no substitute. Students will try a case to a verdict in front of a jury. Feedback will also be provided from experienced trial observers.

We are looking forward to another fantastic Trial Academy. The participants in this year's Trial Academy will take advantage of one of the greatest assets to our member firms -- providing courtroom opportunities and learning experiences to young lawyers.

Corporate Counsel Seminar is a Hit

by John Kuppens

The SCDTAA held a Corporate Counsel CLE on April 13th in Columbia, in coordination with its Legislative and Judicial Reception later that evening. The CLE program was very well attended by in-house counsel from across South Carolina and the presentations were outstanding. The program began with an update on issues pending in the State Legislature, including tort reform, workers compensation, budget issues, legislative and congressional redistricting, by State Senator Shane Massey and Harry Lightsey. Newly appointed Dean of the USC School of Law Robert Wilcox gave an excellent presentation on ethical issues faced by in-house counsel, and Ashley Cuttino spoke about the legal impact on employers of social media in the workplace. Jim Irvin briefed the group on the new state court rules regarding electronic discovery, and strategies for complying with the rules in an effective manner.

Many thanks to Cathy Cauthen for her help planning the program. The SCDTAA is planning a second Corporate Counsel CLE in Greenville in September, and will provide details on it very soon.

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

by David A. Anderson

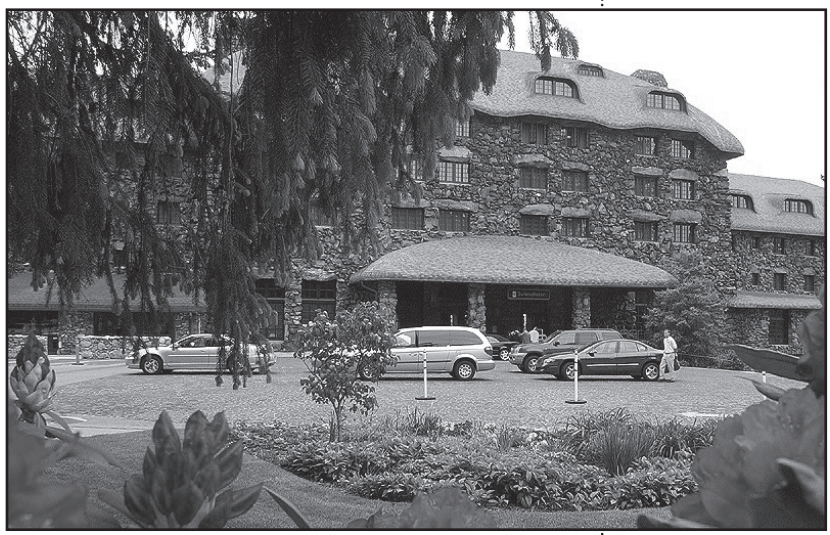
Please plan to join us at the beautiful Grove Park Inn (GPI) in Asheville, NC July 28th – 30th, 2011 for the 44th Annual Joint Meeting between the South Carolina Defense Trial Attorneys' Association and Claims Management Association of South Carolina. This year's meeting will be of great value to our membership, providing timely and informative Continuing Legal Education Discussions while also giving you the opportunity to network and enjoy the many opportunities that the GPI and surrounding area have to offer.

Your Joint Meeting Committee consists of Mitch Griffith, Graham Powell, Chris Adams, Jared Garraux, Jenna Garraux, Mark Allison, Shane Williams and Drew Butler. Your Committee members as well as the substantive committees for Workers' Compensation, Alternative Dispute Resolution, Construction and Medical Malpractice have all worked to provide attendees with excellent programs.

The Claim Management Association of South Carolina President, Dwayne Smalls and his Vice-President, Barry Reynolds, both of Farm Bureau Insurance have worked with our committee to have a presentation on Post Traumatic Stress and Traumatic Brain Injuries. They have also coordinated for a presentation on Human Factors Accident Evaluations and a presentation on the Institute of Business and Home Safety which has a new state of the art testing facility here in South Carolina.

All of our South Carolina Workers' Compensation Commissioners have been invited and they will provide us with their company and insights, a must see event if you practice in the Workers' Compensation arena. The Construction break out session will provide an actual demonstration of constructing walls and the placement of windows to assist in understanding common errors in construction. We will have the latest information on the MEDICARE, MEDICAID, and SCHIP Extension Act of 2007 to assist with clarifying and understanding the intricacies of this law and how it may affect the settlement of personal injury claims. There will be presentations from two of our States newly appointed Directors. If you have clients who use the services of our Department of Labor and Licensing or our Department of Insurance, you will certainly want to hear Catherine B. Templeton and David Black speak about their respective Departments.

As always we will have an ethics segment, which we are excited to note will be presented by the newly named Dean of The University of South Carolina Law School, Robert M. Wilcox. Then we will end our



program with comments from Robert P. McGovern, a former NFL player and a current Major in the U.S. Army Reserves who served as Judge Advocate General in the U.S. Army 18th Airborne Corps where he helped prosecute the notorious case of Sergeant Hasan Akbar, accused of killing two Army comrades in Kuwait. Major McGovern is currently a Federal Prosecutor and he and his family reside in Virginia.

Our Executive Director, Aimee Hiers and your Committee are working to keep costs down for you and your family while allowing you to enjoy a first rate conference. Please join us on Thursday Night, July 28, 2011 to socialize with clients, present and potential, Commissioners, Speakers and fellow members of the South Carolina Bar. Our CLE program will begin Friday morning, July 29 and end at noon on Saturday July 30th. The Agenda and Registration is online at WWW.SCDTAA.COM . Reservations for the Grove Park Inn can be made by calling 1-800-438-5800 and ask for the SCDTAA rate (only provided to those who register for the event).

For those of you with kids, bring them along. We will have children's programs as well as babysitting by professional sitters offered by GPI. Please plan to join us and we look forward to seeing you in Asheville.

Legislative Update

by William G. Besley

The Legislature has been largely focused on the budget and economic issues facing the State. However, legislatures were able to enjoy some time away from these budget pressures at the annual Legislative and Judicial Reception, which was held on April 13th at the Oyster Bar in Columbia. It was once again well attended with many members of the South Carolina Legislature and the South Carolina Judiciary. This event seems to get better each year. Our lawyers, legislators, and judges enjoyed an evening of fine food and great conversation hosted by the SCDTAA.

The Honorable J. Michelle Childs
United States District Judge

by William S. Brown

Judge Childs was nominated to be a United States District Judge by President Barack Obama, and was confirmed by the Senate in 2010. She assumed office in August of 2010, filling the opening on the District Court created by the Honorable G. Ross Anderson, Jr. taking senior status.

As a 1991 graduate of the University of South Carolina School of Law, Judge Childs began her legal career in private practice, focusing on the areas of employment and labor law, general litigation, and domestic relations. She spent approximately eight years at one of South Carolina's larger law firms, and learned early on in her years of private practice that relationships she built in networking through bar organizations, community service, and legal practice were a significant and meaningful part of the practice of law.

Shortly after Judge Childs became a partner in her law firm, she received a call from the Governor's office offering her a position as the Deputy Director of the Division of Labor within the South Carolina Department of Labor, Licensing and Regulation. In that position, Judge Childs had responsibility for six governmental programs: Wages and Child Labor, Occupational Safety & Health, Occupational Safety & Health Volunteer Programs, Labor-Management Mediation, Elevators and Amusement Rides, and Migrant Labor. Judge Childs served the State of South Carolina in this capacity from 2000 until 2002.

As Judge Childs was contemplating her choices for continuing her legal career as her time with the Division of Labor came to a close, she received another call from the Governor's Office. This time, she was asked to consider an appointment as a commissioner for the South Carolina Workers' Compensation Commission. She served as a commissioner, a quasi-judicial role, hearing Workers' Compensation claims, ruling on evidentiary matters, and writing orders based on her findings of fact and conclusions of law regarding contested cases, as well as serving in an appellate capacity to review rulings of other commissioners. After Judge Childs had served for four years as a Workers' Compensation Commissioner, an opening occurred on the South Carolina Circuit Court.

After working her way through the unique election process for state judges in South Carolina, Judge Childs was elected to serve in an at-large seat of the State Circuit Court in 2006. In early 2009, when President Obama assumed office, the Honorable G. Ross Anderson, Jr. assumed senior status making a seat on the United States District Court available. Judge Childs was recommended to the President by two members of the United States House of Representatives from South Carolina. Although the process that followed that recommendation involved more waiting and patience than Judge Childs may have initially expected, she handled it with the dignity befitting a federal judge. Judge Childs now sits in Greenville, handling a steady docket of both criminal and civil matters.

Judge Childs graciously agreed to share her thoughts on her career and her path to becoming a United States District Judge as follows:

Q What are the greatest differences you see in being a judge on the federal court, as opposed to the state court?

A. The federal court is very organized and methodical, which is nice for a judge. In the state court system, there is much less certainty. As a state court judge, you do not always know the particular matters you will be addressing in a given week, or even on a given day. Also, in state court you may be handed lengthy briefs at a hearing. As a judge, you would like to read all of the information submitted, but in the state court system it is difficult to do so in a timely manner. An additional difference that has been nice is the electronic court filing system. This is efficient for the reduction in paper, but even more so for the level of access to the records it provides. Having the court file stored electronically allows for preparation no matter where a judge may be. Also, it allows access remotely through devices such as an iPad or laptop. This access to records and the brief-

Continued on next page

ing schedule in federal court allow a judge to be better prepared, and being prepared is a showing of respect I like to afford to the lawyers who work hard to provide the information to the court. It also allows the lawyers to fully understand the other side's arguments. This enhances civility and collegiality because there can be no sandbagging of arguments.

Q. Has a transition to the federal bench been easier or more difficult than the transition from Workers' Compensation commissioner to circuit court judge?

A. Each transition has been different and provided tools which assist me in performing the duties of a federal judge. As a Workers' Compensation commissioner, you are the fact finder as well as the judge of the law. This provides insight into weighing of evidence and how to handle a bench trial. Also, sitting on appeal panels as a Workers' Compensation commissioner helped to improve my skills as a judge, by providing the opportunity to review errors and learn from them. With the transition to circuit court came the added experience of dealing with juries and criminal matters. Also while on the circuit court bench, I was given the opportunity to serve as chief administrative judge for the criminal side of the circuit court at times, and also as judge of the business court program. Each of these roles helped me gain skills in management of the docket, which were a good preparation for the federal bench and eased the transition.

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

A. As most judges will say, my answer has to be that preparation is the most important thing a lawyer can do. I seek to be prepared myself to show respect for the lawyers appearing before me and would hope that the lawyers would show the court the same courtesy. Additionally, communication between the lawyers to facilitate the review and exchange of exhibits in advance of a trial is very helpful. When lawyers can agree to the admission of certain documents at the beginning of the trial, it assists the court and aids in the flow of the trial. It is similarly helpful if the parties can exchange jury charges and agree to basic charges early in the process of trial. Then, submission of additional language sought from individual parties can be added to the agreed upon charges.

Q. Without giving names, what is the biggest mistake you have seen an attorney make in your court?

A. Ignorance of a key case in the area at issue is a problem. If there is a case that could easily have been found and is not identified by a lawyer, it creates an unpleasant situation for the court. Also, in talking to juries and surveying them after trials, the chief complaint of most juries is that lawyers are often too repetitive in their presentation of materials. Although this is not a specific complaint of the judge, it is something that I wanted to pass along to practicing lawyers regarding juries' perception of them.

Q. What factors led you into a career in the law?

A. I was involved in a mock trial program in high school. I enjoyed being an advocate for a position, and that led me early on to explore a legal career.

Q. Who has been the single biggest influence in your legal career?

A. I have to say that there have been two "most significant influences" in my legal career: Chief Justice Toal and Judge Perry. Chief Justice Toal worked with me and guided me as a young lawyer and a woman lawyer through bar activities. She was a role model, showing me what could be achieved and how to succeed. Chief Justice Toal also served as a great mentor and provided me opportunities to learn and grow, particularly through appointment as a judge on the business court and as chief administrative judge for the criminal side in the circuit court. Judge Perry also provided me guidance as a young lawyer in practice. His wisdom and tremendous judicial temperament are an example to me.

ARTICLE

South Carolina e-Discovery Amendments: Following in Federal Footsteps

by James Thomas Irvin III [1]

Introduction

On April 28, 2011, several amendments to the South Carolina Rules of Civil Procedure related to electronic discovery ("the SCRCP Amendments") went into effect. The Note to the SCRCP Amendments explains their purpose:

> The amendments to Rules 16, 26, 33, 34, 37, and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient, cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means of facilitating a just and cost-effective resolution of disputes.

In short, the purpose of the SCRCP Amendments is to ensure that proportionality[2] serves as the touchstone of any analysis to determine whether electronically stored information should be produced. This stated purpose is consistent with the purpose of similar amendments to the Federal Rules of Civil Procedure, which went into effect in December of 2006 ("the 2006 FRCP Amendments"). However, upon enactment of the 2006 FRCP Amendments, media attention obscured their purpose by suggesting that even though "[f]ederal and state courts have increasingly been requiring the production of [electronically stored information] in individual cases, . . . the new rules clarify that the data *will be required* in federal lawsuits."[3] As a result, parties involved in litigation sometimes perceived the 2006 FRCP Amendments as creating additional burden and cost for litigation, which was the opposite of their intended purpose. Indeed, electronically stored information had been a part of litigation for decades and had created significant problems in terms of costs and draconian sanctions for what were arguably technical missteps. The 2006 FRCP Amendments were intended to mitigate these difficulties, not add to them. Understanding and emphasizing this will help prevent litigation opponents from mischaracterizations the purpose of the SCRPC Amendments in order to gain a strategic advantage.

In light of this earlier experience, this article seeks to clarify the purpose of the SCRCP Amendments and the ways in which they are intended to lessen unnecessary or unreasonable burden and cost associated with electronic discovery. To do this, this article will first discuss the "myths" propagated by the plaintiffs' bar that had led to increasing and unreasonable burdens associated with electronic discovery. Then, this article will discuss the ways that the 2006 FRCP Amendments were intended to dispel these myths and rectify the problems that they created. This article will then identify three of the most significant features of the SCRCP Amendments – two-tiered discovery, cost-shifting, and a "safe harbor." This article will then discuss the new 26(f) conference and the importance of preservation, the protections for privileged information, and form of production. Finally, this article will discuss the practical implications of the SCRCP Amendments and the actions that parties can take to maximize the potential benefits of the changes.

Three Myths that Created the Need for Reform

The need for the 2006 FRCP Amendments arose from difficulties created by three "myths" attributed primarily to the plaintiffs' bar, whose clients ordinarily did not face the challenges of preserving, collecting, reviewing, and producing large amounts of electronically stored information ("ESI") that was distributed across a large and complex information technology infrastructure. The plaintiffs' bar sought to exploit these challenges by insisting upon large and burdensome document productions without worrying about being subject to similar requests of their own clients. This situation is often referred to as "asymmetrical." The propagation of the following three myths undermined the efforts of the "producing party" (usually a defendant) to combat the unduly burdensome requests made by the "requesting party" (usually a plaintiff):

Continued on next page

Myth #1: "Just Push a Button"

Myth #2: "ESI is Just Like Paper"

Myth #3: "The Truth is on the Hard Drive"

The "Just Push a Button" myth argued that producing responsive ESI was "easy" because the producing parties' complex information-management systems allowed them to "just push a button" and all of the information that the requesting party sought could be identified easily and produced. This argument was appealing on its face, and requesting parties sometimes pointed to advertisements for information-management software, which touted the software deployment at Fortune 100 companies, and argued that these advertisements proved that the information sought was at the producing party's fingertips. The reality was altogether different. The categories and types of information requested in litigation seldom aligned with the way that the producing party stored and organized its information. In addition, the requests were often so broadly worded that they literally could be read to seek all ESI within an organization. Nonetheless, the "just push a button" perception persisted and grew so that in many cases, courts were reluctant to impose meaningful limits on requests for ESI. In sum, the "just push a button" myth undermined FRCP 26's protections against undue burden and expense because the myth suggested that, in fact, there was no undue burden and expense associated with the production of ESI.

The "ESI is Just Like Paper" myth argued that ESI was no different from paper documents and, therefore, was properly subject to discovery. For example, the mythmakers pointed out that a producing party would never argue that responsive documents should not be produced simply because they were stored in a cardboard box rather than a file cabinet. Similarly, a producing party should not be allowed to "shield" ESI from discovery simply because the producing party chose to "store" the ESI in complex computer systems. Again, this myth belied the very real challenges associated with identifying, collecting, reviewing, and producing ESI. But, the myth was facially compelling –- surely a producing party should not be allowed to "shield" ESI from discovery simply because they were stored in electronic form. Indeed, the Federal Rules of Civil Procedure contemplated discovery of such information based upon language providing for the discovery of information available through "detection devices." Of course, the mythmakers ignored the portions of FRCP 26 that recognized discovery should be limited if it would result in undue burden, regardless of the form that the discovery would take.

The "Truth is on the Hard Drive" myth argued that the "smoking guns" were most likely to be found on the hard drives of individuals. As a result, discovery into every electronic crevice of an organization was paramount (deleted data, thumb drives, text messages, instant messages, etc.). However, this argument ignored the fact that individuals' hard drives often do not contain "the truth," but instead contain inaccurate versions of documents, analyses, and memos that are in various states of draft. Indeed, discovery into "fragmented" and "slack" space of a hard drive in order to obtain copies of deleted documents often results in obtaining duplicative documents or documents replete with inaccuracies or incomplete information. Nonetheless, high profile cases with "smoking gun" emails propagated this myth.

Mythbusters: the 2006 FRCP Amendments regarding Electronic Discovery

The Committee Notes that accompanied the 2006 FRCP Amendments contained some helpful language that dispelled the three problematic myths that had flourished in various courtrooms over the preceding decades. The following is a summary of the myths and the comments from the Committee Notes that helped to dispel each myth:

- Myth: "Just Push a Button" – Reality: "Electronic storage systems often make it easier to locate and retrieve information. But some sources can be accessed only with substantial burden and cost." Committee Notes, F.R.C.P.26 (emphasis added).
- Myth: "Just Like Paper" – Reality: "It has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of 'document.'" Committee Notes, F.R.C.P. 34.
- Myth: "Truth is on the Hard Drive" – Reality: "In many cases, the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs." Committee Notes, F.R.C.P. 26.

Thus, the Committee Notes went a long way to dispelling the myths that had driven a pattern of court orders compelling expensive and disproportional productions from such expensive sources as back-up tapes. The 2006 FRCP Amendments recognized that just because a source of ESI existed, it did not automatically mean that the source was "fair game" in discovery. This provided significant guidance for courts and allowed them a definitive framework in which to analyze ESI disputes. Arguably, the "undue burden" language already present in FRCP 26 prior to the 2006 FRCP Amendments could have served this purpose, but the propagation of the three myths discussed above blunted the utility of these existing tools. As a result, it was necessary for the 2006 FRCP Amendments to put "undue burden and

cost" front and center in the analysis of whether discovery from a particular source of ESI was appropriate. In addition, the 2006 FRCP Amendments provided an incentive for the requesting party to be judicious in their requests because the requesting party may end up paying for the costs associated with the production of the requested ESI.

In sum, the 2006 FRCP Amendments made proportionality the cornerstone of the framework for courts to resolve disputes over ESI. Whether production of ESI from a particular source would be appropriate would depend upon the burden or cost associated with the production and the importance of the ESI to the litigation. Indeed, the 2006 FRCP Amendments created another one of the law's balancing tests, with burden and costs on one side of the scales, and importance to the litigation and the amount in controversy on the other.

South Carolina Adopts the Federal Rules' Triumvirate: Two Tiers, Cost Shifting, and a "Safe Harbor"

The SCRCP Amendments follow the 2006 FRCP Amendments in adopting three features that ensure proportionality when resolving a discovery dispute over ESI – two-tiered discovery, cost shifting, and a "safe harbor" from sanctions. First, SCRCP 26(b)(6), like its federal counterpart FRCP 26(b)(2)(B), creates two tiers of discoverable information.[4] The first tier is ESI that is reasonably accessible and therefore discoverable as a matter of right. The second tier is ESI that is not reasonably accessible because of undue burden or cost, which is presumptively not discoverable. SCRCP 26(b)(6) provides that "a party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost."[5] Note two things. First, the producing party must identify the source of the ESI to the requesting party, but the Rule does not specify how this will be done. In practice, litigants ordinarily have made such disclosures general in nature. Secondly, while the producing party gets the privilege of identifying the ESI that is not reasonably accessible because of undue burden of cost, this privilege carries with it the responsibility of proving the undue burden and cost that would be associated with producing the information.[6] If the producing party makes this showing, then it will overcome the first "hurdle" to avoiding the undue burden and cost of producing from ESI sources that are not reasonably accessible. But, that is not the end of the issue. A requesting party may still seek production of the disputed ESI by showing good cause.[7] In determining whether there is "good cause," the courts should look to the factors set forth in the Committee Notes to FRCP 26(b)(2)(B), which focus primarily on whether the ESI sought is the "sole source" of information important to the litigation.[8] Applying these factors is vitally important to promoting the proportionality that the Rules are intended to establish.

If a showing of good cause is made by the requesting party, then the second significant feature of the SCRCP Amendments, cost shifting, may be invoked. Specifically, the court may order the requesting party to pay some or all of the expenses associated with producing ESI from the source that is not reasonably accessible.[9] This mechanism should incent the requesting party to be judicious in the ESI that it seeks. Indeed, this cost-shifting mechanism seeks to balance the one-sided nature of asymmetrical litigation where one party possesses a signification volume of ESI, but the other does not, leaving no incentive for the party with little or no ESI to be reasonable in their discovery requests. To be more precise, it seeks to deter discovery requests that are intended primarily to burden a producing party by increasing the cost of defense to the point where settlement can be had for a fraction of the cost of producing ESI from a source that is not reasonably accessible because of undue burden or cost.

Finally, the third feature of the SCRCP Amendments seeks to restore balance to the discovery process by discouraging potentially draconian sanctions for unintentional missteps in the challenging ESI landscape.[10] ESI sanctions cases have received a significant amount of media attention and they illustrate the risks associated with the preservation, collection, and production of ESI. To mitigate these risks, Rule 37(f) of the SCRCP Amendments provides a "safe harbor" from sanctions arising from unintentional conduct. Rule 37(f) recognizes that unlike paper documents, ESI is dynamic. While a box of documents will remain in the corner of a storage room until some human makes an effort to move it, the way in which IT system work puts ESI at risk because there may be automated delete or purging features intended to relieve IT systems of unneeded ESI. While the ESI may no longer be necessary for the business, it may be relevant to litigation involving events that happened years before. Of course, at the beginning of a case, it is often difficult to know exactly what ESI will be at issue after the case develops. That makes it difficult to identify and preserve all potentially responsive ESI. The amended SCRCP 37(f) recognizes this challenge and provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as result of the routine, good-faith operation of an electronic information system."

Note, however, that the safe harbor does not provide blanket protection against sanctions for all types of ESI loss resulting from automated processes. On the contrary, the Committee Notes to FRCP 37(f) (now FRCP 37(e)) make it clear that a party must make reasonable efforts to suspend such automated features if it appears necessary to preserve poten-

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tially responsive information. Ordinarily, these actions are required in order to establish the "good faith" necessary to seek shelter in the safe harbor. If such actions create significant burden or expense, parties should document the burden and expense and consider raising the issue with the opponent or seeking protection from the court.

Moving Towards the FRCP 26(f) Conference, But Without the "Preservation" Discussion

The SCRCP Amendments add provisions for ESI to the existing 26(f) framework, which is similar to FRCP 26(f)'s requirements that the parties conduct a mandatory conference on discovery and submit a report to the court. However, the Rule 26(f) provisions of the SCRCP Amendments provide only that the court "*may* direct the attorneys for the parties to appear *before it* for a conference on the subject of discovery[]" and also provides that "[t]he court *shall* do so upon motion by the attorneys for any party if the motion includes [a proposed discovery plan and other information]."[11] In contrast, FRCP 26(f) requires these conferences in most cases, and the conference is held between the parties instead of before the court. Nonetheless, the SCRCP Amendments make clear that any discovery conference should include a discussion of ESI.

The SCRCP Amendments to SCRCP 26(f) do not include [12] one provision of FRCP 26(f) that was a part of the 2006 FRCP Amendments. FRCP 26(f)(2) requires the parties to discuss, among other things, "any issues about preserving discoverable information[.]" [13] This provision created a significant amount of disinformation when first included in the 2006 FRCP Amendments. Many commentators and the wider media characterized this provision as requiring extreme measures to preserve ESI. In reality, it simply suggested that the parties discuss the matter with the hope that parties would reach agreement early on and thus avoid litigating the propriety of a party's preservation efforts "after the fact" and when it was too late to turn back the clock and do anything differently. The change proved to be less problematic (and to some extent less successful at avoiding controversy) than originally thought. While it has encouraged parties to have a discussion about appropriate preservation efforts, and thus avoided controversy on some occasions, litigants continue to litigate preservation issues either at the beginning of the litigation or at various points after the case has developed. Nonetheless, in many cases, it does serve a party well to raise preservation issues with the opponent and make clear what preservation efforts have been taken in order to avoid addressing the issues for the first time when the opponent is engaging in the equivalent of "Monday-morning quarterbacking."

Of course, nothing prevents the parties in state court from discussing and reaching agreement on preservation efforts at any discovery conference or otherwise. In addition, any party to litigation must give deep and careful thought to, and adequate attention to execute on, appropriate preservation efforts. Failure to preserve potentially responsive ESI is the primary reason that parties are sanctioned. Yet, what constitutes appropriate preservation efforts depends on the facts and circumstances of each case and, to a large extent, the perspective of the judge. Indeed, judicial opinions vary, with some courts holding that a failure to issue a written litigation hold notice constitutes gross negligence, [14] while other courts suggest that in some circumstances, a written litigation hold might be counterproductive.[15]

In most cases, the safest course is to issue a written litigation hold and follow up in a methodical way to ensure that it is followed, documenting each step along the way. In the end, the court will decide whether a party's efforts were or were not reasonable. If costs are an obstacle to certain preservation efforts, then document those costs for future reference and in anticipation that the preservation efforts will be second-guessed by an opponent in order to gain a strategic advantage.

A Word About Privilege: Clawback is the Rule, Rather than the Exception

The SCRCP Amendments include a provision in Rule 16(b) suggesting that the parties include in the pretrial order "any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production."[16] Similarly, the SCRCP Amendments include a provision in 26(b)(5)(A) that provides:

> If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The producing party must preserve the information until the claim is resolved. [17]

Thus, SCRCP 26(b)(5)(A) provides a procedure for the "clawback" of inadvertently produced privileged materials. The purpose of this provision is to eliminate, to the extent possible, any uncertainty about whether a party waives privilege in the event of inadvertent production. This provision also reduces the likelihood of a draconian loss of privilege protection despite reasonable efforts to preserve privilege,

which becomes more likely when dealing with the massive volumes of documents that are characteristic of ESI. Note, however, that these protections are not "bullet proof" because an argument remains that this procedural rule cannot change the substantive legal doctrines related to waiver. The Federal Rules addressed this by amending Federal Rule of Evidence 502, but similar changes to South Carolina law remain open.

A Word About Form of Production

The SCRCP Amendments add a provision to SCRCP 34 providing that a document request "may specify the form or forms in which electronically stored information is to be produced."[18] However, amended Rule 34 also allows an objection "to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. . . . If objection is made to the requested form or forms for producing electronically stored information (or if no form was specified in the request), the responding party must state the form or forms it intends to use."[19] Thus, the amended Rule 34(b) will allow the requesting party to state their preference with respect to form of production, but the producing party has their say as well. Any dispute can be decided by the court. The amended Rule 34 provides further guidance on form of production by providing that "a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable." [20]

Aggressive litigants may argue that this language provides a right to production in native format or that the language provides a right to direct access to the producing party's information technology systems. Either of these outcomes can create problems for the producing party. Producing in native form creates document-control challenges. For example, a document produced in native may be printed out for use in a deposition in a number of different ways, creating the potential for confusion. In addition, the document is not static and does not have the document-control discipline of a hard-copy document or image with a bates number. Direct access is even more problematic because it essentially circumvents the ordinary procedures of Rule 34 by allowing an opponent direct access into the information technology systems of a party, which can expose privileged, confidential, or irrelevant materials. In addition, the logistics of this ordinarily result in significant expense, especially if the producing party wants to ensure the requesting party has access only to certain portions of the producing party's systems.

The Committee Notes to FRCP 34 make it clear that the amendments are not intended to create or encourage either native production or direct access. With respect to native production, the Committee Notes provide that "[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature[.]"[21] Similarly, the Committee Notes make it clear that direct access should be the exception, rather than the rule, by explaining that "[t]he addition of testing and sampling is not meant to create a routine right of direct access to a party's electronic information system, although such access *might* be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems." [22] Thus, a court should require a party seeking such access to demonstrate exceptional circumstances, such as the inability to obtain the relevant discovery in any other way, before granting any such access.

In practice, the majority of ESI production needs can be met by producing static images of the documents with associated "load files" that preserve the "searchability" of original native documents, thus satisfying Rule 34's directive to avoid producing "in a form that removes or significantly degrades this feature [of being "searchable by electronic means"]." Excel files and dynamic databases can create special challenges if, for example, the formulas embedded in the excel files are particularly relevant. In most cases, however, excel files can be formatted and produced as images with load files as well. If redaction is necessary, special care should be taken to redact in a way that also removes the text from the load file. Otherwise, the requesting party will have access to the redacted text just as if the entire document had been produced.

Preparing a Path: How to Prepare for the Coming Changes

Educate Opposing Counsel and the Courts: With the enactment of the SCRCP Amendments, defense counsel should first ensure that opposing counsel and the court recognize the purpose of the SCRCP Amendments. Defense counsel should not allow opposing counsel to perpetuate yet another myth that these amendments have been enacted to make all ESI "fair game" in state court actions. On the contrary, these amendments have been enacted to provide the courts with a framework for ensuring proportionality in discovery. Specifically, courts should protect a party from undue burden and cost associated with ESI if the case or controversy at issue does not justify the proposed expenditure. In addition, the court should encourage the requesting party to be judicious in its requests by imposing the cost-shifting mechanism appropriately.

Prepare for Preservation: As mentioned above, one of the significant challenges of ESI is taking appropriate steps to ensure that potentially relevant ESI is preserved. Exactly what those preservation

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efforts will look like will depends on the nature of the ESI involved as well as the facts of the case. In order to maximize the protections afforded by SCRCP 37(f), a party should make a good-faith effort to identify sources of potentially responsive ESI that may be at risk because of automated processes and then determine whether these can be suspended without undue burden or cost. Typical examples include automated e-mail delete features and databases that "roll off" data after a certain period of time.

Be Prepared to Meet Your Burden: While the SCRCP Amendments do not impose one of the more challenging provisions of the Federal Rules, the duty to identify in the Rule 26(a) disclosures the sources of ESI that may support a party's claims and defenses, the SCRCP Amendments do require the producing party to identify "sources" of ESI that are not reasonably accessible because of undue burden or cost. This will require a party to be prepared to assess IT systems and identify those sources, through the help of the business users as well as the IT professionals. Helpful tools for this process include a protocol and checklist that walks counsel through the questions to ask in assessing this with the client. Then, document the outcome.

Next, a litigant will need to be prepared to estimate the cost of preserving, collecting, reviewing, and producing ESI from the source at issue. This will require estimates of the volume of ESI contained in the source, the cost of copying the ESI to a platform on which it can be searched, and the cost of reviewing the potentially responsive ESI. The litigant will also need to be prepared to determine whether the ESI in these sources is likely to be the sole source of potentially responsive ESI. This will require some knowledge of the contents of these sources. In this way, a litigant can evaluate the sources of ESI and then prepare to maximize the protections afforded by the new SCRCP 26(b)(6)(A).

Conclusion

The SCRCP Amendments present challenges, but with preparation and planning, litigants can use them to accomplish the purpose of the SCRCP Amendments – ensuring proportionality and avoiding undue burden and cost associated with ESI in litigation.

Endnotes

1 Jim Irvin is a partner with Nelson, Mullins, Riley & Scarborough, L.L.P. and resident in the Columbia office. He has significant experience litigating electronic discovery disputes in state and federal court in venues across the country in a variety of business and product-liability cases. He has managed large-scale electronic discovery projects, including the collection, review, and production of numerous forms of electronically stored information. In addition, he counsels clients on litigation preparedness and helps them develop practical and cost-efficient procedures for the preservation, collection, review, and production of electronically stored information.

2 "Proportionality," quite simply, is the need to ensure that the cost or burden of the discovery is justified by its benefit to the litigation *and* the amount in controversy or issues at stake in the litigation. *See* S.C.R.C.P. 26(b)(6)(B)(iii). Commentators and courts have emphasized the importance of proportionality in determining what steps are appropriate in the preservation and production of electronically stored information. *See* THE SEDONA CONFERENCE COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY (2010); THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS (2010); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done-or not done-was *proportional* to that case and consistent with clearly established applicable standards.") (emphasis in original) (citing THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b. (2007) ("Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.")).

3 Christopher S. Rugaber, *New e-discovery rules benefit some firms*, USA TODAY, Dec. 4, 2006 (emphasis added).

4 The Acting Chairperson of the Advisory Committee on the Federal Rules, which spearheaded the development of the 2006 FRCP Amendments, was the Honorable Lee H. Rosenthal from the United States District Court for the Southern District of Texas. Notably, Texas state rules of procedure already had a "two tier" structure for the discovery of ESI. Under that system, the producing party would produce responsive ESI that admittedly was accessible, but in order to get ESI that was identified as not accessible by the producing party, the requesting party would need to move the court for an order compelling production and would need to pay for at least some of the costs associated with the production. This procedure meant that the requesting party now had "skin in the game" in that they would help pay for discovery of ESI that was not accessible, which incented the requesting party to be judicious in their requests.

At the time, Texas was recognized as a state that often had complex litigation involving technology and companies producing significant amounts of ESI. Texas also had a strong, vocal, and nationally recognized plaintiffs' bar. As a result, if this two-tiered framework could work in Texas, then it was likely to be workable in other jurisdictions as well. To the plaintiffs' bar's credit, during the public hearings held in Dallas regarding the proposed 2006 FRCP Amendments, attorneys from the plaintiffs' bar in Texas candidly explained that they were able to litigate cases and get them resolved under the two-tiered structure. This went a long way towards recognizing that a case could be litigated using ESI only from accessible sources and without spending an inordinate amount of money to search for and produce all types of ESI from expensive sources such as deleted data, disaster-recovery systems, back-up tapes, or legacy systems, as some court opinions had suggested.

5 S.C.R.C.P. 26(b)(6)(A).

6 "On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost." S.C.R.C.P. 26(b)(6)(A).

7 "If that showing is made [that the information is not reasonably accessible because of undue burden or cost], the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B)." S.C.R.C.P. 26(b)(6)(A).

8 The Committee Notes to the 2006 Amendments explain the following:

> [a]ppropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Fed. R. Civ. Proc. 26 Committee Notes.

9 "The court may specify conditions for the discovery, including the allocation of expenses associated with discovery of the electronically stored information." S.C.R.C.P. 26(b)(6)(A).

10 For an excellent overview of the varying standards for imposing sanctions for spoliation, as well as an example of circumstances under which sanctions are warranted, *see Victory Stanley v. Creative Pipe*, 2010 WL 3530097 (M. Md., Sept. 9, 2010).

11 S.C.R.C.P. 26(f) (emphasis added).

12 Another provision of the 2006 FRCP Amendments not included in the SCRCP Amendments, likely because there is no state counterpart, is FRCP 26(a)(1)(A)(ii)'s requirement that both parties include as part of their initial disclosures "a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment[.]" This requirement caused some consternation because identifying all ESI that may support a party's claims or defenses requires significant effort and may not be practicable within the timeframes provided for initial disclosures. In practice, the challenge has been less problematic because litigants generally provide the information available and then rely on supplementation as discovery develops.

13 Fed. R. Civ. P. 26(f)(2).

14 *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) (holding that a failure to issue a written litigation hold constitutes gross negligence). But *see Orbit One Communications, Inc. v. Numerex Corp.*, 2010 WL 4615547 at *10 (S.D.N.Y.) ("[t]he implication of Pension Committee, then, appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there [has] been no showing that the information had discovery relevance, let alone that it was likely to have been harmful to the innocent party. If this is a fair reading of *Pension Committee*, then I respectfully disagree.").

15 *Orbit One Communications, Inc. v. Numerex Corp.*, 2010 WL 4615547 at *11 (S.D.N.Y.) (explaining that "in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all.").

16 S.C.R.C.P. 16(b)(5).

17 S.C.R.C.P. 26(b)(5)(B).

18 S.C.R.C.P. 34(b).

19 Id.

20 S.C.R.C.P. 34(b)(1).

21 Committee Notes for 2006 Amendments to Rule 34.

22 Id. (emphasis added).

Some Things Change, Some Stay the Same

In the Spring Issue of *The DefenseLine* we published a piece which noted that in January of 2011, the South Carolina Supreme Court issued four orders which proposed changes to the procedural rules which can effect civil trail practices, including proposed changes to Rules 6, 7, 56 and 59 of the South Carolina Rules of Civil Procedure, and Rule 2 and 21 of the South Carolina Rules of Family Court related to a briefing schedule for motions. It appears the Supreme Court had a change of heart as to the order relating to a briefing schedule on motions. The Court withdrew the proposed changes from consideration by the General Assembly prior to any action upon them. Therefore, for now, a briefing schedule did not become a part of the Rules.

ARTICLE

Lawyers: Are You Lost in the Technology Cloud?

by Wendy J. Keefer*

First came desktop computers putting creation of documents, images and other work products at everyone's fingertips. Then came laptops, allowing your fingertips to do this work in multiple locations. What followed was the ever-growing Internet, permitting access to information from multiple locations and eventually without even a wire connection. The world of the Internet now provides continuously expanding means for accessing information and networking – both personally and professionally. That said, this article seeks only to introduce you to a small sample of what is truly available out there for potential use by lawyers and in law practice.

Information Gathering

By now, the idea of using Westlaw or LexisNexis to gather legal and news information is well known and commonplace. These services, once costly, are relatively accessible (at least in some form) to most. Lawyers are generally comfortable with the formats used by these legal research tools.

With the online presence of courts, legislatures, and other law-creating bodies, though, access to the legal materials they produce may be available directly. Not to mention that other legal research services continue to pop up. Are you familiar with Google Scholar -- http://scholar.google.com/advanced_scholar_search? And though certainly never to be the final source or say on any topic, more and more issues now find their entry on Wikipedia (www.wikipedia.org). As I tell my law students, you cannot rely upon or cite to Wikipedia, but that is not to say you cannot use the entries on that site to identify potentially acceptable sources. Many Wikipedia topics include quite extensive citation to accepted legal or factual sources.

Want access to other lawyers' and legal professionals' work (or want to share your own in order to increase your name recognition in a particular area of work), try JD Supra (www.jdsupra.com). Here, lawyers share briefs, pleadings, motions and the like. You can too. Just be ever conscious of your ethical obligations to protect client confidentiality and otherwise comply with all relevant professional rules.

Though not strictly information gathering, once you locate information you need, the Internet is full of services to help you format that information. For example, pdftoword.com can help you convert pdf documents to Word format and readability.com can assist with removal of ads, banners and other distractions from web pages to make them more printer friendly.

Aside from these informational or formatting tools, perhaps the most talked about electronic or Internet innovations are the various social networks that alter traditional networking and permit both information gathering and sharing among online communities.

Information Sharing

Traditional websites, blogs, Facebook, LinkedIn, Ning, and Twitter all provide a means for lawyers to network with each other, with those providing services to the legal profession, and with clients or potential clients. You can find your actual past and current friends (Facebook), professional services recommended by others with similar practices (LinkedIn), and follow others (Twitter). By now, it is generally accepted good practice for law firms to have easily searched, user-friendly websites. And, more and more lawyers appear on the professional networking site, LinkedIn. Lawyers, however, seem more reluctant to join newer or seemingly "younger" platforms, like Twitter.

As a relatively new "Tweeter," here are just a few ways Twitter differs from these other means of learning about others and telling about yourself: (1) You can follow other users of Twitter who you do not know and likely may never know, but who provide useful information. Want a constant feed of state, national or world news in 140 characters or less and including direct links to full news stories – follow those on Twitter such as @nytimes, @WSJ, @thestate, or @postandcourier. How about breaking legal news – try following @SCBAR or any of a number of official or private members of Twitter following U.S. Supreme Court opinions (e.g., @SCOTUSOpinions, @SCOTUSTweets, or @USSupremeCourt). Or keep abreast of this association by following @SCDTAA.

Certainly, Twitter is also filled with innumerable members whose Tweets hold no interest for you (e.g., @DavidHasselhoff, @ParisHilton, or @charliesheen – though, admittedly, this last one can be entertaining), but you need not follow those folks. You may find that targeted Twitter participation provides you the most complete and easily accessible breaking news and information of any similar online network-

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ARTICLE

Court Holds Punitive Damages Recoverable from Underinsured Motorist Carriers

by Fredric Marcinak and Jack Riordan

The question of whether punitive damages were recoverable from an underinsured motorist ("UIM") carrier had long bedeviled insurers and attorneys in South Carolina. The question arose when an injured plaintiff's damages exceeded the insurance coverage available for the at-fault motorist defendant, thus triggering the injured plaintiff's UIM coverage. Often, where liability was clear and damages significant, the liability carrier for the at-fault motorist agreed to tender its policy limits in exchange for a covenant not to execute judgment obtained against the at-fault motorist. The plaintiff then continued their lawsuit against the at-fault motorist in name only, while the UIM carrier assumed the defense. In real terms, the suit at that point proceeded against the plaintiff's own insurance carrier. Thereafter, any damages awarded beyond the liability coverage, compensatory or punitive, would be addressed solely by the UIM coverage.

For years, defense attorneys and UIM carriers argued that punitive damages were not recoverable from the UIM carrier as a matter of public policy and constitutional law. In support of this argument, they contended that punitive damages were designed to punish a wrongdoer and to prevent future reckless behavior. Here, where punitive damages were paid not by the wrongdoer but by the injured plaintiff's own insurer, the wrongdoer was not punished and would not be deterred from future recklessness. Many states continue to agree and hold that punitive damages may not be recovered from a UIM carrier. See, e.g., Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 246 S.W.3d 653, 658 (Tex. 2008).

Although this question was debated in South Carolina for years, the state courts had not conclusively decided the issue. Typically, this was because the courts viewed the issue as non-justiciable until a jury had actually awarded punitive damages and very few cases progressed through trial to that end. However, in O'Neill v. Smith, 695 S.E.2d 531 (2010) the South Carolina Supreme Court addressed the issue via certified question of law.

In O'Neill, the Federal Court diversity plaintiff had accepted the liability carrier limits in exchange for a covenant not to execute, agreeing to pursue additional damages solely against his own UIM carrier. The UIM carrier then moved for partial summary judgment on the plaintiff's claim for punitive damages. The Federal Court, determining there was no South Carolina precedent, certified the issue to the South Carolina Supreme Court for resolution. The Supreme Court accepted the certified question and held that punitive damages are recoverable from a UIM carrier.

The Court relied on several primary points to support its ruling. Initially, the court found that S.C. Code §38-77-160, which provides for UIM coverage, allows for the recovery of punitive damages:

[C]arriers shall . . . offer . . . underinsured motorist coverage . . . to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault . . . underinsured motorist.

The term "damages" is defined as including "both actual and punitive damages." S.C. Code § 38-77-30(4). Through the combination of these two provisions, the Court determined that punitive damages are recoverable from a UIM carrier.

The court's reading of §38-77-160 creates an additional ground for support. Specifically, the Court's determination necessarily assumes that punitive damages can be "sustained" by a plaintiff. Therefore, punitive damages are not merely a recognition of wrongful action and a means of punishment as against a tortfeasor, but a component of the injury sustained by the tortfeasor's victim. Accordingly, a plaintiff might sustain greater damage based solely upon the reckless, willful or wanton actions of the at-fault defendant. In articulating this ground to support the holding, the Court reaffirmed prior decisions which held that punitive damages "compensate" for violation of the plaintiff's rights by the reckless behavior of the tortfeasor. Although the case law relied on by the Court is longstanding, the lack of discourse in distinguishing "punitive" from "compensatory" damages may be of concern. At least in this context, punitive damages apparently ARE compensatory damages, albeit a version requiring a higher standard of proof. The Court reminded, however, that our legislature defined damages to include both actual and punitive damages and to deny an injured party the benefit of their own UIM coverage would itself violate public policy.

The decision in O'Neill will immediately affect those corporate insureds and insurers who have secured UIM coverage to protect their drivers when punitive damages in excess of coverage are awarded in favor of their employee-drivers against at-fault motorists. However, even where a trucking company,

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Court Holds Punitive Damages... cont.

for example, elects not to obtain UIM coverage, it may still be affected by O'Neill given that the decision will logically extend to uninsured motorist ("UM") coverage as well. Because UM coverage is mandatory, all trucking companies in South Carolina will be required to pay punitive damages where their driver recovers from them against an uninsured motorist. Punitive damages paid by a UIM or UM carrier, and even larger settlements paid because of the possibility of punitive damages being awarded, will impact self-insured retentions and affect the loss runs for trucking companies, which, in turn, will lead to increased premiums for coverage.

Generally, corporate insureds such as trucking companies select the minimum coverages for UM and UIM because their drivers are covered by worker's compensation. However, because the mandatory UM is $75,000 for a $1 Million CSL policy, UIM is often purchased at the same amount. Potentially worse will be the application of the same to self-insureds who utilize a fronting policy to address this exposure. Therefore, in a punitive UM case, the motor carrier will have paid the worker's compensation for the driver, paid for its physical damage to its own vehicle, paid the cargo claim of its shipper, and will now pay the excess exposure of the at fault motorist who recklessly caused the entire accident.

Despite such scenarios, the Court referenced and rejected as "disingenuous" the UIM carrier argument that, having done no wrong, the UIM carrier should not be required to pay a punitive damage award. The Court reminded that, as a liability carrier, the insurer would also have done no wrong, but would admittedly be required to pay punitive damages. However, this argument ignores the fact that in the liability context the tortfeasor has directly contracted with the insurer, and the insurer is able to identify and manage its risk through premium level changes and/or the cancellation or refusal of coverage. In the UIM context, the insurer has no relationship with the tortfeasor, nor any ability to predict exposure for its insureds' encounters with reckless, underinsured drivers. Perhaps a more distinctive reminder by the insurer that neither it nor its insured had done wrong would have seemed less disingenuous; however, such reminder may be more effectively addressed to the Legislature than the Supreme Court.

Ultimately, the Supreme Court determined that protection of the injured insured was the central purpose of UIM coverage, with statutory "sustained damages" encompassing both compensatory and punitive damages. Whether the lack of distinction between compensatory and punitive damages was statutorily intended remains to be seen. In the meantime, it can be expected that Plaintiffs will seek to allocate settlements with liability carriers to maximize pressure on UM, UIM or excess carriers. Varying allocations between co-defendants can also be expected. In addition, the taxation of punitive damages is further brought into question. Therefore, it appears there may be some wrestling over O'Neill for the foreseeable future - unless the Legislature attempts to provide a more definitive, final word.

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Lawyers: Are You Lost in a Cloud? cont.

ing site. And, as the SCDTAA's Tweets intend to do, the right members of the Twitter community for you to follow may, by regularly retweeting entries of those they follow, compile most of the information that interests you in their own tweets, thereby limiting those you must actually "follow." Unsure about Twitter, take a look at 22 Tweets (http://22tweets.com or @22twts), a site full of interviews with lawyers who tweet.

For those of you who join the Twitter community, familiarize yourself with tools that can help you manage your online presence (e.g., tweetdeck.com, hootsuite.com). These services can monitor several different social networking sites and help you organize your own contributions to them. And, Twitter participation does require terms and methods to be learned by the new user – hashtags (a way to identify your tweet as containing information on a certain subject or to search tweets on certain subjects), URL shortening (services like http://bit.ly/ that shorten website addresses to permit their posting without exceeding the 140 character tweet limit), and linking your Twitter account through your website, Facebook or LinkedIn pages. Taking a look at Twitter's own guidance on its use is worth a few minutes. Who knows what is next on the electronic horizon.

Each day new developments present advantages, as well as potential ethical concerns, for lawyers (e.g., cloud computing that raises concerns of client confidentiality). With these and any future networking platforms, lawyers must be ever vigilant to act ethically and to monitor their own state bar rules and opinions related to their usage. Never forget that what you put out there can be seen and, potentially, can be seen forever.

Despite any individual's concerns or lack of interest in these online sites and those yet to come, no doubt exists that familiarity with what is out there can only serve to assist us in using those tools that will make us most efficient, accessible, and in tune with our clients and others in the legal community.

JOIN SCDTAA @ THE ANNUAL MEETING
NOVEMBER 3-6
@ THE RITZ CARLTON, AMELIA ISLAND, FL
FOR A DISCUSSION OF
THE ETHICAL USE OF SOCIAL MEDIA & NETWORKING

ARTICLE

Practical Implication of Tort Reform

by Laura M. Saunders and James B. Hood [i]

I. Introduction

Many states, including South Carolina, have recently passed medical malpractice reform laws. These statutes generally act to impose caps on the amount of certain damages recoverable in a medical malpractice suit, create time limits for filing claims and conducting required mediations, and set forth new standards for expert witnesses.[ii] South Carolina's version of this medical malpractice reform requires the filing of a Notice of Intent to File Suit prior to filing a complaint which notifies all parties of the claim, tolls the statute of limitations, and sets forth the theory of liability in the case. However, the pre-suit pleading requirements under this statute do not constitute proper pleadings under the rules in federal court. While considerable attention has been paid to the requirements and implications of these medical malpractice reform laws in the states where they have been enacted, little attention has been paid to how these laws will are to be applied in federal court. Under the *Erie* doctrine, federal courts must apply state substantive laws. The majority of federal courts interpret state medical malpractice reform laws as substantive but equally procedural. However, the numerous procedural requirements contained in medical malpractice reform statutes seem to create confusion when a medical malpractice suit is filed in federal court or removed to federal court. This article evaluates the practical implications that South Carolina's medical malpractice reforms have on cases pending in federal court when jurisdiction is based upon diversity.

II The *Erie* Problem

Some federal courts will apply the state law and have discussed the substantive/procedural dichotomy and *Erie* problem at length. However, other federal courts refuse to apply state medical malpractice laws regardless of the principles set forth in Erie due to the stringent procedural requirements and other conflicts with the Federal Rules of Civil Procedure ("FRCP") or the Federal Rules of Evidence ("FRE").

Under *Erie* and its progeny, the federal court must apply the substantive law of the state where the cause of action arose. The traditional *Erie* analysis involves a determination of whether a law should be classified as substantive or procedural.[iii] Many courts have analyzed the blurred line between what should be classified as substantive or procedural.[iv] Substantive law establishes principles and defines the rights associated with some laws, while procedural law sets forth the actual rules which the parties and the court must follow. In the case of state medical malpractice reform, the statutes are substantive because they place caps on the amount of damages recoverable and create requirements for expert witnesses. However, these statutes also set forth specific procedural requirements to limit the time a Plaintiff has to file suit and allow for tolling of the statute of limitation: thus, the *Erie* problem. The United States District Court for the Eastern District of Texas summarized it well when the Court analyzed how the provisions of the Texas Medical Liability and Insurance Improvement Act create confusion in light of an *Erie* challenge:

> The problem is that the rules cannot operate simultaneously without one being subordinated to the other. And although the substantive/procedural distinction is not relevant when the state and federal rules directly collide, at best, section 13.01 falls within the uncertain area between substance and procedure and is "rationally capable of classification as either." [v]

The Fourth Circuit joins the majority approach on the applicability of state medical malpractice reform in federal court. In *DiAntonio v. Northampton-Accomack Memorial Hospital*, the court reasoned that, since state medical malpractice reform statutes blend substantive and procedural law, the court should apply state law.[vi] In *DiAntonio*, the Court applied the Virginia Medical Malpractice Reform Act in a diversity action.[vii] Specifically, the Court held that the procedural pre-filing notice provisions of the Act were applicable and dismissed the action based on the Plaintiff's failure to properly comply with the pre-filing notice requirements under the state laws.[viii] The Court reasoned that the Act's notice and other requirements were so "intimately bound up with the rights and obligations being asserted as to require their application in federal courts under the *Erie* Doctrine." [ix]

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ARTICLE CONT.

III. The Impact of Medical Malpractice Reform Statutes on Trial Practice

When a Plaintiff files a medical malpractice action in state court, the pre-suit filing requirements under South Carolina's malpractice reform statutes apply in conjunction with the South Carolina Rules of Civil Procedure.[x] First, the Plaintiff must file the Notice of Intent to File Suit in the state court and comply with the other requirements concerning expert witnesses and alternative dispute resolution. The statute of limitations is effectively tolled when a Plaintiff files a Notice of Intent. Once the Plaintiff files a formal Summons and Complaint, the case proceeds and may be defended in state court. If complete diversity exists and the amount in controversy exceeds $75,000, the Defendant may wish to file notice to remove the case to federal court.[xi] A Defendant has 30 days to remove the case to federal court once a Summons and Complaint is filed. In the notice of removal, a Defendant should indicate to the court that the case is in compliance with the state medical malpractice statutes.Importantly, the time to remove the case does not begin to run with the service of a Notice of Intent, rather, it begins when the summons and complaint are served. [xii]

When a Plaintiff elects to pursue a medical malpractice claim in federal court, there are three potential options but only one option is appropriate. First, the summons and complaint may be without addressing the state law pre-suit filing requirements. Such an action would ostensibly be filed under the belief that the state reform statute is procedural and will not be enforced by the district court. *DiAntonio* reveals the error of such a belief, and a pre-answer motion to dismiss pursuant to R. 12(b)(6), FRCP is appropriate. The second alternative is that a Plaintiff may file a Notice of Intent in the federal court, and the district court may reject the pleading which has happened in South Carolina. If the clerk does not reject the Notice of Intent, one should file a motion to dismiss the pleading since a Notice of Intent does not create a case or controversy as defined under federal law. The failure to appreciate this distinction and subsequent dismissal could have real implications if the Notice of Intent was filed at the end of the statute of limitations period as they often are. The third and proper alternative would be for the plaintiff to file the Notice of Intent in state court and then file the summons and complaint in federal court after completion of the pre-suit requirements.

Tolling of the statute of limitations is the key to defining the interrelationship between the state medical malpractice statutes and their applicability in federal court. As explained, the pleading requirements for filing a medical malpractice action in state and federal court are irreconcilable. As the Fourth Circuit majority sets forth, the federal court must adhere to state medical malpractice reform statutes because they are substantive law. As DiAntonio demonstrates, a Plaintiff must comply with the medical malpractice pre-suit requirements in order to pursue a state law medical malpractice claim in federal court. However, filing a Notice of Intent in federal court is not a proper pleading that formally commences an action so a Plaintiff must first file the Notice of Intent in state court and then once the Plaintiff is permitted to file a complaint, the complaint may be filed in federal court. By following this process, the tolling provisions will act to toll the statute of limitations from the date when the Notice of Intent is filed in state court. The federal court's computation of time should include the tolling provisions under the state laws as these are substantive provisions. The circumstances are rare where the timing may be so critical that a dismissal may result in a claim being time barred, but one should be aware of the possible situation to avoid shifting from the role of a defense lawyer to a defendant for failing to pursue a statute of limitations defense.

IV. Conclusion

Once the lawsuit is filed after all of the pre-suit requirements have been satisfied, you can expect the district courts to apply the medical malpractice reform law in its entirety. This will include the limitations of damages as well as any expert requirements. But the newness of these statutes and the rareness with which they are used in federal court require the savvy practitioner to be vigilant of the form as well as the substance because, in the context of these medical malpractice reforms, form is substance.

Endnotes

i Laura M. Saunders is an Associate at the Hood Law Firm. James B. Hood is a Partner at the Hood Law Firm.

ii S.C. Code Ann. §§ 15-79-110 – 130

iii *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

iv "The line between 'substance' and 'procedure' shifts as the legal context changes." *Hanna v. Plumer*, 380 U.S. 460, 465, 85 S.Ct. 1136, 1144 (1965) (*discussing Erie*, 304 U.S. 64, 58 S.Ct. 817 (1938)).

v *Poindexter v. Bonsukan*, 145 F.Supp.2d 800, 809 (E.D.Tex. 2001) (*quoting Hanna*, 380 U.S. at 472, 85 S.Ct. 1136).

vi 628 F.2d 287, 290 (4th Cir. 1980).

vii *Id.* Virginia passed its first Medical Malpractice Act in 1976 and has since amended the statutory caps on damages. *See* VA Code § 8.01 -20.1; § 8.01- 50.1; and § 16.1 – 83.1.

viii *Id.* at 292.

ix *Id.*

x *See* S.C. Code Ann. §§ 15-79-110 – 130

xi 28 U.S.C. §1441.

ARTICLE

U.S. Supreme Court Issues the Final Word on Class Action Arbitration Waivers

by Dowse B. ("Brad") Rustin IV [1]

A husband and wife travel to a local car dealership. Upon purchasing a vehicle, they are presented with a document titled "Arbitration Agreement." They sign the document. Later, husband and wife bring suit against the dealership for violations of various South Carolina consumer protection laws. They seek to certify a class of buyers of vehicles that were subjected to the same practices that they experienced. However, in the Arbitration Agreement, husband and wife agreed to waive their right to pursue class claims and solely to arbitrate in an individual capacity.

Until recently, the validity of this waiver of class action rights and the dealership's ability to compel arbitration varied depending on which state's law controlled.[2] Over the last twenty years, South Carolina courts have clearly telegraphed their intent to restrict "anti-consumer" terms in arbitration agreements, especially in consumer "adhesion contracts."[3] In 2010, the South Carolina Supreme Court addressed this issue head-on. In *Herron v. Century BMW*,[4] the court was confronted with a consumer vehicle purchase agreement. One of the documents signed by the purchasers in *Herron* included an "Arbitration Agreement," containing a waiver of class action rights. The *Herron* court found the arbitration agreement to be "neither oppressive nor one-sided." The court found that the purchasers "had a meaningful choice in signing the contract" and that some of the terms, in fact, "favor the customer." Rather, the court specifically addressed the parties' waiver of the right to pursue a class action.

The *Herron* court ultimately found the class action ban unenforceable and unconscionable. The court looked specifically to the consumer protection statutes that served as a basis for the plaintiffs' claims. The court, after noting the split in authority on this issue throughout the nation, held that the legislative intent of South Carolina's consumer protection statutes was to preserve the right to pursue class actions. The court concluded that "the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of [consumer protection statutes] and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." The *Herron* court struck the provision and allowed the case to proceed as a putative class action.

One year and eight days after the South Carolina Supreme Court issued the *Herron* opinion, the United States Supreme Court weighed in on this issue—settling the split of authority across the nation as to these "class action waivers." In *AT&T Mobility LLC v. Concepcion*, a plaintiff brought a putative class action against AT&T for charging sales tax on what had been advertised as "free" wireless phones.[5] AT&T immediately filed a motion to compel arbitration. Both the District of California and the Ninth Circuit Court of Appeals denied AT&T's motion—finding the class action waiver "unconscionable" under California consumer protection law (the *Discover Bank* rule).[6]

Both the trial and appellate courts specifically addressed the application of the Federal Arbitration Act ("FAA") to the parties' agreement. They focused on Section 2 of the FAA, which provides that "[a] written provision in any…contract…to settle by arbitration a controversy…shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). The Ninth Circuit, in striking the waiver, asserted that it "placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration."

The United States Supreme Court granted certiorari. In 2011, the Court reversed the Ninth Circuit's decision. Justice Scalia, writing for the four-justice majority (Justice Thomas filed a concurring opinion, forming the 5-4 majority) disagreed with the Ninth Circuit's analysis of the FAA. The Court observed that "[Section 2] permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Thus, the debate between the majority and the dissent became whether California's prohibition on class waivers "interfered with" or "frustrated" the fundamental attributes of arbitration.

The majority stressed that the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to the parties' agreement and their terms. The Court stated that "[t]he

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ARTICLE CONT.

point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." The Court went on to note that California's *Discover Bank* rule interferes with a fundamental attribute of arbitration and creates a scheme inconsistent with the FAA by requiring the availability of class arbitration, despite the parties' agreement to the contrary.

The Court's analysis began with its observation that "adhesion contracts" are not fundamentally frowned upon within the legal system. Rejecting the plaintiffs' arguments that the *Discover Bank* rule is only applicable to adhesion contracts, the Court noted that "the times in which consumer contracts were anything other than adhesive are long past." While the Court rejected California's attempt at a blanket restriction on class waivers in arbitration agreements, the Court did observe that states can still regulate adhesion contracts. For instance, states can require that class action waivers be highlighted or called-out to the parties. However, such steps cannot conflict with the FAA or frustrate its purpose to ensure that arbitration agreements are enforced according to their terms.

The Court based its conclusion on three main factors. First, the majority concluded that class arbitration sacrifices the principal advantage of arbitration—its informality—and would make the "process slower, more costly, and more likely to generate procedural morass than final judgment." Second, the majority noted that class arbitration would "require formality" to comply with class action requirements of notice, opportunity to be heard, and a right to opt out. The majority thought these requirements ran contrary to the use of arbitration and the intent of congress to have class actions and the due process rights of absent third parties decided by courts, rather than arbitrators. Third, the majority noted that class arbitration would greatly and unequally increase the risk to defendants. No longer would an

aggrieved defendant be able to appeal a class certification ruling or seek appellate review of a class award. The majority feared that this would lead to "the risk of *in terrorem* settlements" of class action arbitrations. Based on these chilling effects that the California rule had on arbitration agreements, the Court found that the FAA preempted the California rule. The Court required the *Concepcion* plaintiffs to arbitrate their claims on an individual basis.

The Court concluded by rejecting a point raised by the dissent—that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." In responding to this argument, the Court held that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

Following the issuance of the *Concepcion* opinion, on May 2, 2011, the United States Supreme Court granted certiorari to the dealership's appeal of the South Carolina Supreme Court's *Herron* decision. The judgment was vacated and has been remanded for further consideration in light of *Concepcion*.[7]

So where does this leave us in South Carolina? Where the FAA does not apply or where the parties include a South Carolina choice of law provision, *Simpson v. MSA of Myrtle Beach, Inc.* is still "good" law—at least for the time being. An "unconscionable waiver of statutory rights" may be struck by the courts. However, where the FAA applies (contracts involving interstate commerce), the courts will be guided by *Concepcion*. A state law or policy that restricts waivers in arbitration agreements will not be enforceable if it "interferes with fundamental attributes of arbitration."

Only time will tell if *Concepcion* was an abnormality given the extremely pro-consumer language contained in the arbitration agreements. The extremely favorable treatment of the defendants in *Concepcion* may have a great deal to do with the protections afforded to consumers in the agreement and the Court's observation that plaintiffs would likely end in a better position through arbitration, as opposed to class litigation.

Beyond the topic of class action waivers, in dicta, the Court cited a number of examples of policies that would interfere with "fundamental attributes of arbitration." The Court noted that states may not restrict parties from agreeing: (a) that the arbitrator will be a specialist in a particular field, (b) that the proceedings will be kept confidential, (c) to waive applicable exhaustion of administrative remedy requirements, (d) to waive the protections of the Federal Rules of Civil Procedure, or (e) to waive the discovery devices that would be available in litigation. All of these waivers, along with the waiver of class rights, are now "fair game" in contracts involving interstate commerce. The *Concepcion* Court noted that each waiver will be protected under the FAA.

Returning to the opening example, for one year and four days, husband and wife would have been able to strike the class-action waiver from their agreement with the car dealer and pursue this claim on behalf of a class. However, now, in light of *Concepcion*, this possibility is foreclosed. Such waivers are protected by federal statute. It is now possible for a party to draft arbitration agreements with this waiver—and many others.

In final analysis, the full implications of the *Concepcion* decision are uncertain (and likely will be the subject of cases around the nation), but they are apt to be significant. Courts around the nation have held class action arbitration waivers unconscionable under reasoning similar to California's *Discover Bank*. The *Concepcion* decision likely overrules all of these decisions that held a class action waiver in arbitration unconscionable on the basis that the waiver is presented in an adhesion contract and prevents consumers or other plaintiffs from aggregating small claims.

The *Concepcion* opinion may have much broader consequence. Beyond those other "waivers" cited favorably in the Court's opinion, courts around the nation have already applied *Concepcion* to the waiver of "other" rights. These courts have applied *Concepcion* to injunctive relief waivers and unfair competition law ("UCL") remedy waivers. With such broad language (whether a state rule "frustrates" arbitration agreements) it is likely that this case will arise in many different, future contexts. The courts have now come full circle and, once again, arbitration will be a focus for businesses seeking to control litigation costs and risks. Businesses will likely be quick to take advantage of the additional protections granted by *Concepcion*.

Endnotes

1 Brad Rustin is an Associate at Nelson Mullins Riley and Scarborough, LLP in Greenville. His practice focuses on banking, commercial, and business litigation.

2 For citations to this split in authority, *see Scott v. Cingular Wireless*, 160 Wash. 2d 843, 850, 161 P.3d 1000, 1004 (2007) (listing states that have deemed such agreements unenforceable and those allowing these types of agreements).

3 *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (addressing punitive and treble damages waivers in consumer contracts).

4 387 S.C. 525, 693 S.E.2d 394 (2010).

5 No. 09-893, ___ U.S. ___, ___ S. Ct. ___, 2011 WL 1561956, at *1 (April 27, 2011)

6 *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005).

7 Though *Concepcion* dealt expressly with "unconscionability" challenges to class action waivers and not waiver of statutorily created class action rights, such as those in *Herron*, the fact that the United States Supreme Court vacated the South Carolina Supreme Court's judgment likely indicates a broader application on the *Concepcion* decision.

Case Notes

Summaries prepared by Anna Hamilton and William S. Brown

Attorney Discipline

In the Matter of Anonymous Member of the South Carolina Bar, Op. No. 26964 (S.C. Sup. Ct. Filed April 25, 2011).

An anonymous member of the South Carolina bar was issued a Letter of Caution for engaging in conduct that is prejudicial to the administration of justice, based upon his uncivil communications to opposing counsel. The member of the bar sent an e-mail to an opposing counsel containing personal attacks on the opposing counsel's family and accusing the opposing counsel's child of buying illegal drugs. The Supreme Court found this conduct to be prejudicial to the administration of justice and in violation of the Lawyer's Oath. The Supreme Court also rejected the arguments raised by the member of the bar that the Lawyer's Oath was unconstitutionally vague and overbroad.

The Supreme Court chose to publish the Letter of Caution as an "opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication." The Court further stated:"We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: 'More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers.' Sandra Day O'Connor, Professionalism, 76 Wash. U. L.Q. 5, 8 (1998)." The Court cautioned the bar that, henceforth, this type of conduct could result in a public sanction.

Negligence - Comparative Fault

Berberich v. Jack, Op. No. 26955 (S.C. Sup. Ct. Filed April 4, 2011).

Plaintiff, a construction contractor, alleged that he was injured when he fell from a ladder while working on the Defendant's home. He alleged the fall was caused by water on the ladder from Defendant's sprinkler system, and that Defendant was reckless, willful and wanton in continuing to run the sprinkler system after he informed her it created a hazard for him. The jury found Plaintiff 75% at fault and Defendant 25% at fault, resulting in a defense verdict. Plaintiff argued that the trial court erred in its instructions to the jury and in its failure to give a special verdict form. In particular, Plaintiff asserted that his alleged ordinary negligence could not be compared to or offset by Defendant's alleged recklessness.

In this case of first impression, the Supreme Court held that under South Carolina's comparative negligence system conduct amounting to negligence in any form—including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct—may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage. Additionally, a trial court should instruct the jury on the definitions of these various terms, in addition to ordinary negligence, when such an instruction is requested by a party.

Real Estate – Quiet Title

Estate of Patricia S. Tenney v. SCDHEC, Op. No. 26965 (S.C. Sup. Ct. Filed April 25, 2011).

A dispute arose over the title to a 15 acre island in the tidal marsh of Beaufort County after the plaintiff, who owned the island, was denied a dock permit. DHEC asserted that the island belonged to the State pursuant to the public trust doctrine. The plaintiff, who had paid $875,000 for the island, claimed that she had proper title to the property and that she was therefore entitled to a dock permit. The master-in-equity agreed with Plaintiff.

The Supreme Court overturned the specific holding of two earlier cases, Coburg I and Coburg II, that title to marsh islands follows title to the surrounding marshland. Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 513, 458 S.E.2d 547, 548 (1995) (Coburg II); Coburg, Inc. v. Lesser, 309 S.C. 252, 253, 422 S.E.2d 96, 97 (1992) (Coburg I). The Court limited the public trust doctrine in tidal marshes to land below the high water mark, and found that it was improper to extend the doctrine to islands above the high water mark which are contained in marshlands. The Court thereby quieted title to the island in favor of the record title holder, the plaintiff.

Medical Malpractice

Oblachinski v. Reynolds, Op. No. 26932 (S.C. Sup. Ct. filed February 22, 2011).

Plaintiff sued Dr. Dwight Reynolds and his medical practice for third party injury stemming from Dr. Reynold's medical misdiagnosis of a four-yearold girl. Based upon an examination of the girl that lasted between thirty seconds and one minute, Dr. Reynolds concluded the child had been sexually abused. Plaintiff was subsequently indicted for crim-

inal sexual conduct with a minor. The charges against Plaintiff were dropped, however, after a second doctor concluded that Dr. Reynolds misdiagnosed the child. Plaintiff initially brought a civil action against his accuser. Dr. Reynolds testified on Plaintiff's behalf at that trial and admitted he was mistaken in his diagnosis. Plaintiff then brought this second lawsuit seeking to recover based upon Dr. Reynolds' negligent misdiagnosis of the child. Plaintiff argued that Dr. Reynolds owed a duty of care to him as a reasonably foreseeable third party. The Court rejected his argument, finding that no such duty exists between a physician and a third party under the circumstances of the case.

Real Estate – Lien Priority

SunTrust Bank v. Bryant, Op. No. 4815 (S.C. Ct. App. Filed April 6, 2011).

Defendant Bryant obtained a judgment against co-defendant Davis. Later, Bryant purchased property using the proceeds of a loan given by Central Carolina Bank, SunTrust's predecessor in interest. Bryant failed to pay property taxes on the property and it was sold at a tax auction to a third party. The tax sale resulted in an overage, leading to this action to determine which party had priority to claim the overage. The master-in-equity found that Davis's judgment lien was entitled to priority over SunTrust's purchase money mortgage. The Court of Appeals reversed, finding that SunTrust, as a purchase money mortgage holder, had priority in distribution of the overage from a tax sale of the real property subject to the purchase money mortgage. The Court noted that no prior South Carolina case addressed the question of a tax sale's effect on the the priority of a purchase money mortgage, but ultimately applied the general rule of priority., The Court noted that had it not been for the purchase money loan there would have been no property to be sold at the tax sale and therefore, no overage to seek to attach.

Medical Malpractice – Statute of Repose

Providence Hospital v. Medical Malpractice Liability JUA and Taillon, Op. No. 4819 (S.C. Ct. App. Filed April 13, 2011).

In this action for equitable indemnification, Providence Hospital appealed the trial court's granting the JUA and Dr. Michael P. Taillon's motion for summary judgment based upon the six-year medical malpractice statute of repose. In May of 1997, a patient was treated for chest pains at Provident Hospital's emergency room by Dr. Hayes and Dr. Taillon. He was released by Dr. Taillon with a diagnosis of reflux. It was later determined that the patient suffered a heart attack. In 1999, the patient sued Providence Hospital and Dr. Hayes, but not Dr. Taillon. At some later date not identified in the record, Providence Hospital sought indemnification from Dr. Taillon and JUA. On May 4, 2004, JUA and Dr. Taillon declined to defend or indemnify Providence Hospital. On June 10, 2004, Providence Hospital settled the lawsuit brought by the patient. Providence Hospital filed this case for equitable indemnification on June 7, 2007.

Applying the statute of repose in S.C. Code Ann. § 15-3-545(A), the Court of Appeals determined that the claim for indemnification by Providence Hospital was barred. The Court concluded that the action was one to recover damages for injury to the person arising out of medical malpractice. The claim, though it sought repayment of money paid in a settlement, was based upon Dr. Taillon's alleged liability to the patient in tort and the amount sought was a measure of the value of the injuries suffered by the patient. The Court of Appeals concluded that allowing this type of equitable indemnification claim would in effect subject the doctor to liability after the legislatively proscribed six-year statute of repose expired, and would run afoul of the policy which supports the statute of repose.

Insurance

Hutchinson v. Liberty Life Insurance Co., Op. No. 4820 (S.C. Ct. App. Filed April 20, 2011).

This matter arose from a dispute over a provision within a life insurance policy excluding coverage for a death resulting from the insured's being "under the influence of any narcotic." Two days after his policy came into effect, an insured was killed when he drove his tractor-trailer off of an interstate highway directly into a bridge abutment. At the time of the wreck, the insured had methamphetamines in his blood at levels ten times greater than the threshold for impairment. Liberty Life denied coverage based upon the narcotic exclusion. The plaintiff, the beneficiary under the insured's policy, presented an expert who opined that narcotics are limited to drugs which induce pain relief, drowsiness, sleep, or similar states of stupor. He also opined that Methamphetamine is a stimulant and not a narcotic. The trial court accepted these opinions and granted summary judgment in favor of the plaintiff.

Liberty Life argued the circuit court erred in granting summary judgment. The Court of Appeals agreed, finding that the trial court erred in applying a medical definition of the term "narcotic," as opposed to the plain and ordinary meaning of "narcotic" as understood by laypersons, in the context of an insurance policy written for laypersons. The Court of Appeals found that a layperson would understand "narcotic" to be a generic term for drugs considered illegal, and that a layperson would therefore commonly understand methamphetamines to be narcotic drugs.

Continued on next page

CASE NOTES

Workers Compensation

Lawson v. Hanson Brick America, Inc., Op. No. 4824 (S.C. Ct. App. Filed April 20, 2011).

Claimant was a forklift operator who injured his back. Six or seven months after his back injury, he developed left and right knee pain. It was undisputed that the back injury was compensable. However, several doctors determined that the knee pain was a pre-existing condition and not work-related. Claimant contended that the combination of his conditions entitled him to temporary total disability benefits. After a hearing before a single commissioner, but before a final order was issued, claimant sought to submit a medical report from a new doctor who opined that a change in gait caused by the back injury had exacerbated the pain in Claimant's knees. The single commissioner allowed the new evidence over the objection of the defendants. The single commissioner determined that Claimant was entitled to further evaluation to determine whether his knee injuries were causally related to his on- the-job accident and also awarded temporary total disability benefits. The Workers' Compensation Appellate Panel reversed the findings of the single commissioner, finding that Claimant was not entitled to further evaluation of his knees, that Claimants' knee injuries were not work-related, that Claimant was not entitled to temporary total disability benefits, and that the single commissioner erred in admitting the late submitted evidence. The circuit court reversed the Appellate Panel.

Defendants appealed the circuit court's order reversing the Appellate Panel's findings. Defendants argued (1) the circuit court engaged in improper fact finding, (2) substantial evidence supported the Appellate Panel's decision, (3) the Appellate Panel made sufficiently detailed findings of fact, and (4) the circuit court improperly relied on late-filed medical evidence. The Court of Appeals reversed and remanded, finding that the circuit court applied an improper standard of review. A circuit court is required to determine whether substantial evidence supported an Appellate Panel's findings of fact or whether an error of law affected the order. Here, the circuit court analyzed facts and drew its own conclusions regarding those facts. This improper weighing of evidence required reversal. The Court of Appeals also found, however, that the Appellate Panel should have considered the late submitted medical evidence because it satisfied the requirements of Regulation 67-707(C) of the South Carolina Code. The Court did not reach the other issues and remanded the case for further consideration.

Arbitration

Steinmetz v. American Media Services, Op. No. 4829 (S.C. Ct. App. Filed April 27, 2011).

Plaintiff sued Defendants for breach of an employment agreement, violation of the Wage Payment Act, and conversion. By agreement, the matter was referred to arbitration. The arbitrator found in favor of the plaintiff on the claims for breach of contract and conversion. Defendants filed a motion to reconsider with the arbitrator, which was denied. Defendants filed an appeal of the order denying the motion to reconsider. Nine months later, Plaintiff sought to have the arbitrator's award confirmed by the circuit court. Defendants declined to consent to confirmation, but did state that there was no legal basis to oppose confirmation of the arbitrator's award. The circuit court entered judgment in accordance with the arbitrator's award. No appeal was taken from the confirmation and final judgment.

The Court of Appeals dismissed the appeal of the denial of the motion to reconsider. The Court determined that the legislature has set a limited category of appealable items in arbitrated matters. Because Defendants appealed the denial of the motion to reconsider the decision of the arbitrator, not an order of the circuit court, the Court of Appeals concluded that it lacked jurisdiction over the appeal. See S.C. Code Ann. § 14-8-200(a) (Supp. 2010) (providing the Court of Appeals with jurisdiction over only "order[s], judgment[s], or decree[s] of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission"). The Court of Appeals concluded that the post-arbitration motions to confirm or vacate an arbitration award allowed by statute in the circuit court are more than a mere formality, but they provide the only basis for a properly perfected appeal of an arbitration award.

Negligence – Duty and Spoliation of Evidence

Trask v. Beaufort County, Op. No. 4799 (S.C. Ct. App. Filed March 2, 2011)

Plaintiffs sued Curtis Copeland, as Beaufort County Coroner and as a funeral home and crematory owner, for his actions related to the investigation of their son's fatal car accident and its effect on the settlement value of another lawsuit.

The Court of Appeals found that various statutes cited by Plaintiffs governing coroners and crematory operators provide only criminal penalties, and do not give rise to private rights of action for civil damages. Plaintiffs could not establish that there was a legislative intent to create a private right of action and could not demonstrate that they were members of a specific class of people the statutes were intended to protect and were therefore owed a special duty.

The Court of Appeals also agreed with the circuit court's findings that South Carolina does not recognize a cause of action for third party spoliation of evidence and that the South Carolina Tort Claims Act prohibits recovery of damages from a county coroner for emotional harm. Finally, the Court of Appeals held that Beaufort County could not be held vicariously liable for the actions of the coroner because Plaintiffs had not established that the coroner was personally liable.

Negligence – Respondeat Superior and Negligent Supervision

Kase v. Ebert, Op. No. 4806 (S.C. Ct. App. Filed March 9, 2011).

Plaintiff and Defendant were both truck drivers. After a minor rear end collision at a truck stop, both drivers exited their trucks and a fight ensued. There were no injuries in the collision. Plaintiff was injured in the fight, however, causing him to miss several months of work and eventually lose his job. Plaintiff sued both the other driver and the trucking company which employed the other driver. The other driver had been convicted for assault twenty-two years prior to the incident and had a poor driving record. The trial court granted summary judgment for the defense, holding (1) the trucking company, as a matter of law, could not be held vicariously for its employee's assault on Plaintiff and (2) the trucking company was entitled to judgment as a matter of law on Plaintiff's claims for negligent hiring, negligent supervision, and negligent retention.

The Court of Appeals affirmed. The Court held that respondeat superior did not apply because the driver was not acting in the course and scope of his employment or in furtherance of the trucking company's business when the fight occurred—he was defending himself from what he perceived as an attack by the Plaintiff, which was an independent purpose of his own.. The Court of Appeals further held that the prior assault conviction and poor driving records were not sufficient to prevent a judgment as a matter of law on the claims of negligent hiring and supervision.

Removal and Remand

Limehouse v. Hulsey, Op. No. 4805 (S.C. Ct. App. Filed March 10, 2011).

This defamation case from Charleston County was initially filed in state court and subsequently removed to federal district court. Upon motion of Plaintiff, the federal court issued an order remanding the matter back to state court. The clerk of the federal court failed, however, to send a certified copy of that remand order to the state court. Defendant did not file or serve an Answer in state court prior to removal nor in federal court after the removal. After the remand order, the state court entered default. After the entry of default, Defendants sought to file an Answer and moved pursuant to Rule 55 to be relieved of the default. Ultimately, a default judgment was entered against Defendants in excess of $7.3 million (actual and punitive damages).

On appeal, the appellant alleged the trial court erred in: (1) exercising jurisdiction over the case, (2) failing to set aside the entry of default, (3) allegedly depriving the appellant of due process during the default damages trial, and (4) allowing an award of punitive damages. The Court of Appeals affirmed the judgment. The Court found that the jurisdiction issue turned on when the remand from the federal court was effective. When a removal occurs, 28 U.S.C. § 1446(d) requires that the state court proceed no further unless and until the case is remanded. The procedures for a remand are controlled by 28 U.S.C. § 1447(c), which provides in part that a "certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case."

The Court of Appeals determined that the federal district court was divested of jurisdiction upon entry of the order of remand, and relied upon a case from the United States Court of Appeals for the Fourth Circuit to find that the remand was effective when the federal court was divested of jurisdiction. Because the state court system is a court of general jurisdiction, the Court of Appeals reasoned, once the federal court was divested of jurisdiction the state court could properly exercise jurisdiction. The Court also found that the act of the federal court clerk mailing a certified copy of the remand order was a procedural, not jurisdictional, requirement. On this basis, the Court noted that a timely objection to the failure was required. No objection was made by Defendants until after the entry of judgment. The Court of Appeals also noted that it did not believe that the trial judge abused his discretion in finding the Answer was not timely and in refusing to set aside the default. Additionally, the Court of Appeals found no errors in the conduct of the default damages trial.

Chief Judge Few wrote a dissent in which he noted that he would find that the state court lacked jurisdiction. The dissent noted that the plain language of § 1447(c) authorizes a state court to proceed only after the certified copy of the remand order is mailed to the state court. The dissent therefore concluded that the judgment was void. The dissent also asserted that the majority misunderstood the Fourth Circuit law they relied upon. The dissent interpreted the Fourth Circuit authority as deciding only the point at which a federal court is divested of jurisdiction, not the point in time at which a remand occurs. The dissent challenged the majority's statutory interpretation, arguing that it renders an entire sentence of the United States Code meaningless, in violation of general principles of statutory construction. The dissent also argued that the trial court's Rule 55 analysis was incorrect, stating that based upon the Sundown case he would remand for a proper analysis of whether the interests of justice would be furthered by the relief from the entry of default.

Verdict Reports

Type of Action: Trademark Infringement and Unfair Trade Practices

Injuries alleged:
Contributory trademark infringement

Name of Case:
Roger Cleveland Golf Company, Inc. v. Prince

Court: (include county)
United States District Court for the District of South Carolina

Case #:
2:09-CV-2119

Name of judge:
The Honorable Margaret B. Seymour

Date of verdict:
March 14, 2011

Amount:
$770,750 statutory damages against the web-hosting firm, Bright Builders, Inc and $28,250 statutory damages against Christopher Prince owner of the website

Attorney(s) for Roger Cleveland Golf Company, Inc.:
Nelson Mullins Riley and Scarborough, LLP attorneys Jeffrey Patterson, Christopher Finnerty, John McElwaine, and Morgan Nickerson

Description of the case, the evidence presented, the arguments made and/or other useful information: The dispute involved trademark infringement, contributory trade mark infringement, and unfair trade practices regarding the creation and operation of the web site www.copycatclubs.com ("Copycat"), an online business that sold counterfeit Cleveland golf clubs. Claims were presented against Christopher Prince , the owner of the web site, and against Bright Builders Inc., a Search Engine Optimization ("SEO") and web-hosting firm that assisted with the construction and hosting of the website. The homepage of copycatclubs.com went so far as to boast, "Your one stop shop for the best copied golf clubs on the Internet." In addition to finding liability against Prince as the direct infringer of the trademarks, the jury found Bright Builders liable for contributory infringement. This represents the first time a SEO/Web Host or other Internet Intermediary was found liable for contributory infringement without having first received actual notification of the counterfeit sales from a third party. The case was presented and pursued by Cleveland Golf/Srixon based on a theory that Bright Builders knew or should have known of the infringing conduct based on the name of the website, the content of the website, and certain discussions Bright Builders had with Prince regarding his web site. The jury accepted this theory finding Bright Builders was liable for contributory trademark infringement of eleven of Cleveland Golf's registered trademarks.

Type of Action: Medical Malpractice

Injuries alleged:
Severed common bile duct and hepatic bile duct

Name of Case:
Lisa K. Toole and James B. Toole v. John E. Carey, M.D. and John E. Carey, M.D., P.A.

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

Case number:
09-CP-23-8414

Name of Judge:
The Honorable Letitia H. Verdin

Amount:
Defense Verdict
Date of Verdict: April 14, 2011

Attorneys for defendant (and city): Robert H. Hood, Jr. and Jeffrey M. Bogdan, Charleston, South Carolina

Description of the case: The Plaintiff filed a medical malpractice action against a general surgeon who was treating a forty-five year old woman for gallbladder disease. After providing informed consent of the risks of the surgery to the Plaintiff, the physician performed an elective laparoscopic cholecystectomy. The Plaintiff alleged that the surgeon misidentified the anatomical landmarks thereby severing the common bile duct and the hepatic bile duct during the surgery. The severed ducts were discovered six days later and the patient was referred to the nearby medical university for the repair surgery. Her repair surgery was complicated by other conditions and she had over $300,000 in medical expenses. The Defendants were able to prove the injury was an unfortunate but a known complication of the procedure and not caused by a deviation from the standard of care. Further, the Defendants argued there

was no evidence that the Plaintiff would incur any future medical expenses related to the incident or her life will be affected in any way. All evidence showed that the reparative surgery was successful. After a four day trial, the jury returned a verdict for the Defendants.

Type of Action: Automobile Accident

Injuries alleged:
Right shoulder strain and aggravation of pre-existing lower back and hip arthritis

Name of Case: Lena Mae Osgood v. Walter Paz

Court: (include county)
Beaufort County Common Pleas

Case #: 09-CP-07-04438

Tried before: Jury

Name of judge:
The Honorable Perry M. Buckner, III

Amount:
$1,234.88 (after reduction for 50% comparative fault assigned to Plaintiff)

Date of verdict: April 5, 2011

Demand:
Pre Trial Demand $10,000.00 Requested of Jury: $16,000.00

Highest offer: $5,000.00

Attorney(s) for defendant (and city):
James P. Sullivan of Howser, Newman & Besley, LLC, in Mount Pleasant

Description of the case, the evidence presented, the arguments made and/or other useful information: Plaintiff and Defendant were involved in collision at the entrance to Defendant's apartment complex. Defendant asserted that Plaintiff had right turn signal on leading the Defendant to believe he had enough time to turn left into complex. Plaintiff asserted she was driving straight with no turn signal on and Defendant failed to yield the right of way by turning left in front of her vehicle. Plaintiff's credibility was questioned and jury returned fifty-fifty spilt on fault given Defendant's acceptance of some responsibility for collision.

Type of Action: Automobile Accident/UIM

Injuries alleged:

Broken Wrist; Torn Ligaments; Post- Traumatic Arthritis; 10% Upper Extremity (6% Whole Person) Impairment Rating from Dr. McIntosh of Lexington Ortho.

Name of Case:
Kaysey Fersner v. Juanita Johnson

Court: (include county)
Orangeburg County Common Pleas

Case #: 10-CP-38-00138

Tried before: Jury

Name of judge: The Honorable Edgar W. Dickson

Amount: $50,000

Date of verdict: April 12, 2011

Demand:
Pre Trial Demand $80,000. Requested of Jury: $211,000

Highest offer: $65,000

Attorney(s) for defendant (and city): Kelley Shull Cannon and Jennifer Thomas of Howser, Newman & Besley, LLC, in Columbia

Description of the case, the evidence presented, the arguments made and/or other useful information: Plaintiff was completely stopped waiting to turn and was rear-ended by Defendant. Plaintiffs' truck was knocked into the ditch and the damages resulted from the wreck. Liability carrier tendered and the UIM carrier tried on damages only.

Type of Action: Negligence claim under the Federal Employers' Liability Act (FELA

Injuries alleged:
Back injury that allegedly occurred while working for CSX

Name of Case:
Ricky L. Monroe v. CSX Transportation, Inc.

Court: (include county)
Court of Common Pleas Laurens County, South Carolina

Case #: C.A. No.: 2008-CP-30-792

Name of judge: Frank Addy

Amount: Defense verdict

Date of verdict: March 15, 2011

Attorney(s) for defendant (and city):
Ron Wray and Kevin Couch of Gallivan White and Boyd in Greenville

Description of the case, the evidence presented, the arguments made and/or other useful information: _Plaintiff alleged he sustained a permanently disabling back injury while working for CSX. Plaintiff never returned to work following the injury, and sought compensation for time off work as well as pain and suffering. Defendant presented evidence that the alleged injury did not occur as claimed by Plaintiff, was not timely reported, and Plaintiff had not suffered any long-term problems. Surveillance of Plaintiff showed him doing heavy landscaping work and using a chain saw at a time when Plaintiff claimed to be out on disability. The jury deliberated less than 2 hours over lunch before returning a defense verdict.

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