THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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The Ritz Carlton on Amelia Island
SCDTAA Annual Meeting
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SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

President's Message

by Gray T. Culbreath

As I write my last President's letter, I am in the midst of learning the processes and systems of my new law firm. To be sure, this has been a year of change for me and with those changes has come the opportunity to learn. We all experience the learning process as students, but what we do with it and how it shapes us is as different as each of us. Learning for me took flight when I joined the US Army. As I quickly discovered, if nothing else the Army forced you to learn and work hard, and if you were willing to learn and work hard you could advance and excel.

Earlier this year I was interviewed by a legal publication, and one of the questions asked was what I liked best about the practice of law. The response I gave, which I have given for some time, is that I enjoyed the opportunity law gives me to learn something new everyday. Everyday I am learning something new and in 23 years of practice I have had the opportunity to learn many things that I never would have had if I had not chosen a career as a lawyer. As this year winds down and so does ten years serving the South Carolina Defense Trial Attorneys' Association, I began to reflect back on what I've learned and what I can pass on to the membership from my time on the board and as an officer.

Over the years, I have had the opportunity to interact with and observe many of our sister defense organizations from across the country. Clearly, one of the things that I have learned from those experiences is that South Carolina has, by far, one of the best, if not the best, State Defense Organizations in this country. Many things distinguish us beyond our membership numbers and finances. We put on an array of programs and provide significant benefit to our members, often at no additional charge. If you and your law firm are not taking advantage of the many opportunities that SCDTAA provides for education and fellowship, you are missing out, and I encourage you to participate.

In my role as SCDTAA President for 2010-2011, I have had an opportunity to attend other State Defense Organization meetings. Many were well done, but I have yet to find one that compares with our Annual Meeting. When I tell other State Presidents that the judges come to our Annual Meeting, they are surprised and want to know how they can go about developing a meeting like ours. As several of our former Presidents older and wiser than me have said before, it is malpractice if you do not attend our Annual Meeting. I would encourage all of you to sign up for this year's meeting at the Amelia Island Ritz Carlton.

In today's environment of dwindling dollars and belt tightening, many organizations have seen a downturn in attendance, membership, and participation. Thankfully, SCDTAA has not suffered from that. We are blessed to have many members who are eager to participate and offer their talents to the organization. Opportunities abound for our members to write, speak, or be an active participant in one of our many substantive law committees. As someone whose first job in the SCDTAA was as a substantive law committee vice-chair and worked his way up to the Presidency, I have learned that if you want to work and want to be involved, there is a place for you in SCDTAA.

Reflecting back upon this year, I was blessed to have an outstanding Executive Committee. The Executive Committee has always been the life blood of SCDTAA and this year was no different. I was able to task folks with responsibilities, and I have not been disappointed. As I learned during my years on the Executive Committee, folks rise to the occasion and do a good job. This year was no different.

Likewise, I was blessed with three great officers to help me throughout this year. Molly, Sterling, and Curtis each provided excellent leadership, support and counsel to me over the past year, and I can truly say that the Association is in good hands in the coming years under each of them. I was also able to lean on our Past Presidents throughout the year for advice and counsel and quickly learned that although they may be Past Presidents, they are full of good ideas and are always eager to help. Simply put, this job is not a one man show. It takes the input and participation of many people to make SCDTAA the success that it is.

In parting, I want to thank each of you for what has been an exciting and fun year for me and my family. In a year marked by personal and professional changes, I have truly enjoyed the year and appreciate all the opportunities that came with serving as your President. Now it is time for me to learn something new.

Letter From The Editors

by William Brown, Ryan Earhart, and Breon Walker

Mark Twain once said, "All you need in life is ignorance and confidence; then success is sure." Based on this, when we began this year as editors of *The Defense Line*, Ryan, Bre and I were sure of success. We had an abundance of ignorance. None of us had previously worked on the publication of *The Defense Line*. The only thing we had going for us was unjustifiable confidence in our ability to get the job done. We learned, as we went, the necessary steps to produce the magazine and how, hopefully, to make it better.

We have now successfully published all three of the issues of *The Defense Line* for 2011. However, during the year, our thoughts changed from the "success" of getting all of the issues published, as mentioned in the Mark Twain quote above, to a quote from Albert Einstein, "Try not to become a man of success, but rather become a man of value." Successfully publishing all three of the editions of *The Defense Line* is an accomplishment, and we are proud of the efforts of everyone who contributed to it. Nevertheless, we have come to realize that merely getting the job done is not enough. Developing appreciation by the readers of *The Defense Line* that it adds value to their practice, as tool to learn and an important source of information was the true goal that evolved from our efforts. We endeavored to meet this aspiration with articles on timely court decisions, analysis of interesting issues of law, judicial profiles, as well as information on the many events and activities of the SCDTAA. In addition to these regular features, in this issue, is an article dedicated in honor and memory of the Honorable Matthew J. Perry, Jr. The legal community, South Carolina, and the nation experienced a tremendous loss with the passing of Judge Perry this summer. We hope everyone will read the memorial article and also take the time to watch online the speech Judge Perry gave at the 2008 SCDTAA Annual Meeting which is a part of the South Carolina Bar Foundation's Oral History Program and is available at the Bar Foundation's website. If our readers find value in nothing else, we believe you will understand the significance of remembering and learning from great men of the legal profession, such as Judge Perry.

We would like to again emphasize that the contributions of many individuals allow for the publication of *The Defense Line*. We would like to thank all of the people who have worked to formulate ideas, recruit authors, contribute articles or other submissions, or assist in editing. If you are interested in getting involved with *The Defense Line* by writing an article or other submission, or in any capacity please contact us. There is always an opportunity to contribute and be a part of the team responsible for *The Defense Line*. Last, but certainly not least, the editors thank our Executive Director, Aimee Hiers, for her hard work and tremendous dedication to helping us produce a quality publication. We hope that through all of our efforts we have provided value to the members of the SCDTAA through *The Defense Line*.

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

Collins & Lacy Partner Appointed to Role in American Board of Trial Advocates

Collins & Lacy, P.C. is pleased to announce founding partner Joel W. Collins, Jr. has the distinguished honor of being appointed by the president of the American Board of Trial Advocates (ABOTA) to serve on the 2011 Board of Trustees. Collins is one of only two people from South Carolina to receive such an appointment from the organization's national president. Additionally, the president of the ABOTA Foundation has tapped Collins to serve as Trustee Emeritus on the 2011 ABOTA Foundation Board. ABOTA is a national organization established to provide education to the American public about the right to trial by jury and to promote the professional education of trial attorneys. The South Carolina Chapter of ABOTA also provides educational programs to other attorneys in South Carolina, students at the University of South Carolina Law School and to high school students in South Carolina through its James Otis Lecture Series on National Constitution Day. In September 2009, Collins was the program director for the inaugural James Otis Lecture in the South Carolina State House, where more than 100 selected high school students learned about the history of the United States Constitution. In 2009, he was awarded the ABOTA Masters in Trial Award, and in 2002, Collins was the recipient of the Jeter E. Rhodes Jr., Trial Lawyer of the Year Award, presented by the South Carolina Chapter of ABOTA.

Collins & Lacy Attorney to Lead Specialized Litigation Group of DRI

Collins & Lacy, P.C. is pleased to announce Brian Comer has been selected to serve as Vice-Chair of the Agricultural, Construction, Mining and Industrial Equipment (ACMIE) Specialized Litigation Group within the Products Liability Committee in the Defense Research Institute (DRI). DRI is an international organization of attorneys defending the interests of business and individuals in civil litigation based in Chicago, IL. Comer commented, "I have enjoyed my membership with DRI and am committed to its mission of addressing issues related to the defense bar and the civil justice system. I look forward to working with fellow DRI members as we make preparations for the ACMIE breakout sessions at the next DRI Products Liability Conference in April 2012." Comer is Of Counsel to Collins & Lacy, and is the Products Liability Practice Group Chair for the firm. Comer presently serves as Co-Chair of the Products Liability Substantive Law Committee for the South Carolina Defense Trial Attorneys Association (SCDTAA). He also is the founder and contributing author of "The South Carolina Products Liability Law" blog at http://scproductsliabilitylaw.blogspot.com, which provides current information on trends in products liability law in South Carolina for individuals and product manufacturers.

Nexsen Pruet Named One of the "Best Companies in the Midlands for Working Moms"

For the second year in a row, the Columbia Business Monthly and The March of Dimes have named Nexsen Pruet as one of the ""Best Companies in the Midlands for Working Moms." Seven companies receiving the designation are recognized in the magazine's September 2011 edition.

Collins & Lacy Attorney Named President–Elect of the S.C. Bar Foundation

Collins & Lacy, P.C. is pleased to announce that Jack D. Griffeth has been named President–Elect of the South Carolina Bar Foundation Board of Directors. Griffeth begins his term July 1, 2011. The South Carolina Bar Foundation is the philanthropic arm of the South Carolina Bar. Its mission is to fund the advancement of justice by improving access, education and accountability. Since 1987, the Foundation has awarded more than $43 million to various legal-related organizations that work on behalf of the justice community. The Foundation is governed by a 14-member Board of Directors. Along with being a tireless advocate for the South Carolina Bar Foundation, Griffeth is the 2011 President of the Greenville Bar Association, Secretary/Treasurer for the S.C. Bar Foundation Board of Directors and a member of the House of Delegates for the 13th Judicial Circuit. He is a past member of the South Carolina Bar's nominations committee and past-president of the Bar's Alternative Dispute Resolution Council. Jack is a certified mediator by the South Carolina Bar and speaks frequently on the subject of mediation.

Collins & Lacy, P.C. Live Well 24/7 Campaign Makes Great Strides in Employee Health

Collins & Lacy, P.C. is working to combat growing health concerns in South Carolina with its employee wellness campaign, Live Well 24/7. Over the past year, employees of the statewide law firm have stepped more than nine million steps, lost more than 100 pounds, and the firm has provided employees with several health initiatives, including educational luncheons on weight management, nutrition, heart

Continued on next page

disease and stress management, gym membership discounts and motivating health and nutrition tips in a variety of formats. With the help of Lexington Medical Center in the Midlands and Bon Secours St. Francis in the Upstate, Collins & Lacy employees received free health screenings that included cholesterol, glucose and blood pressure tests. Additionally, the Live Well 24/7 campaign included a firm-wide weight loss challenge and a steps challenge facilitated by Clark & Company Insurance. Along with the benefits of health and nutritional knowledge gained by employees, the Collins & Lacy team achieved the following: In the nine-week steps challenge, employees stepped a total of 9,265,474 times; and the firm-wide weight loss challenge resulted in 100.5 pounds lost. Collins & Lacy awarded an iPad and an iPod to top achieving staff members in weight loss goals.

Collins & Lacy Attorney Appointed to the Frye Foundation Executive Committee

Collins & Lacy P.C. is pleased to announce Aisha Grant Taylor has been appointed to the Executive Committee of The Frye Foundation. The Frye Foundation, founded by University of South Carolina Track and Field Head Coach Curtis Frye, is a nonprofit organization dedicated to helping people and families that deal with diabetes and mental illnesses, as well as other charitable causes. The foundation will support the American Diabetes Association, the National Alliance on Mental Illness – Moore County, and the Mental Health America of South Carolina. Taylor is a senior associate with Collins & Lacy practicing in workers' compensation and employment law. She received her Juris Doctor from the University of South Carolina School of Law. Taylor is a member of the South Carolina Defense Trial Attorneys' Association (SCDTAA), of which she is on the Workers' Compensation Committee, and the South Carolina Self Insurers Association. Taylor was captain of the University of South Carolina 2002 National Championship Women's Track and Field Team.

Gallivan White & Boyd's Brown Named to Leadership Greenville

Gallivan White & Boyd PA is pleased to announce that Deborah Casey Brown has been selected to join Leadership Greenville Class 38. Leadership Greenville is a 10-month-long program designed and facilitated by the Greenville Chamber. Since 1973, the program has helped develop informed, committed and qualified leaders for Greenville County. By taking an intensive look into the issues affecting the area, Leadership Greenville prepares and motivates participants to provide quality, dynamic leadership within the area. Brown is a shareholder at GWB and a member of the Workplace Practices Group. She is certified by the South Carolina Supreme Court as a specialist in Employment and Labor Law, and focuses her practice on the defense of employment and workers' compensation cases. She previously served as Program Chair for DRI's Employment Law Seminar where she spoke and served as a moderator.

Gallivan, White & Boyd Attorney Named Julie Valentine Center's Board Member of the Year

Gallivan White & Boyd PA is pleased to announce that attorney Steven Buckingham has been honored as 2011 Board Member of the Year for the Julie Valentine Center. He currently serves as Chairman of the center's Board of Directors. Greenville's Julie Valentine Center works to stop sexual violence and child abuse and the impact of these crimes through prevention, investigation, collaboration, treatment and advocacy. Buckingham is an associate at Gallivan, White & Boyd, where he practices in the firm's business litigation group. A Furman University graduate, he currently serves as an adjunct professor of trial advocacy at the school.

Gallivan White & Boyd Launches Columbia Office

Gallivan White & Boyd PA announced the establishment of a Columbia law office and the addition of a skilled team of litigators. John T. Lay Jr., Johnston Cox, John Hudson and Shelley Montague join GWB as partners in the Columbia office. James Brogdon, Childs Thrasher and Breon Walker will serve as associates. The Columbia office follows the opening of an office in Charlotte earlier this year. Chris Kelly, who heads GWB's e-discovery and trucking litigation teams, is partner-in-charge for Charlotte. The Columbia team has 77 years of combined legal experience and is led by Lay. They will continue to serve clients with whom they have established relationships over the years while also assisting current GWB clients and working to grow the firm as a whole. Lay is a past president of the S.C. Defense Trial Attorneys' Association, as is Mills Gallivan, senior shareholder, and another GWB shareholder, David Rheney. The addition of the Columbia office brings the number of lawyers at the firm to 51.

Gallivan White & Boyd Attorney Named to S.C. Bar Dispute Resolution Council

Gallivan White & Boyd PA announces that senior shareholder Mills Gallivan has been appointed to the South Carolina Bar Dispute Resolution Section Council. The council oversees the Alternative Dispute Resolution Section of the SC Bar. The section educates judges, attorneys and the public to the benefits of alternative dispute resolution and promotes the adoption of mediator and arbitrator standards. Gallivan will serve on the Council through 2014. He is a certified arbitrator and a certified mediator and Alternative Dispute Resolution is one of his primary practice areas at Gallivan White & Boyd. Gallivan served as managing shareholder at GWB in 1993-96 and 2003-07. He has previously served as president of the S.C. Defense Trial Attorneys' Association, chairman of the Tort and Insurance Practice Section of the South Carolina Bar, and Program Chair for the National Foundation

for Judicial Excellence. He currently serves on the Board of Directors of the Federation of Defense & Corporate Counsel and the National Foundation for Judicial Excellence.

Gallivan, White & Boyd's Lay Appointed Chair of IADC Business Litigation Committee

Gallivan, White & Boyd, P.A. is pleased to announce that John T. Lay, Jr. has been appointed as Chair of the Business Litigation Committee for the International Association of Defense Counsel (IADC). The IADC is known as the oldest and most prestigious international organization of attorneys representing corporations and insurers, and is a national leader in legal reform and professional development. Comprised of the world's leading corporate and insurance attorneys, the core purpose of the IADC is to enhance the development of skills, professionalism and camaraderie to serve and benefit its members, their clients, the civil justice system, the legal profession and society in general. Membership in the IADC is by invitation only, and nominees are subject to a peer review process in advance of acceptance. John T. Lay, Jr.'s serves on the commercial litigation and product liability committees for the Defense Research Institute and is a past president of the South Carolina Defense Trial Attorneys' Association.

Gallivan White & Boyd Named to "America's Leading Lawyers for Business"

Gallivan White & Boyd PA was recently named to "America's Leading Lawyers for Business" for 2011 by Chambers USA. The firm received a Band 2 ranking for general commercial litigation. Chambers USA reported that GWB "has an established reputation in commercial litigation. The team has developed particular expertise in the areas of transportation and toxic tort, and represents a variety of clients, including healthcare providers, real estate developers and financial institutions." Chambers USA is part of British-based Chambers and Partners. It has been publishing guides to the legal profession for two decades. Its annual rankings are complied by a team of researchers who conduct in-depth interviews with attorneys and clients around the world. In addition to the firm's ranking, individual attorneys W. Howard Boyd, Arthur L. Howson Jr. and Daniel B. White were noted individually in the annual publication.

Mauney Elected Board of Directors Chair for Upstate Mediation Center

Gallivan, White, & Boyd, P.A. is pleased to announce that C. Stuart Mauney has been elected as Chair of the Board of Directors for the Upstate Mediation Center. Mauney will be chair for the 2011-2012 term. The Upstate Mediation Center is a non-profit organization that offers a voluntary alternative to the adversarial court process by resolving disputes through use of mediation. The organization promotes the use of mediation and other non-adversarial means of resolving conflicts and nurtures peace by restoring and strengthening family, business and community relationships.

Mauney Designated State Chair for Council on Litigation Management

Gallivan, White & Boyd PA is pleased to announce that C. Stuart Mauney has been designated as a State Chair for the prestigious Council on Litigation Management. The State Chair is a leadership role within the Council on Litigation Management (CLM) whose purpose is to assist in the development and growth of the Council, foster communications locally and provide more opportunities to participate. State Chairs also establish and monitor CLM Strategic Affiliations for state and local organizations/associations. 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.

Gallivan White and Boyd's McGee named to SCBT Greenville Advisory Board

Gallivan White and Boyd PA is pleased to announce that C. William McGee has been named to the 2011 Greenville Advisory Board for South Carolina Bank and Trust (SCBT). SCBT Financial Corp., Columbia, S.C., is a registered bank holding company and includes SCBT, N.A., the largest publicly traded bank headquartered in South Carolina. Providing financial services for over 76 years, SCBT Financial Corp. operates 80 locations in 17 South Carolina counties, 10 North Georgia counties and Mecklenburg County in North Carolina, and has assets of approximately $3.8 billion. As managing shareholder at Gallivan White and Boyd, McGee manages a continuously growing team of attorneys in the firm's three offices in two states.

Haynsworth Sinkler Boyd, P.A. Shareholders Expand their South Carolina Practice

Haynsworth Sinkler Boyd, P.A. announces Firm Shareholder, Sarah P. Spruill, has relocated to the Firm's office in the Upstate. Sarah P. Spruill, formerly based in the Firm's Columbia office, will now be located primarily in Greenville, South Carolina. Ms. Spruill focuses on business and commercial matters, appeals, and complex litigation. Before joining Haynsworth Sinkler Boyd, she spent two years as law clerk to The Honorable Kaye G. Hearn, then chief judge for the South Carolina Court of Appeals.

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Member News cont.

McKay Firm Chosen for Prestigious Insurance Attorney Listing

McKay, Cauthen, Settana & Stubley, P.A. (The McKay Firm) has been selected for the 2012 Edition of the Recommended Insurance Attorney Directory published by A.M. Best Company, Inc. The Directory is comprised of selected and client-recommended attorneys from each state that are considered to be uniquely qualified to handle insurance industry needs.

Lamar selected to serve on the 2012 Medical Seminar Committee for the South Carolina Workers' Compensation Educational Association

McKay, Cauthen, Settana, & Stubley, P.A. (The McKay Firm), is pleased to announce that Marcy J. Lamar, a member of the McKay Firm Workers' Compensation Team, has been selected to serve on the 2012 Medical Seminar Committee for the South Carolina Workers' Compensation Educational Association. Committee members will work together in order to plan the Association's annual Medical Seminar which is an event held in February of each year that is heavily attended by key players in both the workers' compensation and medical industry.

Leventis and Holmes Named Partner

McKay, Cauthen, Settana, & Stubley, P.A. is pleased to announce that Janet Brooks Holmes and Peter Leventis, IV have been named partners in the firm. Peter Leventis, IV, originally from Sumter, SC, is a graduate of the University of Virginia and the University of South Carolina School of Law. Prior to attending law school, Peter was a Special Agent in the New York field office for the United States Secret Service from 2000 – 2004 and served as the national Spokesman for the New York Electronic Crimes Task Force from 2002-2003. He practices primarily in the areas of workers' compensation defense and workers' compensation appeals. Janet Brooks Holmes, a Greenville, SC, native, is a 1984 graduate of Clemson University and a 1988 graduate of the University of South Carolina School of Law. Janet is a Member the of the John Belton O'Neall American Inn of Court, recently completed her appointment to serve on the 2011 Merit Selection Panel for the position of United States Magistrate Judge for the District of South Carolina, and acted as a Mentor in the South Carolina Supreme Court Lawyer Mentoring Pilot Program. Janet practices primarily in the areas of civil litigation, trucking and transportation defense, and insurance defense litigation.

McKay Firm Partner Selected for Trucking Law Committee

McKay, Cauthen, Settana, & Stubley, P.A. is pleased to announce that firm partner, Daniel R. Settana, Jr., has been selected to serve on the Trucking Substantive Law Committee for the South Carolina Defense Trial Attorneys' Association. In addition to his the South Carolina Defense Trial Attorneys' Association, he is also a member of the South Carolina Trucking Association and the Trucking Industry Defense Association.

McAngus Goudelock & Courie and BigHand Honored with Speech Technology Magazine's 2011 Implementation Award

The law firm of McAngus Goudelock & Courie was recognized by Speech Technology magazine for the firm's implementation of BigHand's digital dictation workflow software. MG&C was one of four companies worldwide honored with the 2011 Implementation Award. Speech Technology magazine gives Implementation Awards annually for product usage collaborations that illustrate the versatility of speech and achieve superior results while still cutting costs. In MG&C's case, the firm was looking for a way to replace the analog handheld recorders that attorneys were using for dictation with a modern digital solution that would work with the firm's existing Citrix infrastructure. MG&C chose the digital dictation software from BigHand, which ultimately allowed the firm to hire 24 lawyers and paralegal in 2010 without increasing support staff. The software's reporting module has allowed the firm to track the amount of dictation and transcription each legal secretary and attorney team are doing. With this information, the firm can more strategically apply its workforce and more efficiently complete transcription projects, saving the firm a significant amount of time and money. BigHand's team worked with MG&C to test the software, install it across the firm's six offices in the Carolinas, and train key personnel to be in-house experts on the software, which records dictation and then automatically sends the digital recording to a specific transcriptionist. The firm also uses BigHand's mobile application for Blackberry, allowing attorneys to dictate and send their recordings even when they are out of the office. Speech Technology is the leading source of news, information and analysis for the global speech technology industry. MG&C and BigHand were one of four collaborations recognized as Implementation Award winners in the magazine's July/August 2011 issue.

Jay Courie Re-Elected to Chair Hammond School's Board of Trustees

McAngus Goudelock & Courie's Managing Member Jay Courie has been re-elected to serve as the chairman of the Hammond School's Board of Trustees for a two-year term. Located in Columbia, Hammond School is the largest independent school in South Carolina. The school enrolls students from pre-kindergarten through grade 12. Mr. Courie is a founding member and the managing member of McAngus Goudelock & Courie, LLC.

Quattlebaum installed as South Carolina Bar President

A. Marvin Quattlebaum Jr. was installed as the 2011-12 President of the South Carolina Bar on Thursday, May 5, during the Bar's House of Delegates

meeting in Greenville. S.C. Supreme Court Chief Justice Jean H. Toal administered the oath of office. Quattlebaum serves as the Business Litigation Practice Group co-chair of Nelson Mullins Riley & Scarborough LLP and as a member of the firm's Management Group. He practices in the areas of business litigation, products liability litigation and other complex civil litigation.

Nelson Mullins continues to grow

Nelson Mullins Riley & Scarborough LLP is now the 112th largest law firm in the United States, according to The National Law Journal's 2011 Annual Survey of the Nation's Largest Law Firms released in 2011. Nelson Mullins reported 399 attorneys during the survey period. The Firm ranked 118th in the previous survey.

Moise and Westbrook honored with Compleat Lawyer Award

Nelson Mullins Riley & Scarborough's Charleston partner Scott Moïse and Columbia partner Thad Westbrook will be honored 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.

Mullins receives Leadership in Law Award

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.

Nexsen Pruet Sends Students Back to Class with Scholarship

Nexsen Pruet is pleased to announce that three law school students from the Carolinas are headed back to class as recipients of the firm's 2011 Diversity Scholarships. Annually, Nexsen Pruet awards scholarships to exceptional minority law school students who are planning legal careers in the Carolinas. In addition to the $3,000 award, the students may be considered for summer employment in one of the firm's eight offices. Deven S. Gray earned her undergraduate degree from Cornell University in Ithaca, NY. She began law school at the University of South Carolina School of Law. She transferred to Duke University's School of Law this summer and expects to graduate in 2013. As a law student, she served the Midlands and Lowcountry of South Carolina through work with City Year in Columbia and the Lowcountry Food Bank in Charleston. Fallon J. Speaker earned her undergraduate degree from the University of North Carolina at Chapel Hill and is working to graduate from the UNC Law School in 2013. As a law student, she has provided more than 100 hours of pro bono work to organizations such as the Innocence Project, Volunteer Income Tax Assistance and Guardian ad Litem. Tansy Woan earned her undergraduate and masters degrees from the State University of New York at Binghamton and is working to graduate from the UNC Law School in 2013. Woan has been actively involved at school and in her community through work with the Take Back America Conference, Asian Outlook magazine and as well as Binghamton's Policy Debate Team

Bogan rejoins private practice with Nelson Mullins

A. Mattison "Matt" Bogan has returned to Nelson Mullins Riley & Scarborough's Columbia office as an associate following a clerkship with the Honorable Richard Mark Gergel, United States District Court Judge for the District of South Carolina. Mr. Bogan practices in the areas of appellate law, business litigation, and consumer financial services litigation. Mr. Bogan is admitted to practice in South Carolina and before the United States District Court for the District of South Carolina, the Fourth Circuit Court of Appeals, and the United States Supreme Court. He is a member of the Richland County Bar and the American Bar Association. He has served on the South Carolina Bar Association's Law School Task Force and as Co-Chair of the Richland County Bar's young lawyers section. Mr. Bogan is a member of the John Belton O'Neall Inn of Court and currently serves as a member of the executive committee. Prior to joining Nelson Mullins, Mr. Bogan clerked for the Honorable Chief Justice Jean Hoefer Toal of the South Carolina Supreme Court.

Nelson Mullins Riley & Scarborough LLP recognized as a national leader

Legal directory publisher Chambers and Partners has recognized Nelson Mullins Riley & Scarborough LLP as a national leader in products liability litigation and gives partners David E. Dukes and Stephen G. Morrison national rankings for their products liability and mass torts practices. The publishers also rank the Firm for its South Carolina general commercial litigation, corporate/mergers and acquisitions, corporate work with banking and finance, and real estate practices. Twenty-four Nelson Mullins attorneys are singled out for their practice areas. Rankings are based on interviews with law firms and clients and released in *Chambers USA 2011*. The publication calls the Firm's South Carolina general commercial litigation group a top-tier practice and, in addition to the Columbia-based Dukes and

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Morrison, recognizes Mark Phillips in Charleston and notes his "great reputation for his national asbestos litigation practice."

Chambers ranks the Nelson Mullins South Carolina corporate/mergers and acquisitions group and the corporate/mergers and acquisitions group in banking and finance as top-tier. Key individuals in the corporate practice identified are Gus Dixon (Columbia), Neil Grayson (Greenville), Dan Fritze (Columbia), Mason Hogue (Columbia), and John Jennings (Greenville).

The publication identifies notable South Carolina practitioners in labor and employment as Sue Erwin Harper (Columbia) and William Foster (Greenville). In real estate, Chambers says the group "interacts seamlessly with the firm's strong corporate and litigation practice groups." Chambers identifies real estate attorneys Bill Bobo (Charleston) and Ralston "Pete" Vanzant (Columbia).

Dukes and Rogers recognized in International Who's Who of Life Sciences Lawyers

Law Business Research has recognized David E. Dukes, managing partner of Nelson Mullins Riley & Scarborough LLP, and Columbia partner James F. Rogers in the 2011 edition of the International Who's Who of Life Sciences Lawyers. The two are the only South Carolina-based attorneys listed. The publication names 453 attorneys in 43 jurisdictions who can be considered to be leaders in life sciences law. The publication's research team canvasses and analyzes the opinions of law firm clients and life sciences lawyers from around the world to develop the list. Law Business Research is the official research partner of the International Bar Association and the American Bar Association's Section of International Law. Mr. Dukes also has been recognized for several years by Law Business Research as one of the top product liability lawyers in the world. He practices in the areas of pharmaceutical and medical device litigation, business litigation, patent litigation, and coordination of national litigation. He has served as national trial counsel for companies in the pharmaceutical, computer, and consumer products industries. He speaks throughout the country on pharmaceutical and medical device litigation and computer and technology-related litigation issues. Mr. Rogers also practices in the areas of product liability as well as commercial litigation and consumer fraud actions. He primarily has been engaged in the defense of pharmaceutical and medical device companies since 1991. He has served as the primary case manager for mass tort cases involving thousands of plaintiffs and has been involved in the coordination of national litigation. He has significant experience throughout the United States in defending class action allegations for pharmaceutical companies in economic injury cases and certain types of business litigation.

Nelson Mullins launches e-discovery and document review service

Expanding upon its extensive experience serving as national discovery counsel for corporate clients, Nelson Mullins Riley & Scarborough LLP has developed a new business division and resource devoted solely to corporate needs for comprehensive information management, electronic discovery, and document review. Encompass E-Discovery and Document Review Solutions offers clients coordinated electronic discovery (e-discovery) counsel from its secure, state-of-the-art facility in Columbia, S.C., where the team's attorneys have managed more than 34 million pages for review in the last year for multiple litigation, internal investigations, and at U.S. and foreign government requests. The team of attorneys works with companies to create processes for data preservation, collection, and production that balance risks and costs for each matter. The Encompass team provides legal counsel and technology solutions for all stages of the electronic discovery process.

Nelson Mullins Healthcare Practice Recognized

The American Health Lawyers Association has ranked Nelson Mullins Riley & Scarborough as its third largest healthcare practice in the United States, up from fifth last year. The Firm's National Healthcare Practice Group and the Nelson Mullins Pharmaceutical and Medical Device Practice Group includes more than 110 attorneys and professionals dedicated to the healthcare industry. All of the Firm's 12 offices house members of the National Healthcare Practice Group and the Nelson Mullins Pharmaceutical and Medical Device Practice Group. Nelson Mullins lawyers and policy advisors bring real world experience from prior careers in healthcare as varied as a billing and coding provider, a cardiac care nurse, a director of an ambulatory surgery center, a hospital administrator, a VP of business development for a technology company and a hospital compliance officer. The Nelson Mullins Fraud and Abuse Group guides clients through government investigations and whistleblower lawsuits and offers thoughtful, business-minded solutions in providing Stark and anti-kickback analyses. The Firm's E-Health and Healthcare IT Practice Group includes a former leader of a national privacy and security consulting practice, a Certified Information Privacy Professional who was formerly a senior manager at a global corporation, and a former advisor to top management of one of the world's largest technology companies. The Nelson Mullins Healthcare Transactions Group has managed more than $10 billion in healthcare mergers and acquisitions transactions and more than $5 billion in healthcare finance transactions.

Legal 500 Recognizes Nelson Mullins for Two Litigation Practice Areas

The 2011 U.S. edition of *The Legal 500* calls Nelson Mullins Riley & Scarborough's product liability and mass tort defense practices in automotive/transport and pharmaceuticals and medical devices "true lawyers, not just litigators" and "extremely able." The UK-based organization highlights the works of South Carolina partners David Dukes, Steve Morrison, and Michael Cole. The legal directory selected 23 firms nationwide for inclusion for their practices in product liability and mass tort defense: pharmaceuticals and medical devices. Nelson Mullins was among 15 selected in product liability and mass tort defense: automotive/transport. The Legal 500 publishers interview law firm commercial clients and attorneys every year and develop recommendations for inclusion based on responses. The reference guide has been published annually for more than 20 years.

Law Business Research has recognized Nelson Mullins attorneys

Law Business Research has recognized five Nelson Mullins Riley & Scarborough LLP attorneys for their performances in product liability law in its publication, *The International Who's Who of Product Liability Defense Lawyers 2011*. The publication names 360 attorneys in 36 jurisdictions who can be considered leaders in the area of product liability law. The publication acknowledges Managing Partner David Dukes as one of the "most highly regarded individuals" in product liability law in the United States. Nelson Mullins Riley & Scarborough attorneys Steve Morrison, Ed Mullins, Richard North, and Jim Rogers also were individually named for their product liability practices. Mr. North is based in Atlanta; the other four are based in Columbia. Mr. Dukes has also been recognized as one of the world's top five product liability defense lawyers by Legal Media Group based on interviews with clients and peers. Stephen Morrison is recognized as an attorney who "stands out for his courtroom expertise." Earlier this year Mr. Morrison was recognized for excellence in client services in the *BTI Client Service All-Star Team for Law Firms 2011*. BTI is a leading provider of strategic research to law firms and General Counsel. Since 1996 Who's Who Legal has identified the foremost legal practitioners in 31 areas of business law. Nominations are made by clients and other attorneys. Law Business Research Limited publishes research, analysis and reporting on international business law and the business of international law.

Smith Moore Leatherwood Earns Top Rankings in 2011 Chambers USA Guide

Chambers and Partners, publisher of the world's leading guides to the legal profession, recognizes 20 attorneys from Smith Moore Leatherwood as "Leaders in their Field" in the *2011 Chambers USA Guide*, an annual publication that ranks the top U.S. lawyers and law firms. Smith Moore Leatherwood also achieved high rankings in North Carolina, South Carolina and Georgia across seven practice areas. In its 12th year of publication, the Chambers Guide's results are gathered through thousands of confidential interviews conducted with clients and lawyers, with greater weight given to the views of the clients. The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment and other qualities most valued by the client. The publication ranks both law firms and individual lawyers by practice areas. Seven of the firm's practice areas were ranked in the 2011 guide, including Corporate/Mergers & Acquisitions, Environmental law, Labor & Employment, General Commercial Litigation, Healthcare, Real Estate and Real Estate: Zoning/Land Use.

Steven A. Snyder presented lectures at the Nigerian Law School

Steven A. Snyder, of Davis & Snyder, P.A. in Greenville, S.C., presented lectures this spring at all four regional campuses of The Nigerian Law School, Nigeria's sole graduate level school of law from which all lawyers admitted to practice in Nigeria are required to graduate. He spoke to more than 4,500 students on campuses in Abuja, Lagos, Kano and Enugu on Seeking Justice and The People Ingredient to the Successful Practice of Law. He presented a similar series of lectures there in 2010. In addition to practicing law with Davis & Snyder, P.A., where he specializes in representing physicians and hospitals in medical negligence litigation and matters involving medical risk management, Snyder is the founder of Global Adapt, a non-profit corporation which has worked on five continents with international schools, business, mission and non-governmental organizations on issues pertaining to living cross-culturally and transitioning between cultures.

Shannon Furr Bobertz elected Vice President of the Friends of the Richland County Public Library Board

Turner Padget Graham & Laney, P.A. is pleased to announce that Shannon Furr Bobertz has been elected Vice President of the Friends of the Richland County Public Library Board. She was sworn in at the September Board meeting. Friends of the Library works to support the library and raise awareness throughout the community. Shannon is based in the firm's Columbia office and practices in torts and insurance, municipal law and insurance coverage law. Shannon is a former adjunct professor for legal writing courses at the University of South Carolina School of Law.

Continued on next page

Member News cont.

Catherine H. Kennedy elected chair of the Probate, Estate Planning and Trust Law Section

Turner Padget Graham & Laney, P.A. is pleased to announce that Catherine H. Kennedy has been elected chair of the Probate, Estate Planning and Trust Law Section of the South Carolina Bar. This is a one-year term leading the Section Council and the members of the Probate, Estate Planning and Trust Law Section in addressing issues related to this area of the law. Mrs. Kennedy serves as Special Counsel in Turner Padget's Columbia office and concentrates her practice in the areas of estate planning and probate administration and litigation. She has been certified by the South Carolina Supreme Court as a specialist in Estate Planning and Probate Law.

Anne R. Culbreath joined the law firm of Turner Padget Graham & Laney, P.A.

Anne R. Culbreath has joined the law firm of Turner Padget Graham & Laney, P.A. and is based in the Greenville office. Anne's areas of practice are professional liability, insurance litigation, personal injury litigation, construction litigation, healthcare law, administrative and regulatory law, and trucking litigation. After obtaining her undergraduate degree in 1994 from Emory University, she received her Juris Doctor from the University of South Carolina Law School in 1998.

Cuttino to Serve as Chairman of Eagle International Associates, Inc. Board

Turner Padget Graham & Laney, P.A. is pleased to announce that John E. Cuttino has begun serving a two (2) year term as Chairman of Eagle International Associates, Inc. Mr. Cuttino is a shareholder in the Columbia office. Eagle International Associates, Inc. is a global network of independent law firms, adjusters and claims related service providers throughout the United States, Canada and Europe. Mr. Cuttino began his term as Chair at the recent Eagle Spring Conference and Seminar which was held May 19-20 at the Four Seasons Los Colinas Resort in Irving, Texas. He has served on Eagle's Board of Directors since 2007 and was Vice Chair from 2009-2011.

Eric Englebardt Named to the National Academy of Distinguished Neutrals

Turner Padget Graham & Laney, P.A. is pleased to announce that shareholder Eric K. Englebardt has been named to the National Academy of Distinguished Neutrals (NADN), a professional association of elite attorneys with extensive experience in civil and commercial conflict resolution. Mr. Englebardt is one of only two South Carolina attorneys who have been inducted into the organization. Mr. Englebardt has nearly 22 years of experience as a litigator in the areas of business, insurance and personal injury, as well as premises and product liability matters. He has mediated over 600 cases. He has been qualified four times by the South Carolina Judicial Merit Screening Commission for a position as a South Carolina Circuit Court Judge, and was nominated for the position in 2003, 2009, and 2010. He has been a judge, speaker, and small group leader at the South Carolina Defense Trial Attorneys' Association annual trial academy since 2000. Mr. Englebardt also serves on the Upstate Committee of the South Carolina Bar's Client Fee Dispute Board. Membership to the NADN is by invitation only, and is limited to professional mediators and arbitrators who are well established as trusted neutrals amongst the legal community.

Englebardt Elected to the Board of Directors of the Upstate Mediation Center

Turner Padget Graham & Laney, P.A. is pleased to announce that shareholder Eric K. Englebardt has been unanimously elected to a two-year term on the Board of Directors of the Upstate Mediation Center. After his initial term, Eric will be eligible for a subsequent term of three years. The Upstate Mediation Center is a non-profit organization whose mission is to promote the use of mediation and other non-adversarial means of resolving conflicts and to nurture peace by restoring and strengthening family, business and community relationships. Mr. Englebardt is based in Turner Padget's Greenville office.

Elaine H. Fowler Elected to serve as Chair of the Leadership Development Committee of the Charleston Regional Development Alliance

Turner Padget Graham & Laney, P.A. is pleased to announce that Elaine H. Fowler has been elected to serve as Chair of the Leadership Development Committee of the Charleston Regional Development Alliance for FY 2011-2012 and will be serving on the Executive Committee of CRDA as Chair of that committee. CRDA is a private nonprofit organization whose purpose is to promote long-term economic development in Charleston, Berkeley and Dorchester Counties, and it works very closely with the SC Department of Commerce and industries being recruited to South Carolina in those efforts. It's work is supported by the financial commitments of local governments, educational institutions and diverse businesses in the Charleston area, including the Turner Padget law firm. Ms. Fowler is a resident in the Charleston office and is a member of the firm's Business Transactions Group. In addition to devoting much time to her legal career, she is committed to service in her community and, among other activities, serves as a member of the Sullivan's Island Planning Commission and on the Board of the South Carolina Bar Foundation.

Lawson appointed to serve on the South Carolina State Athletic Commission

Turner Padget Graham & Laney, P.A. is pleased to announce that Ed Lawson has been appointed by Governor Nikki Haley and confirmed by the state

senate to serve a four-year term on the South Carolina State Athletic Commission. Mr. Lawson is a shareholder in the Myrtle Beach office and concentrates his practice in mediation, construction and insurance litigation. The South Carolina State Athletic Commission directs, manages and controls boxing, wrestling, sparring events, exhibitions, athletic contests and performances occurring in South Carolina. The Commission stresses protection of the participants of athletic events, investigates complaints and provides disciplinary action as necessary.

Phillip Florence Inducted into The Citadel Athletic Hall of Fame

Turner Padget Graham & Laney, P.A. is pleased to announce that Phillip Florence will be inducted into The Citadel Athletic Hall of Fame Mr. Florence is based in our Charleston office and focuses his practice on litigation. Phil is a 1990 graduate of The Citadel and was named All Southern Conference First Team as a wide receiver in 1989 by both the coaches and the media before joining the Minnesota Vikings of the National Football League as a wide receiver. The Citadel Athletic Hall of Fame was created in 1977, and its membership currently consists of approximately 160 members.

Adam Russell Joins Turner Padget

J. Adam Russell has joined the law firm of Turner Padget Graham & Laney and is based in the Greenville office. Adam practices in the areas of insurance litigation, personal injury litigation and premises liability. He received his undergraduate degree from Clemson University and his juris doctor from the University of South Carolina School of Law. While in law school, Adam earned CALI awards in Real Estate Transactions, Constitutional Law, Bankruptcy and Consumer Law.

Shawn Willis Appointed to the Charleston County Board of Assessment Appeals

Turner Padget Graham & Laney, P.A. is pleased to announce that Shawn R. Willis has been appointed to the Charleston County Board of Assessment Appeals for a term ending June, 2015. Mr. Willis recently joined the law firm of Turner Padget and is based in the Charleston office. He practices in the areas of transactional law, business litigation, commercial real estate and taxation law. The Board of Assessment Appeals is a fifteen-member board appointed by the Charleston County Council which performs a quasi-judicial function by rendering impartial decisions on disputes between property owners and the Charleston County Tax Assessor concerning property valuation and assessment issues.

Wall Templeton & Haldrup, P.A., Formed

Mark H. Wall, Morgan S. Templeton, Neil S. Haldrup, Keith E. Coltrain, J. Mark Langdon, and Graham P. Powell announce the formation of a new law firm, Wall Templeton & Haldrup, P.A., an experienced team of litigation attorneys. Previously with Elmore & Wall, P.A., these shareholders in Wall Templeton will have offices in Charleston, South Carolina and Raleigh, North Carolina. The firm formally began on July 1, 2011. The firm will service a wide variety of legal matters with the attorneys continuing their primary focus on general liability defense, construction litigation, toxic torts, class actions, insurance coverage, transportation litigation, products liability, and catastrophic injury defense. Wall Templeton is further pleased to announce that William "Trey" Watkins, Jr., Peden Brown McLeod, Jr., Taylor H. Stair, and William W. Silverman are joining the new venture.

Wallace Lightsey is President of the South Carolina Bar Foundation

Wyche, P.A. is pleased to announce that attorney Wallace K. Lightsey is now serving as President of the South Carolina Bar Foundation. The Foundation is the philanthropic arm of the South Carolina Bar whose mission is to fund programs that improve access to justice, educate the public about the legal system, and assist with the administration of justice. Lightsey will serve a one-year term as President of the Foundation. In this role, he will chair the Board of Directors of the Foundation, serve as liaison to the South Carolina Bar, and lead the Foundation's strategic planning. Lightsey has served in numerous leadership roles, both legal and civic, throughout his career, including serving as Chair of the Wyche Executive Committee, Chairman of the South Carolina Commission on Lawyer Conduct, President of the Greenville Symphony Orchestra, and Chair of the Family Effect Foundation. In 2004, he was inducted as a Fellow of the American College of Trial Lawyers in recognition of his substantial jury trial experience, and since 2007 he has been ranked in Band 1 for Litigation in Chambers USA: Leading Lawyers for Business, one of the leading legal directories worldwide.

Emily Gifford Selected as Chair-Elect of the TIPS Self Insurers and Risk Managers Committee

Richardson, Plowden & Robinson, P.A. is pleased to announce that Emily R. Gifford was selected as chair-elect of the Self Insurers and Risk Managers Committee within the American Bar Association's Tort Trial and Insurance Practice Section (TIPS). Gifford was also appointed as the Executive Editor of the Tortsource newsletter, and she will be the Editor-in-chief of the quarterly publication from August 2012 until August 2014. TIPS is considered the American Bar Association's source of knowledge and leadership on trial practice and critical issues of justice that involve tort and insurance law. The Self Insurers and Risk Managers Committee that Gifford will chair provides insight into topical tort and insurance law issues, practice tips and updates on contin-

Continued on next page

uing legal education programming. Gifford also graduated from the 2010-2011 class of the TIPS Leadership Academy. Gifford focuses her practice in Construction Law and Insurance Defense. She earned her Master's degree in health administration while completing her Juris Doctor at the University of South Carolina (USC). She also earned her Bachelor of Arts degree from the USC Honors College. In addition to her work at Richardson Plowden, Gifford is a pro bono special prosecutor for the Office of the Attorney General, assisting in the prosecution of criminal domestic violence cases. She is actively involved with the Young Lawyers Division of the South Carolina Bar, is a member of the Palmetto Health Hospice and Palliative Care Board, and is a member of the South Carolina Defense Trial Attorneys' Association Construction Law Committee.

Eight Collins & Lacy Attorneys Recognized as "Best Lawyers"

Collins & Lacy, P.C. is pleased to announce eight attorneys have been selected by their peers for inclusion in *The Best Lawyers in America ® 2012*. The annual list is compiled by Best Lawyers after conducting surveys in which more than 39,000 leading attorneys confidentially evaluate their professional peers. Since attorneys are not required or allowed to pay a fee to be listed, Best Lawyers has come to be regarded by both the legal profession and the public as the most respected referral list of attorneys in practice. Following are the Collins & Lacy attorneys selected for inclusion in *Best Lawyers in America,* as well as the practice areas in which their work is being recognized: Joel Collins - Criminal Defense: White Collar; Stan Lacy - Workers' Compensation Law; Gray Culbreath – Bet-the-Company Litigation, Commercial Litigation, Mass Tort Litigation, Mass Tort Litigation – Class Actions – Defendants, Product Liability Litigation; Pete Dworjanyn – Workers' Compensation Law; Ellen Adams – Workers' Compensation Law; Donald Van Riper – Workers' Compensation Law; Henry McKellar - Banking & Finance Law, Litigation – Banking & Finance; and Jack Griffeth – Arbitration, Mediation.

Richardson Plowden Attorneys Selected to 2012 edition of Best Lawyers in America

The 2012 edition of *The Best Lawyers in America*® has selected six Richardson, Plowden & Robinson, P.A. attorneys as Best Lawyers: Leslie A. Cotter, Jr., Frederick A. Crawford, Steven W. Hamm, Francis M. Mack, Frank E. Robinson, II, and Franklin J. Smith, Jr. *The Best Lawyers in America* publication is highly regarded and is used as a referral guide in the legal profession. It represents attorneys in 80 specialties in all 50 states and Washington, D.C. Top lawyers in the nation are evaluated and selected by fellow attorneys for the award. The peer-reviewed publication is considered among the most reliable sources for legal referrals. Cotter was selected for his work in Legal Malpractice Law. Crawford was recognized for his work in Health Care Law. Hamm was chosen for his work in Administrative and Regulatory Law. Mack was selected for his work in Commercial Litigation and Construction Litigation. Robinson was honored in the area of Real Estate Law. Smith was selected in the area of Construction Litigation.

Ginny Williams Elected to Board of Big Brothers Big Sisters of Greater Columbia

Turner Padget Graham & Laney, P.A. is pleased to announce that Virginia (Ginny) Williams has been elected to the Board of Big Brothers Big Sisters of Greater Columbia, Inc. Ms. Williams is based in the Columbia office and focuses her law practice in the areas of professional malpractice defense and product liability, as well as personal injury and insurance. She began serving as a Big Sister while in law school. Ginny recently accepted a three year position with the organization's Board and is one of its newest and youngest members. The goal of the board is to provide governance and oversight to the organization as well as hands on resource development, strategic planning of operations, and efforts to increase awareness and recruitment.

Big Brothers Big Sisters of Greater Columbia, Inc. is an affiliate of BBBS of America, the nation's largest and most respected mentoring organization. The agency's purpose is to promote positive youth development and strengthen family support systems to assist youth in achieving their highest potential.

Turner Padget Shareholders Named Among Best Lawyers in America for 2012

Turner Padget Graham & Laney, P.A. is pleased to announce that 30 of its shareholders have been selected by their peers for inclusion in the 2012 edition of *The Best Lawyers in America*. Turner Padget is highly ranked in 25 practice areas around the state. Listed from the firm's Charleston office are: John K. Blincow, Jr., Medical Malpractice Defense; Elaine H. Fowler, Mergers and Acquisitions, Real Estate Law; Michael G. Roberts, Tax Law, Trusts and Estates; and John S. Wilkerson, Professional Malpractice Defense. Listed from the firm's Columbia office are: J. Kenneth Carter, Jr., Product Liability Litigation; Michael E. Chase, Workers' Compensation for Employers; Danny C. Crowe, Mediation, Municipal Law, Municipal Litigation; John E. Cuttino, Construction Litigation, Product Liability Litigation; Cynthia C. Dooley, Workers' Compensation for Employers; Charles E. Hill, Legal Malpractice Defense, Medical Malpractice Defense; Catherine H. Kennedy, Trusts and Estates, Trusts and Estates Litigation; Lanneau Wm. Lambert, Jr., Banking and Finance Law, Real Estate Law; Edward W. Laney, IV, Personal Injury Defense; Curtis L. Ott, Commercial Litigation, Product Liability Defense; Steven W. Ouzts, Mass Tort Litigation/Class Action

Defense, Product Liability Defense; Thomas C. Salane, Insurance Law; Franklin G. Shuler, Jr., Employment Law, Labor and Employment Litigation, Mediation; and W. Duvall Spruill, Banking and Finance Litigation, Commercial Litigation, Construction Litigation, Real Estate Litigation. Listed from the firm's Florence office are: Richard L. Hinson, Mediation; J. René Josey, Appellate, Non-White Collar Criminal Defense, White Collar Criminal Defense; Arthur E. Justice, Jr., Employment Law, Labor and Employment Litigation; Julie Jeffords Moose, Commercial Litigation; J. Munford Scott, Jr., Tax Law; and John M. Scott, III, Tax Law. Listed from the firm's Greenville office are: Vernon F. Dunbar, Workers' Compensation for Employers; Eric K. Englebardt, Arbitration, Mediation; William E. Shaughnessy, Workers' Compensation for Employers; Timothy D. St. Clair, Intellectual Property Litigation, Patent Law, Patent Litigation, Trademark Law; and Charles F. Turner, Jr., Personal Injury Defense. Listed from the firm's Myrtle Beach office is: R. Wayne Byrd, Banking and Finance Litigation, Commercial Litigation, Mergers and Acquisitions Litigation, Trusts and Estates Litigation

'Best Lawyers' Guide Lists Nelson Mullins Attorneys

Fifty-six Nelson Mullins Riley & Scarborough LLP attorneys in more than 40 practices areas in South Carolina have been selected for inclusion in the 2012 edition of *The Best Lawyers in America*. Lawyers are selected for inclusion based on a peer-review survey. Lawyers are not allowed to pay a fee to be listed. *Best Lawyers* is based on confidential evaluations by and interviews of the top attorneys in the country.

The Charleston lawyers listed are: Bill Bobo, Real Estate Law; Michael T. Cole, Product Liability Litigation; Jennifer Davis, Tax Law; Richard A. Farrier, Jr., Bet-the-Company Litigation, Commercial Litigation; John B. Hagerty, Corporate Law; Cynthia B. Hutto, Healthcare Law; Elizabeth Scott Moise, Insurance Law; Thomas F. Moran, Tax Law; G. Mark Phillips, Product Liability Litigation-Defendants; Newman Jackson Smith, Environmental Law, Environmental Litigation, Government Relations Law, Water Law; and John C. von Lehe, Jr., Appellate Law, Tax Law.

The Columbia lawyers listed are: Stuart M. Andrews, Jr., Health Care Law; George S. Bailey, Tax Law, Trusts and Estates, Trusts and Estates Litigation; Edward D. Barnhill, Jr., Real Estate Law, Real Estate Litigation; C. Mitchell Brown, Appellate Law, Commercial Litigation; George B. Cauthen, Bankruptcy and Creditor-Debtor Rights Law, Bankruptcy Litigation; Karen Aldridge Crawford, Environmental Law, Environmental Litigation; Christopher J. Daniels, Personal Injury Litigation, Product Liability Litigation; Clarence Davis, Personal Injury Litigation, Product Liability Litigation; Gus M. Dixon, Corporate Law, Mergers & Acquisitions Law, Securities/Capital Markets Law; Dwight F. Drake, Government Relations Law; David E. Dukes, Bet-the-Company Litigation, Commercial Litigation, Personal Injury Litigation, Product Liability Litigation, Patent Litigation, Securities Litigation; Mark C. Dukes, Intellectual Property Litigation, Technology Law; Carl B. Epps III, Personal Injury Litigation; Robert W. Foster, Jr., Personal Injury Litigation, Product Liability Litigation; Daniel J. Fritze, Corporate Law, Mergers & Acquisitions Law, Securities/Capital Markets Law, Securities Regulation; James C. Gray, Jr., Administrative Law, Insurance Law; Sue Erwin Harper, Employment Law – Management, Labor & Employment Litigation; Bernard F. Hawkins, Jr., Environmental Law, Environmental Litigation; P. Mason Hogue, Jr., Corporate Law, Mergers & Acquisitions Law, Mergers & Acquisitions Litigation, Securities/Capital Markets Law; William C. Hubbard, Commercial Litigation, Banking & Finance Litigation; S. Keith Hutto, Commercial Litigation, Franchise Law, Banking & Finance Litigation; Kenneth Allan Janik, Employee Benefits Law, ERISA Litigation, Tax Law; Frank B.B. Knowlton, Product Liability Litigation; D. Larry Kristinik III, Commercial Litigation, Securities Litigation; John F. Kuppens, Commercial Litigation, Product Liability Litigation – Defendants; James K. Lehman, Commercial Litigation, Environmental Litigation, Mergers & Acquisitions Litigation; Steven A. McKelvey, Jr., Franchise Law; John T. Moore, Financial Services Regulation Law; Stephen G. Morrison, Bet-the-Company Litigation, Commercial Litigation, Product Liability Litigation; Edward W. Mullins, Jr., Bet-the-Company Litigation, Commercial Litigation, Personal Injury Litigation; R. Bruce Shaw, Mass Tort Litigation/Class Actions - Defendants, Personal Injury Litigation, Product Liability Litigation; B. Rush Smith III, Bet-the-Company Litigation, Banking & Finance Litigation; David G. Traylor, Jr., Mass Tort/Class Actions – Defendants, Personal Injury Litigation, Product Liability Litigation; Ralston B. Vanzant II, Real Estate Law; Daniel J. Westbrook, Health Care Law; and George B. Wolfe, Government Relations Law.

The Greenville attorneys listed are: William H. Foster, Employment Law – Management; Neil E. Grayson, Mergers and Acquisitions, Securities Regulation; John M. Jennings, Corporate Governance, Mergers and Acquisitions, Mergers & Acquisitions Litigation, Securities Litigation, Securities/Capital Markets Law, Securities Regulation; Neil Jones, Intellectual Property Litigation; Timothy E. Madden, Family Law; Marvin Quattlebaum, Jr., Bet-the-Company Litigation, Commercial Litigation, Insurance Law; Bo Russell, Mergers and Acquisitions, Venture Capital Law; and Rivers S. Stilwell, Commercial Litigation, Construction Litigation. The Myrtle Beach attorney listed is: James F. McCrackin, Trusts and Estates.

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Member News cont.

Nexsen Pruett Attorneys Named to the 2012 Edition of Best Lawyers

Nexsen Pruet is proud to announce that 5 attorneys have been named to the 2012 edition of Best Lawyers®: Russell T. Burke from Columbia, SC, E. Grantland Burns from Greenville, SC, Elbert S. Dorn from Myrtle Beach, SC, Michael S. Pitts from Greenville, SC, and Bradish J. Waring from Charleston, SC. The Best Lawyers in America® has been published annually since 1983 and is based on an extensive annual peer-review survey. For the 2012 edition, approximately 41,000 attorneys cast almost 3.9 million votes regarding the legal abilities of other their colleagues.

Lightsey Listed in the 2012 Edition of Best Lawyers

Wyche is pleased to announce Wallace Lightsey was recently selected for inclusion in the 2012 edition of *Best Lawyers*®. Best Lawyers in America® is a leading legal referral guide that has been published annually since 1983 and is based on an extensive annual peer-review survey. Wallace K. Lightsey was listed in the following categories: Bet-the-Company Litigation; Commercial Litigation; Litigation – First Amendment; Litigation - Intellectual Property; Medical Malpractice Law – Defendants; and Medical Malpractice Law – Plaintiffs.

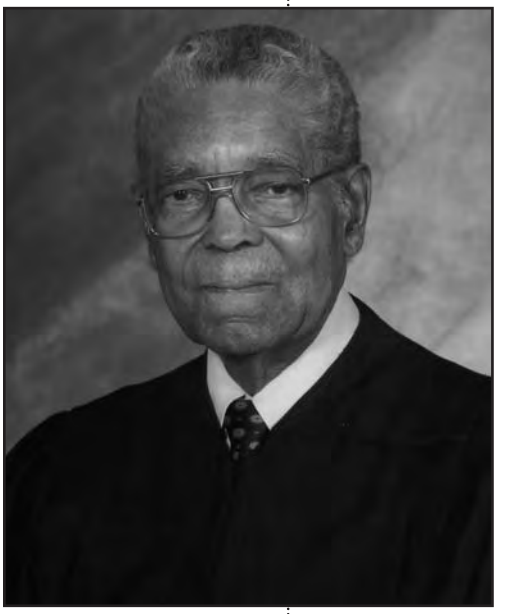
Culbreath Joins Gallivan, White & Boyd

Gallivan, White & Boyd, P.A. is pleased to announce that Gray T. Culbreath has joined the firm as a Shareholder in the firm's Columbia office. Culbreath has 23 years of broad-based litigation experience and currently serves as President of the South Carolina Defense Trial Attorneys' Association (SCDTAA). He joins the firm's Complex Litigation and Business and Commercial practice groups. Culbreath is currently recognized as a South Carolina Super Lawyer for Product Liability and Personal Injury Defense Litigation, and is listed as one of the Best Lawyers of America for Bet-the-Company Litigation, Commercial Litigation, Mass Tort Litigation, Mass Tort Litigation / Class Actions – Litigation, and Product Liability – Litigation. Culbreath is active in both national and state organizations supporting the legal profession. In addition to leading the SCDTAA, he is a member of the International Association of Defense Counsel, Lawyers for Civil Justice, Litigation Counsel of America, Defense Research Institute, and American Board of Trial Advocates. He has also served as chair of the Products Liability Committee and Judiciary Committee for the Federation of Defense and Corporate Counsel. As a result of his contributions to the legal profession, he has been the recipient of the South Carolina Lawyers Weekly Leadership in Law Award, as well as the Gold Compleat Lawyer Award from the University of South Carolina School of Law.

Remembering a Legal Legend: The Honorable Matthew J. Perry, Jr.

The Honorable Matthew J. Perry, Jr. passed away this summer, just a few days short of his 90th birthday. Judge Perry's life and accomplishments touched, influenced and enhanced the lives of countless numbers of people in South Carolina and in the nation. Although no written memorial can truly do justice to the legacy of Judge Perry, the South Carolina Defense Trial Attorneys' Association thought it was important to honor his memory, so that we can be reminded of the impact he had and further seek to follow his example of leadership, grace, civility, and a true heart for justice.[1]

Matthew James Perry, Jr. was born on August 3, 1921 in Columbia, South Carolina. As a child he lived in Petersburg, Virginia, and Tuskegee, Alabama, in addition to Columbia. He was raised by his mother and grandfather, after his father died when he was young. Immediately after graduating from high school in Columbia in 1939, young Mr. Perry entered the Colored Normal, Industrial, Agricultural, and Mechanical College of South Carolina. In 1942, College Student Perry was drafted into the United States Army, and shortly thereafter, Private Perry entered basic training in Alabama. Returning to South Carolina after the war, Sergeant Perry re-enrolled in what would soon become South Carolina State College, in Orangeburg. In 1948, he graduated from what is now known as South Carolina State University with a degree in Business Administration. He immediately enrolled in the law school at South Carolina State, and graduated in 1951. Attorney Perry began his practice in Spartanburg and after about ten years, moved it to Columbia. In 1974, Matthew Perry, the politician, ran for Congress as a Democrat for the Second District of South Carolina. The next year, in 1975, Republican President Gerald Ford made him, "Judge Perry," by nominating him to the United States Military Court of Appeals. And in 1979, President Jimmy Carter nominated him to the United States District Court for the District of South Carolina. Judge Perry took Senior Status in 1995, but he continued to serve as one of our most distinguished and respected Federal Judges right up until his passing. On April 23, 2004, the Federal Courthouse in Columbia was dedicated as the Matthew J. Perry, Jr. Federal Courthouse in his honor.



These basic facts of the life of Judge Matthew J. Perry, Jr., do not even begin to tell us the depth of this great man. Behind all of this chronological information, there were interesting facts and circumstances. There was talent. There was history and struggle; success and notoriety. There was gentleness. There was humility. There was grace and dignity. There was, of course, family. Judge Perry was married for over 65 years to Hallie. They have a son named Mike.

Anyone who heard Judge Perry's big booming voice would not be surprised at all to learn that in his youth he was an accomplished baritone singer whose performances repeatedly filled the Township Auditorium in Columbia. When he was in the Army, he met the members of a singing group who had sang with Cab Calloway before World War II, and after the War they invited him to New York to interview. The story goes they offered him a job, which he thankfully, declined.

Judge Perry was a witness to history. He had felt personally the sting of racial discrimination when he was a child, when he was in the Army, and when he was practicing as a young lawyer. He was in the courtroom in 1947, even before graduating college, when Thurgood Marshall convinced Judge Waties Waring to declare that the all-white voting system in the Democratic primary in South Carolina was illegal. He was also in the courtroom when Judge Waring ordered the State of South Carolina to offer legal education opportunities to black men and women. He later became— as we all know— a leader in bringing about the historic changes in race relations that many of us now seem to take for granted.

Judge Perry has received numerous significant awards, including being awarded the Order of the

Continued on next page

Palmetto in 1986 by Governor Richard Riley. He was inducted into the South Carolina Hall of Fame and the National Black College Alumni Hall of Fame. He received honorary degrees from numerous colleges and universities in South Carolina, and even some from elsewhere to include Princeton University.

These remarkable facts and significant awards, though, barely begin to tell us the significance of the life of Matthew J. Perry, Jr. Very few of us in the legal profession knew "Matthew," and very few more knew "Attorney Perry." Most of us knew "Judge" Perry only in his capacity as a Judge. But it is important for all of us to remember that this label by which we knew "Judge" Perry misleads us into thinking that his significance is defined only by his life as a federal judge. Long before 1979, and even 1975, Matthew J. Perry, Jr. had made his mark, on Columbia, on Spartanburg, on South Carolina, and on his nation.

In addition to being in attendance at the trial of those two important civil rights cases before Judge Waties Waring in Charleston, Judge Perry made his own impact in the aftermath of those trials by going door to door to encourage black men and women to get out and vote in the first-ever open Democratic primary that was held as a result of Judge Waring's decision in Elmore v. Rice. Further, he enrolled in the second class ever at the South Carolina State law school in Orangeburg— as a result of Judge Waring's decision in Wrighten v. University of South Carolina.

After law school, Judge Perry handled some of the most significant cases of his era. In 1954, he represented Sarah Mae Flemming against South Carolina Electric and Gas Company, a case in which the Fourth Circuit declared that segregated buses were illegal years before the famous incident in Montgomery, Alabama involving Rosa Parks.

In 1957, I. DeQuincey Newman, then-President of the state NAACP, asked Judge Perry to take the role as the Chair of the State Legal Committee, which is a position he held on up into the 1970's. In 1963, Judge Perry represented Harvey Gantt before the United States District Court and the Fourth Circuit, and got him peacefully admitted into Clemson University. Also in 1963 he handled Edwards v. South Carolina before the Supreme Court of the United States, one of the most important, and most often cited First Amendment cases the Supreme Court has ever decided. He represented the plaintiffs in Stevenson v. West, which in 1973, resulted in the United States Supreme Court declaring that South Carolina must have single-member districts for its state Senate and House seats— a case that changed the face of South Carolina politics, and resulted in the largest election of African-Americans to the South Carolina Legislature since Reconstruction.

These are just a few of the highlights of a life and a career, the importance of which has hardly any equal. But even a comprehensive discussion of his significant accomplishments would not complete the story of the impact of this great man. Nor, would it adequately foretell the legacy that he has left us.

Courage lives itself out in the lives of the people who are touched by courageous men and women. In the fight for civil rights, that courage included men like abolitionist and political leader Frederick Douglass, Thurgood Marshall, Waties Waring, Matthew Perry, and others. Frederick Douglass' courage played itself out again in the life that Thurgood Marshall chose to live, and in turn, his courage and Judge Waring's courage, and Judge Perry's courage, plays itself out in lives that we live as lawyers.

Many of us will reflect on the impact Judge Perry had on us. The gentleness, the grace, and the dignity that decorate the firm resolve and courage of a man who made it clear in the way he lived his life, that he would stand for no less than fairness, equality, and justice. We can only hope this image can keep us focused on why we do what we do as lawyers and should allow us to strive to uphold the standard that Judge Perry has set for us.

But we are missing an important opportunity, if we let Judge Perry's legacy be merely the impact he had on us. A poem by Robert Hayden, entitled "Frederick Douglass" tells us that the lives of men and women, like Frederick Douglass, like Judge Perry, who defined themselves by courage and justice, will be remembered not only in stories and statues, and by their names on courthouses, but they will be remembered in the lives grown out of their life— the lives, as the poem says, "fleshing the dream" that men like Judge Matthew Perry had for those who follow. The lives that are "fleshing the dream" of Judge Perry, not only include lawyers and the legal community that Judge Perry impacted, but they include the lives of the people that we touch, in turn.

We should remember that we have a real privilege to be one of this noble group of men and women called lawyers, who share the duty of living out the courage that Judge Perry showed to us. And so, let Judge Perry's legacy be in our hands. Let his legacy not only be the impact he has had on us, but also let it include the impact that we will have on those people whose lives we touch.[2]

Endnotes

1 The content of this memorial is derived from the introduction given by the Honorable John C. Few to the presentation made by Judge Perry at the South Carolina Defense Trial Attorneys' Association Annual Meeting in November of 2008. The SCDTAA is grateful to Judge Few for agreeing to our use of his remarks in this memorial tribute to Judge Perry.

2 Judge Perry gave a tremendous presentation at the South Carolina Defense Trial Attorneys' Association Annual Meeting in November of 2008. His speech entitled The Civil Rights Movement - Personal Memories is now part of the South Carolina Bar Foundation's Oral History Program, which is available at the Bar Foundation's website, http://scbarfoundation.org, under the "Lawyers" tab and the "Oral History Program" sub-tab.

The Honorable Richard M. Gergel
United States District Judge

by William S. Brown

The Honorable Richard Mark Gergel was nominated to be a United States District Judge by President Barack Obama in December 2009 and was confirmed by unanimous vote of the United States Senate on August 5, 2010. Judge Gergel filled a vacancy created on the District Court when the Honorable Henry M. Herlong, Jr. took senior status. Judge Gergel presides in the Charleston Federal Courthouse.

Judge Gergel is a native of Columbia, South Carolina and is a graduate of the Richland School District No. 1 public schools. He attended New College, Oxford University and Duke University, where he graduated in 1975 summa cum laude. Judge Gergel attended the Duke University School of Law and graduated in 1979. While at Duke Law School, Judge Gergel was a member of the Editorial Board of the Duke Law Journal. He was sworn in as a member of the South Carolina Bar in November 1979, initially practicing with the law firm of Medlock and Davis. He subsequently began his own law firm in 1983 and practiced with the firm Gergel, Nickles and Solomon until 2010. During his years in private practice, Judge Gergel was an accomplished and well respected trial attorney. He handled a wide array of cases involving issues ranging from apportionment of voting districts to video poker.

Judge Gergel also has a long standing interest in the history of his native state and has written a book and numerous articles and book chapters on South Carolina history. He is married to Dr. Belinda Friedman Gergel and they have two sons, Richie and Joseph.

Judge Gergel kindly agreed to provide some of his insight on the legal profession by answering the following questions:

Q. What has been the hardest part of transitioning from practicing law to presiding as a Judge on the bench?

A. The greatest challenge for a new federal district judge is the mastery of the vast breadth of law presented to us daily. If any lawyer attempted to practice in all the areas of law district judges are asked to address-- patent law, environment law, social security law, criminal law and procedure, ERISA, habeas corpus, employment law, tort law and on and on and on-- he or she would surely face disbarment. How do we do it? The simple truth is that if all of us will simply slow down and focus, there is not much in the law we cannot master. I have disciplined myself to take the time necessary to understand each case before me. The good news is that with now one year experience on the bench, I am more and more infrequently forced to interpret a law in which I have had no prior exposure.

Q. What has been the biggest frustration with the court system that you have seen and how do you hope to improve on it?

A. I must candidly say that I have not found any part of the job of district judge frustrating. I do focus every day on how to fulfill the goals of Rule 1 of the Federal Rules of Civil Procedure of a "just, speedy and inexpensive determination" of every dispute. Litigation is rarely described as speedy or inexpensive, and I am doing all I can to push us in that direction. The Federal Courts have certain reporting requirements to Congress for any cases pending more than 3 years. The American Bar Association recommends disposition of cases within 18 months. I have set the 18 month standard, with rare exceptions mandated by the circumstances, as the outside limit for cases on my docket. Most cases are set for trial shortly after pending on my docket for 12 months. I am convinced that the long pendency of cases contributes to expense and frustration of the parties, and I intend to do my small part to improve that situation.

Continued on next page

I am also a believer in mediation, having had great experiences in the mediation process over the last decade or so. For parties who wish to try their cases, I do not push mediation on them. Instead, I try to get them to trial as soon as possible. But experience tells us 98% or more of the civil cases will settle, and I want those that will settle to do so early and not late in the litigation process. Late settlements are often wasteful and avoidable with a little earlier attention and focus by the court and the litigants. I am attempting to do my part to help litigants get their cases resolve in a manner that promotes justice and minimizes the expense of litigation.

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

A. The best advice I can give is the advice I was given by my scout leader: be prepared. Preparation is the foundation of any successful court appearance. Know your case and be prepared to present an argument if a hearing is granted. This does not mean repeat what was submitted in your briefing. I will have read your brief and do not need it repeated or read at the hearing. Often when a hearing is scheduled, it is because I have a particular question or questions which I want answered. Listen to the questions of the court and answer the questions asked. It can be exasperating when an attorney will not or does not answer the court's questions.

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

A. Most of the lawyers appearing in my court are above average to outstanding. Therefore, true mistakes by lawyers are rare. Nevertheless, sometimes I will have a lawyer come to a hearing and make an argument which is completely different than what was presented in the briefing. This usually occurs when a lawyer not as involved in the case is assigned to prepare the brief and the lead trial attorney is not significantly involved in the briefing. The lead trial attorney will realize after briefing is complete that the best argument is not in the memorandum which was filed. My staff and I spend a great deal of time to be prepared for a hearing. It is difficult for the court to evaluate the case when arguments are not in the briefs. I have, on at least one occasion, required the parties to re-brief a motion when the arguments presented issues which were not addressed in the parties' submission to the court. Lawyers should take the preparation of the supporting or opposing memoranda seriously. The court will rely on these submissions and may decide to rule without a hearing, so that if the best argument is not in the briefs, it may be lost.

Q. What advice would you give to young lawyers wanting to get "in court" experience?

A. If a young lawyer wants trial experience, he or she needs to seek out trial opportunities. One way to do this is to go work where there is a higher volume of trials. This is often in the criminal side of the law, such as a solicitor's office, United States Attorney's office, or public defender's office. These public sector opportunities provide greater volume of trials than most jobs on the civil side of the court. For those young lawyers who prefer the civil practice, one way to get court room experience is to tell judges that they are willing to accept appointments to handle cases like Section 1983 claims asserted by indigent plaintiffs. I have appointed these cases to young lawyers who have made good use of the appointment to gain valuable trial experience. Lastly, I would recommend young lawyers work hard on cases within their firms. By knowing the case, young lawyers can become so valuable that the partner on the file will want them involved in the trial.

Q. Who have been the biggest influences in your legal career?

A. Many people have had great influence on me at different times in my career. I could not possibly mention them all, but will note a few of them. Travis Medlock gave me my first job out of law school. He taught me trial skills and gave me the chance to try cases. I was able to try cases with Mr. Medlock and learn from him. He was very talented on his feet. He also gave me opportunities to get into the courtroom often to try many cases. This was an invaluable experience which was the foundation of my legal career.

From a judicial perspective, Judge Perry and Chief Justice Toal have had a tremendous influence on me. When I dealt with and appeared before Judge Perry I could not help but be in awe of his patience, courtesy, and calm judicial temperament. When I became a judge, I used Judge Perry as a model on how to deal with litigants and counsel who appear before me. On the bench, I will at times think of how Judge Perry would handle a situation and seek to be guided by his voice of reason. Chief Justice Toal's diligence, dedication and work ethic have been an inspiration to me. I often saw Chief Justice Toal in an oral argument demonstrate that her knowledge of the record was greater than that of the lawyer arguing. This taught me to know my case and be prepared. As a judge, I try to follow Chief Justice Toal's example and work hard to understand the case and issues before me as thoroughly as possible. I seek everyday to live up to the examples set by Judge Perry and Chief Justice Toal.

The Joint Meeting at Grove Park Inn - A Recap

by David A. Anderson

Those who attended the 44th Annual Joint Meeting held at the beautiful Grove Park Inn (GPI) in Asheville, NC July 28th – 30th, 2011 enjoyed a great educational program along with exciting social events. Your Joint Meeting Committee consisting of Mitch Griffith, Graham Powell, Chris Adams, Jared Garraux, Jenna Garraux, Mark Allison, Shane Williams, Drew Butler, and Chairman David Anderson all worked hard to provide a grand affair. If you missed this year's event, please mark your calendars for July 26-28, 2012. You will not want to miss out again.

The Claim Management Association of South Carolina President, Dwayne Smalls and their Vice-President, Barry Reynolds, both of Farm Bureau Insurance, sponsored David Price, Ph.D., who delivered an informative presentation on Post Traumatic Stress and Traumatic Brain Injuries. They also assisted in having Alan O. Campbell of Applied Building Sciences provide a lecture on Human Factors Accident Evaluations. We received the latest information dealing with Medicare Secondary Payer 2011 from John V. Cattie of Garretson Resolution Group. Two of our South Carolina state government's newly appointed Directors provided informative presentations on their respective departments. Catherine B. Templeton explained her duties as the regulatory czar for South Carolina. She is the Director of the Department of Labor, Licensing & Regulation. Catherine was followed by David Black, the Department of Insurance Director, who explained his role with the Department of Insurance and the services they provide to our State. Allison Dean Love gave a presentation on the Insurance Institute for Business & Home Safety Research which highlighted this nationally known state of the art facility located in Chester County, South Carolina. This included a fascinating video of a house being blown apart in a simulated hurricane. Dean Robert M. Wilcox of the University Of South Carolina School

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Special Thanks to our 2011 Joint Meeting Sponsors

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YOUNG LAWYER UPDATE

Young Lawyer Update

by Jared H. Garraux

As we begin to wind down 2011, I would like to thank all of the young lawyers who have helped make my job a lot easier this year. All of our events have been well attended, and participation by the young lawyers is increasing.

In July, the South Carolina Defense Trial Attorneys' Association held its annual Joint Meeting at the Grove Park Inn in Asheville, NC. As always, the Young Lawyers Division hosted the Silent Auction, which kicks off the Joint Meeting every year. This year, the Silent Auction raised nearly $8,500.00, which the SCDTAA proudly donated to iCivics, the South Carolina Bar Foundation, and the National Foundation for Judicial Excellence.

I would like to give special thanks to Aimee Hiers, Jenna Garraux, John Hawk, Jenny Thomas, Claude Prevost, Ryan Earhart, Frances Zacher and Paul Greene for their help in making this year's Silent Auction a great success. Without their assistance, the Silent Auction would not have been possible. The Auction included over 70 items, ranging from an IPod Touch to weekend stays at coastal resorts. I would also like to thank all of our donors, which included local businesses, member law firms, and legal support companies. And, for those members in attendance, I would encourage you to continue to support the local businesses and legal support companies that donate items. These companies have been supporting the SCDTAA and the Silent Auction for many years. So, it is important that we return the favor.

Also during the Joint Meeting in Asheville, we discussed expanding the Young Lawyers Division Committee. Currently, there are only two members of this committee, myself as President and John Hawk as President-Elect. We are considering creating a representative position for the four regions of South Carolina: the Upstate, the Midlands, the Low Country and the Pee Dee. We are still working on the details; however, if you are interested in one of the YLD representative positions, please contact me.

Looking ahead we still have some great events left in 2011. On October 19th, the YLD will host a happy hour in Charleston. The exact location has not been determined. However, I will send out an e-mail to all young lawyers prior to the event notifying you of the time and location. These events are a great opportunity to socialize and network with fellow young lawyers and also to find out more about the SCDTAA.

Lastly, don't forget the SCDTAA Annual Meeting which will be held from November 3rd-6th at the Ritz Carlton in Amelia Island, Florida. We have a great program this year and, as always, the meeting will be well attended by our Judiciary. This is a great opportunity for young lawyers to interact with Judges in a relaxed environment. For more information on the Annual Meeting, contact me or Aimee Hiers.

As always, if you would like to learn more about the SCDTAA or opportunities within the Young Lawyers Division, please do not hesitate to contact me at jgarraux@richardsonplowden.com. I look forward to seeing you at the upcoming events.

SCDTAA EVENTS

Joint Meeting Recap

Continued from previous page

of Law provided our ethics presentation and also gave an in-depth update on his new role as Dean. To round out the presenters, we had Robert P. McGovern, a federal prosecutor, former NFL player and also a current Major in the U.S. Army Reserves explain his All American story of Football, Faith and Fighting for Freedom. The individual break-out sessions featured a large Workers Compensation Component as well as Construction, ADR, and Medical Malpractice break-outs to discuss informative topics and provide various demonstrations.

The social aspects of the meeting allowed for old friends to become reacquainted and an opportunity to meet new ones. The Silent Auction and Welcome reception saw some new additions with our President Gray Culbreath arranging for a scotch tasting, bourbon tasting and martini bar. We had over 70 donated items for the auction ranging from Kindles to weekend stays at beach resorts. The Young Lawyers Division along with our Executive Director Aimee Hiers and her staff enabled the Silent Auction to raise nearly $8,500 which our Association proudly donated to iCivics, the South Carolina Bar Foundation and the National Foundation for Judicial Excellence. The Friday night barbeque and bluegrass and the Friday afternoon traditional activities of golf, white water rafting and Zip Line Tour were enjoyed by all. You will not want to miss the 45th Annual Joint Meeting in 2012.

The Trial Academy Provides Great Experience

by William Brown and Ronald K. Wray

The 21st Annual South Carolina Defense Trial Attorneys' Association Trial Academy was a tremendous success. The Trial Academy was held July 6 through 8 in Greenville, South Carolina. Twenty-four energetic and eager young lawyers came together for this three-day program. The intense training on trial skills provided at the SCDTAA Trial Academy once again included two days of classroom instruction and the third day presenting a mock trial.

We extend a special statement of thanks to the Circuit Court Judges who assisted the SCDTAA by presiding over the mock trials: Judge C. Victor Pyle, Jr., Judge Roger L. Couch, Judge Edward W. Miller, Judge J. Derham Cole, Judge J. Mark Hayes II, and Judge G. Edward Welmaker. The experience received in the mock trial is significantly enhanced by the ability of the participants to present a case to a sitting judge. We appreciate the willingness of these judges to donate their time to assist in the Trial Academy.

The two days of classroom instruction were once again filled with top-notch speakers drawn from the wealth of talent in the SCDTAA membership. On Wednesday, after opening remarks by SCDTAA President Gray Culbreath, Ellen Cheek led off the presentations with addressing pretrial briefs, motions and jury selection. Morgan Templeton gave an inspired presentation on opening statements, and Past President Mark Phillips spoke on ethical issues a young lawyer must understand in a trial practice. Wednesday morning was concluded by Greg Sloan who, having been a former plaintiff's attorney, spoke on the perspectives of trial preparation from both the defense side and the plaintiff's side. Retired Chief Judge of the United States Court of Appeals for the Fourth Circuit, Billy Wilkins, led off Wednesday afternoon with a presentation on making trial objections and preserving the record on appeal to ensure that appellate issues may be presented if necessary. The participants then heard from Eric Englebardt regarding effective communication and the appropriate use of alternative dispute resolution in trial preparation and understanding when and how to avoid trial through ADR. Beth McMillan taught great lessons in proper use of direct and cross examination of lay witnesses. The educational program on Wednesday concluded with a breakout session led

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Trial Academy Recap

Continued from previous page

by experienced trial lawyers and team practice time for preparation for the mock trial. A Young Lawyers' reception was also held on Wednesday evening.

On Thursday, Sam Mabry kicked off the morning with insights on direct and cross examination of expert witnesses. The next speaker was Luanne Runge to discuss evidentiary issues, focusing on the proper technique to gain admissibility and present evidence in court. Kurt Rozelsky informed the participants of the significance and proper manner of presenting directed verdict and post-trial motions. Charles Boykin then provided an emotional and inspiring segment on effective use of closing arguments to bring home your points to the jury. The Thursday session also included breakout sessions and team practice under supervision of experienced trial lawyers. The Judicial Reception closed out the day.

The mock trials on Friday were also a great success. The staff and personnel at the Greenville County Courthouse were exceptionally accommodating. The volunteers who served as jurors, witnesses, and trial observers also made the mock trial experience more meaningful. The trial observers, as well as the trial judges, provide significant critique and feedback to the students. This year we were thankful to have a great group of trial observers: Mills Gallivan, Rivers Stilwell, Mike Wilkes, Frank Gibbes, Howard Boyd, and Bill Coates. The participants had worked hard to prepare their case, which allowed the trials to move smoothly.

Volunteers who served on the juries for the mock trials came from many different organizations. In addition to our member firms, we would like to thank the Greenville Rotary Club, the Charleston School of Law, the OLLI Program at Furman University, Furman University's Mock Trial Program, and the Greenville County Solicitor's Office, who all sent volunteers to serve on the juries. We would also like to thank our sponsors for the SCDTAA Trial Academy, the Wilkes Law Firm, P.A. and Dixon, Hughes, Goodman, LLP Certified Public Accountants and Advisors.

Once again, the tireless efforts of Aimee Hiers, our Executive Director, and her dedicated assistants made the Trial Academy run as smoothly as ever. The Trial Academy is truly one of the greatest events and benefits to the SCDTAA and its members. We are confident that the dedication and hard work put in by the participants paid off with a great learning experience for all those involved. Thank you to all those who helped make the 21st Annual SCDTAA Trial Academy another great success and tremendous learning experience for the young lawyers involved.

Deposition Boot Camp Offers Great Training

by D. Jay Davis, Jr.

The SCDTAA presented two successful deposition boot camps this year. The boot camps are designed to provide insight into the method of taking depositions, as well as providing outlines and practical suggestions. They also gave attendees the opportunity to observe mock depositions with real expert witnesses. The boot camps are for both new and experienced lawyers. This year's Advanced Boot Camp: Expert Edition was held on May 5, 2011, in Columbia, South Carolina. The program focused on Medical, Vocational Rehabilitation experts and Economic experts. It also included information on deposing an Accident Reconstruction expert. It was well attended and provided insightful tips and information for all attendees.

On October 6, 2011, the SCDTAA held its second deposition Boot Camp/CLE of the year. This program was held at the Charleston School of Law with an outstanding faculty and many interesting topics. Highlighting the day was a presentation by The Honorable Roger Young on the do's and dont's of depositions from the Bench's perspective. As always, Judge Young's presentation was a crowd pleaser with his use of multi-media to deliver a helpful message to those who appear before him. Our own SCDTAA President Gray Culbreath also presented on handling 30(b)(6) deposition and preparing these witnesses. Attendees got great tips on effective use of depositions at trial. Special thanks to all of our speakers at these great events. Without their support, the programs could not have been such a resounding success. We hope to see more members at next year's camps!

SCDTAA Annual Meeting
November 3 - 6, 2011 • Amelia Island, FL

by Anthony W. Livoti

Beautiful beaches, Florida weather, and a Ritz-Carlton hotel. They all make for a great start to the South Carolina Defense Trial Attorneys' Association Annual Meeting. All that's missing is you.

The SCDTAA returns to the Ritz-Carlton Amelia Island Hotel in Amelia Island, Florida November 3 - 6, 2011. The annual meeting committee has been hard at work coming up with a great program with nationally recognized speakers. The weekend starts with the traditional President's Reception Thursday evening.

Friday starts with a new event, a breakfast honoring our judiciary. We will divide up based upon the region of the state in which you live and have a full breakfast with our judges. This will be a great way to mix and mingle with judges over bacon and eggs in a relaxed atmosphere. The Honorable Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, will present an update on the judiciary. Then we have Chuck Rosenberg, a former US Attorney who was instrumental in the Zacarias Moussauoi trial, to present a riveting talk on this monumental case. Coming on the heels of the 10th anniversary of 9/11, it will be a presentation you will not want to miss. We will have substantive law breakouts and a state court judges panel with great "do's and don'ts" from trial and appellate judges. Friday afternoon will involve activities including our golf tournament, tennis tournament, and fishing. We will also have Cricket Newman give a presentation on home decorating tips and craft making. Friday night we all gather together for a seafood dinner on the lawn.

Saturday kicks off with a panel discussion on ethics for attorneys and the use of social media, a topic becoming more and more pressing. Professor John Yoo, a nationally renowned speaker and former Justice Department attorney, will present a talk on presidential power, its limits, and its future. Ever wonder what to do when parties in your case go into bankruptcy? All three bankruptcy judges for South Carolina will give a primer on this important and recurring topic. Finally, Lana Varney, a partner with Fulbright and Jaworski and Dr. Paulette Robinette, a jury consultant from JurySync, will present a talk on using internet searches and social media for jury research, and the limits courts are imposing on the use of this technology in selecting jurors. Saturday afternoon is for shopping, walks on the beach, or relaxing in the hospitality suite for some football. The weekend concludes with the black-tie dinner and dance featuring the music of The Voltage Brothers.

This weekend promises to be a great time of learning and relaxing with old and new friends. More information is available on the Association website.

MAKE PLANS NOW TO ATTEND THIS FUN-FILLED MEETING.

In-House Counsel Seminar Another Success

by John F. Kuppens

The South Carolina Defense Trial Attorneys' Association held its second Corporate Counsel CLE seminar of 2011 at The Hyatt Regency in Greenville, South Carolina on September 16th. The program was a big success, and we had record registration. Our headline speaker, United States Representative Harold W. Gowdy III, shared his insights on current and future congressional actions affecting South Carolina businesses. Next, South Carolina Bar President Marvin Quattlebaum spoke about South Carolina Bar initiatives which benefit corporate counsel. Chris Sorenson gave a presentation on employment law issues arising from the use of social media in the workplace, and finally Steve Buckingham spoke on "Ethics Issues for Corporate Counsel". 2011 is the third year that SCDTAA has presented its Corporate Counsel CLE programs. The great program offered on September 16th and the growing reputation among South Carolina's in-house attorneys of the value and benefit of the SCDTAA Corporate Counsel CLE's brought out the largest group yet of in-house lawyers to attend one of these seminars. In these short few years, the number of in-house counsel registering for these programs has doubled. We are confident the success of these CLE's will continue for many years to come. Thanks to our speakers, and all those who participated in planning the event.

2012

SPRING

TRIAL ACADEMY
June 6-8
Charleston, SC

SUMMER

JOINT MEETING
July 26-28
The Grove Park Inn
Asheville, NC

FALL

ANNUAL MEETING
November 8-11
The Sanctuary
Kiawah Island, SC

ARTICLE

Crossmann II: A Final Consensus on "Occurrence" and New Allocation Rules For Insurers

by Melissa M. Nichols [1]

By now, attorneys involved in construction litigation or insurance coverage issues are well-acquainted with the South Carolina Supreme Court's January 7, 2011 decision in *Crossmann Communities v. Harleysville Mutual Insurance Company* [2], which significantly altered the law regarding the interpretation of the term "occurrence" in a contractor's Commercial General Liability (CGL) insurance policy in a case involving alleged construction defects. In its January 7 decision, the Supreme Court aimed to offer clarity to the confused (and confusing) law on "occurrence," which it termed an "intellectual mess." The language the Supreme Court used in that decision was bold, sweeping and definitive, leaving little doubt that faulty workmanship that leads to foreseeable damage (including damage from water intrusion through a defectively installed roof) would not be considered an "occurrence" under a standard CGL policy, even if a plaintiff showed the defective work caused damage to other parts of the building. The decision was controversial, leading to arguments that the ruling would be catastrophic to the construction industry in South Carolina and resulting in the passage of legislation advanced by Carolinas AGC, a construction trade association.[3]

Just months later, however, that bold and controversial decision no longer reflects the law in South Carolina. On August 22, 2011,[4] the Supreme Court withdrew its January 7, 2011 decision and returned the state of the law regarding what constitutes an "occurrence" to that which existed after its 2009 decision in *Auto Owners v. Newman (Newman)*[5]. The underlying case in *Crossmann* involved claims brought by condominium owners against developers for damages arising from water intrusion the homeowner plaintiffs alleged was caused by defective construction of the condominiums. The developers settled with the homeowners and filed a declaratory judgment action to determine whether their CGL polices provided coverage for the homeowners' damages. Some of the insurers settled their coverage issues prior to trial. The developers and Harleysville Mutual Insurance Company, which proceeded to trial in the declaratory judgment action, stipulated to a number of coverage issues, including that the damage at issue constituted property damage under the policy and that the parties would not argue the applicability of any policy exclusions. At issue before the Supreme Court were (1) whether there had been an "occurrence" under the policies at issue and (2) if so, how damages would be allocated to those policies.

Concerns Expressed by the Court During Rehearing: On May 23, 2011, the Supreme Court heard arguments on whether it should reconsider its January 7, 2011 decision. During the rehearing, comments and questions from the justices indicated that the court was grappling with the tension between reading "occurrence" to require an element of fortuity or some event giving rise to the "occurrence" on one hand and a desire not to render worthless CGL coverage purchased by contractors on the other hand. Justice Kittredge, who authored the August 22 Crossmann II decision, implied that, because of the confusion surrounding the meaning of the term, it must be ambiguous, meaning it would be construed in favor of the insured. This is the path the majority took in the August 22 decision.

The "New" Law Regarding "Property Damage" Caused by an Occurrence: In *Crossmann II*, the Supreme Court acknowledged its struggle to determine the meaning of the word "occurrence" in the context of a progressive damage case and found that the lack of clear meaning renders the term ambiguous. Thus, the term "occurrence" must be construed against the insurer. The insuring agreement in a standard CGL policy provides that the insurer will pay those sums the insured becomes legally obligated to pay for "property damage" caused by an "occurrence." Occurrence is defined as "accident, including continuous or repeated exposure to substantially the same general harmful conditions."[6] "Accident" is not a defined term in a standard CGL policy, and much of the court's discussion in the first *Crossmann* decision focused on the meaning of "accident." In *Crossmann II*, however, the court focused on the term "property damage" and noted that "property damage" was defined in part as "physical injury to tangible property."

The *Crossmann II* court set forth the applicable framework for analyzing coverage: First the court must determine whether there is "property damage,"

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ARTICLE CONT.

and only if "property damage" is alleged does the court need to determine whether there is an "occurrence." The court found that the requirement for "physical injury" to property suggests the property was not defective at the outset but rather was initially sound and was injured thereafter. The court emphasized the difference between a claim for repairing or replacing defective work (not a claim for property damage) and a claim for the cost of repairing damage caused by the defective work (a claim for property damage).[7] The court reviewed the facts of *Newman*, a coverage case brought by a general contractor arising from claims involving water intrusion through defectively installed stucco, and found that in the *Newman* case, the costs to replace negligently constructed stucco were not "property damage," because the stucco was not injured. However, the damage to the rest of the building caused by water penetration through this negligently installed stucco did constitute "property damage." The court clarified that "negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not."

Allocation: Because the court found that the allegations against Crossmann Communities did trigger Harleysville's coverage obligations, the court needed to determine how to allocate the progressive damages among the developer's insurers. The *Crossmann II* court reviewed and reaffirmed its adoption of a modified continuous trigger theory in *Joe Harden Builders*.[8] Crossmann Communities, relying on the court's later decision in *Century Indemnity*,[9] had argued that the court should impose "joint and several" liability and hold Harleysville responsible for all damages.[10] However, the Supreme Court overruled its prior decision in *Century Indemnity* and found that "each triggered insurer must indemnify only for the portion of the loss attributable to property damage that occurred during its policy period." In other words, the damages should be allocated among the various insurers based on the damage that actually took place during the applicable policy period, or in the alternative, based on a default "time on the risk" analysis.

The court thus reversed the trial court's order allocating the entire $7,200,000 in stipulated damages to Harleysville and held that the proper method for allocating damages in a progressive property damage case is to assign each insurer a pro-rata portion of the loss based on that insurer's time on the risk. Under a "pro-rata" approach, each insurer is only responsible for its pro-rata portion of the loss covered by a progressive injury, regardless of whether other insurance policies are triggered and available to cover the remainder, thus requiring the policyholder to bear any portion of the loss attributable to the policyholder's assumption of the risk. In other words, for any period of "no insurance, self-insurance or insufficient insurance" during the period of progressive damage, a portion of the loss is borne by the policyholder. The *Crossmann II* court concluded that the "time on the risk" approach to calculating each insurer's portion of the loss is the method most consistent with the language of a standard CGL policy. The court noted that Harleysville had agreed to pay for damages incurred "because of 'bodily injury' or 'property damage' to which this insurance applies" and that the insurance applies only if the damage occurred during the policy period. Thus, the insurance does not apply to property damage that did not occur during the policy period. Moreover, the court found that this approach is consistent with the objectively reasonable expectations of the contracting parties and promotes the important policy goal of incentivizing businesses to purchase sufficient insurance.

Ideally, the fact finder would determine "precisely how much of the injury-in-fact occurred during each policy period and precisely what quantum of the damage award in the underlying suit was attributable to *that* injury."[11] However, the court recognized that "it is often 'both scientifically and administratively impossible' to make such determinations."[12] Thus, if proof is available showing the precise damage that occurred during the policy period, then the damage should be allocated in that way. However, if such a determination is not possible (and it is likely it seldom will be), then the default rule assumes that the damage occurred in equal portions during each year that it progressed, and each insurer's percentage responsibility is

determined by dividing the number of years an insurer provided coverage by the number of years during which the damage progressed. In *Crossmann*, numerous buildings were at issue, and the court left it to the sound discretion of the trial court to determine whether to apply the above formula separately to each individual building or whether to modify the default formula to arrive at a reasonable methodology for this case. Thus, the court left open the precise application of the "time on the risk" approach where a strict application on the default formula would be unduly burdensome or otherwise inappropriate. However, any formula must result in a reasonable approximation of the amount of property damage that occurred during each insurer's policy period.

So How Does this Decision Affect My Clients? In most construction defect cases, plaintiffs will allege that a contractor's (or multiple contractors') work caused damage to some other part of the structure. For example, in a water intrusion case, plaintiffs often claim the allegedly deficient building envelope enabled water to enter the interior and damage framing, drywall or personal property. The *Crossmann II* opinion did not address and does not affect the application of any policy exclusions. However, at least a portion of a verdict rendered against an insured contractor will often be "property damage" caused by an "occurrence" under the *Crossmann II* framework. While the cost of repairing or replacing the insured's own work (often a significant portion a plaintiff's claim) still would not be covered by the typical CGL policy, to the extent plaintiffs prove damage to other parts of the building or damage to personal property, such damages would constitute "property damage" caused by an "occurrence." Additionally, plaintiffs may be able to show loss of use of the building that would be considered an occurrence. The insurer must then analyze the applicability of policy exclusions.

If your client is . . .

An insurer: Obviously, for an insurer seeking advice regarding a CGL policy issued to a contractor that has been sued for allegedly faulty work, the Supreme Court's "occurrence" framework is not good news. One of the most important pieces of advice you can offer a client in this situation is to obtain a clear breakdown of damages for the cost of repairing or replacing the allegedly faulty work versus damage to other parts of the structure, personal property or loss of use. In *Auto Owners v. Newman*, the insurer "won the battle" by obtaining a decision that the cost of repairing or replacing defective stucco was not covered, only to "lose the war," being held responsible for the entire verdict the arbitrator issued against the insured (which included both covered and non-covered damages), because the record did not delineate the amount awarded for covered versus non-covered damages. Thus, it is particularly important after the recent *Crossmann* decision to ensure any jury award delineates which damages are for the repair/replacement of the faulty work (not covered and often a significant portion of any award) and which, if any, are for other property damage or loss of use. Similarly, an insurer in a progressive damage case must create a record that establishes how much of the damage occurred while that insurer was on the risk. How best to obtain such a breakdown? Insurers in this situation should consider a variety of options, including whether to file a declaratory judgment action while the underlying suit is pending or whether to demand that the insured request special interrogatories in the underlying case that would provide the necessary damages information.

A Contractor: While the "occurrence" portion of the recent decision is good news for contractors, insurers will be examining more closely the time during which the alleged damage occurred and the actual time the insurer was "on the risk." Contractors can no longer rely on a single insurer to cover all of the damages in a progressive damage case but should seek coverage from all insurers potentially on the risk. Contractors should also be forewarned that they will be responsible for any damages that occurred during lapses in coverage.

A Designer: The recent *Crossmann II* decision generally is good news for design professionals, who now are likely to find more parties at the table with money to contribute to settlement or verdict. Claims against a design professional, which typically are covered under the designer's professional liability policy, are not subject to the same coverage analysis the claims against a contractor are. Thus, for both design professionals and their insurers, the recent *Crossmann* decision should help prevent the situation where the designer is the only party at the settlement table with money in its pocket.

Conclusion

In light of the likelihood of a verdict that includes both covered and non-covered damages, attorneys representing insurers must be aware of the need to obtain an itemization of the damages awarded against an insured, both to apply the "property damage" and "occurrence" framework to progressive damages cases and to obtain the benefits of the Supreme Court's allocation analysis. It is unlikely that plaintiffs in progressive damages cases will often delineate precisely what portion of the damages alleged occurred during a specific period of time, so the Supreme Court's "default" allocation based on time on risk is likely to be the typical allocation for insurers. Contractors are on notice from the *Crossmann II* decision that they will be held responsible for periods of no insurance or insufficient insurance. We have yet to see whether *Crossmann II*

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really is the final word on either "occurrence" or allocation among insurers in a progressive damage case.

Endnotes

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2 *Crossmann Communities v. Harleysville Mut. Ins. Co.*, No. 26909, 2011 WL 93715 (S.C. Jan. 7, 2011). The merits of the January 7, 2011decision were debated by C. Mitchell Brown, James E. Brogdon, III and Ned Nicholson in articles from *The Defense Line*, Volume 39, No. 1. Those article also offered an overview of the development of "occurrence" jurisprudence in South Carolina since the 2005 decision in *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005).

3 The legislation, which became law on May 17, 2011, was as controversial as the initial Crossmann opinion. The legislation provided generally that the definition of "occurrence" in a commercial general liability insurance policy issued to a construction professional includes property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself. On May 23, 2011, Harleysville Mutual Insurance Company filed a petition for original jurisdiction with the South Carolina Supreme Court, challenging the legislation as unconstitutional. Harleysville argued that the legislation encroached on the Supreme Court's jurisdiction and was unconstitutional, because it applied retroactively to already-existing insurance contracts. In its August 22, 2011 decision, the Supreme Court declined to address the legislation, and no ruling has yet issued on Harleysville's Petition. However, because the Supreme Court's August 22, 2011 decision accomplishes the same result sought by the legislation (a determination that damage arising from faulty workmanship, with the exception of the faulty work itself, is an occurrence), the significance of the legislation appears to be diminished.

4 *See Crossmann Communities v. Harleysville Mut. Ins. Co.*, No. 26909, 2011 WL 3667598 (S.C. Aug. 22, 2011). That decision is occasionally referred to herein as *Crossmann II*.

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

6 The language "including continuous or repeated exposure to substantially the same general harmful conditions" was added to the definition of "occurrence" in 1966 and contributed to the confusion that ultimately led the Supreme Court to determine the term was ambiguous. *See Crossmann*, No. 26909, 2011 WL 3667598 at * 3 (S.C. Aug. 22, 2011).

7 Citing *United States Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007).

8 *Joe Harden Builders, Inc. v. Aetna Cas. And Sur. Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997).

9 *See Century Indemnity Co. v. Golden Hills Builders, Inc.,* 348 S.C. 559, 561 S.E.2d 355 (2002).

10 As the court noted, the term "joint and several" is a misnomer, as insurers do not have the shared responsibility to a policyholder that exists among joint tortfeasors.

11 *Crossmann*, No. 26909, 2011 WL 3667598, at *12 (S.C. Aug. 22, 2011) (emphasis in original)

12 *Id.* (citing *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290 (Mass. 2009).

ARTICLE

Matrix — New Ground for Litigation about the Unauthorized Practice of Law

by B. Rush Smith III [1]

Introduction

For years, court decisions regarding South Carolina's unauthorized practice of law (UPL) rules and mortgage loan closings have distinguished our state from others, clearly establishing South Carolina as one of the few places in the country where the parties to a mortgage loan must hire a lawyer to perform certain loan-closing tasks. Until recently, it was equally clear that a borrower had no remedy against the lender if the parties did not follow the UPL rules, so there was relatively little litigation arising from unauthorized practice of law claims. Now, however, a decision of the South Carolina Supreme Court promises to engender more litigation about the unauthorized practice of law.

In August 2010, the South Carolina Supreme Court held that a mortgage lender that violated the state's UPL rules when closing a mortgage loan was barred from obtaining equitable relief. [2] The case was decided on principles of equity, with the court finding that the lender had "unclean hands" because of its UPL violation. A petition for rehearing quickly followed. On Monday, August 8, 2011, the court substituted a new opinion for the August 2010 opinion, reaching the same result but without resorting to the doctrine of unclean hands.[3]

Without explanation, the majority jettisoned the "unclean hands" rationale on which it had previously relied: "We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case."[4] The court noted that since 1987 it had required attorney supervision of four key steps in the residential mortgage loan process,[5] and that in 2003 it made clear that the same attorney supervision was required for refinancing of a mortgage loan.[6] South Carolina requires lawyer involvement in mortgage loan closings, said the court, "for the protection of the public." [7] In the majority's view, "[e]nforcing this requirement will come as no surprise to any lender."[8] The court was emphatic: "We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law."[9]

The court's decision, the first to afford mortgagors a defense or remedy based on UPL violations, applies only prospectively: "We apply this ruling to all filing dates after the issuance of this opinion." [10] Justice Kittredge joined in the result "because of its prospective-only application." [11] Justice Pleicones dissented.

This case, *Matrix Financial Services Corporation v. Frazer*, breaks new ground in the court's UPL jurisprudence, and in newly-broken jurisprudential ground, lawsuits are sure to grow.

Background: South Carolina's UPL Rules Affecting Mortgage Loan Closings

The South Carolina Constitution vests in the state supreme court the duty to regulate the practice of law.[12] South Carolina has developed rules governing the unauthorized practice of law by court decision, and in 1992, when presented with proposed rules governing the unauthorized practice of law, the supreme court opted to regulate the practice of law through litigation instead: "We are convinced . . . that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy."[13] Consequently, South Carolina's UPL rules, including those that apply to mortgage loan closings, have developed in an evolving fashion, on a case-by-case basis.

In 1987, the court held that a lawyer must conduct residential real estate closings for purchase-money loans.[14] Title work, document preparation, closing, and recordation—four steps in the mortgage lending process—are all tasks that constitute the practice of law, and a lawyer must perform or supervise these tasks in a residential mortgage loan closing.

In 2003, the court held that the same rule applies in a residential mortgage loan refinancing because the same four steps exist and "refinancing affects identical legal rights of the buyer and Lender as initial financing and protection of these rights is the crux of the practice of law." [15]

Later, in *Doe Law Firm v. Richardson*,[16] the court held that disbursement of loan proceeds constituted the practice of law, bringing to five the number of tasks that must be performed or supervised by a lawyer. Recognizing that its holding represented a new rule, the court delayed the effective date of this decision to January 22, 2007, "in order to afford

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persons with ongoing business relationships the opportunity to adjust their practices and procedures to conform to this new rule."[17]

From the late 1980s on, however, courts have declined to recognize a private right of action for enforcement of the UPL rules promulgated in Buyers Service and its progeny. As the court explained in *Linder v. Insurance Claims Consultants, Inc.*,[18] the proper action for a party aggrieved by the alleged unauthorized practice of law is a declaratory judgment action in the original jurisdiction of the South Carolina Supreme Court. As a result, attempts to sue mortgage lenders for UPL violations have been unsuccessful.[19]

The Matrix Case

The Frazers had borrowed money to purchase a home, and their mortgage had been assigned to Matrix. Matrix subsequently refinanced the mortgage loan—closing the refinance without a lawyer's supervision on November 26, 2001, and recording the mortgage several months later, on April 3, 2002. Meanwhile, Matthew Kundinger obtained a default judgment against the Frazers in another state and enrolled the judgment in South Carolina on October 31, 2001.[20]

The Frazers filed for bankruptcy, and Matrix sought to foreclose. Kundinger counterclaimed, alleging that his judgment had priority because it was filed first. Matrix sought equitable subrogation, arguing that when it refinanced the Frazers' mortgage, it paid the prior mortgage, and thus it was entitled to be subrogated to the rights of that prior mortgage. The master-in-equity agreed. The South Carolina Supreme Court reversed, denying equitable subrogation to Matrix and according priority to Kundinger's judgment lien.[21]

The holding on equitable subrogation[22] was dispositive, as in the August 2010 opinion, but the court proceeded nevertheless to address whether the mortgage lender's closing the loan without attorney supervision barred it from any equitable remedy.

The Majority's Decision on Equitable Remedies

The court began its brief analysis by rejecting the doctrine of unclean hands as the basis for its decision. The court then turned to its prior UPL cases, citing *McMaster and Buyers Service*, as well as the South Carolina Court of Appeals' decision in *Wachovia Bank, N.A. v. Coffey*.[23]

According to *Buyers Service*, performing a title search, preparing title and loan documents, conducting the closing, and recording the instruments in connection with a purchase-money mortgage loan constitute that practice of law and must be performed or supervised by a lawyer. According to *Doe v. McMaster,* because these four steps must be done in connection with a refinancing, the same rule that applies to purchase-money loans also applies to refinancing. Applying these principles, the court held that Matrix committed the unauthorized practice of law by hiring LandAmerica OneStop to conduct the title search, prepare documents, and close the loan—all of which were done without lawyer supervision in violation of South Carolina law.[24]

As in previous UPL decisions, the court emphasized that consumer protection is the reason for its UPL rules. As stated in *Buyers Service*,

> [t]he reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. *Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.*[25]

This consumer protection purpose is "of paramount concern," said the court, quoting again from *Buyers Service*.[26]

The court's concluding words herald its intent to subject lenders to liability for future violations of the court's UPL rules:

> Enforcing this requirement will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. We apply this ruling to all filing dates after the issuance of this opinion.[27]

Given the drastic effect of the court's decision on certain loans, the last sentence of the preceding quotation is noteworthy. One of the concerns voiced in the wake of the court's August 2010 opinion was that applying the court's holding retroactively would be unfair and potentially devastating. In his August 2010 dissent, Justice Pleicones observed that "the Court should acknowledge in fairness and equity, that the law has been evolving in the area of residential real estate closings, and thus many mortgagees may hold mortgages that were closed 'unlawfully.'"[28] The court's prospective-only application of the rule seems designed to cure the unfairness.[29]

The Concurring Opinion

Justice Kittredge joined the majority on the UPL issue: "Concerning the majority's broader holding voiding a real estate mortgage secured through the unauthorized practice of law, I join today's result because of its prospective-only application."[30] In at least two respects, the concurring opinion provides fodder for argument in future litigation. First, the used of the adjective "prospective-only" clarifies the majority's reference to "all filing dates after the issuance of this opinion." Second, unlike the major-

ity, the concurring opinion goes so far as to say that the underlying mortgage is void.

The Dissent

As in August 2010, Justice Pleicones dissented. As to the UPL issue, Justice Pleicones seemed unconvinced that the majority's consumer protection purpose would be achieved in the result, stating, "I see only detriment to the borrowing public and a windfall to junior lienholders in this decision," in the form of reduced availability of credit or increased fees.[31] Additionally, in Justice Pleicones's view, the majority's description of the prospective-only nature of its opinion was vague. Of the phrase "all filing dates after the issuance of this opinion," Justice Pleicones observed, "I am unsure what filing date the majority is referring to in this passage." [32]

Anticipated Future Litigation

Prospective Only?

The exchange between the majority and the dissent frames one issue that will be litigated probably before any other—the question of just how prospective the rule is:

The majority: "*We apply this ruling to all filing dates after the issuance of this opinion.*"

The dissent: *"I am unsure what filing date the majority is referring to in this passage."*

As noted above, Justice Kittredge's characterization of the decision as having "*prospective-only* application" gives a clue to the majority's meaning in the passage that the dissent found cryptic. The concurring opinion's description helps to explain the nature of the decision and its effect. Generally, judicial decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively; prospective application is required when liability is created where formerly none existed.[33] Thus, insofar as Matrix creates liability for a violation of UPL rules where none existed before, it cannot be applied retroactively. Nevertheless, the question of retroactivity is sure to be litigated: already on file is at least one class action in which plaintiffs seek to void mortgage loans on the authority of Matrix.

No Private Right of Action?

A second issue that is sure to be litigated arises from the tension between this decision and the well-established "no private right of action" jurisprudence. The court has not overruled those cases holding that there is no private right of action, and they remain good law.

Of What Effect Is the Recorded Mortgage?

A third issue latent in the court's holding but significant for lenders, title insurers, and prospective purchasers of real estate is the question of just exactly what happens to the mortgage. The court did not declare it to be void. The court simply held that a lender that violates the UPL rules cannot seek equitable relief, leaving open at least two questions: (1) Of what effect is the mortgage of record? (2) Is the note holder free to sue on the note and reduce the debt to judgment?

As to the first question, the concurring opinion went further than the majority when it stated that the majority's holding voided the real estate mortgage. The effect on this particular mortgage appears to be exactly as described by the concurrence, but it is important that *Matrix* stops short of saying that a mortgage procured through the unauthorized practice of law is per se void, and that the majority's focus is not on the underlying instrument but on the conduct of the lender in the case before the court.

The court of appeals addressed the second question in *Wachovia Bank, N.A. v. Coffey*, which is currently pending on a writ of certiorari to the supreme court. In *Coffey*, the court of appeals held that Wachovia could not recover against Ms. Coffey *at law or in equity*. [34] If that is the rule, then a homeowner who borrows a substantial sum of money, purchases a house at a closing without a lawyer, and thereafter fails to pay as agreed would wind up with a house, free and clear of the note and mortgage, despite the broken promise to pay—hardly an equitable result.

Is the UPL Violator an Unsecured Creditor in Bankruptcy?

Among other forums, the bankruptcy courts are sure to see litigation over UPL issues. There are several adversary complaints currently pending in the Bankruptcy Court for the District of South Carolina in which Chapter 13 debtors seek to convert their mortgage lenders into unsecured creditors on the grounds that the mortgage lenders cannot enforce their security interest because the mortgages were closed in violation of South Carolina's UPL rules. In Chapter 7 cases, mortgage lenders can expect the Chapter 7 trustee to challenge and object to secured mortgage claims if the loan file reflects the absence of attorney involvement in the loan closing.

Are Subsequent Holders Liable for the UPL Violations of the Originator?

Finally, given the dynamics of the marketplace in the last decade, most mortgage loans have been assigned to someone other than the originating lender, and as a consequence the note and mortgage are almost certain to be held by someone other than an entity that violated the UPL rules in closing the loan. If the current holder did not violate UPL rules, but the originating lender did, can the current holder avail itself of equity and foreclose on the mortgage?

The court's *holding applies only to the lender that violated the UPL rules*: "a lender may not enjoy the benefit of equitable remedies when *that lender* failed to have attorney supervision during the loan process as required by our law." With the court's rejection of "unclean hands" as the basis for its decision, *Matrix* seems to represent the court's exercise of its author-

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ity to regulate the unauthorized practice of law, and if the current holder/plaintiff before the court in a foreclosure action did not violate UPL rules, presumably it would lie beyond the reach of the court's regulatory authority and remain free to "enjoy the benefit of equitable remedies." Nevertheless, there is certain to be litigation about whether an assignee can be subjected to the same draconian rule as the originating lender.

Conclusion

The *Matrix* decision will inevitably lead to increased litigation about the availability of equitable remedies to foreclosing mortgage lenders and servicers, in the form of contested foreclosures and counterclaims. Further, *Matrix* is certain to be used not only as a shield but also as a sword, producing offensive actions by consumers against mortgage lenders and servicers, including adversary proceedings in bankruptcy court and class actions in state and federal courts; the currently pending adversaries and recently filed class action prove the point. While a truly prospective application of the court's holding to mortgages recorded after August 8, 2011, would curtail the amount of litigation one would expect to see, the words "all filing dates after the issuance of this opinion" are sufficiently ambiguous to guarantee disagreement about their meaning. Until the court resolves that issue, consumers, lenders, servicers, and their attorneys can expect to see more and more litigation grounded on UPL claims under *Matrix*.

Endnotes

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2 *Matrix Fin. Servs. Corp. v. Frazer et al.*, No. 26859, Shearouse Adv. Sh. No. 32, at 39 (S.C. Sup. Ct. filed Aug. 16, 2010).

3 *Matrix Fin. Servs. Corp. v. Frazer et al.*, No. 26859, 2011 WL 3452078 (S.C. Sup. Ct. filed Aug. 8, 2011).

4 *Id.* at *2.

5 *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987).

6 *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003).

7 *Matrix*, 2011 WL 3452078 at *3.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at *4 (Kittredge, J., concurring).

12 See S.C. CONST. art. V, § 4; *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 422 S.E.2d 123 (1992); *see also* S.C. Code Ann. § 40-5-10 (1986).

13 *In re Unauthorized Practice of Law Rules*, 309 S.C. at 305, 422 S.E.2d at 124.

14 *Buyers Service*, 292 S.C. at 434, 357 S.E.2d at 19.

15 *McMaster*, 355 S.C. at 312, 585 S.E.2d at 776.

16 371 S.C. 14, 636 S.E.2d 866 (2006).

17 *Id.* at 18, 636 S.E.2d at 868.

18 348 S.C. 477, 560 S.E.2d 612 (2002)

19 There are other reasons that such suits, which have surfaced intermittently in South Carolina courts since at least the mid-1990s, have been unsuccessful. For example, the plaintiff may be unable to allege or prove any damages resulting from the alleged UPL violation.

20 *Matrix*, 2011 WL 3452078 at *1.

21 *Id.*.

22 This commentary addresses only the second holding of *Matrix*, regarding the unauthorized practice of law. The court's treatment of the first issue, equitable subrogation, is interesting in its own right.

23 389 S.C. 76, 698 S.E.2d 244 (Ct. App. 2010).

24 *Matrix*, 2011 WL 3452078 at *3.

25 Id. (citing Coffey, 389 S.C. at 76, 698 S.E.2d at 248) (emphasis added).

26 Id. (citing Buyers Serv., 292 S.C. at 433, 357 S.E.2d at 19).

27 Id.

28 Matrix Fin. Servs. Corp. v. Frazer et al., No. 26859, Shearouse Adv. Sh. No. 32, at 51 (S.C. Sup. Ct. filed Aug. 16, 2010) .

29 There is precedent for such restraint. It was not until 2006 that the court held that the disbursement of proceeds from a mortgage loan must be conducted under the supervision of a licensed attorney, and when the court established this rule it acknowledged that its decision represented a new rule and thus delayed its effective date, presumably intending to give only prospective force to the rule. *See Doe Law Firm v. Richardson*, 371 S.C. at 18, 636 S.E.2d at 868 ("We hold that disbursement is an integral step in the closing of a residential refinancing or credit line transaction which must be conducted under the supervision of an attorney. Since our decision today is a new rule, and since it is likely that lenders and attorneys may have established procedures which do not account for this step in the closing process, we delay the effective date of this opinion until January 22, 2007.").

Similarly, in 2003, the court limited its opinion about mortgage loan refinances to the stipulated facts before it.

See Doe v. McMaster, 355 S.C. at 311 n.2, 585 S.E.2d at 775 n.2.

30 *Matrix*, 2011 WL 3452078 at *4 (Kittredge, J., concurring).

31 *Id.*. at * 5 (Pleicones, J., dissenting).

32 *Id.* at *5 n. 6.

33 *See Toth v. Square D Co*., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989); *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 401, 520 S.E.2d 142, 156 (1999) (decision holding that assumption of the risk no longer a complete defense to negligence would be applied selectively prospectively); *Russo v. Sutton*, 310 S.C. 200, 205 n.5, 422 S.E.2d 750, 753 n.5 (1992) (court exercised its discretion to apply decision abolishing "heart balm" causes of action prospectively only); *McCall v. Batson*, 285 S.C. 243, 246, 329 S.E.2d 741, 742-743 (1985) (applying prospectively decision to abolish doctrine of sovereign immunity; exercising its discretion, court delayed implementation to provide government actors time to prepare); *Brown v. Anderson Cty Hosp. Assn.*, 268 S.C. 479, 488, 234 S.E.2d 873, 877 (1977) (applying decision partially abrogating doctrine of charitable immunity prospectively only); *see also McCormick v. England*, 328 S.C. 627, 644, 494 S.E.2d 432, 439 (Ct. App. 1997) (prospectively applying decision recognizing new tort for a physician's breach of duty to maintain patient confidence);

34 The *Coffey* court cited the rule "that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequence of that act," which "applies at both law and in equity and whether the cause of action is in contract or in tort." *Coffey*, 389 S.C. at 77, 698 S.E.2d at 248.

ARTICLE

Customs and Usage: Enforcing the Unwritten "Understandings" in an Industry

by Joshua L. Howard [1]

As attorneys engaged in business litigation, we are very familiar with "contracts", "agreements", "schedules", "purchase orders", "invoices" and "terms and conditions". We are familiar with transactions where the parties all have lawyers who have poured many man hours over pages of documents and engaged in lengthy negotiations over the most seemingly insignificant of terms to arrive at a contract that defines every corner of the relationship between the parties. Everything has been considered and only those items that were beyond consideration were left to chance or interpretation.

Being from a small, traditional state where everyone knows someone who knows someone you know, we also have clients that may exchange paper in passing, hash out deals on a napkin over lunch or simply believe in looking a person in the eye and sealing the deal with a handshake. Whether it is the result of the speed of business, the refusal to address the details up front or misplaced trust, in such deals, only the basics have been considered and much is left to chance and interpretation. Under these circumstances, when the relationship breaks down and litigation is threatened or arises, memories suddenly become fuzzy, former understandings become misunderstandings, and the parties' mutual expectations become polar opposites.

In these cases, generally the only item that can be agreed upon is that there was an agreement. What that agreement may have been is now a matter of contention. There may be some writing evidencing the agreement, but for all practical purposes, the key items in dispute are not on paper or were contained in a written document that a party denies receiving. To fill in the all important blanks and ambiguities, one must then wade through murky memories of oral agreements, parties' actions or course of dealing and those items that are simply "understood".

This article deals with those "understandings". The part of an agreement that is "understood" is that which is not set out in writing, orally agreed upon, or part of the course of dealing. It is the unwritten rules of the locale or industry. In legal terms these are often identified as customs or usage of trade.

In the common law of South Carolina, a discussion of the role of customs and usage of trade in contract begins with the principal that "[i]t is well settled that the known usages of a trade, business or calling are presumed to enter into and form a part of contracts made with respect thereto, unless they are excluded or modified by agreement." [2] In commercial matters, the South Carolina Uniform Commercial Code goes so far to codify the acceptance of customs or usages.[3] However, similar to consideration of expert testimony, the law does not permit the introduction of evidence of just any claimed custom or usage. To be recognized at law, "[a] usage or custom… must be long standing, general in it operation, known to, and acquiesced in, by all whose rights are affected by it, and be just and reasonable in its operation." [4] Further, while a custom or usage may meet all of the requirements to be considered generally recognized, it must be put into regular practice and cannot be obscure. As set forth in Love, "[i]t must also have such regularity of observance in a …trade as to justify an expectation that it will be observed with respect to the transaction in question." [5]

The failure to present sufficient evidence in support of a claimed custom or usage can result in disastrous consequences. For example, the Love Bros. operated a farming operation that entered into a letter of intent with Vlasic Foods and a subcontractor in or around 1988 to buy and ultimately grow cucumbers for Vlasic to pickle. The letter of intent only covered the calendar year 1989 and no formal agreement was ever memorialized. In furtherance of the arrangement, Vlasic brought in and maintained equipment, supplied seed, and provided suggestions to the Love Bros to alter or improve the growing practices. The parties performed during 1989 and even extended performance beyond the terms of the letter of intent into Spring 1990. The Spring 1990 crop was significant to the point that Vlasic's subcontractor opted not accept the Love Bros. full yield. The Love Bros. were then subsequently informed prior to planting that cucumbers would not be accepted for the Fall of 1990 or Spring of 1991. Vlasic ultimately removed its equipment during the winter of 1991. The Love Bros. then declared a breach and brought suit.

The Love Bros. claimed breach of contract on the failure to provide timely notice of the intent not to

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purchase cucumbers. This was explicated referenced in any of the writings between the parties or any oral assertions. The Love Bros. premised their claim on a purported custom and usage that "absent notice for an acceptable period of time before each growing season growers and shed operators customarily assume that prior relationships with cucumber buyers …will continue into the next season."[6] In support of the claimed custom and usage, the Love Bros. proffered the testimony of a lone 21-year-old famer as an expert. Unimpressed, the trial court refused the testimony and the Court of Appeals upheld the decision. Moreover, the expert testimony offered was not even as to a custom or usage, it was specific to the farmer's individual business relationship, which was a relationship that had been in place with a single shed operator that had been established by his father and went back 30 years.[7]

Love illustrates the unacceptable proof of a custom or usage. In this case, an agreement was in place and admitted. The lack of a formal agreement setting forth the entirety of the terms of the relationship and not excluding customs and usages did open the door for the introduction of evidence of customs and usage. Had the Love Bros. produced a witness that was an industry expert, one or more shed operators, another pickle manufacturer or even additional growers with arrangements similar to theirs, the testimony would likely have been admitted and the result may have been different.

For instance, in *Keith v. River Consulting, Inc.*[8], third-party defendant construction company was hired to erect a building foundation. Part of the job required the pouring of concrete into a large mold. A concrete company's truck, boom and operator were leased on oral contract by the construction company's job foreman. The concrete company testified that it was under obligation to perform the work to requirements of the lessor construction company. The job necessitated that the concrete company negotiate overhead power lines during the pour. The operator did so during initial placement of the boom, but, according to testimony, was instructed by the construction company's foreman to move the boom into a position that over time caused the boom to inch closer and closer to the lines during the pour. According to the concrete company, the operator was assured that the construction company's employees were watching the line. Unfortunately, the boom did come into contact with line resulting in the electrical shock to one of the construction company's employees. At the conclusion of the job and after the accident, construction company signed a job ticket containing an clause whereby construction company agreed to indemnify concrete company.

The injured employee subsequently sued the concrete company. Relying on contractual indemnity, the concrete company filed a third party complaint against construction company. Recognizing the contractual problem, in addition to relying on the express terms and conditions on the back of the job ticket, concrete company also presented evidence of a common and understood industry custom and usage supporting the construction company's supervisory control and obligation to indemnify. In support of the purported industry and practice, concrete company presented the evidence of one of its own managers as to the concrete company's habit and customs, as well as general industry practices. In addition, concrete company supplied the testimony of a gentleman who was president of several concrete companies and a board member of the American Concrete Pumping Association. On appeal, this evidence was deemed sufficient to survive construction company's motion for summary judgment.

Keith illustrates the significance of presenting reliable evidence of a custom or usage. In Keith, the terms and conditions of the job were clearly not presented to the construction company prior to the conclusion of the job and there was no prior relationship between the companies. Therefore, while a jury may ultimately not have agreed, the evidence in support of the custom and usage was crucial to the survival of the indemnification claim.

Once a custom and usage has been identified and supported, the key issue that then arises is how can it or can it not be used. According to case law, a custom or usage:

1. May be presented to resolve an ambiguity or an area where a contract is silent.[9]
2. May be presented to interpret a contract.[10] For example, a term of a contract may have by custom or usage acquired a meaning different or varied from its common usage.[11]
3. May supplement or qualify the terms of an agreement.[12]
4. May not on its own create a contract where there is no written or oral agreement.[13]
5. May not be used to "explain or very the terms of an express contract, whether written or verbal, unambiguous in its terms, unless it be to show the meaning of certain terms used in such contract which, by well-established custom or long usage, have acquired a meaning different from that which they primarily bear."[14]

One of the more significant cases involving South Carolina law in the last 20 years concerning custom and usage and, in particular, the use of custom and usage to vary or supplement the terms of an agreement is the matter of *Figgie International, Inc. v. Distileria Serralles, Inc.*[15], which is the appeal of a declaratory judgment action governed by the South Carolina Uniform Commercial Code ("UCC"). In *Figgie*, the Plaintiff is a manufacturer of bottle labeling equipment. In 1993, Plaintiff sold equipment to Defendant. The equipment was installed in the Defendant's facility in April 1994. Problems arose

immediate. Plaintiff responded to the problems, but was unable to rectify them and agreed to refund the purchase price and take return of the equipment in November 1994. In addition to a refund, Defendant demanded consequential damages for company losses arising out of the delays and failure of the equipment. Plaintiff refused the demand and instituted the declaratory judgment action.

With regard to the contract, Plaintiff's standard terms and conditions of sale include a limitation of remedies to repair and replacement and a disclaimer of consequential damages pursuant to S.C. Code Ann. § 36-2-719. Unfortunately, the conflict arose because Defendant denied receiving the terms and conditions (apparently they were on the back side of the invoice and Defendant only had the front side) and Plaintiff could not produce either the original or a copy of the invoice sent. In the alternative, Plaintiff alleged that remedies were otherwise limited and consequential damages were disclaimed in accordance with § 2-719 because the custom and usage that supplement the agreement was that all sellers of equipment in the industry "always limit the available remedies in the event of a breach to repair, replacement, or return, and specifically exclude consequential damages." [16]

Plaintiff subsequently moved for summary judgment, which was granted. The appeal to the United States Court of Appeals for the Fourth Circuit resulted. On appeal, the record contained affidavits submitted by the Plaintiff of persons within the industry attesting to the purported custom and usage. Defendant did not offer any contradicting evidence, but defended principally on the basis that the UCC required that in order to be enforceable, the limited remedy of repair and replacement must be "expressly agreed to be exclusive." [17] Defendant asserted that a provision imposed by custom and usage could never be "expressly agreed to be exclusive" as required by the UCC. Affirming the District Court and disagreeing with the Defendant, the Fourth Circuit's opinion held that limitation of remedies and disclaimer of consequential damages can be explicit and expressly agreed to be exclusive even though it is not set out in writing, but implicitly made part of agreement pursuant to a recognized custom and usage.

The holding in *Figgie* is significant and presents a powerful tool for those defending commercial matters. If you have not already, you will face a situation where a client fails to complete its paperwork or just never took the time to draft comprehensive terms and conditions. Despite their best intentions such a failure will expose that client to responsibility for risks of loss they never anticipated. The holding in *Figgie* opens a door to protect clients from their own failures and save them from potentially runaway losses.

Conclusion

Contract law in general practice is the rigid application and enforcement of private arrangements. It is often expressed that it is the court's job to enforce the written word of the agreement not to correct one man's folly. Recognized customs and usage are the result of mutual assent and represent the "understandings" that need not be expressed between honest businessmen. In contrast to rigid enforcement of contracts, the admission of customs and usage is a direct reflection of the reasonable and equitable nature of our courts. In practice they can be a significant tool for the litigator seeking the just result.

Endnotes

1 Joshua L. Howard is a shareholder with Haynsworth Sinkler Boyd P.A in its Greenville, South Carolina office. Mr. Howard's practice concentrates primarily on commercial contract disputes, banking, professional malpractice, product liability, and insurance matters.

2 *Burden v. Woodside Cotton Mills*, 104 S.C. 435, 439, 89 S.E. 474, 475 (1916).

3 *See* S.C. Code Ann. § 36-1-205.

4 *Love v. Gamble*, 316 S.C. 203, 209-10, 448 S.E.2d 876, 880 (1994).

5 *Id*. 448 S.E.2d at 880.

6 *Id*. 448 S.E.2d at 879.

7 *Id*. 448 S.E.2d at 877-80.

8 365 S.C. 500, 618 S.E.2d 302 (2005).

9 *See Keith*, 618 S.E.2d at 305.

10 *See Burden v. Woodside Cotton Mills*, 104 S.C. 435, 89 S.E. 474 (1916).

11 *See Alexas v. Post & Flagg*, 129 S.C. 53, 123 S.E. 769 (1924) (confirming that a custom or usage may vary the common understanding of a term, but unsuccessfully employed by the Plaintiff).

12 *See Love v. Gamble*, 316 S.C. 203, 448 S.E.2d 876, 880 (1994).

13 *See id*.; *Diversified Colors, Inc. v. Cranston Print Works Co.*, 2011 U.S. Dist. LEXIS 88633 at *10-11 (D.S.C. August 9, 2011).

14 *Fairly v. Wappoo Mills*, 44 S.C. 227, 22 S.E. 108 (1895).

15 190 F.3d 252 (1999).

16 *Id.* at 256.

17 S.C. Code Ann. § 36-2-719(1)(b).

Case Notes

Summaries prepared by Anna Hamilton and William S. Brown

SC Tort Claims Act

Boiter v. SCDOT and SCDPS, Op. No. 26981 (S.C. Sup. Ct. filed June 6, 2011)

Plaintiffs filed actions against the South Carolina Department of Transportation ("SCDOT") and the South Carolina Department of Public Safety ("SCDPS") alleging negligence on the part of both Departments in failing to prevent an accident in which Plaintiffs were injured while riding a motorcycle. The negligence claim against the SCDOT was based on the SCDOT's alleged failure to implement an appropriate policy to replace bulbs in traffic signals before they burned out. With respect to the SCDPS, Plaintiffs alleged that the SCDPS was informed prior to the accident that the traffic light had burned out, but failed to properly dispatch a trooper to the scene to direct traffic. The jury returned a verdict in favor of Plaintiffs, and awarded them each $1,875,000.00. The trial court reduced the verdict under the Tort Claims Act, reducing the award to $300,000.00 to each Plaintiff for a total of $600,000.00.

On appeal, Plaintiffs challenged the constitutionality of the Tort Claims Act's two-tier cap system, which allows for different damages caps based on the type of state personnel who committed the ort. The cap for claims against a state-employed physician or dentist is $1,200,000.00 per person and per occurrence. For all other state entities or personnel, the cap is $300,000.00 per person and $600,000.00 per occurrence. Plaintiffs alleged that the Act's disparate treatment based on the identity of the tortfeasor violated the Equal Protection Clause. The Supreme Court determined that the differing caps were not arbitrary and were supported by at least two rational bases identified in the statute: (1) relieving the government from the hardships of unlimited liability; and (2) furthering accountable and competent healthcare while promoting affordable medical liability insurance. Based on this rational basis analysis, the Supreme Court upheld the constitutionality of the two-tier cap system under the South Carolina Tort Claims Act. The Supreme Court also, however, reversed the trial court's finding that the accident presented only a single "occurrence" for purposes of applying the cap. The majority opinion held that, because the negligent acts of the SCDOT and the SCDPS were separate and distinct and did not combine to form a single act of negligence, there were two separate occurrences for purposes of the application of the Tort Claims cap. Accordingly, the Supreme Court determined that Plaintiffs were entitled to a combined verdict of $1,200,000.00.

Attorney Fees

Sloan v. Friends of the Hunley, Inc., Op. No. 26986 (S.C. Sup. Ct. filed June 13, 2011)

Friends of the Hunley, Inc., appealed from the trial court's award of attorney's fees to Plaintiff Sloan pursuant to the Freedom of Information Act. Prior to the initiation of the litigation, Plaintiff sought records from Friends of the Hunley, a nonprofit corporation dedicated to the recovery and conservation of H. L. Hunley Confederate submarine, pursuant to a Freedom of Information Request. Friends of the Hunley initially opposed the request on the basis that it was not subject to the Freedom of Information Act. After Plaintiff filed suit seeking to force production, Friends of the Hunley produced the requested documents, but continued to deny that it was subject to the Freedom of Information Act. The trial court then granted summary judgment to Friends of the Hunley, finding that the controversy was moot since the documents had been produced. That determination was upheld on appeal to the Supreme Court.

Following the initial appeal, Plaintiff moved in the trial court for an award of attorney's fees up through the granting of the motion, which the trial court awarded. Friends of the Hunley initiated this second appeal, arguing that Plaintiff was not a prevailing party for purposes of a FOIA-based attorney's fee award and that Plaintiff was not entitled to attorney's fees beyond the date that the documents were produced. The Supreme Court determined that Plaintiff was a prevailing party for purposes of an award of attorney fees, reasoning that Friends of the Hunley could not moot the case by providing the relief sought and then claim that Plaintiff did not prevail. However, the Court agreed that the fee award should be limited, and refused to extend the award of fees beyond the date that the requested documents were produced.

For purposes of judicial economy, instead of remanding the case to the trial court for determination of the appropriate fee amount, the Supreme Court calculated the proper amount of the fee award at $6,467.50.

Spoliation of Evidence

Cole Vision v. Hobbs, Op. No. 26988 (S.C. Sup. Ct. filed June 20, 2011)

Defendant Hobbs, an optometrist, sublet office space for his optometry practice from Plaintiff Cole Vision. Cole Vision leased the space from Sears. The sublease agreement between Hobbs and Cole Vision contained indemnity provisions and provisions requiring Cole Vision to retain copies of Hobbs' patient records. After a malpractice claim was brought against Hobbs, Cole Vision and Sears, Cole Vision sought indemnity from Hobbs. Hobbs asserted a counterclaim against Cole Vision for negligent spoliation of evidence, alleging that Cole Vision had lost some of the malpractice plaintiffs' records which were vital to defense of the claim. The trial judge dismissed the spoliation counterclaim. The Court of Appeals reversed the dismissal, stating that the claim was nothing more than a general negligence claim. The Supreme Court reversed the Court of Appeals' decision, finding that the tort of negligent spoliation of evidence is not cognizable under South Carolina law.

The Supreme Court initially noted that Hobbs' argument that his counterclaim sounded in general negligence and was not a specific spoliation cause of action was not preserved for review on appeal. Nonetheless, the Court decided to move forward with the analysis of a cause of action based upon spoliation of evidence.

The Supreme Court noted its prior decision in *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31 (2008), in which it rejected a plaintiff's claim for third party spoliation of evidence due to insufficient facts but specifically declined to address whether it would, under other factual circumstances, adopt the tort. *Id.* at 36. In *Cole Vision*, however, the Supreme Court expressly declined to recognize the tort of negligent spoliation of evidence. The Court based its determination in part upon the fact that other remedies, such as sanctions and jury charge instructions, are available with respect to first-party claims of spoliation. The Court also noted that the speculative nature of damages in a spoliation cause of action would be problematic. The Court finally noted that a cause of action for spoliation of evidence should not be permitted because it would create concerns for potential duplicative and inconsistent litigation. However, in refusing to adopt an independent cause of action for spoliation, the Supreme Court specifically acknowledged that spoliation can be used as a defense.

Attorney Fees

Brown v. Howard, Op. No. 26991 (S.C. Sup. Ct. filed June 21, 2011)

The Supreme Court reviewed the trial court's denial of counsel's request for an award of attorney's fees in excess of the $3,500.00 statutory limit provided in S.C. Code Ann. §17-3-50 (2003). Although the Supreme Court found no abuse of discretion under the particular circumstances of the case, the Court took the opportunity to review the constitutionality of court appointments of attorneys to represent indigent clients. The South Carolina Bar provided an amicus curiae brief on the issue. The Supreme Court held that the takings clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the Court to represent an indigent litigant. While it emphasized that a license to practice law is a privilege and not a right, and that the practice of law therefore remains subject to the Supreme Court's control, regulation and discipline, the Court found that an attorney's services constitute property under the takings clause for which just compensation must be provided. The Supreme Court declined to set a bright line rule regarding the amount of this compensation, instead leaving it to the broad discretion of the trial court to handle on a case-by-case basis. The Court specifically noted that its holding would apply only to court-appointed representations which commenced on or after July 1, 2012. The reasoning behind this delay in implementation of the holding is to allow the legislative process to properly budget for the required just compensation.

Evidence – Prior Statements

State v. Nance, Op. No. 26998 (S.C. Sup. Ct. filed July 11, 2011)

In this appeal from a trial court's grant of a pre-trial motion to suppress testimony, the Supreme Court addressed the proper interpretation of South Carolina Rule of Evidence 804 regarding the use of prior testimony of a witness in a trial. The case involved a retrial of a criminal matter in which a witness testified in the original trial but was deceased at the time of the second trial. The criminal defendant objected to the use of the testimony in the second trial, arguing that the legal strategy employed by his counsel in the original trial deprived him of the opportunity to cross-examine the witness. The trial court granted the Defendant's motion, finding that the Confrontation Clause would be violated if the testimony were introduced in the second trial.

The Supreme Court reversed the trial court's exclusion of the testimony. The Court noted that even though the Defendant's counsel had not conducted any cross examination in the first trial, both the Defendant and his counsel had the opportunity to do so. The Court found that this satisfied the requirements of Rule 804, stating that the fact that the Defendant's counsel made a strategic decision not to conduct an examination of the witness at the original trial did not preclude the admission of the prior testimony. Although the case specifically dealt

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with a criminal retrial, the reasoning and application would apply equally to prior testimony, including deposition testimony, in a civil matter.

Sanctions

Bon Secours-St. Francis Xavier Hospital v. Wieters, Op. No. 27016 (S.C. Sup. Ct. filed August 1, 2011)

The Supreme Court addressed whether sanctions imposed on a party for frivolously filing for removal were proper. The underlying case involved claims for defamation and civil conspiracy stemming from a National Practitioners Data Bank report filed by the Defendant Hospital, containing allegations of unprofessional behavior by Plaintiff, a doctor who was suspended from practice at the hospital. The case was initially filed in November 2004. Defendant initially removed the case, arguing federal question jurisdiction based upon the application of the Health Care Quality Improvement Act of 1986, and claimed immunity from suit under that Act. The U.S. District Court remanded the case in January 2005. Five years of discovery ensued. In 2009, the case was assigned to a special multi-week trial docket and a scheduling order was issued setting the trial for March 2010. In February 2008, the parties exchanged briefing regarding motions for summary judgment, which included discussions of the immunity under the federal law. The motions were denied and trial was scheduled to begin at 2 p.m. on March 2, 2010. On March 1, 2010, Plaintiff filed his pretrial brief and proposed jury instructions, which again stated issues related to the federal law. On the morning of March 2, 2010, just hours before the trial was scheduled to begin, Defendant removed the case to Federal District Court for a second time, relying upon Plaintiff's statements in the pretrial brief that federal law applied. The matter was again remanded based upon the finding that the causes of action were solely state law claims and no federal question jurisdiction was present.

On remand, the trial judge issued sanctions for frivolous removal and delay. The sanctions totaled approximately $68,000.00, and included costs and attorney's fees to Plaintiff, reimbursement to the S.C. Judicial Department for the salaries of the judge, law clerk and court reporter for the week which was lost based upon the delay, payment to the Access to Justice Commission for denying public access to the court schedule for trial that week, payment to the Charleston County Clerk of Court for reimbursement for the summoning and administration of the jury panel, and a payment of $50.00 to each juror for the inconvenience suffered.

Defendant appealed only a portion of the sanctions, those beyond the lost income, costs and fees incurred by the Plaintiff. Defendant questioned the ability of the court to impose a sanction for exercising rights of removal. The Supreme Court found that the trial court, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, has appropriate authority to sanction vexatious removal conduct. The Supreme Court noted that it did not intend to chill a defendant's exercise of its removal right and acknowledged that situations in which sanctioning for removal would be appropriate would be rare. Nevertheless, the Court found that under the circumstances of this case, the sanctions were appropriate and the trial judge did not err in ordering them. The Court did, however, reverse the award of the more unconventional measures of sanctions issued by the trial judge, stating that requiring reimbursement to the S.C. Judicial Department for the court's salaries, reimbursement to the Charleston County Clerk of Court for expenses incurred in summoning and administering the jury panel, payment to the Access to Justice Commission and payment to each juror were an abuse of discretion.

Two Justices concurred in the reversal of these portions of the sanctions, but wrote separately to express disagreement with whether the particular conduct was sanctionable or whether the removal at issue was done in good faith.

Expert Fees

James v. SCDOT, Op. No. 4835 (S.C. Ct. App. filed June 1, 2011)

This appeal involved a dispute over the payment and reasonableness of an expert witness's fees. Plaintiffs, drivers who filed an action for negligence against the Department of Transportation following an automobile accident involving a pothole, retained an expert witness from Cincinnati, Ohio. When the Department of Transportation sought to schedule a telephonic deposition of the expert, the expert refused to appear telephonically. Subsequently, the Department of Transportation served a notice of deposition for the expert at the Plaintiffs' attorney's office. Plaintiffs' attorney informed the Department of Transportation that the Department would be responsible for the fees and costs associated with the expert's travel to and participation in the deposition. After the deposition, Plaintiffs' counsel provided the Department of Transportation with an invoice for over $6,000.00 for the expert's deposition. The Department of Transportation declined to pay, and Plaintiffs brought a motion to compel. The trial court reduced the bill and directed that the Department only needed to pay approximately $2,100.00. In doing so, the trial court provided only for payment for the time the expert spent in the deposition itself, plus the $25.00 witness fee provided in Rule 30(a)(2), SCRCP.

Interpreting Rules 26(b)(4) and 30, SCRCP, the Court of Appeals reversed the trial court's determination. The Court noted that Rule 26(b)(4)(C) obligates the party initiating an expert's deposition to pay the expert a reasonable fee for time and expenses

spent in traveling and taking the deposition. The Court further noted that Rule 26(b)(4)(C) required Plaintiffs to produce their expert in South Carolina unless the parties agreed to an alternate arrangement or the court issued an order overriding the location requirement. In this case, there was no agreement to hold the deposition in a location other than South Carolina, and neither party moved the court for an order to alter the location requirement. The Court also recognized that Rule 30(b)(7) offers a party the option of conducting an expert's deposition by telephone, but in no way obligates the party to do so. The Court of Appeals reversed the trial court's exclusion of the expert's travel time and expenses and remanded for the trial court to review the expert's bill and determine a reasonable amount for the expert's travel time and expenses.

Judge Few issued a dissenting opinion in which he stated that would have affirmed the trial court based on language within Rule 26(b)(4)(C) providing "unless the court determines otherwise for good cause shown," the parties seeking discovery "shall pay the expert a reasonable fee." Judge Few would have found that the trial court, for good cause shown, determined that all fees sought should not have been paid. Judge Few further expressed concern that the Court of Appeals' ruling could result in abuse by obstructive lawyers and ultimately delay discovery in trials.

Medical Malpractice

Smith v. Regional Medical Center, Op. No. 4847 (S.C. Ct. App. filed June 22, 2011)

This case presented the question of whether a governmental hospital can be liable for the actions of an independent contractor doctor under the non-delegable duty of care theory. Plaintiffs brought an action for medical malpractice based on care given to their child in the emergency room of a governmental hospital by a doctor who was an independent contractor, not an employee of the hospital. Plaintiffs argued that the reasoning of Simmons v. Tuomey Regional Medical Center, which imposed upon private hospitals a non-delegable duty of care to render competent service to their emergency room patients, should also apply to governmental hospitals. The Court of Appeals disagreed, and affirmed the trial court's ruling that a governmental hospital is not liable for the actions of an independent contractor under the Tort Claims Act. The Court found that the Tort Claims Act specifically limits the liability of governmental hospitals to actions taken by an employee, and that the definition of "employee" under the Act expressly excludes an independent contractor from being considered a covered person. As such, the Court of Appeals found that the concept of a non-delegable duty owed to an emergency room patient does not apply to governmental hospitals.

Arbitration

Davis v. KB Home of SC, Inc., Op. No. 4851 (S.C. Ct. App. filed July 13, 2011)

The Court of Appeals analyzed the appropriate forum for determination of whether a matter is subject to arbitration, as well as whether the right to enforce an arbitration clause has been waived. The case involved an arbitration clause in an employment application, which Plaintiff argued was unenforceable based on a merger clause contained in the parties' subsequent employment agreement which stated that the later agreement contained all of the agreements and understandings between the parties. The later agreement did not include an arbitration provision. The Court of Appeals agreed with Plaintiff, holding that any attempt to introduce the arbitration clause in the prior agreement into evidence would be an improper attempt to modify or add terms to the subsequent agreement in contradiction of the merger clause. The Court of Appeals further argued that even if a valid arbitration provision existed, the Defendant had waived the right to enforce the provision by litigating the case in court for 18 months prior to filing the motion to compel arbitration, a delay the court found to be significant, as well as by engaging in extensive discovery prior to the motion to compel. Lastly, the Court found that the parties had availed themselves of the rights and benefits of the trial court throughout this time, including the resolution of motions, entry of a confidentiality order and entry of a scheduling order. Based on these findings, the Court concluded that the motion to compel arbitration should have been denied regardless of the validity of the arbitration provision, on the alternative basis of waiver of the right to enforce the provision.

Contract

Stevens Aviation v. DynCorp International, LLC, Op. No. 4857 (S.C. Ct. App. filed July 27, 2011)

The Court of Appeals reviewed the trial court's grant of partial summary judgment regarding the interpretation of a subcontract which involved service and maintenance on certain military aircrafts. In granting partial summary judgment, the trial court incorporated into the subcontract terms of a prior agreement between the parties, on the grounds that the terms of the subcontract included a reference to the prior agreement. The Court of Appeals reversed, finding that the trial court erred in incorporating the prior agreement. The Court found that the subcontract's reference to the prior agreement was not sufficient to incorporate the prior agreement, as the subcontract explicitly and expressly incorporated materials by reference in other situations but did not do so as to the prior

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agreement at issue. Further, the subcontract contained an integration clause stating that it superseded prior written agreements. The Court of Appeals further found that the subcontract was unambiguous and subject to interpretation as a matter of law. Though the trial court below had found that the subcontract was an exclusive relationship, the Court of Appeals found as a matter of law that the subcontract was not exclusive. In so doing, the Court of Appeals reversed the partial summary judgment for the Respondent and instead granted partial summary judgment for the Appellant.

Product Liability

5 Star, Inc. v. Ford Motor Co., Op. No. 4862 (S.C. Ct. App. filed August 10, 2011)

This case involved a products liability claim against Ford Motor Company alleging negligence in the design of a speed control deactivation switch. Plaintiffs contended this switch caused a fire that burned a 1996 Ford F-250 pickup truck and other property. At trial, the judge denied motions for directed verdict filed by Ford asserting that Plaintiffs had failed to prove their case. A jury returned a verdict in favor of 5 Star for $41,000.00 in actual damages.

The Court of Appeals reversed, finding that the trial judge erred in failing to grant a directed verdict. The Court of Appeals noted that one of the elements a plaintiff must prove in order to recover for negligent design in a products liability case is negligent conduct on the part of the defendant in the design of the product at or before the time of manufacture. The Court acknowledged existing law which provides the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence. In this case, there was evidence presented that the fire originated in the area of the switch in the truck. However, there was no evidence of Ford's conduct in the original design of the truck or any of its component parts, including the switch at issue. The Court found it significant that no evidence was solicited about the process of designing the switch, what Ford knew or did not know at the time regarding its safety, or anything that occurred at or around the time the truck was sold or earlier. The Court noted that the information regarding whether Ford had acted appropriately or in breach of a duty of care necessarily involved sophisticated engineering and technical sciences which would require an expert and were beyond the knowledge of a lay person. Because Plaintiffs did not present any expert testimony on the design of the control switch and did not present testimony regarding Ford's conduct at the time of the design, the Court of Appeals found that the trial court erred in failing to grant a directed verdict in favor of Ford, and reversed.

Punitive Damages

Hollis v. Stonington Development, Op. No. 4869 (S.C. Ct. App. filed August 17, 2011)

The Court of Appeals addressed the propriety of a trial court's award of $3,500,000.00 in punitive damages. In light of the facts of the case, the Court found that the grant of punitive damages was sustainable, but that the amount awarded was excessive.

The dispute in Hollis involved stormwater management for a proposed subdivision developed by Defendant, and the effects of the stormwater runoff on adjacent property owned by Plaintiffs. After finding Defendant liable for negligence, trespass, and nuisance, the jury below ordered $400,000.00 in actual damages and $3,500,000.00 in punitive damages. The trial court reduced the actual damages award to $315,000.00 as a setoff to account for payments by other settling defendants. On appeal, Defendant argued that the trial court erred in denying its motion for a directed verdict as to punitive damages. The Court of Appeals found, however, there was evidence presented that Defendant ignored both regulations regarding erosion control and stormwater runoff and its own engineering plans. There was also evidence of threats and deception on the part of Defendant to avoid the consequences of the misconduct. Viewing the evidence in most light favorable to Plaintiffs, there was ample evidence that Defendant acted in reckless disregard of the rights of others, thereby justifying punitive damages.

Defendant also objected to the jury charge on punitive damages, indicating that one provision of the charge required the jury to find actual and punitive damages. The Court of Appeals found no error, noting numerous statements contained within the jury charge adequately explained to the jury that it could not award actual or punitive damages unless Plaintiffs met the applicable burden of proof. Accordingly, the Court reasoned, when read as a whole the charge was proper. However, the Court reviewed the constitutionality of the amount of the punitive damages award and found it excessive. Therefore, the Court of Appeals ordered the punitive damages award be reduced from $3.5 million down to $2 million.

Verdict Reports

Type of Action: Premises Liability

Injuries alleged:
Right wrist-specifically radial tunnel syndrome

Name of Case:
Angelia Grant and Michael Grant v. University of South Carolina

Court: Richland County Court of Common Pleas

Case #: 2010-CP—40-1718

Name of judge: The Hon. DeAndrea Benjamin

Amount: Defense Verdict

Date of verdict: July 13, 2011

Demand: $50,000

Highest offer: $5,000

Most helpful expert: Glenn Stewart, Engineering, Design & Testing, Corp., Cayce, SC

Attorney(s) for defendant:
Albert R. Pierce, Jr., Columbia, SC

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

Plaintiff Angelia Grant alleged that on April 2, 2008, she fell down the stairs of the faculty wing of the University of South Carolina School of Law building and injured her right wrist and elbow. She alleged that the cause of her fall was improperly maintained stairs that contained dirt. She presented testimony of her recollection of the accident, and the testimony of two fact witnesses to testify to the condition of that particular staircase prior to the day of the accident, and the condition of other staircases throughout the building. Defendant produced several witnesses to testify that Defendant complied with its duty to maintain a reasonably safe premises, including: engineer Glenn Stewart to testify to the staircase's compliance with all applicable building codes, and five USC employees to testify to the cleaning procedures implemented by USC. Additionally, Defendant offered testimony from these USC employees that it had no notice of any alleged dangerous condition prior to Plaintiff's accident.

Type of Action: Negligence; Strict Liability--Dog Bite Statute

Injuries alleged: Minor puncture wound to hand; property damage claim for loss of Dachshund

Name of Case: Austin J. Wall and Denise Wall v. Michael and Debra Phelps

Court:Court of Common Pleas; Fairfield County

Case #: 09-CP-20147

Tried before: Jury

Name of judge:
The Honorable Brooks P. Goldsmith

Amount: Defense Verdict

Date of verdict: August 31, 2011

Demand: $10,000

Highest offer: $500

Most helpful experts: Not applicable

Attorney(s) for defendant: George V. Hanna, IV and Caroline H. Raines of Howser, Newman, & Besley, LLC (Columbia, SC)

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

It was undisputed that (1) Plaintiff Austin Wall was walking his Dachshund, Hershey, without a leash by the Defendant's property, (2) a dog fight commenced between the Dachshund and the Defendant's dog, and (3) Plaintiff attempted to break up the fight by hitting the Defendant's dog with his fists and with a rock. Plaintiff testified that the Defendant's dog came into the road, grabbed his dog and carried it back onto the Defendant's property. Defendant Debra Phelps testified that (1) the dog fight occurred completely on her property, (2) her boxer mix, Boomer, did not leave the property, and (3) her electric invisible fence was in proper working order and set to the highest setting. Plaintiff also introduced testimonial evidence, over objection, of a prior incident where another neighbor's dog came into the invisible fence area and was injured by the Defendant's dogs. A verdict was directed in favor of the Defendants as to the negligence cause of action and the jury found for the defendants on the remaining cause of action under the strict liability dog bite statute.

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