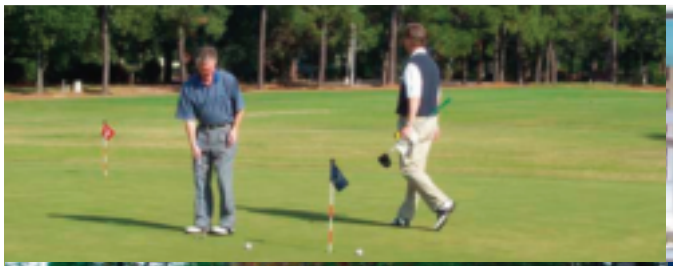
SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



2010
ANNUAL MEETING
NOVEMBER 11-14
PINEHURST, NC

PRESIDENT'S MESSAGE

President's Message

by T. David Rheney

Random Thoughts of Kindness

Every few months, when I have sat down to write an article for the *DefenseLine*, I have always known in advance what I wanted to write about. After all, if you are going to write an article it seems logical to have some idea what you might want to write about. But as I sat down to write this one, I didn't really have any good ideas. So I did what many of us do when we have that problem. I leaned back in my chair, spun around a few times, got a bite to eat, sat back down, watched some TV and...nothing. A couple days went by and...nothing. Aimee, Alan and John called to ask for my article and...still nothing.

After some time what I found myself doing was thinking not so much about an article as about the past 25 years I have been involved in the defense bar and the SCDTAA, and the many acts of kindness that so many have extended to me over that time. Most of the ones I have thought about, the other person probably would have no memory of it, and almost all were very simple. But that didn't make them any less significant to me.

I was never cut out to be a plaintiff's lawyer. And by that I mean no disrespect to those who are. I have great respect for and wonderful friendships with many plaintiff's lawyers. It's just that it takes a different mindset to be a plaintiff's lawyer versus being a defense lawyer, and I don't have that mindset. So I decided early on that I wanted to be a defense lawyer. During the summer after my 1L year, I worked with Turner, Padget, Graham and Laney. I found myself primarily assigned to (or managed to get myself assigned to) Ed Martin. For whatever reason he liked me, and anyone that knew him can understand why I liked him. One evening late that summer, he said something to the effect of, "David you need to get your grades up so you can come to work for us". Now, my grades weren't bad, but I was sort of stuck in the middle of that 1L grading curve. Anyway, that provided huge motivation for me, and I worked hard to both get my grades up and prove myself through hard work. A few years later, they were kind enough to offer me a job. Ed took me and my then-fiancee Barbara to dinner to celebrate, and it was an evening I will always remember.

Back then Turner Padget had offices in Columbia and Florence, and while I initially assumed I would stay in the Columbia office, Ed told me I should consider going to the Florence office. Because he said so, off to Florence I went with my new bride Barbara in tow. A year of so later, while trying my second case in Horry County with John Wilkerson sitting beside me, I made what seemed to me to be a brilliant objection that was actually sustained by the judge, although he didn't seem to be as impressed with me as I was. After a few moments, John leaned over and whispered something like, "you're pretty good at this." Although he did not make a similar comment during my first trial, that comment gave me a huge confidence boost and made me think that maybe I could be a decent trial lawyer.

A couple years later, I found myself sitting in Ed Mullins' office in Columbia. At this point, I have no idea what I was doing there, but I do remember thinking to myself, "What the heck am I doing in Ed Mullins' office, and how can I get out of here without making a fool of myself?" And while I expect it was painfully clear to Ed that I was about as green as green could get, what I really remember is how nice he was to me. Not only was there not a hint of his being perturbed with having to deal with the youngster across the desk from him, but having gotten to know Ed somewhat better since then I expect he actually enjoyed having the opportunity to have a "teachable moment" with a young lawyer.

Several years later I got a call from Sam Outten, who wanted to know if I would agree to take over the golf pairings for the tournament during the Grove Park meeting. I expect Sam was happy to get rid of the job, just as I was a few years later, but I remember being thrilled with the idea that he thought I could do it without screwing it up, and it gave me my first real chance to do something for the SCDTAA.

I still have a letter in my desk from Bill Davies the year he was President of the SCDTAA. I wasn't on the Executive Committee at that point, but Bill was kind enough to ask me to co-chair the Grove Park meeting with Sam and Moose Phillips. Aside from having a lot of fun working with those two, it was a nice compliment for Bill to do that for me, and I am sure it played a part in my being asked to serve on the Executive Committee the next year.

Finally, a few years ago the Past Presidents nominated me to become an officer of the SCDTAA, and that has, in time, led to my sitting here writing this article. Given the respect that we all have for our Past Presidents, that was without a doubt the highest honor I have received in my professional career.

Since this is my last article as President of the SCDTAA, I want to thank all of these folks and the many more that space prevents me from mentioning,

Letter From The Editors

by Alan Lazenby and John Kuppens

As Danny DeVito's character, Gavin, says in The War of the Roses (also starring Michael Douglas and Kathleen Turner) – "when a man who makes $400 an hour wants to tell you something for free, you should listen." I was trying to sum up how I feel about the DefenseLine and the quote above immediately came to mind. Of course the movie was in 1989, so with inflation that should probably be $1,000 an hour, but you get the point.

We defense lawyers like to think in terms of billable hours. If you consider the amount of billable time spent in drafting substantive articles, case notes, and the committee reports – including partner time, associate time, and paralegal time – then $20,000 of time for putting together this issue is a pretty good estimate. We all have busy practices, and I am constantly amazed at the amount of time our membership puts into this group to make it one of the best SLDO within DRI. Not just with the DefenseLine, but also the time that goes into planning and presenting CLEs, lobbying efforts, and just making this organization run.

We have focused our efforts with the *DefenseLine* this year on soliciting substantive articles that are timely and informative to the defense lawyer. We have also included case briefs of just about every case in the past couple of months that affects the practice of the defense lawyer. We would like to thank all of our contributors for making the *DefenseLine* a "go to" source for the defense lawyer. You may have noticed other changes in the DefenseLine recently. In addition to the focus on the substance of the publication, we have also made improvements in style. The last issue featured a full color front page and inside cover. We hope these improvements enhance your enjoyment of the DefenseLine.

This organization is successful because of the people who donate their time. We encourage all of our membership to get involved. Write an article, join a substantive law committee, or apply to be on the Executive Committee. The opportunities abound. In the meantime, we hope you take Gavin's advice and read this issue.

Alan Lazenby

John Kuppens

SCDTAA is on Facebook

The website committee is pleased to announce that the South Carolina Defense Trial Attorneys' Association is now on Facebook. You can access the page through www.Facebook.com by way of a search for South Carolina Defense Trial Attorneys' Association. To receive information posted to the SCDTAA Wall in your News Feed, just press the Like button at the top of the page.

The SCDTAA envisions this page as another tool to connect with and inform the membership, as well as a means for the membership to connect with one another. We look forward to seeing you on Facebook.

Additionally, as always we encourage the members to visit and use the SCDTAA website at www.scdtaa.com. The website contains a wealth of information including reminders for upcoming events, online event registration, recent issues of the DefenseLine, a membership directory, blog posts, and links to regional and national legal news.

Let us know what you think about the Facebook page and the website. The website committee welcomes any questions, suggestions or comments. Please feel free to direct those to Josh Howard at Jhoward@HSBLawfirm.com.

President's Message cont.

for the opportunity to lead our Association in 2010. I especially thank all of my partners at Gallivan, White and Boyd for allowing me so much time away from my practice during the course of the year. I have enjoyed every minute of it and look forward to remaining involved for years to come. We have much to look forward to in 2011 and beyond, and a great group of folks in Gray, Molly and Sterling to lead the way. And remember, even when you might not know it, one of our young lawyers is probably watching you. I hope their memories are as good as mine.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

SCDTAA Docket

ANNOUNCEMENTS

Sean F. Keefer, LLC is pleased to announce that Wendy J. Keefer joined the firm, and the firm is now known as Keefer & Keefer, LLC. Wendy will continue to focus her practice on employment law litigation and advice and counsel, U.S. Customs law compliance, and appellate practice. Wendy also continues to serve as an Adjunct Professor of Law, teaching National Security Law and Separation of Powers courses at the Charleston School of Law.

Aiken Bridges Elliott Tyler & Saleeby, PA. is pleased to announce that John G. "Jack" Hofler, III, former law clerk to the Honorable William H. Seals, Jr., has joined the firm as an associate. Jack graduated Magna Cum Laude from Furman University in 2006 with a B.A. in Political Science and Philosophy. He then attended Wake Forest University School of Law from which he received his J.D. in 2009.

Wilkes Bowers, P.A. is pleased to announce that Joseph Derham Cole, Jr. has joined the firm in its Spartanburg office. Derham graduated cum laude from the Honors College at the University of South Carolina in 1999 with a B.S. in Business Economics, and received an International Master of Business Administration (IMBA) from the University of South Carolina in 2003. Derham also earned his Juris Doctor from the University of South Carolina in 2003. Derham's practice will focus on business transactions and business litigation.

Turner Padget Graham & Laney is pleased to announce that Ammon Lesher has joined the firm. Mr. Lesher will be based in the Greenville office practicing in the area of Intellectual Property. Mr. Lesher earned his Juris Doctor from the University of South Carolina, cum laude, in 2009. Prior to his graduation from law school, Mr. Lesher earned B.S. and M.S. degrees in marine biology from the College of Charleston.

The law firm of McAngus Goudelock & Courie, LLC, is pleased to announce that its Myrtle Beach office is relocating to the Founders Centre at 2411 North Oak Street.

Members in the News

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

Nexsen Pruet has been named one of the "Best Companies in the Midlands for Working Moms." Nexsen Pruet is the only law firm recognized by the program. It is sponsored by the March of Dimes and the Greater Columbia Business Monthly. The September issue of the Greater Columbia Business Monthly profiles the winners. The magazine points out that "family is important" at Nexsen Pruet. The firm offers employees a wellness program, gym membership subsidies and flexible work schedules among other things.

John C. Hawk elected President-Elect Young Lawyers Division of SCDTAA

John C. Hawk of Buist Moore Smythe McGee P.A. has been elected President-Elect of the Young Lawyers Division of the South Carolina Defense Trial Attorneys' Association. Hawk's two-year term begins immediately, and he will assume the position as President in 2012.

John C. Hawk is a litigator who focuses his practice on Products Liability, Construction, Business Litigation, and Insurance.

MG&C Attorney Tina Herbert Elected President of SC Bar Young Lawyers Division

Tina Herbert, a workers' compensation defense attorney at McAngus Goudelock & Courie, has been elected president of the South Carolina Bar's Young Lawyers Division for 2010. As president of the Young Lawyers Division, which has approximately 3000 members state-wide, Herbert oversees 28 committees designed to provide legal education to its members and the Bar.

Sharp Elected President of NCWBA

Mary E. Sharp, a partner with Griffith, Sadler & Sharp, P.A., was elected President of the National Conference of Women's Bar Associations (NCWBA), at the organization's 2010 annual meeting in San Francisco. The NCWBA, an affiliate of the American Bar Association, is an "association of associations," dedicated to strengthening and improving the effectiveness of women's bar associations. Its member associations collectively represent over 35,000 women lawyers nationwide.

Continued on next page

Member News cont.

MG&C Attorneys Selected for 2011 Edition of The Best Lawyers in America

Eight attorneys from McAngus Goudelock & Courie have been selected by their peers for inclusion in The Best Lawyers in America® 2011 edition. MG&C was ranked as a top firm in South Carolina in water law and workers' compensation law and as a top firm in Charleston in employee benefits law, in Columbia in water law, and in Greenville in insurance law.

Individual attorneys were selected for the list:

Columbia, S.C.:

Weston Adams III in Appellate Law

Scott B. Garrett in Workers' Compensation Law

A. Mundi George in Workers' Compensation Law

J. Russell Goudelock III in Workers' Compensation Law

W. Hugh McAngus in Workers' Compensation Law

Charleston, S.C.:

Mark Davis in Workers' Compensation Law

Amy Y. Jenkins in Employee Benefits Law and Labor and Employment Law

Greenville, S.C.:

G.D. "Doc" Morgan, Jr. in Personal Injury Litigation and Insurance Law

Johnson Selected For Leadership Columbia

Turner Padget is pleased to announce that J. David Johnson, IV has been selected to participate in the 2011 Leadership Columbia class. David is a shareholder in the Columbia office and is a member of the Business Transactions Group. The mission of the Leadership Columbia program is to offer a program for Greater Columbia's promising leaders to help them better understand how their community works, build relationships with fellow leaders and become inspired to focus their talents in a way which will best serve the Midlands.

Myrick Chairs ABA/TIPS Business Litigation Committee

James D. Myrick, a principal attorney at Buist Moore Smythe McGee P.A., this week became chair of the ABA/TIPS Business Litigation Committee. Myrick is serving a one-year term that will conclude at the close of the association's 2011 Annual Meeting Aug. 10 in Toronto. Mr. Myrick has previously served the ABA/TIPS Business Litigation Committee as Vice-Chair and Chair-Elect.

Moody selected for The Best Lawyers in America®

Roe Cassidy Coates & Price, P.A. is pleased to announce shareholder D. Randle Moody, II has been selected for inclusion in the 2011 edition of The Best Lawyers in America®. Moody was selected in the area of labor and employment law. In addition to employment law, he concentrates his practice in the areas of general litigation and healthcare law.

Christopher Dorsel Selected for Leadership Charleston

Christopher T. Dorsel, an attorney in Turner Padget's Charleston office, has been selected to participate in the 2011 Leadership Charleston class. Mr. Dorsel practices in the areas of civil litigation, specializing in both business litigation and insurance defense. the Charleston Metro Chamber of Commerce sponsors the ten-month program for professionals, offering an intensive and up-close look at various sectors of the community.

MG&C Managing Partner Jay Courie Receives 2010 Leadership in Law Award

McAngus Goudelock & Courie is pleased to announce that South Carolina Lawyers Weekly will honor the firm's managing partner, Jay Courie, with the 2010 Leadership in Law Award at a reception in Charleston on August 26. The award recognizes individuals whose professional and community leadership has made a positive impact on the state.

Husman Certified as Mediator

Stephen A. Husman has recently been approved by the South Carolina Board of Arbitrator and Mediator Certification as a Circuit Court Mediator and Arbitrator. Mr. Husman is a shareholder in the Columbia office of Turner Padget and has an active business litigation practice focusing primarily on real estate and personal property security issues. He also has expertise in representing banks and other financial entities.

Richardson Plowden Attorneys Selected for 2011 Edition of The Best Lawyers in America

Six attorneys from Richardson Plowden have been selected by their peers for inclusion in The Best Lawyers in America® 2011 edition.

Individual attorneys were selected for the list:

Leslie A. Cotter, Jr. in Legal Malpractice Law

Frederick A. Crawford in Health Care Law

Steven W. Hamm in Administrative Law

Francis M. Mack in Commercial Litigation and Construction Law

Frank E. Robinson, II in Real Estate Law

Franklin J. Smith, Jr. in Construction Law

H. Mills Gallivan elected as Director of Federation of Defense & Corporate Counsel

Mills Gallivan has been elected as a Director of the Federation of Defense & Corporate Counsel (FDCC), an international organization composed of leaders in the legal community. FDCC membership is an honor, as members have been judged by their peers to have achieved professional distinction, and are committed to promoting knowledge, professionalism, fellowship and the cause of justice. Mills will serve consecutive two-year terms as Director of FDCC, beginning this year.

W. Duffie Powers Named as One of Greenville's "Best & Brightest Under 35"

W. Duffie Powers has been selected as a member of Greenville Magazine's Class of 2010 Best & Brightest Under 35. This program recognizes local men and women who are making strides in the Greenville business community. Powers focuses his practice in the areas of design and construction litigation, banking, bankruptcy and creditors' rights and business and commercial litigation.

Stephanie G. Flynn Named as a Member of Leadership Greenville Class 37

Stephanie G. Flynn has been selected as a member of Leadership Greenville Class 37. Flynn practices in the areas of Products Liability, Toxic and Mass Torts, Tort & Personal Injury and Transportation Litigation.

Gallivan, White & Boyd, P.A. Attorneys Named To Super Lawyers Corporate Counsel

Phillip E. Reeves and T. David Rheney have been selected for inclusion in Super Lawyers, Corporate Counsel Edition in the practice area of Insurance Coverage. Reeves has over 30 years of experience and focuses his litigation and trial work in the insurance, products liability and transportation industries, with particular emphasis on first party and bad faith claims. Rheney has over 20 years of experience practicing in the areas of personal injury defense, insurance coverage defense, trucking/transportation defense and product liability defense.

T. David Rheney Selected for IADC Trial Academy Faculty

T. David Rheney has been named to the faculty of the International Association of Defense Counsel Trial Academy (IADC) for 2010. The IADC Trial Academy is one of the oldest and most well respected programs for developing defense trial advocacy skills.

C. Stuart Mauney Re-Elected to Another Term Representing the 13th Judicial Circuit

C. Stuart Mauney has been re-elected to serve another two year term representing the 13th Judicial Circuit in the South Carolina Bar House of Delegates. Mauney has over 20 years of experience in the defense of serious personal injury and wrongful death cases. He also defends professional liability and malpractice cases, including nursing homes and other healthcare facilities.

Gallivan, White & Boyd Attorney Awarded South Carolina Bar "Star of the Quarter"

James M. Dedman, IV has been awarded the South Carolina Bar Young Lawyers' Stars of the Quarter Award for outstanding service and leadership throughout the 2009-2010. This award is given to those members who have unselfishly devoted their valuable time to serve on a committee. Dedman focuses his practice in the areas of tort and personal injury and transportation litigation.

Jennifer E. Johnsen, Graduate of Diversity Leadership Initiative 2009 Class

Jennifer E. Johnsen, a shareholder at Gallivan, White & Boyd, P.A., Greenville, SC, recently completed the Riley Institute at Furman University's Diversity Leadership Initiative. Selection to the program is competitive and based on a nomination and application process. The goal of the program is to provide leaders drawn from a variety of organizations with frames of reference and real world examples of conflict around diversity issues for group discussion and analysis.

Gallivan, White & Boyd Attorneys Named to Best Lawyers 2011

Ten GWB attorneys have been named to the 2011 edition of The Best Lawyers In America.

- H. Mills Gallivan: Alternative Dispute Resolution and Workers' Compensation Law
- Daniel B. White: Commercial Litigation, Mass Tort Litigation, Personal Injury Litigation, Product Liability Litigation and Railroad Law
- W. Howard Boyd, Jr.: Bet-the-Company Litigation, Commercial Litigation and Product Liability Litigation.
- James D. Brice: Product Liability Litigation
- C. Stuart Mauney: Alternative Dispute Resolution and Personal Injury Litigation
- C. William McGee: Product Liability Litigation and Personal Injury Litigation
- Phillip E. Reeves: Product Liability Litigation and Personal Injury Litigation
- T. David Rheney: Personal Injury Litigation
- Ronald K. Wray II: Commercial Litigation and Railroad Law

Gallivan, White & Boyd, P.A. Attorneys Named as South Carolina SuperLawyers

Seven Gallivan, White & Boyd, P.A. attorneys have been selected for inclusion in South Carolina Super Lawyers 2010, and six attorneys have been selected for the Corporate Counsel Edition of Super Lawyers 2010.

Gallivan, White & Boyd, P.A. attorneys appearing in the 2010 South Carolina Super Lawyers list include:

- W. Howard Boyd, Jr., Business Litigation
- H. Mills Gallivan, Alternative Dispute Resolution
- C. Stuart Mauney, Alternative Dispute Resolution
- Phillip E. Reeves, Insurance Coverage
- T. David Rheney, Insurance Coverage
- Daniel B. White, Personal Injury Defense: Products
- Ronald K. Wray II, Business Litigation

Continued on next page

Member News cont.

In addition six Gallivan, White & Boyd, P.A. attorneys are ranked in Corporate Counsel Super Lawyers 2010:

- Deborah C. Brown, Workers' Compensation
- H. Mills Gallivan, Alternative Dispute Resolution
- C. Stuart Mauney, Alternative Dispute Resolution
- Phillip E. Reeves, Insurance Coverage
- T. David Rheney, Insurance Coverage
- Daniel B. White, Personal Injury Defense: Products

Best Lawyers® Legal Resource Directory Lists 6 Buist Moore Attorneys

Six Buist Moore Smythe McGee P.A. attorneys were recently selected by their peers for inclusion in The Best Lawyers in America® 2011. The following outlines the Firm's lawyers who were ranked as leaders in their field, representing 14 areas of law.

- C. Allen Gibson, Jr., Construction Law
- Henry B. Smythe, Jr., Personal Injury Litigation
- William C. Cleveland, III, Alternative Dispute Resolution, Commercial Litigation
- James D. Myrick, Insurance Law, Personal Injury Litigation
- Charles J. Baker, III, Bet-the-Company Litigation, Commercial Litigation, Construction Law
- Sean D. Houseal, Environmental Law

MG&C Named One of the Best Places to Work in South Carolina 2010

The law firm of McAngus Goudelock & Courie, LLC, has been named one of the Best Places to Work in South Carolina for 2010. MG&C is one of eighteen finalists in the program and is named in the small/medium-sized company category. MG&C has offices in Columbia, Charleston, Greenville and Myrtle Beach, S.C. The program, a partnership between the S.C. Chamber of Commerce, the Society for Human Resource Management-S.C. State Council, SCJobMarket.com and SC Biz News, LLC, identifies and recognizes South Carolina's best employers. The finalists were chosen based on employee responses to a satisfaction survey conducted by Best Companies Group.

Turner Padget Launches New Website to Serve as Statewide Business Resource

Turner Padget Graham & Laney, P.A. is pleased to announce that the firm has launched a new website, aimed at providing resources and news to South Carolina businesses. In addition to information about the 81-year-old South Carolina law firm and its 91 attorneys, the website contains newsfeeds from South Carolina's major business publications and links to community and industry resources.

Barefoot and Justice to Receive Leadership in Law Award

Turner Padget is pleased to announce that Walter H. Barefoot and Arthur E. Justice, Jr., have been selected to receive the 2010 Leadership in Law award presented by South Carolina Lawyers Weekly. The award recognizes those individuals whose leadership, both in the legal profession and in the community, has made a positive impact on our state.

Dorsel Appointed to DRI Committee

Turner Padget is pleased to announce that Christopher T. Dorsel, an attorney in its Charleston office, has been appointed to the Steering Committee of the DRI Young Lawyers Division and has also been appointed Vice Chair of the State and Local Defense Organization Subcommittee. Chris practices in the area of civil litigation, specializing in both business litigation and insurance defense.

Ellis Lawhorne lawyers chosen for Best Lawyers in America®

Ellis Lawhorne is pleased to announce that two-thirds of its shareholders have been selected to Best Lawyers in America®. Fourteen of the firm's 21 shareholders will be included in the 2011 edition of the legal profession's most respected peer-review publication. All of the firm's four practice groups are represented in Best Lawyers.

All five of the Firm's shareholders in the Workers' Compensation Practice Group were honored by 2011 Best Lawyers: F. Earl Ellis, Jr., William R. Harbison, Ernest G. Lawhorne, Mary Sowell League, and Lana H. Sims, Jr.

In the Litigation and Dispute Resolution Practice Group, John T. Lay, Jr. was recognized in three areas: "bet-the-company" litigation, commercial litigation and product liability litigation. John L. McCants was recognized for his work in bankruptcy and creditor-debtor rights law and construction law. W. Cliff Moore, III was noted for his work in commercial litigation.

28 Turner Padget Shareholders Named As Best Lawyers in America for 2011

Turner Padget Graham & Laney, P.A. is pleased to announce that 28 of its shareholders have been listed in the 2011 edition of Best Lawyers in America. In addition, the firm has been ranked as the top law firm in South Carolina in the areas of Alternative Dispute Resolution and Municipal Law, is highly ranked in 14 other practice areas, and is recognized as the top law firm in Florence. Since the previous edition, Turner Padget has added two attorneys to this prestigious ranking. The 2011 edition of Best Lawyers in America will be available in December 2010.

<u>Listed from the firm's Charleston office are:</u>

- John K. Blincow, Medical Malpractice Law
- Elaine H. Fowler, Mergers & Acquisitions Law and Real Estate Law
- John S. Wilkerson III, Professional Malpractice Law

The firm is also ranked number one in Charleston in the categories of Medical Malpractice, Mergers and

Acquisitions, and Professional Malpractice Law.

Listed from the firm's Columbia office are:

- Danny C. Crowe, Alternative Dispute Resolution and Municipal Law
- Franklin G. Shuler, Jr., Alternative Dispute Resolution and Labor and Employment Law
- Lanneau W. Lambert, Jr., Banking Law and Real Estate Law
- Curtis L. Ott, Commercial Litigation and Product Liability Litigation
- W. Duvall Spruill, Commercial Litigation
- John E. Cuttino, Construction Law
- Thomas C. Salane, Insurance Law
- Steven W. Ouzts, Mass Tort Litigation and Product Liability Litigation
- Charles E. Hill, Medical Malpractice Law
- Edward W. Laney IV, Personal Injury Litigation
- J. Kenneth Carter, Jr., Product Liability Litigation
- John E. Cuttino, Product Liability Litigation
- Catherine H. Kennedy, Trusts and Estates
- Michael E. Chase, Workers' Compensation Law
- Cynthia C. Dooley, Workers' Compensation Law

The firm is also ranked number one in Columbia in the categories of Alternative Dispute Resolution, Medical Malpractice and Municipal Law.

Listed in the firm's Florence office are:

- Richard L. Hinson, Alternative Dispute Resolution
- J. Rene Josey, Appellate Law and Criminal Defense: Non-White Collar Crime and Criminal Defense: White Collar Crime
- Arthur E. Justice, Jr., Labor and Employment Law
- Michael G. Roberts, Tax Law and Trusts and Estates
- J. Munford Scott, Jr., Tax Law
- John M. Scott III, Tax Law

In addition to being ranked as the top law firm in Florence, Turner Padget's Florence office is recognized in the following categories: Alternative Dispute Resolution, Appellate Law, Criminal Defense: Non-White Collar, Criminal Defense: White Collar, Tax Law and Trusts and Estates.

Listed in the firm's Greenville office are:

- Eric K. Englebardt, Alternative Dispute Resolution
- Timothy D. St. Clair, Intellectual Property Law
- Vernon F. Dunbar, Workers' Compensation Law
- William E. Shaughnessy, Workers' Compensation Law

Listed in the firm's Myrtle Beach office is:

- R. Wayne Byrd, Commercial Litigation

The firm is ranked number one in Myrtle Beach for Commercial litigation.

Four Nexsen Pruet attorneys named to 2011 edition of Best Lawyers®

Nexsen Pruet is proud to announce that 4 of its attorneys have been named to the 2011 edition of Best Lawyers®.

Bet-the-Company Litigation

- Russell T. Burke — Columbia, SC

Commercial Litigation

- Russell T. Burke — Columbia, SC
- Elbert S. Dorn — Myrtle Beach, SC
- Bradish J. Waring — Charleston, SC

Labor and Employment Law

- E. Grantland Burns — Greenville, SC
- Michael S. Pitts — Greenville, SC

Product Liability Litigation

- Elbert S. Dorn — Myrtle Beach, SC

'Best Lawyers' Guide Lists 52 S.C. Nelson Mullins Attorneys

Fifty-two Nelson Mullins Riley & Scarborough attorneys based in South Carolina have been selected for inclusion in the 2011 edition of The Best Lawyers in America. The legal reference guide also ranked Nelson Mullins as a top-listed firm in:

South Carolina in 13 practice areas (administrative, appellate, commercial litigation, corporate governance and compliance law, franchise, government relations, insurance, mergers and acquisitions, personal injury litigation, product liability, securities, venture capital, and water law);

Charleston, S.C., in seven practice areas (appellate, bet-the-company litigation, environmental law, government relations, product liability, tax, and water law);

Columbia in nine areas (administrative, bet-the-company, commercial litigation, employee benefits law, franchise law, government relations, mass tort litigation personal injury, and product liability);

Greenville, S.C., in six areas (corporate governance and compliance law, family, insurance, mergers and acquisitions, securities, and venture capital); and Myrtle Beach in trust and estates;

Charleston:

- Michael T. Cole, Product Liability Litigation
- Richard A. Farrier, Jr., Bet-the-Company Litigation, Commercia lLitigation
- John B. Hagerty, Corporate Law
- Cynthia B. Hutto, Health Care Law
- Elizabeth Scott Moise, Insurance Law
- Thomas F. Moran, Tax Law
- G. Mark Phillips, Product Liability Litigation
- Newman Jackson Smith, Environmental Law, Government Relations Law, Water Law
- John C. von Lehe, Jr., Appellate Law, Tax Law

Continued on next page

Columbia:

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

Greenville:

- William H. Foster, Labor and Employment Law
- Neil E. Grayson, Mergers and Acquisitions, Securities Law
- John M. Jennings, Corporate Governance and Compliance Law, Mergers andAcquisitions, Securities Law
- Timothy E. Madden, Family Law
- A. Marvin Quattlebaum, Jr., Commercial Litigation, Insurance Law
- Bo Russell, Mergers and Acquisitions, Venture Capital Law
- Rivers S. Stilwell, Commercial Litigation

Myrtle Beach:

- James F. McCrackin, Trusts and Estates

Appleby selected for 2011 class of Leadership Columbia

Collins & Lacy, P.C. is pleased to announce attorney Charles L. Appleby IV has been selected for the 2011 class of Leadership Columbia. Charles is an associate practicing in employment law, complex defense litigation and construction defect litigation. The Leadership Columbia program has been sponsored by the Greater Columbia Chamber of Commerce for more than 30 years. The program was designed to provide existing and emerging leaders with opportunities to enhance their civic knowledge and civic network, help participants better understand how our community works and provide opportunities for building relationships with the region's current and future leaders.

Buist Moore Smythe McGee Receives Top Ranking by Chambers USA: America's Leading Lawyers for Business 2010

Buist Moore Smythe McGee P.A. is recognized again this year for their exceptional standing in the legal industry by Chambers USA: America's Leading Lawyers for Business 2010 for its Corporate/Mergers & Acquisitions, General Commercial Litigation and Real Estate practice areas. In particular, Firm principals William C. Cleveland III, David S. Cox, Morris A. Ellison, W. Foster Gaillard, David B. McCormack, Henry B. Smythe, Jr., Susan M. Smythe and Charles P. Summerall IV, are commended for their outstanding legal abilities.

Brad Waring Appointed to the South Carolina Judicial Council

South Carolina Chief Justice Jean Toal has appointed Nexsen Pruet member (partner) Brad Waring to the South Carolina Judicial Council. The Judicial Council is made up of judges, attorneys and lawmakers. The Judicial Council is tasked with several duties: To study and survey how justice is administered in South Carolina; To receive and

consider criticism and suggestions about the state's legal system; To monitor the workings of South Carolina courts; and To make recommendations about ways to improve the administration of justice. His term expires on June 30, 2014.

Four Nelson Mullins Attorneys Recognized by 'Who's Who Legal'

Law Business Research has recognized four Nelson Mullins Riley & Scarborough LLP attorneys for their exceptional performances in product liability law in its publication, The International Who's Who of Liability Defence Lawyers 2010. In addition, the publication acknowledges Managing Partner David Dukes as one of the "most highly regarded individuals" in product liability law in the United States.

The publication names 336 attorneys in 34 jurisdictions who can be considered to be leaders in the area of product liability law. Nelson Mullins Riley & Scarborough attorneys Stephen Morrison, Ed Mullins, and Richard North also were individually named for their product liability practices.

Nelson Mullins' Ed Mullins to Serve on Uniform Law Commission

Edward W. Mullins, Jr., of counsel to Nelson Mullins Riley & Scarborough LLP, has been appointed to serve as a commissioner on the National Board of Commissioners for Promotion of Uniformity of Legislation in the United States, an appointment made by Governor Mark Sanford. He will be participating with commissioners from other states on the National Commission in reviewing conflicting legislation in the various states and territories and making recommendations toward uniformity.

Pearce Approved as Mediator and Arbitrator

Turner Padget Graham & Laney, P.A. is pleased to announce that Christopher H. Pearce has recently been approved by the South Carolina Board of Arbitrator and Mediator Certification as a Circuit Court Mediator and Arbitrator. Mr. Pearce was also recently approved as a Mediator for the United States District Court of South Carolina. Mr. Pearce is a resident in the Myrtle Beach office and has an active litigation practice with a primary emphasis on matters involving construction and professional design related matters.

St. Clair to Serve on Intellectual Property Task Force for JDRF

Tim St. Clair, shareholder in Turner Padget's Greenville office, was recently selected to participate on the Intellectual Property Task Force for the Juvenile Diabetes Research Foundation. Tim also serves as a National Head Coach for the "Ride to Cure Diabetes" program. He has been National Chair of the JDRF Ride Committee, as well as a member of JDRF's Development Committee, since 2009.

Coates selected for Super Lawyers®

The law firm of Roe Cassidy Coates & Price, P.A. is pleased to announce that founding shareholder William A. Coates has been named to the 2010 list of South Carolina Super Lawyers®. William Coates was selected for business litigation. His practice focuses on corporate and commercial litigation, white collar criminal defense, and governmental investigations, as well as healthcare and environmental litigation

Price elected to membership in ABOTA

The law firm of Roe Cassidy Coates & Price, P.A. is pleased to announce that founding shareholder V. Clark Price has been elected to membership in the American Board of Trial Advocates. Membership in ABOTA is extended by invitation only in recognition of the honoree's high personal character, honorable reputation, and proficiency as a trial attorney. ABOTA is a national organization composed of the country's pre-eminent trial attorneys. ABOTA's main goals are the preservation of the Seventh Amendment's Right to Trial by Jury in civil cases and the promotion of professionalism and civility upon trial attorneys.

Suggs elected to South Carolina Bar Board of Governors

Roe Cassidy Coates & Price, P.A. is pleased to announce that Fred W. "Trey" Suggs III was installed as a member of the SC Bar Board of Governors on May 20, 2010. Suggs is a shareholder in the firm and focuses his practice on medical malpractice defense, commercial litigation, and personal injury litigation.

Chambers Co-Chairs PLDF's Healthcare Committee

Gerald Chambers, shareholder in Turner Padget's Columbia office, has been chosen to co-chair the Healthcare Committee of the Professional Liability Defense Federation. Gerald will contribute to article publication, assist in monitoring the PLDF news and respond to member inquiries for assistance, and to assist in annual meeting seminar presentation planning. Mr. Chambers joined Turner Padget in 2001 and concentrates his practice in the areas of medical malpractice, long-term care litigation and legal malpractice.

Collins & Lacy Attorney Elected to South Carolina Bar Foundation Board of Directors

Collins & Lacy, P.C. is pleased to announce that Jack D. Griffeth has been elected Secretary/Treasurer of the South Carolina Bar Foundation Board of Directors. Griffeth begins his term July 1, 2010. 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. Jack, a shareholder with Collins & Lacy, practices in the Greenville office. His 34-year practice of law has

Continued on next page

focused on defense trial work, representing employers in employment related litigation and mediation.

Moose Co-Chairs Accounting Committee of PLDF

Julie J. Moose, shareholder in Turner Padget's Florence office, has been chosen to co-chair the Accounting Committee of the Professional Liability Defense Federation. Ms. Moose will write articles for the quarterly newsletter, present or assist with presentations, and lead discussions at the yearly meeting. She spends the majority of her practice handling accounting, financial, and business matters in both litigation and non-litigation contexts, and she practices in the areas of accountant liability, corporate law, shareholder disputes, securities litigation, business, and commercial litigation.

Nelson Mullins' Bedenbaugh Recognized as 'Renaissance Associate'

For outstanding performance in a number of areas, Columbia associate, Jody Bedenbaugh, has received Nelson Mullins Riley & Scarborough's Renaissance Associate Award. The award is given to an associate who best demonstrates achievement in client service, training, pro bono, marketing, recruiting, and productivity. Mr. Bedenbaugh joined the Firm in 2003 and practices in the areas of banking, consumer financial services litigation, and bankruptcy and creditors' rights.

Turner Padget Attorneys Named Among Finalists by Lawdragon

Turner Padget Graham & Laney, P.A. is pleased to announce that five of the firm's partners have been named as finalists to the 2010 Lawdragon 500 Leading Lawyers in America list. R. Wayne Byrd, Lanneau Wm. Lambert, Jr., Thomas C. Salane, W. Duvall Spruill and John S. Wilkerson were named among 3,000 finalists considered for inclusion in the Lawdragon 500.

Chambers USA 2010 Ranks Turner Padget as Leading Litigation Firm in South Carolina

Turner Padget Graham & Laney, P.A. is pleased to announce that the 2010 edition of Chambers USA: America's Leading Lawyers for Business, a highly regarded directory of business lawyers, recognized the firm as a leading firm in South Carolina. The firm's litigation practice earned high marks.

Nelson Mullins Recognized by Three National Publications

Nelson Mullins Riley & Scarborough has received three national recognitions this month:

Legal directory publisher Chambers and Partners has recognized Nelson Mullins Riley & Scarborough LLP as a national leader in products liability litigation. The publishers rank the Firm for its South Carolina general commercial litigation, corporate/mergers and acquisitions, and real estate practices and single out 11 South Carolina attorneys.

The American Health Lawyers Association has ranked Nelson Mullins Riley & Scarborough as having the fifth largest healthcare practice in the United States. The rankings were published in Modern Healthcare magazine.

The 2010 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 "excellent" and "cost-effective" and highlights the work of partners David Dukes, Steve Morrison, Richard Hines, Michael Cole, and Marvin Quattlebaum for their litigation skills.

Dorsel Elected to Board

Turner Padget is pleased to announce that Christopher T. Dorsel, an associate in its Charleston office, has been elected to the South Carolina Governor's School for Science and Mathematics Alumni Association Board. His term began on July 1, 2010 and will last three years.

Florence Elected Chair of State Ethics Commission

Turner Padget is pleased to announce that Phillip Florence, Jr., Of Counsel in its Charleston office, has been elected Chair of the State Ethics Commission. Having most recently served as the Vice-Chair, Phillip began his term as Chair on June 30, 2010. Mr. Florence focuses his practice in the areas of General Litigation, Construction, Employment, and Personal Injury Defense.

Chambers USA 2010 Ranks Turner Padget as Leading Litigation Firm in South Carolina

Turner Padget Graham & Laney, P.A. is pleased to announce that the 2010 edition of Chambers USA: America's Leading Lawyers for Business, a highly regarded directory of business lawyers, recognized the firm as a leading firm in South Carolina. The firm's litigation practice earned high marks.

2010 Annual Meeting November 11-14 Pinehurst, NC

The SCDTAA excitedly awaits its 43rd Annual Meeting to be held November 11-14, 2010, at beautiful Pinehurst Resort in North Carolina. We look forward to joining members of the federal and South Carolina judiciaries for a weekend filled with informative educational programs and entertaining social activities. Chief Justice Jean Toal will speak on issues related to funding of the South Carolina judiciary. A panel of federal judges and Richard Gergel will address changes to Rules 26 and 56 of the Federal Rules of Civil Procedure as well as the judicial appointment process. A panel of state court judges will discuss trial issues related to application of the South Carolina Contribution Among Joint Tortfeasors Act. The program also features Andrew Urich, Puterbaugh Professor of Ethics and Legal Studies at the Spears School of Business at Oklahoma State University. Professor Urich is renowned for his entertaining and insightful speeches regarding ethics and effective communication.

On the social front, the Annual Meeting promises plenty of smiles, relaxation and fun outings. Beyond the opportunity to play some of the finest golf courses in the country, Pinehurst also will offer SCDTAA members and our judicial guests a quail hunt, a Nascar drive-around experience and a high tea and historic tour of Pinehurst. All will surely enjoy the Taste of North Carolina dinner on Friday night and the black tie dinner and dance on Saturday evening.

The Annual Meeting is a "can't miss" event, and we look forward to seeing you in Pinehurst.

Agenda

THURSDAY, NOVEMBER 11th

3:00pm – 5:00pm
Executive Committee Meeting

4:00pm – 6:00pm
Registration Desk Open

5:00pm – 6:00pm
Nominating Committee Meeting

5:00pm – 6:00pm
Young Lawyers Meeting

6:30pm – 7:30pm
President's Welcome Reception

Dinner On Your Own

FRIDAY, NOVEMBER 12th

8:15am – 8:30am
Welcome and Opening Remarks
T. David Rheney, Esquire, SCDTAA President

8:30am – 9:15am
State of the Judiciary
Chief Justice Jean H. Toal,
South Carolina Supreme Court

9:15am – 10:15am
Effective Communication
Professor Andrew L. Urich,
Oklahoma State University

10:15am – 10:30am
Break

SEMINAR NEWS CONT.

10:30am – 11:15am
Substantive Law Breakouts
Insurance Defense/Torts
Managing Partners
Product Liability/Commercial Litigation
Workers' Compensation

11:15am – 12:00pm
Federal Judges Panel on Changes to Federal Rules of Civil Procedure and the Appointment Process for Federal Judges
John F. Kuppens, Moderator

Afternoon on your own / Hospitality Suite Open

12:30pm
Golf Tournament – Pinehurst # 5 Course

12:30pm
Quail Hunting

2:00pm
Historic Tour and High Tea

2:00pm
Wind Tunnel Experience

3:00pm
Wine Tasting

7:00pm – 9:30pm
Taste of North Carolina Dinner

SATURDAY, NOVEMBER 13th

8:00am – 8:30am
SCDTAA Membership Meeting

8:30am – 9:30am
Ethics
Professor Andrew L. Urich, Oklahoma State University

9:30am – 10:00am
Legislative Update/Status of Tort Reform

10:00am – 10:15am
DRI Update and State of South Carolina Bar
Carl L. Solomon, President, South Carolina Bar

10:15am – 10:30am
Break

10:30am – 11:00am
Important Appellate Opinions You Need to Digest
Nicholas W. Gladd

11:00am – 12:00pm
State Judges' Panel on Trial Issues Raised by South Carolina Contribution Among Tortfeasors Act
Thomas M. Shelley

Afternoon on your own / Hospitality Suite Open

12:30pm
Seagrove Pottery Tour

2:00pm
Historic Tour and High Tea

2:00pm
Wine Tasting

5:30pm – 6:30pm
Past Presidents' Reception (Invitation only)

6:30pm – 7:30
Cocktail Reception

7:30pm
Final Night Dinner & Dancing
(Black Tie Optional)

Legislative and Judicial Election Update Fall 2010

The general election will be held in November for the State House of Representatives and all 9 of the Constitutional Offices. For the first time in eight years, there will be a new Governor of South Carolina. In addition, there will be at least 16 new House members serving which means there will be many changes on the legislative committees including the House Judiciary Committee which will be dealing with Tort Reform again and the House Ways and Means Committee which will be dealing with the funding of the S.C. Judicial Department again.

In early 2011, there will also be elections for the Judicial Seats listed below. In addition, it is likely that the new Governor will appoint and the Senate will have the opportunity to confirm one or more Workers' Compensation Commissioners in 2011. Commissioner Lyndon's term expired June 30, 2010. Commissioner Roche is running for a Circuit Court Seat, which, if she is elected, would create a vacancy. The following information comes from and can be found on the Judicial Merit Selection Commission website.

Court of Appeals

Seat 1
The Honorable Paul E. Short, Jr., Chester, S.C.
Seat 2
The Honorable H. Bruce Williams, Columbia, S.C.

Circuit Court

5th Circuit, Seat 1
The Honorable DeAndrea Gist Benjamin, Columbia, S.C.

5th Circuit, Seat 1
Lisa C. Glover, Columbia, S.C.

5th Circuit, Seat 1
Robert E. Hood, Columbia, S.C.

5th Circuit, Seat 1
John P. Meadors, Columbia, S.C.

5th Circuit, Seat 1
Andrea Culler Roche, Columbia, S.C.

5th Circuit, Seat 1
James Shadd, III, Columbia, S.C.

5th Circuit, Seat 1
Larry C. Smith, Columbia, S.C.

5th Circuit, Seat 1
The Honorable Jeffrey M. Tzerman, Camden, S.C.

13th Circuit, Seat 2
Eric K. Englebardt, Greenville, S.C.

13th Circuit, Seat 2
J. Anthony Mabry, Simpsonville, S.C.

13th Circuit, Seat 2
Andrew R. Mackenzie, Greenville, S.C.

13th Circuit, Seat 2
The Honorable Letitia H. Verdin, Greenville, S.C.

Family Court

9th Circuit, Seat 1
Amanda Lee Callander, Charleston, S.C.

9th Circuit, Seat 1
Emily G. Johnston, Mt. Pleasant, S.C.

9th Circuit, Seat 1
Ben F. Mack, Charleston, S.C.

9th Circuit, Seat 1
Daniel E. Martin, Jr., Charleston, S.C.

9th Circuit, Seat 1
Rita J. Roache, Mt. Pleasant, S.C.

9th Circuit, Seat 1
The Honorable James A. Turner, Charleston, S.C.

9th Circuit, Seat 1
Alexandra DeJarnette Varner, Sullivan's Island, S.C.

Master-in-Equity

Dorchester County
The Honorable Frederick James Newton, Summerville, S.C.

Dorchester County
he Honorable Patrick R. Watts, Summerville, S.C.

Retired

Court of Appeals
The Honorable Jasper Marshall Cureton, Columbia, S.C.

Family Court
The Honorable Stephen S. Bartlett, Greenville, S.C.

Persons desiring to testify at public hearings shall furnish written, notarized statements of proposed testimony. These statements must be received by Noon, Tuesday, November 2, 2010. The Commission has witness affidavit forms that may be used for

Legislative Update cont.

proposed testimony. While this form is not mandatory, it will be supplied on request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel,
104 Gressette Building, Post Office Box 142,
Columbia, South Carolina, 29202.

SC Bar Interviews
Wednesday - Thursday, September 22-23, 2010

Citizens Committees Interviews
Monday- Tuesday, September 20-21, 2010

Report of SC Bar due
Week of September 27, 2010

Reports of Citizens Committees due
Week of September 27, 2010

Deadline for Bench and Bar Surveys
12:00 Noon on Thursday, September 30, 2010

Interview/Tests
Week of October 11, 2010

***Deadline for Complaints**
12:00 Noon on Tuesday, November 2, 2010

Public Hearings Begin
Tuesday, November 16, 2010-Thursday, November 18, 2010

****Nominations Submitted/Report Printed in Journals**
Thursday, January 13, 2011

End of 48-Hour Period
Noon, Tuesday, January 18, 2011

****Election**
12:00 Noon on Wednesday, February 2, 2011

***Dates to be confirmed.*

Circuit Court, At Large, Seat 9

In addition to the above Judicial elections, a vacancy exists in the office formerly held by the Honorable J. Michelle Childs, Judge of the Circuit Court, At Large, Seat 9, who resigned in order to serve as a Judge for the United States District Court, District of South Carolina. The successor will fill the unexpired term of that office which will expire June 30, 2015.

The Judicial Merit Selection Commission is currently accepting applications. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (T-Th).

The Commission will not accept applications after 12:00 Noon on Monday, September 13, 2010.

Deadline for Applications
12:00 Noon on Monday, September 13, 2010

Media Release Announcing Candidates/Notice to Citizens Advisory Committees
Monday, September 13, 2010

PDQ Summaries to Bar and Citizens Advisory Committees
Monday, September 20, 2010

E-Mail Survey to Bench and Bar
Monday, September 20, 2010

SC Bar Interviews
Tuesday- Wednesday, October 5-6, 2010

Lowcountry, Midlands, Pee Dee, and Piedmont Citizens Committees Interviews
Thursday- Friday, October 7-8, 2010

Upstate Citizens Committee Interviews
Wednesday, October 13, 2010

Report of SC Bar due
Week of October 11, 2010

Reports of Citizens Committees due
Week of October 11, 2010

Deadline for Bench and Bar Surveys
12:00 Noon on Thursday, October 14, 2010

Interview/Tests
Week of October 18, 2010; Test - Friday, October 22, 2010

***Deadline for Complaints**
12:00 Noon on Tuesday, November 2, 2010

Public Hearings Begin
Tuesday, November 16, 2010-Thursday, November 18, 2010

****Nominations Submitted/Report Printed in Journals**
Thursday, January 13, 2011

End of 48-Hour Period
12:00 Noon on Tuesday, January 18, 2011

****Election**
12:00 Noon on Wednesday, February 2, 2011

***Dates to be confirmed.*

ARTICLE

Strategy or Secrecy? The Cost of Failing to Inform the Court

by Wendy J. Keefer

Every litigator, at one point or another, will make a strategic decision that is not welcomed by the court in which a case is pending. When determining how best to handle a case, an issue or a particular process, part of developing a strategy must include not only what is procedurally available to the litigant and his attorney but also what potential repercussions –from opposing counsel and parties and from the court in which the case is pending – exist for each alternative. The recent imposition of stiff sanctions in a defamation case in which one party attempted to remove the matter to federal court provides the perfect educational tool for reminding ourselves of the importance of keeping the court informed of possible developments that may delay resolution of a case or matter. The need to keep the court informed is particularly important where potential actions being considered by a party's counsel may create significant inconvenience for the judge, court personnel and opposing parties.

In 2004 Dr. Thomas Wieters filed suit against, among others, Bon Secours-St. Francis Xavier Hospital, Inc. *Wieters v. Bon Secours-St. Francis Xavier Hosp., Inc. et al.* Case No. 2006-CP-10-1397 (new case number after earlier voluntary dismissal). The case arose following Defendants' submission of information about Dr. Wieters to the National Practitioner Databank. That information, according to Dr. Wieters' allegations, was false.

Within the first thirty (30) days following service of Dr. Wieters' complaint, Defendants removed the action to federal court. The basis for that removal focused on a defense in the action: Defendants asserted that a federal statute provided immunity (or at least a whole defense) from this suit. The Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §11101 et seq., insulates those who truthfully provide information to a professional review body. The district court disagreed with Defendants and concluded that the claim of defamation arose under state, not federal, law; thus, the case was not within the jurisdiction of the federal district court.

The parties then proceeded with the case in state court, including a voluntary dismissal without prejudice under S.C.R.C.P. 41(j) and an unsuccessful interlocutory appeal related to discovery matters. In 2009, the parties agreed to place the case on the multi-week docket in Charleston County. It remained on that docket and subject to a scheduling order for such cases. Pursuant to the deadlines established in the scheduling order, Defendants filed a motion for summary judgment and Plaintiff responded. At least one of the grounds for Defendants' motion related to the protections afforded by the HCQIA. Plaintiff responded, similar to Plaintiff's response to the removal of the case in 2004 based on that statute, that the statute did not protect the making of false statements, even if made to a professional review body. Defendants received Plaintiff's opposition to the motion for summary judgment on February 7, 2010.

A hearing on the summary judgment motion took place on February 23, 2010 and was granted as to one of the individual defendants. At that hearing a date certain of March 2 was set for the trial. Defendants indicated they would be at trial on that date. On March 1, the court qualified jurors for the multi-week docket, including the case at issue. Also on that date, Plaintiff submitted a pre-trial brief, including proposed jury instructions. Defendants' counsel reviewed those submissions the morning of March 2. Then, on March 2, 2010, Defendants filed a second notice of removal, stalling the start of any trial in this matter. Just a little over two weeks later, the federal district court again remanded the case to state court. The court issued a Notice of Sanctions hearing sua sponte on March 24, and on March 25, Plaintiff filed his own motion for sanctions against Defendants due to the costs incurred to schedule time and prepare for trial. The trial was to, but was unable to, due to the removal attempt, start March 2.

Nothing in the removal procedures set out in 28 U.S.C. § 1446 prohibits a second removal attempt within thirty (30) days of the filing of a pleading or motion or other discovery of facts that provide first notice of the grounds for removal. At times, grounds raised in an initial removal attempt are supplanted by completely new grounds as a result of information learned during discovery providing first notice of this new basis for removal. In other instances, the same basic premise may give rise to the second removal where facts asserted by the plaintiff in response to the initial removal are shown to be false or inaccurate after discovery progresses (i.e., new factual grounds exist for the removal). *See, e.g., Browning v. Navarro*, 743 F.3d 1069, 1079-80 n. 29 (5th Cir. 1984) (discussing subsequent removal after

Continued on next page

ARTICLE CONT.

remand); see also *O'Bryan v. Chandler*, 496 F.2d 403 (10th Cir. 1974). Thus, the real issue in the present case likely did not arise solely as a result of a second attempt at removal.

Though Defendants' counsel sought the advice of other professionals as to whether a second removal could be attempted, the court's reaction to that filing likely stems from another source: counsel's failure to inform the court at any point prior to the filing of the removal papers (and a failure immediately to inform the court upon the filing) that such an action was being contemplated. Indeed, as a result of Plaintiff's motion for sanctions, the state court reached several key factual conclusions.

First, as the court understood the situation, Defendants began contemplating a second removal on or around February 7, 2010, in response to Plaintiff's opposition to the motion for summary judgment. Yet, Defendants made no mention of this possibility at the court hearing on February 23, during which hearing the court considered not only the summary judgment motion (a decision upon which motion would be unnecessary and of no effect if removal successfully occurred), but set a firm trial date. Defendants indicated they would be ready for trial and made no mention that trial may not occur at all if they filed removal papers. The actual filing occurred at approximately 10:45 a.m. on the March 2 trial date. Indeed, the court appeared seriously troubled not only by the date on which the second removal was filed without prior notice but that the court was not notified of the removal filing until about 11:30 a.m. on March 2 (too late to avoid jurors' arrival at the courthouse, entitling them to mileage reimbursements) And, such notice came in the form of an email.

Second, at least as the state court viewed the facts, little difference existed between the arguments made for removal (and the facts supporting it) originally in 2004 and then again on March 2, 2010. It did not help Defendants' position that the federal district court so quickly remanded the matter. As the federal district court explained, the existence of a defense arising under federal law does not create a federal issue to support federal questions jurisdiction under §1331: "a defendant may not defend his way into federal court because a federal defense does not create a federal question under § 1331."

And, finally, witnesses at the hearing on the motion for sanctions admitted that no consideration was even given to the disruption to the court of the filing of a second removal.

The cost of this decision – more aptly, the cost of the decision to make this decision without immediately informing the court of the possibility – was high. The Rule 11 sanctions imposed included lost income to the plaintiff for cancelled appointments ($34,992.65), expert witness fees paid and lost income of an expert witness ($1,500.00), the cost of service of two trial subpoenas ($ 213.50), mileage for travel time to and from the sanctions hearing and several lost time payments or fees reimbursement to Plaintiff's counsel related to that hearing ($8,520.00), attorneys' fees for the time Plaintiff's counsel expended on March 2 as a result of the removal chaos ($7,200.00), attorneys' fees for the time Plaintiff's counsel expended to respond to the second removal ($1,140.00), the sanctions motion filing fee ($25), and transcript costs ($94.50). These sanctions totaled $53,685.65. In addition, the court imposed additional sanctions on Defendants for the impact on the court of Defendants' second removal. The additional sanctions included funds to be paid to the South Carolina Judicial Department ($6,313.00), funds to be paid to the Chief Justice's Access to Justice Commission ($5,000.00), funds to be paid to the Charleston County Clerk of Court ($2,550.00), totaling $13,863. The total sanctions imposed amounted to $67,548.65. Moreover, Defendants' counsel was ordered to write apologies to each member of the jury panel, along with a check to each juror for fifty dollars ($50). Order For Sanctions Against Defendant Hospital, *Wieters v. Bon Secours-St. Francis Xavier Hosp., Inc. et al.*, Case No. 2006-CP-10-1397 (July 1, 2010).

Undoubtedly, counsel is entitled to utilize whatever procedural mechanisms are legitimately available and in their clients' best interests. This case should not be viewed as a challenge to the right to seek removal to federal court – even a second time. Rather, this case presents a reminder to all counsel that strategy may involve, at times, waiting to inform opposing counsel or the court of intended maneuvers. It should not, however, include doing so in a way that threatens to disrupt entire court operations. Despite the fact that Defendants' counsel acted with proper legal support – the consultation with outside experts on the basis for a second removal supports that conclusion - nonetheless, Defendants' counsel here suffered extreme sanctions. Their plight does warn us all to be sure we are considering not only the strict letter of the rules and laws but the real life impact of our decisions on others involved in the judicial process.

A notice of appeal of the sanctions imposed in this matter is pending. All attorneys undoubtedly are interested in the final outcome. Regardless of that outcome, however, the importance of frank communications with the court remains. The allure of keeping the secret of your next strategic move in a case may simply not be worth the costs to you or your client.

ARTICLE

Lies and the Lying Liars Who Tell Them: An Examination of Fraud in the Application

by David M. Bornemann, Esq.

I. Introduction

I don't often quote Al Franken, much less use one of his books as an inspiration for the title of an article, but in this instance, I think it is a fitting device to introduce an examination of the treatment of fraud in the application under South Carolina workers' compensation law.

Suppose you are the owner of a construction company, and one of your employees has strained his back while bending to lift a 2x4. Immediately upon receiving the report, you send the employee to the doctor for an examination. Following an MRI, it is discovered that the employee has bulging discs at multiple levels and will require multilevel fusion surgery. The extent of the injury seems extreme relative to the employee's activity at the time of the injury; how could the employee have such serious pathology without having prior back problems? You review the employee's personnel file; prior to assigning the employee to a position, he completed a medical history questionnaire including the question, "Do you have any physical or mental conditions that limit your ability to work this job?" Sure enough, the form plainly indicates "No." On its face, it would seem that the claim is compensable and the employee is entitled to all medical treatment and benefits available under the Act. However, during the discovery process, you discover that the Claimant was diagnosed with degenerative disc disease with moderately bulging discs two years prior to his employment with your business. The employee counters this information stating that he did not list the prior problems because the situation had resolved and he had no continuing problems leading up to his injury with your company.

You relied on the employee's assertion on his medical questionnaire in making hiring and placement decisions. If the condition were known, the employee would not have been placed in the particular job. What remedy do you have? Since 1973 you have had the standard laid out in *Cooper v. McDevitt;* however, the answer may not always be as clear cut as you think.

II. *Cooper v. McDevitt and Street Company*

In 1973 the South Carolina Supreme Court handed down its decision in *Cooper v. McDevitt & Street Company*, 260 S.C. 463, 96 S.E.2d 833 (1973). Cooper was a welder by trade and had previously injured his back on a construction site in 1967. He received a fourteen percent impairment rating to the back and received a $5000 settlement. After settling his 1967 claim, Cooper went to work on several other jobs. In September 1970 the Claimant went to work for McDevitt & Street in Charleston constructing the St. Francis Hospital. Claimant did state on his pre-employment application that he had back problems and could do no heavy labor or lifting. The Claimant was terminated from this job several months later for absenteeism. Following his termination, Cooper applied for work as a welder for McDevitt & Street on the Williams-Brice Stadium expansion in Columbia. Cooper filled out a new application specific to the Columbia site; however, when asked whether he had now or ever had back trouble, he responded, "No." Cooper admitted that he intentionally falsified his response because he would have been fired from the Columbia job if they knew of his back problems. While working on the stadium expansion, Cooper sustained a new back injury while lifting a long piece of iron. The manager of the stadium project stated he relied on the application being true and confirmed it was a substantial factor in his decision to hire the Claimant. Furthermore, the management of the stadium project stated that they did not have access to the Claimant's prior application for the Charleston project when they made their hiring decision. This chain of events left the court to address the issue of whether a Claimant is entitled to recover workmans' compensation for his injury when he knowingly and intentionally falsified health information in his pre-employment questionnaire.

The court examined how other jurisdictions handled similar issues and decided to adopt a new three-factor test proposed by Professor Larson in his Workers' Compensation Treatise. "The general rule is that the following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3)

Continued on next page

ARTICLE CONT.

There must have been a causal connection between the false representation and the injury. 1A *Larson's Workmen's Compensation Law*, Section 47.53. The foregoing rule is followed and applied in the cases of *Martin Company v. Carpenter, Fla.*, 132 So.2d 400; *City of Miami v. Ford, Fla.*, 252 So.2d 228; *Air Mod Corp. v. Newton, Del.*, 215 A.2d 434; and *Volunteers of America of Madison v. Industrial Commission*, 30 Wis.2d 607, 141 N.W.2d 890. *See also* 136 A.L.R. p. 1124." *Cooper*, 260 S.C. 463, 468-469, 96 S.E.2d 833, 835 (1973).

The court determined there was "ample evidence to sustain the finding of the trial judge that the appellant was guilty of fraud in securing his employment through false representation as to his previous back injury and that the employer would not have hired him had he not misrepresented his physical condition." *Id.* The Claimant argued that the admission of his back problem to the Charleston job should impute the same knowledge to McDevitt & Street's Columbia location. The court did not find this argument compelling where the company's agents in Charleston had no control over the hiring process in the Columbia location and vice versa.

While acceptance of the three-factor test has become widely accepted across the country, the decision was not so clear in 1973. As an early adopter, the South Carolina Supreme Court only adopted the test by a 3-2 margin, with the dissent distinguishing the cases relied on by Professor Larson and asserting that any rule effecting compensation for misrepresenting a physical condition should only be enacted by the legislature.

III. What Constitutes a "Knowing" and "Willful" False Representation?

On its most basic level, to constitute a false representation the employee must actually make a statement; silence is generally insufficient to establish this standard. 3-66 *Larson's Workers' Compensation Law* § 66.04 (2010). The South Carolina Court of Appeals confirmed this position finding that an employee has no affirmative duty to disclose prior injuries or conditions to his employer. *Ferguson v. R.F. Moore Construction Co.*, 298 S.C. 457, 381 S.E.2d 496 (Ct. App. 1989).

The Court of Appeals in *Hartford Accident and Indemnity v. South Carolina Second Injury Fund* expanded *Ferguson* to impose no affirmative duty to disclose information not specifically asked by the employer. *Hartford*, 316 S.C. 420, 450 S.E.2d 110 (Ct. App. 1994). The employee in *Hartford* completed a job application which asked, "Do you have any physical condition which may limit your ability to perform the job applied for?" The employee answered, "No," despite two prior serious back injuries requiring surgery. The court upheld the compensability of the claim because there was no evidence the employee had any physical limitations at the time he applied for the job, and he subjectively had a good faith belief he could perform the job. The court held that the employer's question was very broad; therefore, the employee had a right to provide a broad answer.

Later, the claimant in *Jones v. Georgia-Pacific Corp.* responded "no" to a very similar question and was denied benefits. *Jones*, 355 S.C. 413, 586 S.E.2d 111 (2003). However, this claimant, Jones, admitted that she answered "no" because she was afraid she would not otherwise be offered the job, whereas the claimant in *Hartford* subjectively stated that he did not believe his prior conditions were relevant. Additionally, Jones also completed a detailed health history as part of her pre-employment physical exam and failed to disclose her preexisting back condition, leg pain, and bursitis. The lack of disclosure, combined with the knowing misrepresentation, was enough to satisfy the first prong of the *Cooper* test.

The *Hartford* case shows that it is very easy for an employee to claim that he did not disclose pertinent health information because he believed he was not impaired at the time of application. This problem can be easily avoided simply by asking direct and specific health questions. For example, in *Brayboy v. WorkForce* the claimant responded negatively to multiple specific questions about prior back injuries despite multiple prior injuries. *Brayboy*, 383 S.C. 463, 681 S.E.2d 567 (2009). Despite Brayboy's testimony that he believed he was not permanently impaired at the time he was hired, his misrepresentations were enough to disqualify him from receiving benefits under the Act. As proof of the "knowing" and "willful" nature of the misrepresentation, the court noted the claimant signed an acknowledgement stating, "MISREPRESENTATIONS AS TO PREEXISTING PHYSICAL OR MENTAL CONDITIONS MAY CAUSE FORFEITURE OF YOUR WORKERS' COMPENSATION BENEFITS." [emphasis in original] *Id.*, at 383 S.C. 464-465, 681 S.E.2d 567-568.

IV. What Constitutes a Reliance on the False Representation?

When an employer relies on an employee's assertions regarding his physical condition, the employer can be severely prejudiced by false statements. To show detrimental reliance, the employer must prove the employee's representation was a "substantial factor in the hiring." *Cooper*, 260 S.C. 463, 96 S.E.2d 833 (1973). This reliance must be substantial enough to have a direct effect on whether the employee would be hired or on what type of position the employee will be assigned. Therefore, if the employer would have hired the employee for the same position even if he disclosed his disability, the claim will not be barred.

Of course, since the passage of the Americans with

Disabilities Act, employers are no longer allowed to inquire into an applicant's medical history or require a physical exam until after an employment offer has been made. This does not affect the analysis of the *Cooper* test, but such health questions may now only be asked following a conditional offer of employment. *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003); 3-66 *Larson's Workers' Compensation Law* § 66.04 (2010). The Court of Appeals directly addressed this issue recently in *Fredrick v. Wellman, Inc. Fredrick*, 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009). The claimant argued that she misrepresented her disability after being given a conditional offer of employment; therefore, her misrepresentation could not have been relied upon in the hiring decision. The court found: 1) that the employee would not have ultimately been given her position if the employer was aware of her injury, and 2) that simply receiving a conditional offer does not terminate the employer's interest in truthful disclosure of health conditions. For the purposes of fraud in the application, the employee has a duty to provide truthful responses to health inquiries until receiving a final offer of employment and placement. This idea is supported by another recent case, *Brayboy v. WorkForce*, which recognized that an employer's reliance is twofold: "the employment application is important in the hiring and placement decisions." *Brayboy*, 383 S.C. 463 681 S.E.2d 567 (2009).

To establish reliance, the statement of the employee must be clear and direct enough to give the employer a reasonable basis to detrimentally rely on its content. A good example is *Jones v. Georgia-Pacific Corp* where the claimant lied about prior conditions on her application despite a disclaimer that disclosing them would not necessarily bar her from employment. *Jones*, 355 S.C. 413, 586 S.E.2d 111 (2003). The employee was placed in a position beyond her physical limitations and sustained a new injury. If she had been truthful in her application, the employer testified, he would still have hired her but would have found a job "that would not subject the pre-existing physical impairment to further deterioration." *Id.* Clearly the misrepresentation had a direct impact on the employment and the Claimant's job placement.

On the other hand, absent a clear and direct statement the court is not likely to deny compensability of the claim. A good example of this point is *Ferguson v. R.F. Moore Construction Co. Ferguson*, 298 S.C. 457, 458, 381 S.E.2d 496, 497 (Ct. App. 1989). The claimant in *Ferguson* did not fill out a written application and was not asked any questions about his health or physical condition; however, he admittedly told his employer that he was "strong, a good laborer, and could operate a jackhammer." *Id.* Soon after, the employee sustained a new injury to his back. The Court of Appeals held that Ferguson made no direct representations regarding his back and there was nothing in the record to indicate he did not believe his statements were true; therefore, they declined to refuse Ferguson benefits under the Act.

V. What Constitutes a Causal Connection Between the False Statement and the Injury?

Obviously, there are certain circumstances where an admittedly false statement on a job application will have little or no connection to a subsequent injury. (For example, a claimant that lies about his level of education and subsequently develops carpal tunnel syndrome will not be barred from receiving disability benefits. *Clarion Mfg. Corp. v. Justice*, 971 S.W.2d 288 (Ky. 1998); 3-66 *Larson's Workers' Compensation Law* § 66.04 (2010).) In South Carolina, *Givens v. Steel Structures, Inc.* is the first decision to address this question. *Givens*, 279 S.C. 12, 301 S.E.2d 545 (1983). Givens sustained an injury to his lower back resulting in permanent partial disability while working for another company. Less than one month after resolving his claim Givens applied for a job with Steel Structures and admittedly denied any prior injuries. It was also admitted that Steel Structures relied on these representations in hiring Givens. Givens sustained a new injury to the same area of the back six months later. Givens' physicians diagnosed degenerative disc disease aggravated by the cumulative effects of the two injuries. Although the Workers' Compensation Commission Appellate Panel believed no causal connection existed, the Supreme Court found that the cumulative nature of the injury to the same body part was sufficient to establish a causal connection and denied benefits.

The problem of a subsequent injury brings about the question of how high of a standard must be met to link two injuries together. The South Carolina Supreme Court recently addressed this in *Brayboy v. WorkForce. Brayboy,* 383 S.C. 463, 681 S.E.2d 567 (2009). Brayboy testified at this deposition that his back pain was "primarily in the same area;" however, he disputed the similarity at his hearing. The court found Brayboy's admission that the new injury was "primarily in the same area" to be "irrefutable evidence of a causal connection between the false information and the aggravation of his preexisting back injury." *Brayboy*, 383 S.C. 463, 469, 681 S.E.2d 567, 569 (2009).

However, the fact that a subsequent injury is sustained in primarily the same location as the preexisting complaint is not always, in and of itself, enough to create a causal connection. The Supreme Court clarified this point through its opinion in *Vines v. Champion Building Products. Vines*, 315 S.C. 13, 431 S.E.2d 585 (1993). Vines sustained a back injury requiring surgery and later returned to heavy labor. Approximately five years later he injured the

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ARTICLE CONT.

same location in his back when he fell backwards, striking a control panel and a handrail. Vines admittedly concealed his prior back condition to Champion. The court stated, "Although there was evidence indicating Vines was predisposed to back injuries because of his previous injury and surgery, Vines physician testified the accident alone without any prior injury would have been sufficient to cause an accident of this nature. Accordingly, Champion failed to prove a causal connection between the misrepresentation and the injury." [emphasis added] *Id.* This is distinguishable from Givens and Brayboy because their injuries would not have been as severe but for the cumulative nature of their preexisting conditions.

While South Carolina courts have not addressed many additional circumstances that could override a sure-fire causal connection, other jurisdictions have declined to find a causal relationship based on certain extenuating circumstances. For example, a Tennessee court held that, even where a claimant admittedly lied about having prior back problems but underwent a physical examination that failed to detect the condition, a claimant's subsequent work-related back injury was not causally related. "The court reasoned that the subsequent injury was no more causally related to the employee's misrepresentation than to the doctor's failure to find the condition." *Quaker Oats Co. v. Smith*, 574 S.W.2d 45 (Tenn. 1978); 3-66 *Larson's Workers' Compensation Law* § 66.04 (2010).

Another circumstance that may outweigh a clear causal connection is the length of time between the injuries. Courts typically will refuse to deny benefits when a significant amount of time has passed between two injuries. The Arkansas Court of Appeals held a second injury compensable in cases where 10 and 14 years had passed between claims. *Baldwin v. Club Prods. Co.,* 270 Ark. 155, 604 S.W.2d 568 (Ct. App. 1980); *Foust v. Ward School Bus Mfg. Co.,* 271 Ark. 411, 609 S.W.2d 88 (Ct. App. 1980). However, jurisdictions such as New Mexico have declined to enforce this standard even in situations where a claimant's subsequent injury occurred 19 years after the first. *Sanchez v. Memorial Gen. Hosp.,* 110 N.M. 683, 798 P.2d 1069 (Ct. App. 1990).

VI. Asserting Fraud in the Application as a Defense

Fraud in the application of course deals with the problem of employees purposefully withholding information about prior injuries and conditions. After an injury, sometimes evidence of a prior condition may not be found through typical discovery methods. Sometimes, this will result in a claim initially being accepted and an employer providing benefits for an extended period of time before discovering the hidden preexisting condition. While it is often unlikely that the employer and carrier will ever receive all of their expenditures back, the good news is that fraud in the application may still be asserted as a defense.

The Court of Appeals recently addressed the above set of facts in *Fredrick v. Wellman, Inc. Fredrick*, 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009). Following Fredrick's on the job injury, Wellman provided medical treatment and paid weekly temporary total disability benefits for over 150 days. The claimant asserted that the fraud defense was time barred as a means of terminating her benefits because fraud was not listed in Reg. 67-505 (suspending temporary total benefits after 150 days), Reg. 67-506 (terminating temporary total benefits after 150 days), or on the Form 21 (Employer's Request for Hearing). The court was not persuaded by this argument, citing S.C. Code Ann. § 42-9-260(F)(Supp. 2008) which allows an application for suspension or termination of benefits for "any cause."

The claimant also asserted that, because the Hearing Request did not assert fraud as a defense, Wellman was barred from arguing it at the hearing (the hearing request was originally filed on other grounds and Wellman did not discover the fraud until after filing). The court found the Hearing Request was not controlling. Wellman's initial response to Fredrick's claim reserved the right to amend their Answer. Prior to the hearing, Wellman timely filed its pre-hearing brief asserting the fraud defense; effectively amending their Answer. The court noted that Fredrick's concealment of her prior condition was the very reason Wellman did not discover the condition until after it filed for the hearing and allowed Wellman to proceed with its argument.

VII. How Can an Employer Protect Itself from Fraud in the Application?

If the employer relies on health information in making hiring and/or placement decisions, the most important way to safeguard its interests is through specific and detailed inquiries into the applicant's physical condition after a conditional offer has been made. Asking many specific questions such as "Do you currently or have you ever had back trouble of any kind?" will tend to generate more useful responses than more generic questions like "Do you have any physical condition which may limit your ability to perform the job applied for?" Specific questions limit an applicant's ability to justify untruthful answers through a subjective interpretation of the question and give an employer a stronger knowledge base to rely on in making hiring decisions. Additionally, an employer requesting health information should have the applicant sign an acknowledgment form similar to the one used in Brayboy. An acknowledgement that "untrue statements could result in forfeiture of workers' compensation benefits" is clear evidence that an applicant

knew the importance of providing accurate responses.

Another issue is whether an employee should be terminated if the employer believes he has committed fraud in the application. The Supreme Court stated in *Small v. Oneita Industries* that failure to terminate an employee does not affect the employer's ability to assert a fraud defense. *Small*, 318 S.C. 553, 459 S.E.2d 306 (1995). The court declined to place employers in a situation where if they terminate the employee they may be open to a suit for wrongful discharge, but if they retain the employee they would be liable for workers' compensation.

But what should you do if you learn of the misrepresentation after the hiring but before the employee sustains a new injury? The court in Small pointed out that scenario but declined to address it; only noting that other jurisdictions are divided as to whether retaining the employee vitiates the employer's reliance on the misrepresentation. The court could go either way, but be leery of the argument that an employer cannot acquiesce in the knowledge of its employee's condition and expect immunity from the Act later when the employee is reinjured. As an old legal maxim suggests, "it is fraud to conceal fraud." Following similar logic, an Arkansas court held that an employer that knew of the employee's prior injury but instructed him not to place that information on his application could not later assert the defense of fraud in the application. *Roberts-McNutt, Inc. v. Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985), aff'd, 288 Ark. 587, 708 S.W.2d 87 (1986). In South Carolina, an employee's false representation "does not make his employment contract void but merely voidable at the employer's option." *Small* at 318 S.C. 555, 459 S.E.2d 307. Therefore, the best practice would be to either terminate the employment or, if available, place the employee in a position within his doctor-ordered restrictions.

VIII. Conclusion

After beginning this article with a quote from Al Franken, I am inspired to end with a thought from another great American thinker, Homer Simpson. "It takes two to lie. One to lie and one to listen." In South Carolina, the employer must exercise great care during the application process in order to make sure it is tough for the "lying liars" to justify their answers when they get caught. While the Cooper test goes a long way toward protecting employers from assuming responsibility for injuries causally related to an unreported prior disability, it is up to the individual employer to be vigilant during the hiring process to make its protections work.

DRI News

John T. Lay Named 2010 Fred H. Sievers Award Recipient by DRI

The award is presented annually to the individual who has made a significant contribution toward achieving the goals and objectives of the organized defense bar, and will be presented during the DRI Annual Meeting in San Diego in October.

John T is a shareholder with Ellis, Lawhorne in Columbia. He was the 2009 President of the SCDTAA, and is also a member of the International Association of Defense Counsel, the Association of Defense Trail Attorneys and the American Board of Trial Advocates. He has been elected to the John Belton O'Neill Inn of Court, and is also listed in Best Lawyers in America, South Carolina Super Lawyers and the Order of the Justitia of the Litigation Counsel of America. In 2009 he was a recipient of DRI's Exceptional Performance Citation.

Sam Outten Selected as DRI Representative

Sam Outten of the Greenville Office of Womble Carlyle Sandridge & Rice, PLLC was recently selected for the South Carolina State Representative of DRI for a 3 year term commencing in October 2010 and will begin serving at the DRI annual meeting.

DRI has set up a Medicare Secondary Payer Task Force

The DRI MSP Task Force has assembled materials to assist you and your clients in making your way toward understanding these, at times confusing, laws and requirements. You will find background information and materials to teach you about the history and intent of the legislation. You will find links to the laws and regulations themselves as well as official government websites that provide additional information and materials. We have also established a list serve accessible through the DRI website to allow for the exchange of information and ideas as we all learn the best way to comply with these obligations, and we are working on a Best Practices Guide for your reference. Please use this website as your starting point for MSP compliance.

ETHICS ADVISORY OPINION

Ethics Advisory Opinion 10-04

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Ethics Advisory Opinion 10-04
SC Rules of Professional Conduct: 5.6(b)
Date: September 8, 2010

Facts

A lawsuit is filed in a SC Court. After over a year and a half of litigation, a settlement is reached whereby the defendant agrees to pay the plaintiff a sum of money. The settlement does not require court approval. As part of the proposed settlement, defendant desires confidentiality of the settlement amount and further desires that Lawyer A, the lawyer for the plaintiff, agree that Lawyer A may not identify or use the defendant's name for "commercial or commercially-related publicity purposes." Lawyer A may identify generally "a settlement was achieved against an industry" - ie: trucking or retail store. The fact that Lawyer A has sued the defendant is a matter of public record and nothing filed in the case was under seal.

Question

Would Lawyer's agreement to the confidential settlement on behalf of his client be ethical under the current rules?

Summary

It is improper to condition a settlement on the relinquishment of a right which is inherent in the right to practice law. The United States Supreme Court has held that lawyer advertising is a First Amendment right. Rule 5.6(b) prohibits settlements which contain restrictions on the right to practice law

Opinion

The issue of secret settlements has been addressed by Rule 41.1 of the South Carolina Rules of Civil Procedure. Initially, it should be noted that although this is not a disciplinary rule, this rule has strong ethical overtones; therefore, it should not be disregarded for purposes of an Ethics Advisory Opinion simply because of its inclusion in the rules of Civil Procedure, as opposed to the Rules of Professional Conduct.

The question presented in this case states that "after over a year and a half of significant litigation, just prior to trial, a settlement is reached whereby the defendant agrees to pay plaintiff a sum of money. The settlement does not require court approval. As part of the proposed settlement, defendant desires confidentiality of the settlement amount and further desires that Lawyer A, the lawyer for the plaintiff, agree that Lawyer A may not identify or use the defendant's name for 'commercial or commercially-related publicity purposes.'" Since this settlement does not require court approval, Rule 41.1 does not directly apply, although it expresses a clear public policy in favor of public access to settlement information where, as here, the public resources of the judicial system have led to it. Rule 41.1(a) states that the enforceability of private settlement agreements wherein the parties agree to have the matter voluntarily dismissed under Rule 41(a)(1) without court involvement is governed by general legal principles and not by Rule 41.1.

Rule of Professional Conduct 5.6(b) states that a lawyer shall not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a client controversy." Comment [2] to this Rule states that a lawyer is prohibited from agreeing not to represent other persons in connection with settling a claim on behalf of a client. The purpose of the proposed limitation in this settlement is aimed at preventing Lawyer A from advertising for clients in cases involving alleged similar conduct by this defendant.

Even though parties contracting among themselves may often waive certain rights, Rule 5.6(b) precludes contracting away rights associated with the practice of law, among them the right to advertise one's services pursuant to Bates v. Arizona 433 U.S. 350, 383-84 (1977). A settlement conditioned on the relinquishment of this right would therefore violate Rule 5.6

South Carolina Rule 5.6(b) is identical to the ABA Model Rule. ABA Formal Opinion 93-371, Restriction on the Right to Represent Clients in the Future (1993), explained the rationale behind Rule 5.6 as follows:

The rationale of Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second,

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ARTICLE

Non-Compete Provisions in Physician Employment Contracts:
What is their role in South Carolina?

by Ella S. Barbery

Non-compete clauses are a common provision in employment contracts in South Carolina, including those between physicians and their hospital and private practice employers. Although covenants not to compete are typically disfavored in South Carolina, they are enforceable as long as certain factors are met. Specifically, a court will uphold a non-compete clause as long as it is (1) reasonably necessary for the protection of the legitimate interests of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of an individual to earn a livelihood; (4) reasonable from the standpoint of public policy; and (5) supported by valuable consideration. *Rental Uniform Service v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983). Covenants not to compete, however, are subject to strict scrutiny, and if a non-compete agreement fails to meet any of the aforementioned criteria, the provision will fail. Additionally, even if a contract does not have a per se covenant not to compete, South Carolina law requires that any restrictions set forth in an agreement be subject to the same heightened scrutiny with which the courts analyze covenants not to compete if the restrictions have the effect of a non-compete clause. *See, e.g., Carolina Chemical Equip. Co., Inc., v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996).

With regards to the medical profession, there is no South Carolina case that has definitively answered whether or not covenants not to compete are enforceable against physicians or has otherwise set forth the specific parameters under which such provisions would be enforceable. But *see, Moore v. Rural Health Services, Inc.,* 2007 WL 666796 (D.S.C. Feb. 27, 2007)(stating that a jury could find the plaintiff-physician's non-compete provision invalid and unenforceable if it was determined that the defendant-hospital breached the employment agreement by firing the physician without cause or proper notice). Although non-compete provisions are presumed enforceable and are, therefore, routinely incorporated in physician employment contracts, their enforceability against physicians may be questioned on public policy reasons regarding a patients' access to a particular physician and continuity of care. Likewise, there may be antitrust or unequal bargaining positions that could also impact the enforceability of non-compete agreements.

In a recent case, a physician non-compete agreement was challenged in State court. In *Brownlee v. Pathology Associates of Greenville, P.A., et al,* a 2010 case that was pending in Greenville County's Business Court, a dispute arose over the enforceability of a "Payback Provision" used in a former physician's employment contract. The provision required the doctor to pay the practice 15% of his gross receivables for a period of two years upon his departure from the practice if he went to work within a thirty mile radius of Greenville County. During a hearing on the doctor's motion for injunctive relief that was held before The Honorable Edward Miller, counsel for the doctor argued that the restrictions of the "Payback Provision" had the same effect as a non-compete clause and, therefore, were subject to the same strict scrutiny regarding its enforceability. Counsel went on to state that except under a limited situation where a physician is attempting to steal his former employer's practice or patients, there is no valid reason for enforcing covenants not to compete against a medical professional, and in this particular case, the provision constituted an unenforceable "penalty." Counsel explained that non-compete provisions unduly burden a physician's ability to earn a living by forcing him to possibly relocate and move from the area to continue providing medical services. This is in direct violation of South Carolina Regulation 81-60, which provides inter alia that a physician shall be free to choose whom to serve, with whom to associate, and the environment in which he provides medical services. Citing AMA Opinion 9.02, counsel further argued that non-compete agreements in the healthcare setting violate public policy by restricting competition, disrupting continuity of care, and potentially depriving the public's access to healthcare. Judge Miller took the case under advisement and ordered an expeditious mediation. The case was resolved at mediation before Judge Miller ruled on any of the issues.

In light of the arguments made in the *Brownlee* case, though, it is clear that the continuing role of non-compete clauses in physician contracts is ques-

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tionable absent extremely compelling circumstances, and the arguments against the enforceability of covenants not to compete against physicians will likely continue until a South Carolina court is forced to rule on the issue. Even though the words "covenant not to compete" may not appear anywhere in the agreement, one cannot escape the heightened scrutiny with which South Carolina courts analyze non-compete agreements if the restrictions contained in the agreement have the ultimate effect of a covenant not to compete. Furthermore, the South Carolina Supreme Court recently prohibited Judges or parties from rewriting or "blue-penciling" the restrictions set forth in non-compete agreements to make an otherwise unenforceable agreement enforceable. *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.,* 387 S.C. 583, 694 S.E.2d 15 (2010)(holding that the restrictions in a non-compete agreement must stand or fall on their own terms). Consequently, an employer wishing to enforce a non-compete agreement or other restrictive covenant against a physician cannot rely on an "off-the-shelf" provision and must spend time on the front end preparing restrictions that are clearly defined, limited in time and scope, and are reasonably necessary to protect a legitimate business interest. Accordingly, every hospital, private practice, and physician should re-visit any restrictions imposed in their employment contracts to make sure that those restrictions comply with South Carolina standards.

Ethics Advisory Opinion cont.

the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to 'buy off' plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the countervailing policy favoring the public's unfettered choice of counsel.

Texas Ethics Opinion 505 (August 1994) involved the same issue. In interpreting Rule 5.6(b), Texas adopted Comment 2 stating that a lawyer is "prohibited from agreeing not to represent other persons in connection with settling a claim on behalf of a client." The same language appears in a South Carolina comment. Texas discussed the very issue of whether solicitation is a part of the right to practice law in Opinion 505:

Is 'solicitation' protected under the umbrella of 'a lawyer's right to practice law?' Solicitation generally describes conduct by an attorney or a third person acting for an attorney, which specifically targets potential clients, with the intent of pecuniary gain. To the extent that such is permitted under the State Bar Rules, and other applicable state and federal statutes, solicitation is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement than it is restricted in the Rules and applicable law.

Nearly all authorities prohibit a settlement which would preclude a lawyer from handling future cases, which is admittedly not the exact same issue. For example, the Colorado Bar in its Opinion 92 (1993) discussed a variety of indirect restrictions that could run afoul of its Rule 5.6(b), including "barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party, preventing the settling claimant's lawyer from using a certain expert witness in future cases, and imposing forum or venue limitations in future cases brought on behalf of non-settling claimants." The Opinion formulated a test to use to help determine whether a given provision in a settlement provision improperly restricted a lawyer's right to practice. As stated by the Opinion, "the test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such limitations." This seems to be the crux of the issue in the advertising scenario.

Another example of a restriction which would violate Rule 5.6 serves to illustrate the above point. There is no dispute that Rule 5.6 prohibits a non-competition agreement (other than a retirement agreement) prohibiting a lawyer who leaves a particular law firm from practicing within a certain radius of the other law firm's office. Such an agreement is prohibited even though it is clear that the lawyer would still have the right to practice law in some fashion.

Note: The Committee reminds Bar members that all attorney advertising must be in compliance with the Rules of Professional Conduct, including Rules 7.1, 7.2 and 7.3.

ARTICLE

Service of Discovery in South Carolina Courts, a/k/a Tag, You're it

by Andrew Cole

The South Carolina Rules of Civil Procedure are a sophisticated form of the playground game of tag. Various deadlines, timelines, and case handling procedures are first triggered with the delivery of an underlying pleading or legal document. The term "service" is not specifically defined in the Rules of Civil Procedure; however, it is clear that the term is used to describe the delivery of documents in a legally sufficient manner such that the intended recipient has received actual notice, or the legal equivalent, of the important legal documents at issue.[1] Tag – you must answer the complaint in thirty days. Tag – you, witness, must respond to my subpoena. And the subject of this article – Tag – you must answer my interrogatories, requests for production, and requests to admit.

In Circuit Court, any party may serve any other party with interrogatories (Rule 33), requests for production (Rule 34), and requests for admission (Rule 36). Copies of these discovery pleadings "shall be served upon each of the parties of record" unless the named parties are "in default for failure to appear" or "[u]nless otherwise ordered by the court because of numerous defendants or other reasons." Rule 5(a), SCRCP. The inclusion of discovery under Rule 5 is not explicitly stated, but likely falls within the "other similar papers" catch-all in the list of pleadings required to be served. [2] Rule 5(d), SCRCP, makes clear that only certain papers that are served on the parties must also be filed with the court. It is here that the service rule specifically references by incorporation Rule 26(g)(1), SCRCP, that "the party requesting discovery shall serve the [discovery] request on other counsel or parities, but not file the notice or materials or matters discovered."

Service is accomplished by actual service on a party's attorney or by delivery via U.S. Mail. Rule 5(b)(1), SCRCP. [3] Again, the importance of properly serving a party with discovery is that it starts the clock ticking for the recipient of the discovery to respond. Without the "tag," the responding party is not "it" and are not required to respond. *See Salley v. Bd. of Governors, UNC, Chapel Hill, NC,* 136 F.R.D. 417 (1991) ("actual notice by a means other than that authorized by Rule 5(b)[, FRCP, like via fax,] does not constitute valid service and is not an exception to the rule.")[4] That is, the 30 day time limit[5] for the party to respond to interrogatories (Rule 33(a)) or requests for production (Rule 34(b)) does not start. Likewise, if service is inadequate, then the 30 day time limit for a party to respond to requests to admit does not run and the requests are not deemed admitted. See Rule 36(a), SCRCP. With inadequate service, the party seeking discovery arguably waives its ability to seek redress under the discovery sanctions Rule 37, SCRCP, which rule provides the court with much discretion to issue orders ranging from compelling discovery, to awarding attorney's fees and costs, to striking whole pleadings.

As the above illustrates, the default requirements for how a party must serve discovery can impact the later enforcement of the discovery. If one complies with the actual and/or mailing service set forth in Rule 5(b)(1), SCRCP, this may not be an issue. However, as what now is common discovery practice among the construction bar, much of the discovery pleadings may fall outside the rules and protections they provide.

I first noticed this change in proceedings several years ago. It seemed innocuous when I received it. Plaintiffs' counsel in a medium-sized case with only six defendants forwarded discovery via e-mail on the parties noting something like: "Attached are the initial interrogatories and requests for production produced on Defendant X. Original copies are only being sent to Defendant X. Please let us know if you would like a mailed copy." Although not technically compliant with the civil procedure discovery rules, this e-mail notice made sense. It effectively reduced the amount of paper necessary for discovery, it delivered the discovery quickly, and it reduced costs for the sending party. This method also dovetailed nicely with the electronic filing (CM/ECF) that the Federal Courts were developing. However, while the federal electronic filing is possible because attorneys affirmatively consent to electronic service under the CM/ECF system, the construction discovery was only voluntary.

I realized the limitation of the voluntary construction discovery when I received an e-mail in a case asking why I had not answered some discovery that had been due for quite some time. I combed through our paper file and my e-mails. My paralegal and secretary did the same. We had no record of receiv-

Continued on next page

ARTICLE CONT.

ing the requested discovery, which I was informed, had been served on us by e-mail only. The matter was easily resolved after we accepted service of the discovery requests and subsequently filed our responses. However, this incident pointed out two important limitations with our voluntary discovery procedures that had essentially evolved over time: (1) there is a fundamental flaw with a complete reliance on e-mail; and (2) the serving party had no way to enforce compliance with their discovery that they thought had been served.

The default service rules must be strictly construed. "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Farnsworth v. Davis Heating & Air Cond., Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, __ (2006) (citing *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)).

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

SC Dept. of Trans. v. First Carolina Corp. of SC, 369 S.C. 150, 153-154, 631 S.E.2d 533, 535 (2006) (internal citations and quotations omitted).

While the service requirements must be strictly adhered to under the default provision of Rule 5, the rules give the trial court some discretion to relax the service rules when "otherwise ordered by the court because of numerous defendants or other reasons." Rule 5(a), SCRCP. What the rules allow to be relaxed is outlined in Rule 5(c).[6] Notably, this subpart focuses on the "unusually large number of defendants" and their impact on the pleadings. That is, "[t]his rule permits the trial court to exempt the plaintiff and the defendants from the normal requirement of serving answers to cross-claims or counterclaims made by *co-defendants* when there are numerous defendants." James F. Flanagan, South Carolina Civil Procedure, p.45 (2nd Ed. 1996).

The careful reader will note that although Rule 5(c) in conjunction with Rule 5(d) impliedly gives the court the discretion to expand the service requirements, there is no explicit grant to expand service of discovery pleadings by means other than actual service or by mail. Do any of the rules of civil procedure allow service by alternative means, like via e-mail? The answer may be no. However, at least three of the rules arguably give the court the discretion, with the consent of the parties, to enter into a stipulated, alternative method of service.

The rules of civil procedure start with the most general proclamation that the rules "should be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. Pursuant to this general understanding, "[u]nless the court orders otherwise, the parties may by written stipulation… modify the procedures provided by these rules [of civil procedure] for other methods of discovery." That is, "Rule 29 permits the parties to waive any of the rules regarding discovery." Flanagan, p. 243. "The parties, however, cannot by stipulation extend the time for response to interrogatories, document requests, and requests to admit." Rule 29, SCRCP (reporter Notes). Lastly, Rule 16 regarding pre-trial hearings and status conferences conducted by the court provides a framework for the court to issue pre-trial orders to streamline the trial process.

Despite the importance of entering into

consent orders that help define alternative methods of service, these are rarely implemented. Such an order, entered into early in the litigation, should streamline a case. Topics to consider for the alternative discovery service consent order should include the following:

- What form of alternative service will be deemed sufficient: e-mail, facsimile, text message, Twitter post, etc.?
- What will be considered proof of service? For example, with an e-mail delivery, will a showing that an e-mail was forwarded to a correct address and that it was not returned (bounced back) be proof that the e-mail was delivered?
- Must the original copy of the discovery (i.e., the sent e-mail, the fax paper) be kept in the same format that it was sent?
- What is the actual date of service, which, with e-mails, would likely be the day the e-mail was forwarded? Note that the service date could be on a weekend. (As the time for responses cannot be enlarged by consent of the parties, the five extra days added to a response pursuant to Rule 6(e), SCRCP, is likely inapplicable.)
- Are any other forms of pleadings, deposition notices, hearing scheduling, etc. that the parties will also stipulate to alternative service?
- If there are multiple e-mails to a party, is service on one e-mail account sufficient for service?
- Is there a stipulated format for the discovery service and/or production?
- What will constitute certificate of service? Must a receiving party send a reply to the produced pleading? (Such a reply would appear to comport with Ruled 4(j), SCRCP, regarding the process for acceptance of service.)
- Will there be added Rule 11, SCRCP discussions between the parties before motions to compel are filed?

Conclusion:

The South Carolina Rules of Civil Procedure do not explicitly allow for alternative methods of service of discovery. For those parties that wish to serve discovery via e-mail, unless a consent order regarding and allowing an alternative method of service is adopted by the trial court, they may find themselves outside the protections and enforcement power of the rules. That is, the party that thinks they served their discovery on another may find that they hadn't actually tagged the recipient and started the discovery clock ticking. However, in the spirit of the rules and with the assistance of the court, the parties can outline and file a stipulated method of conducting and serving discovery. This will be a benefit for the construction bar attorneys who find themselves in multi-party litigation with voluminous document discovery.

Footnotes

1 Accord, "Service [is t]he formal delivery of a writ, summons, or other legal process…. Also termed *service of process*." Black's Law Dictionary, p.1372 (7th Ed. 1999).

2 Rule 5(a), SCRCP lists the "pleadings and other papers" to be served as: (1) written orders; (2) pleadings subsequent to original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; (3) written motions, other than ones which may be heard ex parte; (4) written notices; (5) discovery requests and responses; (6) appearances; (7) demands; (8) offers of judgment; (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers. The Note to the 2005 Amendment to Rule 5(a) states that the rule was amended to "make[ ] explicit that all major documents and papers, including, but not limited to, pleadings and amended pleadings, discovery requests, and responses, motions and similar papers are to be served on every party of record."

3 Rule 5(b)(1) regarding how service is made reads:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

4 The *Salley* case is interesting. After finding that service by fax did not comply with Federal Rule of Civil Procedure 5, the court found that plaintiff still showed "exceptional good cause" why defendant should still be required to respond to the improperly served discovery. Plaintiff was able to demonstrate that because defendant had previously answered discovery that was served via fax, that defendants had "waived their rights to insist on compliance with Federal Rule of Civil Procedure 5(b)."

5 Or 45 days if the initial discovery is served with an initial summons and complaint served on a defendant. Rules 33(a) & 34(b), SCRCP.

6 Rule 5(c), SCRCP, regarding numerous defendants reads in full: "In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleadings and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs."

ARTICLE

Discovering the New Interstate Deposition Law

by Jay Hupfer & Eric Fish

On March 24, 2010 Governor Mark Sanford signed into law the Uniform Interstate Deposition and Discovery Act (UIDDA), the purpose of which is to provide an efficient and inexpensive procedure for parties conducting out of state litigation to both depose individuals and seek the production of documents within the State of South Carolina.

The Act was originally created by the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (ULC), whose goals are to both simplify and standardize the procedures from various states in the hopes of creating a more manageable system for out-of-state litigation. The Uniform Law Commission is currently in its 118th year and identifies itself as providing states with non-partisan legislation designed to bring stability to critical areas of state law. Best known for the Uniform Commercial Code, Uniform Probate Code, and the Uniform Trust Code, ULC drafts legislation for adoption in the states that reduces the need for litigants to deal with different laws as they conduct business within the different states and protects against Federal preemption of areas of traditional state law.

The UIDDA was completed by the Uniform Law Commission in 2007 after a two year drafting process that involved a cadre of advisors, including representatives of Federation of Defense and Insurance Counsel and observers from the American College of Trial Lawyers. The final product has received wide support and has been adopted by sixteen (16) states including Delaware, Tennessee, Virginia, Maryland, and Kentucky. An additional 15 introductions are expected during the legislative sessions held in 2011. The UIDDA creates a system which requires a limited amount of judicial intervention and oversight, making the process more cost effective, largely because it eliminates the need to hire local counsel in states in order to obtain an enforceable subpoena. Widespread enactment is necessary for the realization of the goal of reducing barriers to impacting out of state discovery requests.

In order to comply with the Act, a party is required to submit a foreign subpoena, i.e. from the state the trial is to be held, to the clerk of court in the county where the party wishes to conduct discovery. The subpoena may includes requiring a person to attend a deposition, produce documents for inspection, and permit the inspection of premises. It does not include the inspection of a person as governed by FRCP Rule 35. The Act specifically states that the issuance of the subpoena under the Act does not constitute an appearance in courts of the State of South Carolina. When the party has submitted a foreign subpoena, the clerk of court will then issue the subpoena from the discovery state, and such a subpoena must incorporate the terms used in the foreign subpoena as well as contain the name, address, and telephone numbers of the all counsel of record and pro se parties. The process envisioned by the Uniform Law Commission is that the attorney from the trial state will obtain a copy of the subpoena form from the discovery state, and then prepare a trial state subpoena using the terms called for in the discovery state. The clerk of court of the discovery state will then issue a subpoena identical to the one submitted from the trial state. As a consequence, the only documents that are required to be submitted to the clerk of court in the state in which discovery is sought is the subpoena from the trial state and the draft subpoena from the discovery state.

The Act specifically requires that the information sought under the subpoena and the manner in which it is sought must comply with the South Carolina Rules of Civil Procedure thus presumably protecting South Carolina residents who become non-party witnesses from unduly burdensome discovery requests. This is further strengthened by the requirement that any motion to quash or protective order much be submitted to the court in the county in which discovery is sought to be conducted. If a motion regarding the subpoena is filed, the lawyer from the trial state must comply with the South Carolina laws governing an appearance within its court system which would presumably require hiring of local counsel.

The UIDDA is a positive development in South Carolina law. The act is cost effective for lawyers and the act is fair to deponents and other parties involved in litigation. The procedures of this uniform act parallel the way one obtains and enforces subpoenas in federal district court on a witness who is found outside of the filing jurisdiction, so counsel should be able to easily adapt to the new rule..

Case Notes

Torts and Insurance Case Updates

By Frances G. Zacher

O'Neall v. Smith, et al., Op. No. 26826 (S.C. Sup. Ct. Filed June 14, 2010) (Shearouse Adv. Sh. No. 23, at 24).

In this certified question, the Supreme Court of South Carolina considered the following question: "Does a plaintiff who has protected a defendant from personal financial responsibility through a covenant not to execute on that defendant's assets violate the public policy of South Carolina relating to punitive damages by seeking an award of punitive damages where payment of the punitive damage award will not come from either the defendant or from a source for which the defendant is responsible?" The Court decided the question in the negative.

Patricia and Michael O'Neill (Plaintiffs) sued Ormega and Smith and Yolanda Adams (Defendants) seeking compensatory and punitive damages as a result of a vehicular accident. The action was brought in the United States District Court for the District of South Carolina based on diversity jurisdiction, and Plaintiffs served a copy of the complaint upon State Farm, their UIM carrier. State Farm tendered the limits of the policy in exchange for Plaintiffs signing an "Agreement and Covenant Not to Execute" in which they agreed not to execute any judgment that they might obtain against the personal assets of Defendants and instead they would pursue recovery only through UIM coverage.

State Farm then moved for partial summary judgment on Plaintiffs' claim for punitive damages, arguing that the covenant relieved Defendants from personal liability and that allowing Plaintiffs to seek punitive damages "would be misleading to the point of thwarting public policy and would perpetuate a fraud upon the court and the jury because it would be based upon the fiction that Defendants could be punished by an award of punitive damages." State Farm maintains punitive damages are intended to punish the wrongdoer and to deter the wrongdoer and others from engaging in similar conduct, but in this case a covenant not to execute protects Defendants from personal liability so they cannot be punished and there is no deterrence of Defendants or others. State Farm further argues it could promote collusion among nominal adversaries and its defense could be handicapped because "Defendants have no incentive to participate or cooperate" if they do not face personal liability.

The Court turned to S.C.Code Ann. § 38-77-160 (2002), which provides that UIM coverage must be offered to an insured "to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault ... underinsured motorist....." therefore, stated the Court, once the damages of Plaintiffs, State Farm's insureds, exceed the liability insurance limits of the at-fault motorist, State Farm's underinsurance contract with Plaintiffs is triggered statutorily. Whether or not the at-fault motorist has other assets out of which the excess damages could be paid is irrelevant. Plaintiffs are not legally required to pursue the assets of the at-fault motorist, although they may pursue the claim in order to establish the amount of excess damages sustained. Concomitantly, it is irrelevant that the excess damages are not actually paid by the at-fault motorist. The only relevant question is whether or not the damages sustained exceed the liability insurance limits of the at-fault motorist.

The Court determined that allowing the suit for punitive damages under this set of facts would not violate public policy since "punitive damages serve additional purposes beyond punishing a specific individual." Because the goals of deterrence of similar behavior by others, as well as vindication of the plaintiffs' rights, re met by the subsequent suit, to deny an injured party the benefit of the party's own UIM coverage "would itself violate public policy because it would abrogate the purpose surrounding UIM coverage, which is to benefit the insured party, and would also thwart the other purposes for imposing punitive damages beyond imposing a financial penalty on the tortfeasor; namely, deterrence and vindication of the private rights of the injured plaintiff." Finally, the Court stated, "State Farm set its premiums with the knowledge that they are liable for compensatory and punitive damages under the insurance contract, and it cannot now be heard to complain that the delivery of benefits under the contract would thwart public policy."

Grinnell Corp. v. Wood, et al., Op. No. 26869 (S.C. Sup. Ct. Filed August 16, 2010) (Shearouse Adv. Sh. No. 33, at 58).

Following an injury on the job, John Wood successfully filed a workers' compensation action against his employer, Grinnell Corporation (Grinnell), a division of Tyco. Wood subsequently sought UM and UIM coverage in a separate suit against American Home Assurance Company (American Home), the insurer for the company car, and his own personal coverage with Government Employees Insurance Company (GEICO). Grinnell then filed this declaratory action against all three

parties, seeking a declaration from the court that it had properly rejected UM and IUM coverage in its policy with American Home.

The trial court granted summary judgment to Wood and GEICO, finding that American Home failed to make a meaningful offer of UM and UIM coverage to American Home, and ordered the reformation of the policy to include additional UM and UIM coverage. The court of appeals affirmed.

The Supreme Court reversed. South Carolina statutory and common law requires that an insurer make a "meaningful offer" of UM and UIM coverage to thee insured, such that the insured be made aware of his options and be able to make an informed decision about coverage. S.C. Code Ann. § 38-77-350(A) outlines what information must be included in forms used by insurers to offer optional insurance coverage and, if satisfied by the insured, a presumption arises under § 38-77-350(B) that the insured voluntarily rejected additional coverage. If the requirements of (A) are not met, however, the insurer can still show that a meaningful offer was made by satisfying the criteria set forth in *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518 (1987).

Under *Wannamaker*, one of the relevant factors as to whether an insurer made a meaningful offer is the sophistication of the purchaser of insurance and, in this case, that factor proved to be the most persuasive to the Court. Gerald Goetz, the corporate officer in charge of purchasing insurance for Grinnell and other Tyco subsidiaries, had a degree from the Insurance Institute, and had taken graduate courses at the College of Insurance. He had worked in the Risk Management department since 1978, and his job description had included the purchase of insurance since that time. Goetz also testified that it was Tyco's corporate policy to decline optional UM and UIM coverage to limit its deductible. As a result, even though the form used by American Home did not comply with the criteria set forth under § 38-77-350(A), and although Goetz failed to return the form denying the additional coverage, the Court found that Goetz was aware of his options and understood that he had the right to purchase additional coverage, and therefore a "meaningful offer" was made, but declined, by Grinnell.

Note: In another recent case factually similar to Wood, the South Carolina Supreme Court also held that a meaningful offer was made and declined in *Ray v. Austin, et al*., Op. No. 26858 (S.C. Sup. Ct. Filed August 16, 2010) (Shearouse Adv. Sh. No. 32, at 29).

Chester v. South Carolina Dept. of Public Safety, et al., Op. No. 26833 (S.C. Sup. Ct. Filed August 23, 2010) (Shearouse Adv. Sh. No.34 , at 17).

In this case, the South Carolina Supreme Court considered whether a defendant sued under the Tort Claims Act has the ability to force the plaintiff to sue other tortfeasors. The case involved Carolyn Chester, whose decedent was killed in a multiple-vehicle accident on Interstate 95 after heavy smoke on the road obstructed visibility. Many people involved in the accident brought actions against Chester in Hampton County, who then brought suit against several Tort Claims Act (TCA) defendants in Dorchester County. Chester then settled with several defendants in the Hampton County suits.

The Dorchester TCA defendants contended at trial that they were entitled to have the judge order appellant to join other alleged tortfeasors (including many with whom appellant had already settled in Hampton County) as defendants under Rule 19, SCRCP. The trial court agreed, citing S.C. Code Ann. § 15-78-100(c), which provides that "when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined."

The Supreme Court reversed, finding that an appellant cannot be required to sue additional parties in order to afford the named defendants their potential right to proportionate liability under § 15-78-100(c). First and foremost, stated the Court, "a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." Furthermore, if more than one respondent is found liable by the jury, liability would be apportioned amongst the respondents. Finally, the TCA defendants would be entitled to a set-off of any settlement already received.

Richitelli v. Motiva Enterprises, LLC d/b/a Texaco, et al., Op. No. 4707 (S.C. Ct. App. Filed July 7, 2010) (Shearouse Adv. Sh. No. 27, at 33).

Christie Richitelli was injured in 2001 when her car was struck by a wrecker driven by Harry E. Parker and displaying decals that read, "North Main Texaco, Greenwood, South Carolina." North Main Texaco was owned by Thomas Sprott and operated on property owned by H.D. Payne & Co., Inc. and H.D. Payne & Co. (Payne), of which Hayne Workman was the managing partner. North Main Texaco was operated under a Marketer Agreement, under which the station was required to sell only Texaco fuel and meet other Texaco-mandated provisions. Nevertheless, the Marketer Agreement stated that the facility was an independent business identity. A Retail Facility Standards Manual was also provided to the business, which covered signage and other promotional materials.Initially, Richitelli and her husband sued only North Main Texaco, as well as Parker and Sprott. A settlement was reached with Parker and Sprott. Thereafter, the Richitellis filed an Amended Complaint against Parker, Sprott, Texaco, Payne and Workman, alleging, inter alia, that Parker was an agent of Texaco on the date of the accident. Texaco moved for summary judgment, and the trial court granted the motion, finding that the Richitellis,

as a matter of law, could not establish an agency relationship between Parker and Texaco. The Richitellis moved to alter or amend the summary judgment order, and when the trial court denied the motion, they filed an appeal.

In affirming the trial court's grant of summary judgment, the Court of Appeals stated that the question of agency hinges on "the right of the purported master to control the actions of the purported servant rather than the actual exercise of this right." The Court looked to *Jamison v. Morris*, 385 S.C. 215 (2009) in which the South Carolina Supreme Court held that a franchisor is not vicariously liable for a tort committed by an independent gas station when the franchisor only controls aspects of the franchisee's business which deal with uniformity of appearance and quality of service. The Court of Appeals found it relevant that neither the Marketer Agreement nor the Retail Facility Standards Manual addressed operations of a wrecker service by the franchisee.

Rutland v. South Carolina Dept. of Transp., Op. No. 4721 (S.C. Ct. App. Filed August 4, 2010) (Shearouse Adv. Sh. No. 31, at 181).

On June 7, 2003, Tiffanie Rutland sustained fatal injuries after her husband's uncle, Joseph Bishop, lost control of his Chevy Blazer and she was partially ejected from the side window of the vehicle. The decedent's husband Clarence Rutland (Rutland), as the personal representative of the decedent's estate, received a $30,000 settlement from Bishop's automobile insurance policy. He subsequently filed a wrongful death action against SCDOT. He amended the complaint to add REA Construction Company and General Motors (GM) as defendants. REA Construction Company was voluntarily dismissed prior to trial. Also prior to trial, Rutland reached a settlement with GM totaling $275,000. In approving the settlements with both GM and the auto insurance policies, the trial court allocated part of the settlements to the wrongful death claim, and part to the survival action. The Bishop and GM settlements totaled $305,000.

A jury awarded Rutland $300,000 against SCDOT at trail for the decedent's wrongful death. SCDOT subsequently filed a motion to set-off the proceeds of the Bishop and GM settlements. The trial court granted the motion for set-off, reduced the verdict against SCDOT to zero, and also denied the motions for new trial filed by Rutland. Rutland filed a motion to reconsider, at which time the trial court concluded the settlement agreement should be reallocated based on the insufficiency of the evidence to support a survival claim, which was not alleged as a cause of action in Rutland's original or amended complaint.

After reviewing the record, the Court of Appeals affirmed the trial court's holdings. First, the Court agreed that there was no evidence that the decedent endured "conscious pain and suffering" to support a survival claim and, therefore, concluded the trial court did not err in granting SCDOT's motion for set-off. Furthermore, because SCDOT was not a party to the Bishop and GM settlements and the settlement trial court's order expressly granted SCDOT the right not to stipulate to the findings of the order, it not bound by the settlement trial court's sufficiency of the evidence ruling in regard to whether the decedent endured conscious pain and suffering. The Court also declined to adopt "pre-impact fear" as a compensable cause of action in South Carolina.

Peterson v. Porter, Op. No. 4702 (S.C. Ct. App. Filed June 29, 2010) (Shearouse Adv. Sh. No. 26, at 24).

Frank Peterson was injured when he fell 14 feet off a ladder at the home of Charles and Tiffany Porter while pressure-washing their house. Peterson had been hired by the Porters before, first through a temporary agency and then outside the agency. Most of the time, and in the case of the pressure washing, Peterson would contact the Porters and ask if they needed any odd jobs done around the house. The Porters supplied Peterson with all of the supplies for the washing job, including the ladder, the pressure washer, and the solution, but they did not give him any specific instructions and they did not supervise Peterson as he did the work.

Peterson filed suit against the Porters and alleged that the Porters' negligence, gross negligence, and negligent supervision proximately caused his injuries. He alleged that the Porters (1) knew or should have known that he was not trained to safely perform the task assigned, (2) failed to provide him with the proper training and instruction necessary to safely perform the task assigned, and (3) failed to provide the equipment and support necessary to safely perform the task. He asserted damages for pain and suffering, mental anguish, disability, lost wages and loss of future income and future earning capacity.

The trial court granted the Porters' motion for summary judgment, finding that Peterson was an invitee on the property and therefore the only duty owed by the Porters was to exercise reasonable or ordinary care for his safety, and to warn him of any hidden dangers of which they had knowledge. The trial court found that the Porters had not breached this duty. The Court of Appeals affirmed, finding that the steep pitch of the roof was an "open and obvious" condition. Furthermore, the Court held that Peterson's "lack of mental capacity" did not demonstrate that he was incapable of safely performing the pressure washing, or that he required additional supervision to do the job.

Continued on next page

CASE NOTES CONT.

Construction Law Case Updates

By Melissa Nichols

Builders Mutual Insurance Company v. R Design Construction Co., LLC, et al. 2010 WL 2079741, No. 2:07-1890 (D. S.C. May 24, 2010) (Anderson, J.).

Builders Mutual Insurance Company sought a declaration of its rights and obligations under a Commercial General Liability (CGL) policy to R Design Construction Company. The district court determined the CGL policy did not provide coverage because there was no property damage caused by an occurrence and issued judgment in favor of Builders Mutual.

R Design was a general contractor on a multi-story condominium project in Beaufort. One of its subcontractors, Catterson & Sons, framed the building and performed other work. Approximately six months into construction, the engineer of record inspected the project for the owner and noted several framing deficiencies. The engineer recommended that repairs be completed "to restore the framing back to the original design intent." Both the framer and R Design later left the project prior to completion and without correcting the faulty work. Subsequent inspections by the engineer of record revealed that the original defects had not been corrected and that numerous additional defects existed.

State Court Action: The owner of the project, 16 Jade Street, LLC, filed suit in state court against R Design, the framer and the principals of those companies. R Design cross claimed against Catterson & Sons. After a bench trial, the state court entered judgment in favor of Jade Street for $911,296 in repair costs and $14,260 in engineering costs and other fees and awarded that same amount to R Design on its cross-claim against the framer. The trial court found that numerous framing defects were attributable to the framer's negligence and that after the framer and R Design left the project, the framing began to fail, causing the floor to sag. In addition, water intrusion and exposure to the elements caused the sheathing and framing to deteriorate.

DJ Action: At issue in the declaratory judgment action was whether the damage that occurred at the project constituted a sum the insured was obligated to pay as "damages" due to "property damage" to which the insurance applied. The policy provided coverage for "property damage" caused by an "occurrence" and defined "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court quoted the definition of accident used in the Auto Owners v. Newman decision: "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." Further quoting Newman, the court stated: "A CGL policy in the home construction industry is designed to cover the risks faced by homebuilders when a homeowner asserts a post-construction claim against the builder for damage to the home caused by alleged construction defect." (emphasis added by Builders Mutual court). Such policies are not intended to ensure business risks or to ensure an insured's work itself but are generally to ensure consequential risks that stem from that work.

The court found that there had been no "property damage" caused by an "occurrence." First, the alleged property damage related primarily to faulty workmanship. The project had thirty-one defects before R Design and Catterson & Sons left the project. Such faulty workmanship does not constitute an occurrence. Moreover, even to the extent the faulty workmanship caused damage to other parts of the structure, the damage was not caused by an occurrence. Numerous defects had been discovered early in the construction process and could have been corrected before the project was completed. The defendants were aware that the framing did not comply with the plans and should have known that if the framing was left uncorrected, damage could occur. The court found that there was nothing accidental or unexpected about any damage that occurred to other parts of the structure and expressed concern that permitting coverage under these facts would encourage general contractors to avoid or prolong correction of faulty work discovered during the construction process. Such an approach would be contrary to the very purpose of CGL policies, which is to cover risks faced when a homeowner asserts a post-construction claim. Because there was no property damage caused by an occurrence, the court did not address various exclusions and endorsements that Builders Mutual claimed would bar coverage.

Products Law Case Update

By Susie Glenn

Snoznik v. JELD-WEN, inc., Civil Case no. 1:09cv42, 2010 U.S.Dist. LEXIS 46814 (W.D.N.C. May 12, 2010).

In this detailed opinion, the United States District Court for the Western District of North Carolina addressed the admissibility of expert testimony under the standards set forth in Rule 702 of the Federal Rules of Evidence and in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny. After a lengthy hearing, at which the plaintiffs presented two experts—a mechanical engineer

and a "human factors" expert—for direct and cross-examination, the Court ruled that the testimony of the two experts did not meet the applicable standards. In addition, the Court excluded, as untimely, affidavits from these two experts proffered in response to the Defendant's *Daubert* motions. The opinion provides a good overview of current case law regarding the application of Rule 702 to both "causation" and "warnings" opinion testimony.

Plaintiffs had sued JELD-WEN for injuries incurred by Mr. Snoznik as the result of a fall from his second story window. 2010 U.S.Dist. LEXIS 46814, *5 (W.D.N.C. May 12, 2010) The Snoznik's were cleaning their casement windows when the fall occurred. They claimed that the hinge arm of an "Easy Wash" hinge had become detached from the hinge post during the cleaning process and that Mr. Snoznik, who was holding the window sash at the time, fell with the sash from the window. Mr. Snoznik had little memory of the accident. *Id.* at *10. Mrs. Snoznik testified that she did not remove the hinge arm from the hinge post and that she did not see Mr. Snoznik remove the hinge arm from the hinge post. *Id.* at *8-9. She also testified that she had left the room for approximately five minutes during the cleaning process. *Id.* at *11. The Plaintiffs believed either that Mr. Snoznik must have detached the hinge arm from the hinge post during that five-minute period, although Mr. Snoznik did not recall taking any such action, or that the hinge arm spontaneously detached on its own accord. *Id.* at *30-32. Importantly, this was the first time (based on their testimony) that they had attempted to use the "Easy Wash" function of their casement windows. Id. at *30. Accordingly, their "Easy Wash" hinge was in relatively the same condition on the day of the accident as it had been when the windows were first installed.

Plaintiffs retained Dr. Bryan Durig, a mechanical engineer, to provide causation and defect opinion testimony. In the course of developing his theories of causation and defect, Dr. Durig obtained an exemplar window with an "Easy Wash" hinge. He testified that he "tested" this window numerous times over the course of several months. *Id.* at *35. Notably, he failed to document most of the "testing" he conducted for the case, other than to take photographs of the window at various times and from various angles. In addition, he manipulated the same hinge numerous times, so that after several months, the exemplar hinge was no longer in the same condition as it was when it was new. *Id*. He opined both that the hinge assembly was defective and that a "reasonably feasible" design alternative existed in the form of an additional screw in the hinge track. *Id.* at *14-15.. Until Defendant filed its Motion to Exclude Dr. Durig's opinion testimony, he had not tested this design alternative. He attempted to remedy this defect by submitting an affidavit, in conjunction with Plaintiffs' responsive brief, claiming that he had conducted a test of his alternative design, and that his testing confirmed his opinions. *Id.* at *20.

Plaintiffs also retained Dr. Rushton Hunt, a "human factors" expert, to offer opinions regarding the printed instructions regarding the use of the "Easy Wash" hinge and the instruction "imprinted" on the hinge arm. He was prepared to opine that both types of instructions were unclear and ambiguous. *Id.* at *40. He was also prepared to testify, among other things, that Defendant should have provided warnings regarding the hazards associated with manipulation of the "Easy Wash" feature. *Id.* When Defendant pointed out that Dr. Hunt had not proffered a "reasonably feasible" alternative warning in its Motion to Exclude Dr. Hunt's opinion testimony, Dr. Hunt attempted to remedy this defect by submitting an Affidavit "clarifying" his opinion. *Id*. at *50-51.

Defendant moved to strike the affidavits as untimely. In Response, the Plaintiffs argued that both expert's affidavits were proper supplementation of expert opinion testimony pursuant to Rule 26(e), which permits a party to correct inadvertent mistakes and omissions in an expert's report. *Id.* at *21-23, *50-51. The Court disagreed, finding that both affidavits were "untimely" expert disclosures, submitted in an attempt to bolster the expert's opinion so as to withstand the Daubert challenge. *Id.* at *23, *52. As a sanction for the late submittal, the Court excluded both affidavits. *Id.* at *23, *52-53.

The Court then examined each expert's opinion testimony, not considering the late-filed affidavits, and found that each failed to comply with the applicable standards. Because Durig's testing had not been conducted with a window in a condition similar to that of the Plaintiffs' at the time of the accident, the Court ruled that it was unreliable. *Id.* at *30. The Court also found that Durig's failure to employ a reliable methodology during his "testing" and his failure to document the testing rendered his opinion unreliable and, hence, inadmissible. *Id.* at *34-35.

The Court excluded Dr. Hunt's opinions because he had failed to proffer an alternative warning and to test that warning, as required. *Id*. at *57. In addition, the Court found that several of Dr. Hunt's opinions were merely "common sense" observations and thus were an attempt to usurp the role of the jury. *Id.* at *55-57.

Having ruled the testimony of both of Plaintiffs' experts inadmissible, the Court granted Defendant's Motion for Summary Judgment.

Continued on next page

CASE NOTES CONT.

Products Law Case Updates

By Jay Thompson

Branham v. Ford Motor Company, Op. No. 26860 (S.C. Sup. Ct. filed August 16, 2010) (Shearouse Adv. Sh. No. 32 at 52).

The plaintiff ("Branham") was a 12-year-old back seat passenger in a Ford Bronco II. The driver ("Hale") "took her eyes off the road and turned to the backseat to ask the children to quiet down. When she took her eyes off the road, the Bronco veered towards the shoulder of the road, and the rear right wheel left the roadway. When Hale realized that her inattention resulted in the vehicle leaving the roadway, she responded by overcorrecting to the left. Hale's overcorrection led to the vehicle 'shaking.' The vehicle rolled over. Branham was thrown from the vehicle and was injured.

The plaintiff named both Ford and the driver, Hale, as defendants. However, "[a]t trial, Branham did not seriously pursue the claim against Hale." Against Ford, the plaintiff alleged a defect in the seatbelt sleeve and "a 'handling and stability' design defect claim related to the vehicle's tendency to rollover." The Hampton County jury found both Ford and Hale responsible and awarded $16 million in actual damages and $15 million in punitive damages.

On appeal, the South Carolina Supreme Court reversed the verdict and remanded for a new trial. In a forty-page majority opinion in the Advance Sheets, the Court cited numerous errors by the trial court.

Regarding the seatbelt sleeve negligence claim, the Court held that the trial court erred in granting directed verdict on the strict liability claim but not on the negligence claim. A plaintiff may still bring claims under more than one product liability theory simultaneously. However, the Court acknowledged that strict liability and negligence have multiple elements in common and clarified that a failure to prove any one of the common elements is fatal to both claims. "An analytical framework that turns solely on whether strict liability and negligence are mutually exclusive theories of recovery may miss the mark. . . . If one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed."

The Court also noted that "there is no separate 'failure to test claim' apart from the duty to design and manufacture a product that is not defective and unreasonably dangerous. . . . [I]f a product is not in a defective condition unreasonably dangerous to the user, an alleged failure to test cannot be the proximate cause of an injury."

Regarding the "handling and stability" design defect claim, the Court held the trial court correctly denied Ford's motion for directed verdict. After listing numerous items appearing in the record, the Court stated that "Branham presented sufficient evidence of a design defect known to Ford at or prior to the date of manufacture to withstand a directed verdict motion."

Next, the Court solidified the applicable test for determining whether a product is unreasonably dangerous in a design defect case. "[T]he exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design." In reaching this conclusion, the Court addressed case law from almost every state in the nation and relied on the Restatement (Third) of Torts: Products Liability. "In sum, in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design."

Next, the Court also held that "[t]he use of post-distribution evidence to evaluate a product's design through the lens of hindsight is improper." Citing again to the Restatement (Third), the Court stated: "post-distribution evidence is evidence of facts neither known nor available at the time of distribution. When assessing liability in a design defect claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or 'reasonably attainable' at the time of manufacture." The Court held the trial court erred in allowing evidence of memoranda and films dated after the manufacture of the vehicle at issue.

Next, the Court held that, while evidence of other "substantially similar" incidents is admissible if it tends to prove or disprove some fact in dispute, this issue is not even examined if the evidence is post-distribution evidence. Pre-manufacture evidence of substantially similar incidents is admissible. However, the Court held open a potentially significant exception in cases "where the precise cause of an accident is not known," allowing that statistical data of accidents for the vehicle model at issue "has relevance" when compared to similar data over other vehicles in the same class.

Next, the Court addressed the plaintiffs' counsel's closing argument, which was calculated to inflame the passion and prejudice of the jury. The Court held that the closing argument was impermissible in that it "relied heavily on inadmissible evidence" and pursued "punitive damages in requesting that the jury punish Ford for harm to Branham **and others**." (emphasis in original).

Next, the Court addressed the standard comparative negligence verdict form used by the trial court, holding that it was error for the trial court to require the jury "to apportion liability between Ford and

Hale." Because the accident occurred in 2001, when "multiple tortfeasors were jointly and severally responsible for all damages," it was improper to apportion fault on the jury form. To address any concern that "any punitive damage award was supported by a negligence cause of action, and not the strict liability claim," a proper verdict form would have "specified whether a finding of negligence against Ford was based on the seatbelt sleeve claim or the design defect claim."

Next, the Court addressed two issues with regard to punitive damages: "Branham's reliance on 'harm to others' and the evidence of compensation of Ford's executives." The Court held that the trial court erred in "charg[ing] the jury not to punish Ford for other 'conduct.' . . . By focusing on conduct, as opposed to harm to Branham, the charge invited the jury to punish Ford for all Bronco rollover deaths and injuries." The Court then held that, while "'the wealth of a defendant is a relevant factor in assessing punitive damages,'" the "safest harbor" to be sure such evidence is admissible is to limit it to evidence of the defendant's net worth. "[F]inancial evidence of the salaries and compensation of a defendant corporation's officers" is not admissible because it "introduces an arbitrary factor in a jury's consideration and assessment of punitive damages."

Finally, the Court addressed "a novel issue in our modern jurisprudence" even though it was not properly preserved for review. Ford alleged the trial court erred in failing to "realign Hale as a plaintiff so that Ford would not have to share its allotment of preemptory jury strikes with Hale." In dicta, the Court stated that "[t]he only bona fide defendant in this case was Ford." Citing authority from federal courts and one other state, the Court stated that "[t]rial judges in South Carolina have the authority to realign parties." The Court adopted the reasoning of the Supreme Court of Georgia, "including the authority of a trial court to realign parties 'at any stage of the action.' The decision whether to realign the parties lies within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice." (internal citation omitted).

Holst v. KCI Konecranes Int'l Corp., Op. No. 4736 (S.C. Ct. App. filed September 8, 2010) (Shearouse Adv. Sh. No. 37 at 58).

Holst died when a crane moving containers at the Wando Welch Terminal of the South Carolina State Ports Authority lowered four containers on top of him, crushing him to death. The crane operator was unable to see Holst beneath the containers while lowering them into place. Holst's estate brought a product liability claim against the crane manufacturer, KCI, alleging the crane "was defectively designed because of visibility limitations from the operator's cab." The plaintiff also "proposed mounting a closed-circuit video camera on the edge of the crane's trolley as a feasible design alternative to increase the operator's visibility [and] argued KCI failed to warn crane users about the crane's sight limitations." The trial court granted summary judgment to KCI, finding:

there was no competent evidence the crane was negligently designed or that the crane's design did not meet consumer expectation or social utility tests. Furthermore, the circuit court concluded that Holst failed to present competent evidence that the warnings supplied by KCI were inadequate. The circuit court also noted Holst's proposed alternative design was not mandated, was not used on any rubber-tired gantry (RTG) crane operating in the world, and its absence did not make the crane unreasonably dangerous for its intended use.

On appeal, the South Carolina Court of Appeals affirmed the grant of summary judgment. The plaintiff first argued the trial court "erred in weighing the evidence instead of finding that material questions of fact existed." The Court disagreed, finding first that "the testimony offered by Holst's experts was not sufficient to prove the crane was defective and unreasonably dangerous . . . ." "Because Holst failed to produce evidence of a feasible design alternative or that a risk-utility analysis was conducted, she cannot establish the crane was defective and unreasonably dangerous as a matter of law." The Court also found the trial court did not err in finding as a matter of law that KCI complied with applicable safety standards and "did not improperly weigh testimony in determining the evidence in the record was insufficient to sustain Holst's claim that the crane was defective and unreasonably dangerous."

The Court next held the trial court "did not err in considering conformity with industry custom as one factor in its analysis" of whether Holst "produce[d] competent evidence that the crane was defective and unreasonably dangerous." Because this was just one of four factors the trial court considered, the trial court did not improperly base its grant of summary judgment on the crane's conformity with industry custom.

The Court next held the trial court did not err in applying legal standards from *Sexton By & Through Sexton v. Bell Helmets, Inc.*, 926 F.2d 331 (4th Cir. 1991), *Marchant v. Mitchell Distributing Co.*, 270 S.C. 29, 240 S.E.2d 511 (1997), and *Bragg v. Hi-Ranger, Inc*., 319 S.C. 531, 464 S.E.2d 321 (Ct. App. 1995). In addition to finding each of these cases applicable, the Court found that Bragg's statements that "conformity with industry practice is not conclusive of the product's safety" and "industry standards are relevant to show both the reasonableness of the design and that the product is dangerous beyond the expectations of the ordinary consumer" were not dicta.

Finally, the Court held the trial court did not err in granting summary judgment on the plaintiff's strict liability, negligence, and failure to warn causes of

Continued on next page

action. The strict liability claim failed because the plaintiff's expert testimony was insufficient to create a genuine issue of material fact as to whether the crane was defective and unreasonably dangerous. The negligence claim failed because the evidence in the record showed that KCI did use due care in designing the crane. The failure to warn claim failed because the crane manual and warning decals warned "users about the dangers of working under the crane's hanging load."

Priester v. Cromer, Op. No. 26846 (S.C. Sup. Ct. filed August 2, 2010) (Shearouse Adv. Sh. No. 30 at 12).

This case involved federal preemption of claims alleging an automotive product defect regarding tempered window glass. Priester was ejected from the window of a Ford F-150 when the vehicle went off the road and rolled several times. Priester and the driver of the vehicle, "both of whom were under twenty-one years old, were apparently intoxicated after they had been served alcohol" at a local strip club. Priester died at the scene. His estate brought a product liability claim against Ford, alleging breach of warranty "by using inappropriate glazing materials which would retain occupants inside the vehicle, and which would not shatter on impact." The F-150 used tempered glass that met the requirements of Federal Motor Vehicle Safety Standard 205 (49 C.F.R. § 571.205 (1971)) ("Regulation 205"). The trial court granted summary judgment to Ford on the ground that Regulation 205 "preempts a state law products liability claim premised solely on a manufacturer's choice of tempered glass for a vehicle's side windows." The Supreme Court affirmed this grant of summary judgment.

Regulation 205, promulgated by the National Highway Traffic Safety Administration, "mandates that '[g]lazing materials for use in motor vehicles . . . shall conform' to the American National Standard Institute 'safety code for safety glazing materials.'" The Supreme Court stated

> Regulation 205 does not itself specify which types of glazing materials may be used in motor vehicles. Rather, it requires adherence to the following safety code developed by the American National Standards Institute:
>
> S5.1.1.6
> Multipurpose passenger vehicles. Except as otherwise specifically provided by this standard, glazing for use in multipurpose passenger vehicles shall conform to the requirements for glazing for use in trucks as specified in ANS Z26."

The Court observed that, while the U.S. Supreme Court has not ruled on the preemption issue regarding Regulation 205, it has concluded that Regulation 208, from the same section of the Code of Federal Regulations, preempts state law. Also, the Court cited three federal and state appellate courts that have reached differing conclusions on whether Regulation 205 preempts state law.

Acknowledging this split of authority, the court reasoned that "[t]o allow this suit to go forward would sanction a jury verdict finding the Ford F-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass. . . . [S]uch a result would stand as an obstacle to achieving the purposes and objectives of Regulation 205." Therefore, the Court stated: "[p]ending resolution from the United States Supreme Court, we join those jurisdictions finding the federal regulation preempts state law, and therefore, we affirm the trial court's grant of summary judgment in favor of Ford Motor Company."

Workers' Compensation Case Updates MAY 11, 2010 to AUGUST 1, 2010

By Marcy J. Lamar

Hargrove v. Carolina Orthopaedic Surgery Associates, Op. No. 4695 (S.C. Ct. App., filed June 7, 2010) (Shearouse Adv. Sh. No. 23 at 78).

Claimant worked as a transcriptionist for the Carolina Orthopaedic Surgery Associates, P.A (hereinafter "Carolina Orthopaedic"), for over twenty years. Prior to her employment with Carolina Orthopaedic, Claimant worked for twenty years as a clerk and transcriptionist for the York County Hospital.

While working for Carolina Orthopaedic in 2003, Claimant's chair hit a runner and turned over backwards, causing her to fall to the floor. Although no one saw her fall, two other employees heard a noise when Claimant's chair fell over and they helped her get up. While Claimant testified that she was embarrassed, shaken up, and sore, she continued to work the remainder of her shift that day. Claimant also testified that she promptly reported the accident to her immediate supervisor; however, that supervisor denied Claimant ever telling her she had fallen.

Claimant first took samples of medications given to her by a technician at the office, but later consulted with a physician with Carolina Orthopaedic. However, before she saw this physician at Carolina Orthopaedic (Dr. James), Claimant clocked out for her appointment, as she was required to do if her problems were not work-related. In addition, when she registered as a patient of Dr. James with Carolina Orthopaedic, she failed to indicate that her problems were work-related even though the form specifically requested this information.

Eventually, Claimant was diagnosed with a central herniation at L-S1, and a concentric disc bulge from L1 through L3 and she subsequently underwent a right L3-4 microendoscopic decompression. However, shortly before her surgery, Claimant applied for short-term disability benefits and she also received five hundred sixty hours of donated sick time from other employees in the office. Several months later, Dr. Tsahakis (who performed the surgery) found Claimant reached maximum medical improvement with an impairment rating of ten percent. He also restricted her to working six hours per day.

In October 2004, Claimant returned to work; however, Carolina Orthopaedic had anticipated Claimant would retire soon and had already hired someone to take her place full time, but that new hire was only assigned tasks that students would normally perform. Thus, Claimant continued to work her normal job until she retired at the end of 2004.

By her own admission at the Single Commission Hearing, Claimant never told anyone that she intended to file for workers' compensation. Furthermore, according to her supervisor, Claimant indicated that her back pain resulted from having to care for her invalid brother. Claimant's supervisor stated she first became aware that Claimant was seeking workers' compensation benefits in April 2005, when Carolina Orthopaedic received a subpoena for Claimant's medical records.

On August 8, 2005, Claimant filed a Form 50, in which she stated the causative event took place on September 1, 2003. In its Form 51, Carolina Orthopaedic alleged that Claimant's claim is barred under S.C. Code Ann. § 42-15-20, because notice of the alleged injury was not given to Carolina Orthopaedic within ninety (90) days as required. In addition, Carolina Orthopaedic further stated it "reserves its right to assert any and all defenses available and applicable ... as evidence may develop in the course of discovery."

In the Order dated January 24, 2007, the Single Commissioner denied Claimant's claim for benefits, finding: (1) Claimant failed to meet the statutory requirement regarding notice to Carolina Orthopaedic of a workplace injury; and (2) even if she had met the notice requirement, she failed to prove her current complaints resulted from her alleged workplace accident.

The Appellate Panel of the Workers' Compensation affirmed the order of the single commissioner. Claimant then appealed the matter to the Circuit Court, which affirmed the Commission's Order. Finally, Claimant appealed to the South Carolina Court of Appeals, which affirmed all prior Orders denying the Claimant any benefits under the Act, based upon several reasons:

1. TWO INDEPENDENT GROUNDS :

The Circuit Court's decision to deny Claimant workers' compensation benefits was based upon two independent grounds: (1) Claimant's failure to give Carolina Orthopaedic timely notice of her workplace accident; and (2) her failure to prove the conditions for which she sought compensation resulted from the accident.

The Court of Appeals noted that affirming just one of these grounds is enough to uphold the decision to deny workers' compensation benefits, citing *Weeks v. McMillan*, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct.App.1987), which held that "[w]here a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous."

Accordingly, the Court based its affirmance of the denial of workers' compensation benefits on the finding that Claimant failed to prove that the problems for which she sought workers' compensation benefits resulted from her accident.

2. FORM 51:

Claimant argued that because Carolina Orthopaedic did not raise the issue of causation in its Form 51, it was unfair to deny her claim on that ground. The Court disagreed finding that an employer who has responded to a workers' compensation claim may assert a general denial of liability whether or not the response expressly contests compensability. *See Clade v. Champion Labs,* 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) ("The Claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation."). Moreover, the Court specifically noted that Carolina Orthopaedic stated in its Form 51 that it reserved the right to assert any applicable defenses supported by evidence developed during discovery.

3. PROXIMATE CAUSE:

Claimant next argued that the only reasonable conclusion from the evidence in the record was that her problems resulted from her accident on the job. The Court disagreed. "Regardless of what the medical evidence indicated, we cannot disregard the lay evidence on which the commission relied in finding Claimant did not prove her problems resulted from her fall." *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record."); *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946) ("Medical testimony should not be held to be conclusive, irrespective of other evidence....").

Continued on next page

Claimant clocked out for her appointment with Dr. James even though she was informed this would not be necessary for treatment of a workplace injury. (Empasis Added). Dr. James appeared to have been unaware of Claimant's contention that her problems occurred as a result of her fall until he received a report from Dr. Tsahakis recounting her version of the events. In addition, Claimant had reported experiencing lower back pain from having to care for her incapacitated brother.

Furthermore, when Claimant applied for short-term disability benefits, she never indicated her disability resulted from an accident at work. Claimant's behavior indicated she herself did not consider her injury to be work-related. Therefore, the Court stated that "[w]e will not disturb the appellate panel's decision regarding the weight to be given this evidence."

4. REFERENCES TO SOCIAL SECURITY AND RETIREMENT BENEFITS:

Claimant alleged that evidence of her social security and retirement benefits were improperly considered in denying her claim for compensation. However, the Court disagreed. While Claimant correctly pointed out that procedures regarding retirement and social security benefits cannot be used as a basis for a deciding a workers' compensation claim, the Single Commissioner's Order simply mentioned the fact that the Claimant had stopped her attempts to retire in 2003, and the fact that she had also applied for social security benefits.

The Court held that these references to retirement and social security benefits by the Single Commissioner were not for the purpose of justifying the decision to deny Claimant's claim for workers' compensation benefits. Rather, they provided only additional explanation as to why Claimant, as she readily admitted in her testimony, did not tell anyone she intended to file a workers' compensation claim.

5. CONCLUSION:

Accordingly, based upon the above, the Court affirmed all of the prior Orders which found and concluded that Claimant failed to prove her medical problems resulted from a workplace injury. Therefore, because the affirmance of this finding was sufficient to uphold the denial of workers' compensation benefits, the Court declined to address the merits of the Single Commissioner's alternative finding that Claimant failed to timely notify Carolina Orthopaedic of her accident.

DENIED.

Temporary Services, Inc. v. American International Group, Inc., et. al., (Op. No. 26835) (S.C. Supreme Court, filed July 19, 2010) (Shearouse Adv. Sh. No. 28 at 22)

In this case, the Plaintfiff insureds under commercial workers' compensation insurance policies brought this action against the above insurers, alleging that they had breached the Plaintiffs' policies by fraudulently charging excessive premiums. The United States District Court for the District of South Carolina, *Joseph F. Anderson, Jr.*, United States District Judge, certified two questions to the South Carolina Supreme Court regarding the applicability of the "*Filed Rate Doctrine*" to Plaintiffs' claims:

> 1. Under South Carolina law, were the Defendants' submissions to the DOI in 2001 "filed rates" within the meaning of the Filed Rate Doctrine as adopted by this Court in *Edge v. State Farm Mutual Insurance Company*, 366 S.C. 511, 623 S.E.2d 387 (2005)?
>
> 2. Does South Carolina recognize an exception to the "Filed Rate Doctrine" that permits a private plaintiff to avoid the Filed Rate Doctrine by alleging that regulatory approval for the rate was obtained through fraudulent means, or must a private plaintiff seek remedies solely through administrative channels?

In answering the certified questions, the Court first discussed how carriers determine the rates applicable to insurance policies. Specifically, carriers utilize a calculation based on a combination of two criteria: a pure loss component (LC) and an expense component, or loss cost multiplier (LCM).

The LC is an industry-wide calculation of projected claims as to each specific job description. The LCM is a multiplier applied to the premium rate based on an insurer's specific expenses. The expenses relevant to the LCM include items such as acquisition costs, overhead, taxes, and profit. S.C. Code Ann. § 38-73-1400 (2002).

In this case, the Plaintiffs allege Defendants fraudulently calculated their LCM, which was submitted to the Department of Insurance (hereinafter "DOI") in 2001, in order to charge excessively high premiums in addition to arguing the Filed Rate Doctrine did not bar its claims. In its analysis of this claim, the Court discussed in detail the applicability of the Filed Rate Doctrine to the plaintiffs' claims.

1.THE FILED RATE DOCTRINE:

This Doctrine "stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." *Edge*, 366 S.C. at 517, 623 S.E.2d at 391 (quoting Amundson & Assocs. *Art Studio v. Nat'l Council on Comp. Ins.*, 26 Kan.App.2d 489, 988 P.2d 1208, 1213 (1999)).

In order to properly answer the two certified questions, The Court examined in detail the regulatory scheme applicable to workers' compensation policies in order to provide the necessary context to understand the issues before the Court. Generally, the DOI is vested with the authority to regulate the insurance

industry. For regulatory purposes, there are three categories of workers' compensation insurance that employers can maintain: self-insurance, assigned risk insurance, and voluntary insurance. In this case, the workers' compensation insurance at issue is voluntary insurance. However, in order to understand the issues in more detail, the Court found that a brief discussion of both voluntary insurance and the assigned risk program was necessary.

Generally, employers participating in the assigned risk program are high-risk insureds that are unable to procure insurance in the open market. In contrast, those employers participating in the voluntary program are able to acquire insurance on the open market. The differences in the nature of these programs are reflected in their respective regulation and rating system described above.

Beginning in 1990, the DOI differentiated between the voluntary and assigned risk programs as to how the "expense component," or LCM, would be developed and who would file this information. S.C. Code Ann. § 38-73-1380 provides for the LCM to be "filed with the department and approved by the director or his designee, by each member or subscriber of a rating organization independently."

The DOI, however, utilized the discretion given to it under S.C. Code § 38-73-1430 to mandate that the rating organization file a proposed expense component for the Assigned Risk Plan reflecting the cost of the Assigned Risk Plan only, which, when approved, will be added to the approved pure loss component for the Assigned Risk Plan to become the final rate for the Plan. Thus, after the inception of the rating system in 1990, workers' compensation insurance rates were to be established uniformly throughout the assigned risk program.

In contrast, however, insurers in the voluntary program market relied upon rating agencies for the LC used in calculating their rates, but developed and filed their own LCM. The Administrative Law Court recognized this change by stating that "[e]ach carrier determines its own final rates in the voluntary program by combining its own expenses with the loss costs." *NCCI v. SCDOI, et. al.*, 05-ALJ-09-0355-CC (S.C. Admin L. Ct.2005) (http://www.scalc.net/decisions.aspx?q=4&id=8127#_ftn1).

Nonetheless, within its Department of Insurance Bulletin No. 1990-05, the DOI established a two-tiered rating system. Specifically, the DOI mandated that all insurers filing proposed LCM figures, including those in the voluntary insurance market, "shall include the necessary information required by 'SCID Form No. 2007,' ... and all data necessary to support the filing." Department of Insurance Bulletin No. 1990-05.

The deregulation of the voluntary insurance program continued until 2000, when the General Assembly altered the filing and review requirements for workers' compensation insurers seeking deviations from their previously-approved premiums. The General Assembly introduced the definition of "exempt commercial policies" to the rating scheme in 2000 Act No. 235. Exempt commercial policies were defined as insurance contracts:

> ... for large commercial insureds where the total combined premiums to be paid for these policies for one insured is greater than fifty thousand dollars annually and as may be further provided for in regulation or in bulletins issued by the director. Exempt commercial policies include all property and casualty coverages except for commercial property and insurance related to credit transaction written through financial institutions.

S.C. Code Ann. § 38-1-20(40)(2002). The Court noted that the definition of casualty insurance includes workers' compensation insurance per S.C. Code Ann. § 38-1-20(9). Thus, workers' compensation insurance policies are exempt commercial policies.

Per Act No. 235, 2000 S.C. Acts 1683, § 8 (codified as S.C. Code Ann. § 38-73-910(G) (2002)), the General Assembly provided that "[e]xempt commercial policies are *not subject to prior approval by the [DOI]*." *Id.* (emphasis added). The General Assembly then amended the definition of exempt commercial policies by removing the minimum premium requirement, thus making *all commercial insured policies exempt from DOI rate approval*. S.C. Code Ann. § 38-1-20(4) (Supp.2008)(emphasis added).

The Court stated that the General Assembly's recognition of a class of exempt commercial policies abrogated the DOI's rate-making authority over the policies at issue. Specifically, Act No. 235 eliminated the subject policies from the public notice requirement by specifically exempting them from the rate-making requirements of Title 38.

This exemption eliminated the policies at issue in this case from the requirement of public notice given to consumers of a proposed rate increase and the fundamental requirement that "[n]o insurer may make or issue a contract or policy except in accordance with the filings which are in effect for the insurer." *Id*. § 38-73-920.

Furthermore, the Court noted that it has recognized in the past that "sellers of exempt commercial policies are not required to file rate schedules and plans with the [DOI]." *Croft v. Old Republic*, 365 S.C. 402, 410, 618 S.E.2d 909, 913 (2005). Finally, the Court stated that the DOI has specifically noted that "no insurer of exempt commercial policies will be required to file any classification, rate, rule, or rating plan." S.C. Code Ann. Reg. § 69-64 (Supp. 2008).

The Plaintiffs argued that despite the law as outlined above, the DOI continued to require rating agencies to file LC data with the DOI for its approval. However, beginning in 2000, with the advent of

Continued on bottom of next page

VERDICT REPORT

Verdict Reports

Type of Action: Medical Malpractice

Injuries alleged:

Brain damage, developmental, motor and cognitive delays and deficits

Name of Case:

Jamesetta Washington, as Guardian ad Litem for Jayden Washington, a minor v. Edmund Rhett, Jr., M.D., Low Country Obstetrics & Gynecology, P.A., Tenet South Carolina, Inc., d/b/a East Cooper Regional Medical Center, AMN Services Inc, f/k/a Nurses RX, Inc.

Court: (include county):

Circuit Court-Charleston County

Case number:

07-CP-10-155

Name of Judge:

The Honorable J. Michael Baxley

Amount:

Defense Verdict

Date of Verdict:

August 11, 2010

Attorneys for Defendant (and city):

Robert H. Hood, Molly H. Craig, Chilton Grace Simmons, Elizabeth W. Ballentine, Charleston, South Carolina

Description of the case:

The Plaintiff alleged medical malpractice against an obstetrician and his practice. The Plaintiff alleged the doctor was negligent in his delivery of the baby by vacuum extraction, thereby causing injury to the minor child's brain, resulting in brain bleeds in multiple areas and severe permanent harm. The defense presented evidence that the child was not tolerating labor as based upon the drop in the baby's heart rate on the fetal heart monitor and an emergent situation presented itself where the baby needed to be delivered as quickly as possible to prevent hypoxia. Further, the defense presented expert testimony that the cause of the child's brain bleeds and subsequent developmental, motor and cognitive delays and deficits were not caused by the use of the vacuum but the child's congenital abnormalities including weak, malformed blood vessels to the brain. At trial, Plaintiff presented a life care plan in excess of 6 million. Prior to trial, the hospital and the nurse staffing agency settled the case. During trial, the doctor's practice settled. The case was tried for two and a half weeks and the jury returned a defense verdict in favor of the obstetrician.

CASE NOTES CONT.

exempt commercial policies, the DOI was not vested with the authority to regulate LCM.

The filing at issue in this case was made in 2001, a year after exempt commercial policies were no longer subject to rate setting regulation by the DOI. All of the policies at issue in this case were for large commercial insureds and carried premiums in excess of $50,000. Accordingly, based upon the above-stated law, all were exempt commercial policies under both the original and amended versions of the definition of this term.

Therefore, according to the Court, because the submission made by Defendants in 2001 did not invoke the regulatory authority of the DOI, the *Plaintiff's claim against Defendants is not barred by the Filed Rate Doctrine and the Court* (Emphasis Added). Specifically, the Court found that the DOI was not vested with the authority to determine the rates applicable to the workers' compensation policies at issue. *Therefore, the Filed Rate Doctrine did not bar Plaintiff's claims in this instance.* (Emphasis added).

2. EXCEPTIONS TO THE FILED RATE DOCTRINE:

Plaintiff argued that even if the Filed Rate Doctrine applied in this case, their claims should fall within an exception to the Doctrine. However, because the Filed Rate Doctrine did not apply so as to bar Plaintiffs' claims, the Court declined to answer the second certified question. [1]

Footnotes

1 In addressing the two certified questions before the Court, it made no judgments regarding the merits of Plaintiff's underlying claims. Instead, the Court answered the questions narrowly, finding that the Filed Rate Doctrine did not bar Plaintiff's claims and, therefore, that the Court need not address the Federal Court's second certified question.

2011

Spring

TRIAL ACADEMY

TBD

Summer

JOINT MEETING

July 28-30

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The Amelia Island Ritz Carlton

Amelia Island, FL

South Carolina Defense Trial Attorneys' Association
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Columbia, SC 29223

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