

# THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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- SCDTAA Remembers Judge Houck
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- Reservation of Rights: What Now?



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[WWW.SCDTAA.COM](http://WWW.SCDTAA.COM)

**Annual Meeting**  
**The Cloister**  
**Sea Island, GA**  
**November 9-12**  
**Celebrating 50 years**

**Summer Meeting**  
**Sonesta Resort**  
**Hilton Head, SC**  
**July 27-29**



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# President's Message

by David A. Anderson

As I sit down to pen this article there are a number of things that I wish to convey to our membership as my tenure as President is quickly coming to a close. First, I am writing this during a backdrop of tragic events, disrespect of law and order, and advocacy of extremism. So what does that have to do with the South Carolina Defense Trial Attorneys' Association? Plenty. We are an Association whose mission is to promote justice, professionalism, and integrity in the civil justice system by bringing together attorneys dedicated to the defense of civil actions. Now more than ever our Association can be seen as a voice of reason during these critical, turbulent times, and together we can further the goals of our Association and face the future with confidence.

The SCDTAA is committed to the goal of diversity in our membership. We recognize the value of different perspectives and experiences which are found in a diverse membership. This diversity brings a broader and richer environment which produces creative thinking and solutions. SCDTAA embraces and encourages diversity in all aspects of our activities and is committed to maintaining a culture to support and promote this diversity. These are goals that we need to constantly reflect back on and improve as we approach the future. It takes each of us within our respective practices to commit to these goals and reap the benefits that they provide.

As we celebrate our upcoming 50th Annual Meeting, you can take great pride in knowing that those who started the SCDTAA had lofty goals. We are seeing firsthand the benefit of their hard work and dedication. We will celebrate November 9-12 at The Cloister, Sea Island, GA, and I hope that you will make plans to join us. As you read this magazine, you will see recaps of several important events that have taken place this year. The Summer Meeting, which took place in Asheville, NC, featured excellent CLE content and great participation by our Workers' Compensation Commissioners. Recently our Motions Practice Seminar took place in Greenville, providing another successful opportunity for learning and refining our trial skills.

Our Corporate Counsel Committee has worked hard to grow our corporate counsel membership. Our membership has grown three fold, and with additional businesses coming to our State, this is an area that we can all benefit from. I encourage you to promote this membership to those Corporate Counsel Attorneys that you know.

We have seen attacks on the Judicial Branch of Government, whether by inadequate funding or legislative attempts to erode this separate, but equal, pillar to our way of governance. Your Association stands watch through our Legislative Committee, Representative, Lobbyist and PAC to oppose those ill-informed attempts to weaken this branch of government. I urge members to contact our Association when you see these attacks, and we will take appropriate steps to ensure the integrity of this critical branch of government.

We all owe a special thanks to our Association Officers, Anthony Livoti, Jamie Hood, Johnston Cox and William Brown. Their hard work and wise counsel have significantly furthered our Association goals. I also need to give a personal debt of gratitude for our Executive Director, Aimee Hiers. She continues to devote great energy to our Association and is constantly vigilant to serve the needs of our members. Your Board of Directors consists of twenty-four individuals across our State who work hard to further the association. Please take time to reach out to them and thank them as well as letting them know how we can grow and improve.

I want to close by thanking the members of the state and federal judiciary and workers' compensation commissioners whose support of our organization is exceptional. Through their participation and support of our educational programs whether by serving as judges for mock trials, speaking at seminars, or attending our Summer and Annual Meetings, all are keys to our continued success. It is their participation which sets our Defense Association apart from all others. I wish to extend on behalf of SCDTAA our sincere thanks for their participation.

Thanks for allowing me the benefit to serve you as a board member and for the profound privilege of being your President. I hope to see each of you as we celebrate our 50th Annual Meeting at The Cloister. I look forward to our Association's continued growth for the next 50 years.



*David A. Anderson*

# Thank you to our Summer Meeting Sponsors

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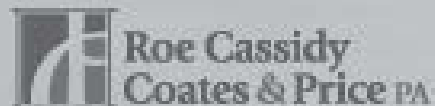


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# Editors' Note

by Alan G. Jones, James T. Irvin III, and Geoffrey W. Gibbon

EDITORS'  
NOTE

It is Fall once again, and we are excited to be able to bring you a very special edition of *The DefenseLine*. This issue marks a special opportunity to look back on the founding of our organization as well as the first Annual Meeting 50 years ago. We are honored to have Ed Mullins lead us all through the story of the Association's founding, and we know you will enjoy this look back at how it all began.

This issue also looks forward, including articles meant to assist you in your daily practice. The seemingly impenetrable topic of ERISA litigation is explained in clear and helpful detail in order help you either better litigate your ERISA matters or recognize how ERISA may impact an existing matter you are handling. We also take a look at key recent rulings in South Carolina regarding apportionment to non-parties on verdict forms.

As always, we aim to keep you up-to-date on the latest happenings within the SCDTAA. With that in mind, we have included reviews, previews, and pictures of events the SCDTAA has held, including a review of the Summer Meeting held this past July in Asheville, North Carolina and a preview of the 50th Anniversary Annual Meeting being held at The Cloister at Sea Island.

Finally, we have included case notes from South Carolina's appellate courts, an update on the Defense Research Institute (DRI) in South Carolina, and important legislative news to keep you informed of what's happening at the State House. The editors would like to thank all of the contributors to this issue, without whom this issue would not have been possible. We look forward to seeing all of you at the Annual Meeting!



*Jones*



*Irvin III*



*Gibbon*



**Join DRI and your first seminar is free!**  
(First time members only)

**This is an \$875.00 value**  
(excludes the DRI Annual Meeting)

**If interested in joining DRI,  
please contact Jay Courie  
803.227.2223 or [jcourie@mgclaw.com](mailto:jcourie@mgclaw.com)**

# SCDTAA Docket

## **Gallivan White Boyd Attorneys Now Head All Three Major Defense Bar Groups**

In an unprecedented achievement in the legal field, attorneys with Gallivan White Boyd, the ninth largest law firm in South Carolina according to Lawyers Weekly, recently served as presidents of all three major defense bar organizations simultaneously. John E. Cuttino of the firm's Columbia office just finished his term as president of DRI-The Voice of the Defense Bar, H. Mills Gallivan of the firm's Greenville office is president of the Federation of Defense and Corporate Counsel and John T. Lay, Jr. of the firm's Columbia office is president of the International Association of Defense Counsel. All three attorneys have long and distinguished track records in civil defense litigation and leadership in the civil defense bar.

## **Ed Mullins Jr. Inducted into the Warren E. Burger Society and Honored with the McKay Brabham Award from the Midlands Mediation Center**

The National Center for State Courts (NCSC) has inducted Edward W. Mullins Jr., partner emeritus in Nelson Mullins Riley & Scarborough LLP's Columbia office, into the Warren E. Burger Society, which honors individuals who have volunteered their time, talent, and support to NCSC. Mr. Mullins was among five new inductees into the society named for the former Chief Justice of the United States who helped found NCSC in 1971.

The Midlands Mediation Center has also honored Mr. Mullins with the McKay Brabham award as an outstanding and determined champion of justice. The award recognizes individuals who are "champions of justice by working for reconciliation and peace and by transcending the barriers of social class, belief systems, racial status, and gender."

## **Roe Cassidy Continues to Grow with the Addition of R. Boatner Bowman**

Roe Cassidy Coates & Price, P.A., is pleased to announce that R. Boatner "Bo" Bowman has joined the firm as an associate. Prior to joining Roe Cassidy, Bo spent three years serving as judicial law clerk to circuit court judges in the Upstate and two years in an Upstate litigation firm where he represented both businesses and individuals involved in litigation. Bo concentrates his practice on medical malpractice defense, business litigation, criminal defense, and personal injury.

## **2017 MGC Long Run Raises Over \$23,000 for USO South Carolina**

The MGC Long Run raised \$23,233.41 for USO

South Carolina. USO South Carolina is a nonprofit organization that strengthens America's military service members by connecting them to family, home, and country throughout their service to the nation. The donation is a result of the 2017 MGC Long Run 15k, 15k Relay, 5k and Kids' Fun Run that took place on Feb. 4.

This year's race had over 750 runners and walkers and over 125 volunteers. The Long Run was presented by McAngus Goudelock & Courie, a regional insurance defense firm headquartered in Columbia. The Not-So-Long Run 5k was presented by Midlands Orthopaedics, P.A.

The MGC Long Run has raised nearly \$100,000 for nonprofits since it began in 2014. The 2018 race will take place on Sat., Feb. 3, and will feature a 15k, 5k and Kids' Fun Run. More information can be found at [www.mgclongrun.com](http://www.mgclongrun.com).

## **Clawson and Staubes, LLC Names Mike Leech to Membership**

Clawson and Staubes, LLC is pleased to announce that Mike Leech has become a Member of the firm. Mike practices Construction Defect and Personal Injury Defense Litigation in the firm's Charleston office.

## **Chambers USA Names Sowell Gray Robinson Band 1 in 2017 Directory**

The 2017 edition of the highly-regarded Chambers USA – America's Leading Lawyers for Business, a directory of top lawyers and law firms, has ranked Sowell Gray Robinson Stepp & Lafitte, LLC among the nation's best in general litigation. Sowell Gray Robinson was named to Chambers USA's "Band 1" listing in the category of general litigation. The firm's litigators handle a wide variety of business issues, focusing on both complex commercial litigation and resolution of commercial disputes, and regularly litigate in all state and federal courts in South Carolina. Sowell Gray Robinson was first honored in Chambers USA in 2006.

## **Nelson Mullins Partner Nominated to United States District Court for South Carolina**

President Donald Trump nominated A. Marvin Quattlebaum Jr., a partner in the Greenville office of Nelson Mullins Riley & Scarborough LLP, to the United States District Court for the District of South Carolina. Mr. Quattlebaum, 53, currently serves on the law firm's Executive Committee.

A Fellow of the American College of Trial Lawyers, Mr. Quattlebaum is a veteran trial lawyer who focuses his practice on serving as regional and

national counsel defending high risk and exposure products liability cases.

**Barnwell Whaley Member Attorney Chris Hinnant to Present “Experts: Using Testimony, Reports and Scientific Evidence” at August Continuing Legal Education Course**

Barnwell Whaley member attorney Chris Hinnant joins an outstanding faculty at the National Business Institute’s upcoming seminar, “Ultimate Guide to Evidence”, to be held at the North Charleston Hilton Garden Inn on August 29th. Hinnant’s presentation, “Experts: Using Testimony, Reports and Scientific Evidence,” is an eleven-point look at the practical aspects of utilizing experts in civil trials.

Licensed to practice in both North and South Carolina, Mr. Hinnant has handled hundreds of cases in both state and federal court. He focuses his practice in the areas of complex litigation, including medical malpractice, commercial disputes, construction defects, dram shop defense and personal injury. As a member attorney of Barnwell Whaley Patterson & Helms, Hinnant heads up the firm’s Wilmington office. He is a graduate of the University of North Carolina at Chapel Hill and the Campbell University Norman Adrian Wiggins School of Law.

**Gallivan White Boyd Has Twenty-One Attorneys Recognized by Super Lawyers**

The law firm of Gallivan White Boyd is pleased to announce that twenty-one of the firm’s attorneys were selected for inclusion in South Carolina Super Lawyers 2017. Gallivan, White and Boyd attorneys appearing in the 2017 edition of South Carolina Super Lawyers include:

**Greenville**

- W. Howard Boyd, Jr. – Business Litigation
- H. Mills Gallivan – Alternative Dispute Resolution
- Phillip E. Reeves – Insurance Coverage
- T. David Rheney – Personal Injury Defense: General
- Thomas E. Vanderbloemen – Intellectual Property
- Daniel B. White – Personal Injury Defense: Products

**Columbia**

- Gray T. Culbreath – Class Action
- John E. Cuttino – Civil Litigation Defense
- John T. Lay, Jr. – Business Litigation
- John Hudson – Professional Liability Defense
- Curtis L. Ott – Personal Injury Defense: Products
- Amy L.B. Hill – Business Litigation

In addition, nine Gallivan White Boyd attorneys have been recognized as South Carolina Rising Stars by Super Lawyers. Those attorneys include:

**Greenville**

- Robert Corney – Personal Injury Defense: General
- Zach L. Weaver – Business Litigation
- Nick Farr – Insurance Coverage
- Batten Farrar – Construction Litigation
- William T. Young, III – Construction Litigation

**Columbia**

- A. Grayson Smith – Personal Injury Defense: General
- Breon C.M. Walker – Personal Injury Defense: General
- Lindsay Joyner – Banking

**Charleston**

- Mikell H. Wyman – Workers’ Compensation Defense

**Three McKay Firm Attorneys Selected for 2017 Midlands Legal Elite**

The McKay Firm is pleased to announce that three of its attorneys have been selected for the 2017 Midlands Legal Elite.

Kelli Sullivan, a Partner at the Firm and three time Midlands Legal Elite recipient, was nominated in the field of Healthcare Law. Kelli practices in the areas of medical malpractice defense, insurance defense, insurance coverage, and professional liability defense. She is also certified as a mediator by the South Carolina Supreme Court.

Brandon Jones, also a partner at the Firm, was nominated in the field of Insurance Law. Brandon Jones, a two-time Midlands Elite recipient and Partner, practices in the areas of trucking and commercial transportation, construction defect litigation, automobile liability, employment liability, and general insurance defense.

Charles Kinney was nominated in the field of Insurance Law. Charles practices in the areas of government defense, general insurance defense, trucking and transportation law, commercial and business litigation, civil litigation defense, and products liability defense.

The Midlands Legal Elite honorees, presented by Columbia Business Monthly, are attorneys nominated by their peers in one of twenty different practice areas. The top attorneys in each area are then selected.

**Haynsworth Sinkler Boyd Recognized as a Leading Firm in 2017 Chambers USA**

Haynsworth Sinkler Boyd, P.A. received numerous distinctions in the 2017 edition of Chambers USA: America’s Leading Lawyers for Business. Chambers USA ranked Haynsworth Sinkler Boyd’s Corporate/Mergers & Acquisition: Banking and Finance practice area in the top tier. The firm’s Corporate/Mergers & Acquisitions, Litigation: General Commercial, and Real Estate practice areas also received rankings for their strengths and abilities.

Chambers USA ranking results are gathered through thousands of confidential interviews conducted with clients and lawyers by a team of over 150 full-time editors and researchers. Individual lawyers are ranked on the basis of their legal knowledge and experience, their ability, their effectiveness, and their client service.



### **Elmore Goldsmith Attorneys Recognized as South Carolina 'Super Lawyers'**

Three attorneys from Elmore Goldsmith have been honored by South Carolina Super Lawyers Magazine for 2017. Super Lawyers recognizes attorneys who have distinguished themselves in their legal practice. Less than five percent of lawyers in each state are selected to this exclusive list.

Elmore Goldsmith attorneys recognized as Super Lawyers are:

L. Franklin Elmore – Construction Litigation

Mason A. Goldsmith – Business Litigation

In addition, Bryan P. Kelley – Construction Litigation has been recognized by Super Lawyers as a Rising Star.

### **Nelson Mullins Joins Ranks of Top 100 U.S. Law Firms**

Nelson Mullins Riley & Scarborough LLP debuted in the Am Law 100, jumping from the 103rd position in 2015 to 88th in 2016 in the publication's annual ranking of law firm revenue, after posting the fifth largest percentage increase in revenue among the Am Law 100 firms.

Nelson Mullins' revenue has grown 41 percent since 2013, largely thanks to its investment in Atlanta, where it went from 76 lawyers in 2008 to more than 140 lawyers now, The American Lawyer noted. Am Law also pointed to the Firm's opening of new offices in recent years, most notably in New York City in 2015. Nelson Mullins also expanded to the West Coast in November 2016 with the opening of a Denver office and again in early 2017 in the Los Angeles area.

### **Barnwell Whaley Wilmington member attorney Chris Hinnant appointed to NC Bar committee**

Barnwell Whaley member attorney Chris Hinnant has been appointed to the North Carolina Bar Association's Lawyer Effectiveness & Quality of Life Committee for the 2017-2018 fiscal year. The Lawyer Effectiveness & Quality of Life Committee engages in activities to help attorneys successfully practice law in an increasingly complex and competitive profession. "I'm delighted for this opportunity to serve the North Carolina Bar Association," said Hinnant. "I expect to learn quite a bit from my colleagues on the committee and, with any luck, also be able to give back something to the profession." His committee service began July 1, 2017.

### **20 Gallivan White Boyd attorneys named to 2018 Best Lawyers list**

Gallivan White Boyd is pleased to announce that twenty lawyers have been included in the 2018 Edition of The Best Lawyers in America. Since it was first published in 1983, Best Lawyers has become universally regarded as the definitive guide to legal excellence. Gallivan White Boyd would like to congratulate the following attorneys named to 2018 The Best Lawyers in America list:

### **Columbia**

A. Johnston Cox - Insurance Law, Personal Injury Litigation – Defendants

Gray T. Culbreath - Commercial Litigation, Bet-the-Company Litigation, Personal Injury Litigation - Defendants, Mass Tort Litigation / Class Actions - Defendants, Product Liability Litigation – Defendants

John E. Cuttino - Litigation - Construction, Personal Injury Litigation - Defendants, Product Liability Litigation – Defendants

John T. Lay - Insurance Law, Commercial Litigation, Bet-the-Company Litigation, Personal Injury Litigation - Defendants, Mass Tort Litigation / Class Actions - Defendants, Product Liability Litigation – Defendants

William R. Harbison - Workers' Compensation Law – Employers

John D. Hudson - Insurance Law, Litigation – Insurance

Shelley S. Montague - Insurance Law, Litigation - Insurance

### **Greenville**

W. Howard Boyd - Commercial Litigation, Bet-the-Company Litigation, Product Liability Litigation – Defendants

Deborah C. Brown - Employment Law - Management, Employment Law - Individuals, Workers' Compensation Law – Employers

T. Cory Ezzell - Workers' Compensation Law – Employers

H. Mills Gallivan - Mediation, Arbitration, Workers' Compensation Law – Employers

Jennifer E. Johnsen - Employee Benefits (ERISA) Law, Insurance Law, Commercial Litigation

C. Stuart Mauney - Mediation, Personal Injury Litigation - Defendants, Professional Malpractice Law – Defendants

C. William McGee - Personal Injury Litigation - Defendants, Product Liability Litigation – Defendants

Curtis L. Ott - Commercial Litigation, Product Liability Litigation - Defendants

Phillip E. Reeves - Insurance Law, Personal Injury Litigation - Defendants, Product Liability Litigation – Defendants

T. David Rheney - Insurance Law, Personal Injury Litigation - Defendants, Product Liability Litigation – Defendants

Ronald G. Tate - Commercial Litigation

Daniel B. White - Railroad Law, Commercial Litigation, Personal Injury Litigation - Defendants, Mass Tort Litigation / Class Actions - Defendants, Product Liability Litigation – Defendants

Ronald K. Wray - Railroad Law, Commercial Litigation, Product Liability Litigation – Defendants



## **Legal Publication Chambers USA 2017 Recognizes Nelson Mullins South Carolina Attorneys, Practices**

Legal directory publisher Chambers and Partners has recognized Nelson Mullins Riley & Scarborough LLP in its national category for the Firm's product liability and mass torts litigation. The publishers also single out Columbia partner David E. Dukes in product liability and mass tort and Columbia partner Steven A. McKelvey, Jr. in transportation: road (carriage/commercial), as notable practitioners nationally in their practice areas. Charleston partner Robert H. Brunson and Columbia partner James T. Irvin III also are listed as recognized practitioners in nationwide product liability.

Overall, the organization ranked thirty Nelson Mullins attorneys in six states and the District of Columbia for their local legal practices. The organization also ranked four of the Firm's practices in South Carolina. They are:

- Litigation: General Commercial, South Carolina
- Corporate/M&A, South Carolina
- Corporate/M&A: Banking & Finance, South Carolina
- Environment, South Carolina

### **Individuals recognized for their South Carolina practices:**

Thomas A. Brumgardt – Corporate/M&A (Up and Coming)

Karen Aldridge Crawford – Environment

Gus M. Dixon – Corporate/M&A

David E. Dukes – Product Liability and Mass Torts, Litigation: General Commercial

William H. Foster III – Labor & Employment

Daniel J. Fritze – Corporate/M&A

Neil E. Grayson – Corporate/M&A, Corporate/M&A: Banking & Finance

Sue Erwin Harper – Labor & Employment

Bernard F. Hawkins Jr. – Environment

P. Mason Hogue – Corporate/M&A

John M. Jennings – Corporate/M&A, Corporate/M&A: Banking & Finance

John T. Moore – Corporate M&A: Banking & Finance

Samuel W. Outten – Litigation: General Commercial

G. Mark Phillips – Litigation: General Commercial

A. Marvin Quattlebaum Jr., – Litigation: General Commercial

Bo Russell – Corporate/M&A

According to the organization, rankings are based on interviews with law firms and clients and are released in Chambers USA 2017. The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by the client, according to the publisher.

## **John J. Dodds, IV joins Wall Templeton & Haldrup, PA as Associate**

Wall Templeton & Haldrup, P.A. is pleased to announce that John J. Dodds, IV has joined the firm's Charleston office as an associate attorney. Mr. Dodds obtained his B.A. in History from Tufts University in 2013, and graduated summa cum laude from Charleston School of Law in 2016. During law school, John was a member of the Presidential Honors Society, Charleston Law Review, Trial Advocacy Board, and James L. Petigru Inn of Court. Prior to joining Wall Templeton, John served as law clerk to the Honorable Edgar W. Dickson, Circuit Court Judge for the First Judicial Circuit.

## **Davis, Snyder, Williford & Lehn, PA Attorneys Recognized in Super Lawyers**

Davis, Snyder, Williford & Lehn, PA is pleased to announce that four of the firm's attorneys have been recognized as South Carolina Super Lawyers and South Carolina Rising Stars for 2017.

### **The attorneys honored as 2017 South Carolina Super Lawyers:**

Ashby Davis – Personal Injury Medical Malpractice: Defense

Steve Snyder – Personal Injury Medical Malpractice: Defense.

### **The attorneys recognized by Super Lawyers as Rising Stars:**

David Williford – Personal Injury Medical Malpractice: Defense

Trip Lehn – Personal Injury Medical Malpractice: Defense.

Davis, Snyder, Williford & Lehn, PA is pleased to announce that its five lawyers, Ashby Davis, Steve Snyder, David Williford, Trip Lehn, and Keith Knowlton, all have been selected for inclusion in the 2018 edition of The Best Lawyers in America in the practice area of Medical Malpractice Law - Defendants

## **Four Haynsworth Sinkler Boyd Attorneys Named "Lawyer of the Year"**

Best Lawyers®, a legal peer-review guide, has selected four Haynsworth Sinkler Boyd attorneys as "Lawyer of the Year" for 2018. Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant.

The following have been named Best Lawyers' 2018 "Lawyer of the Year" for their respective practice area:

### **Charleston**

John H. Tiller – Personal Injury Litigation – Defendants

### **Columbia**

John C. Bruton, Jr. – Litigation – Real Estate

**MEMBER  
NEWS  
CONT.**

Robert Y. (Bob) Knowlton – Litigation – Securities  
Greenville

J. Ben Alexander – Medical Malpractice Law –  
Defendants

**2017 Chambers & Partners Rank Gallivan White Boyd and  
Three Attorneys as Leaders in Law**

The law firm of Gallivan White Boyd, is pleased to announce that the firm has been selected for inclusion in the 2017 edition of Chambers USA, Leading Lawyers for Business as a Leading Law Firm in Commercial Litigation. Additionally, firm attorneys Daniel B. White, Gray T. Culbreath, and John T. Lay, Jr. were chosen as leading business attorneys in the field of Commercial Litigation. White, Culbreath, and Lay have years of experience in the handling of complex high-stakes corporate and commercial litigation matters.

Daniel B. White's legal practice focuses on mass torts and complex commercial litigation. He is a former President of the South Carolina Bar and former Chairman of the SC Bar House of Delegates.

With over twenty-eight years of legal experience, Mr. Culbreath concentrates his law practice on products liability, business and commercial litigation, transportation, class actions, and professional negligence. He is a member of American Board of Trial Advocates, Federation of Defense and Corporate Counsel, and Lawyers for Civil Justice.

Mr. Lay focuses his law practice on business litigation, professional malpractice, insurance bad faith and coverage, financial services litigation, product liability, and environmental law. He is the president of the International Association of Defense Counsel (IADC) and a member of the Board of Directors of the IADC, the Defense Research Institute, and Lawyers for Civil Justice as well as a Delegate of The American Civil Trial Bar Roundtable.

**Nine Sowell Gray Robinson Lawyers Recognized as 2017  
South Carolina Super Lawyers and Rising Stars**

Sowell Gray Robinson is pleased to announce that nine of its lawyers have been named 2017 South Carolina Super Lawyers, and three additional lawyers were selected as 2017 South Carolina "Rising Stars."

This is the tenth year that lawyers from Sowell Gray Robinson have appeared on the Super Lawyers list. Attorneys are selected to the Super Lawyers list by peer nominations, independent research and a review by attorneys in the same practice areas. No more than five percent of the lawyers in the state were recognized in the 2017 South Carolina Super Lawyers list. Those selected from Sowell Gray Robinson include:

Becky Laffitte – Personal Injury Defense: Products  
Bill Metzger - Creditor Debtor Rights, Business/  
Corporate, Real Estate  
Biff Sowell – General Litigation  
Bobby Stepp – Business Litigation

Monty Todd – Personal Injury Defense: Medical  
Malpractice

Cal Watson – Business Litigation

Super Lawyers also recognizes South Carolina "Rising Stars." This designation is used for up-and-coming lawyers who are either younger than 40 or who have been practicing for 10 years or less. No more than 2.5 percent of the lawyers in the state were selected to the 2017 Super Lawyers "Rising Stars" list. Those selected from Sowell Gray Robinson include:

Will Jordan – Business Litigation

Alexis Lindsay – Business Litigation

Michael Montgomery – General Litigation

**Five Roe Cassidy Attorneys Named to Greenville Business  
Magazine's Legal Elite**

Greenville Business Magazine has recognized nine Roe Cassidy attorneys as among the area's Legal Elite. The following are the Roe Cassidy attorneys selected for inclusion, as well as the practice areas in which their work is recognized:

Bill Coates –Criminal Law

Clark Price –Healthcare Law

Trey Suggs – Health Care Law

Josh Smith – Environmental Law (Top Attorney Vote)  
Business Litigation; Labor and Employment;  
Government Law

Ross Plyler – Insurance Law (Top Attorney Vote)

In its annual survey, the magazine sent emails to over 800 Greenville-area lawyers and asked them who, in their opinions, were the best lawyers in numerous practice areas. Respondents could nominate lawyers in their firms, but for each in-firm lawyer there had to be an out-of-firm lawyer nominated, although not necessarily in the same practice area

**Three Barnwell Whaley attorneys selected for 2018 The  
Best Lawyers in America list; M. Dawes Cooke, Jr. recog-  
nized as Charleston, SC 2018 Mediation "Lawyer of the  
Year"**

Barnwell Whaley attorneys M. Dawes Cooke, Jr., Randell C. Stoney, Jr., and Chris Hinnant have been named to the 2018 "The Best Lawyers in America" list, and M. Dawes Cooke, Jr. has been selected as the 2018 Charleston, Mediation "Lawyer of the Year."

The 2018 Mediation "Lawyer of the Year" award is the seventh "Lawyer of the Year" designation for Cooke, who in previous years had been selected as the "Lawyer of the Year" for Charleston, in the areas of arbitration, personal injury litigation: defendants, and as the top "bet-the-company litigator" as reviewed by his peers and Best Lawyers methodology. Cooke is recognized this year for his work in those areas as well as commercial litigation and personal injury litigation for both plaintiffs and defendants.

Barnwell Whaley managing member attorney Randell C. Stoney, Jr. is recognized for his efforts in

the areas of construction law and product liability litigation: defendants. Chris Hinnant, member attorney in the firm's Wilmington, North Carolina office, is also recognized for his work in personal injury litigation: defendants.

#### **Legal Guide Publisher Legal 500 2017 Recognizes Nelson Mullins M&A Practice, Columbia Partner Gus Dixon**

Legal directory publisher The Legal 500 has recognized Nelson Mullins Riley & Scarborough LLP for its national M&A/corporate and commercial - M&A: middle-market (sub-\$500m) practice and Columbia partner Gus M. Dixon as a "recommended" practitioner in the practice.

Selections for the publication are based on Legal 500's research into the legal market, including interviews with law firm commercial clients and attorney peers, according to the organization. The UK-based reference guide has been published annually for more than 25 years.

#### **Elmore Goldsmith Attorney Recognized in The Best Lawyers in America for 2018**

The law firm of Elmore Goldsmith is pleased to announce that Frank Elmore has been selected by his peers for inclusion in The Best Lawyers in America for 2018 in the area of Construction Law and Litigation-Construction

Best Lawyers is one of the oldest peer-review publications in the legal profession and is regarded by many as the definitive guide to legal excellence. Rankings are based on an exhaustive peer-review process in which attorneys from across the country provide feedback on the legal abilities of other lawyers in their respective practice areas.

#### **Best Lawyers Names Fifty-Six Haynsworth Sinkler Boyd Attorneys to Annual List**

Fifty-six lawyers from Haynsworth Sinkler Boyd, P.A. were recently selected by their peers for inclusion in The 2018 Best Lawyers in America list.

The following attorneys and specific practice areas include:

##### Charleston

Stephen E. (Steve) Darling – Personal Injury Litigation – Defendants; Product Liability Litigation – Defendants

Wm. Howell Morrison – Commercial Litigation; Professional Malpractice Law – Defendants

John H. Tiller – Personal Injury Litigation – Defendants; Product Liability Litigation – Defendants

##### Columbia

James Y. (Jamie) Becker – Litigation – Banking and Finance

William C. (Bill) Boyd – Antitrust Law; Corporate Law; Mergers and Acquisitions Law; Real Estate Law

John C. Bruton, Jr. – Insurance Law; Litigation – Construction; Litigation – Real Estate; Personal Injury Litigation – Defendants

Clarke W. DuBose – Mass Tort Litigation / Class Actions – Defendants; Product Liability Litigation – Defendants

Manton M. Grier – Commercial Litigation; Litigation – Antitrust

Robert Y. (Bob) Knowlton – Bet-the-Company Litigation; Commercial Litigation; Litigation – Intellectual Property; Litigation – Securities

##### Greenville

J. Ben Alexander – Medical Malpractice Law – Defendants; Professional Malpractice Law – Defendants

Thomas H. (Tom) Coker, Jr. – Litigation – Construction

W. David Conner – Mass Tort Litigation / Class Actions – Defendants

H. Sam Mabry III – Litigation – Banking and Finance; Litigation – Intellectual Property; Litigation - Labor and Employment; Litigation – Mergers and Acquisitions; Litigation – Real Estate; Personal Injury Litigation – Defendants; Product Liability Litigation – Defendants

W. Francis (Frankie) Marion, Jr. – Bet-the-Company Litigation; Commercial Litigation; Personal Injury Litigation – Defendants; Product Liability Litigation – Defendants

J.W. (Jay) Matthews III – Commercial Litigation

Charles E. (Bud) McDonald, Jr. – Real Estate Law

Moffatt G. (Mott) McDonald – Litigation – Environmental

Sarah M. (Sally) Purnell – Medical Malpractice Law – Defendants; Personal Injury Litigation – Defendants; Professional Malpractice Law – Defendants

J. Derrick Quattlebaum – Insurance Law; Litigation – ERISA

#### **Five Roe Cassidy Attorneys Selected for Inclusion in 2017 South Carolina Super Lawyers and Rising Stars lists**

Roe Cassidy Coates and Price, P.A. is pleased to announce that five of its attorneys have been recognized in the 2017 South Carolina Super Lawyers and Rising Stars lists. Super Lawyers creates an exclusive listing of attorneys who have obtained a high degree of peer recognition and professional achievement in particular practice areas. Only 5% of all attorneys in South Carolina are selected as "Super Lawyers" and a mere 2.5% designated as "Rising Stars."

The Roe Cassidy attorneys selected for inclusion in these exclusive lists are:

##### Super Lawyers

Bill Coates – Business Litigation

Jack Griffeth – Alternative Dispute Resolution

Ross Plyler – Business Litigation

##### Rising Stars

Trey Suggs – Professional Liability Defense

Josh Smith – Business Litigation



# 2017 Summer Meeting Wrap Up

by Walter K. Barefoot



The 2017 summer meeting was held on July 14, 2017 through July 16, 2017 at The Omni Grove Park Inn in beautiful Asheville, North Carolina. The event kicked off with a reception and silent auction on Friday night. The Young Lawyers, led by their President Claude Prevost, worked very hard to increase the number of items donated to the Silent Auction. This led to an increase in money raised which will be used to support the three charitable organizations that benefit from the Silent Auction.

President David Anderson welcomed everyone on Saturday morning. The educational program then began with Henry Deneen speaking about Emotional Intelligence for lawyers. It was an enlightening presentation.

The Insurance/Torts Substantive Law Committee provided a substantive update, featuring plaintiff's lawyer David Savage, while the Workers' Compensation Substantive Law Committee led a breakout featuring a panel of five of our seven Workers' Compensation Commissioners.

Gray Culbreath, Alan Jones, Steve Moon, Roy Shelley, and Jessica Waller, all participated in a panel discussion, moderated by Jay Thompson, on the recent decisions regarding multiple tortfeasors.

Despite some afternoon showers, attendees were able to have a great golf tournament Saturday. The

Women in Law Committee held a reception Saturday afternoon and enjoyed some professional and social networking. And once again, the Bluegrass, Blue Jeans and BBQ on the Blue Ridge Dinner Saturday night included some good BBQ, good grits, and, of course, some good adult beverages.

The Workers' Compensation Substantive Law Committee hosted the Breakfast with the Commissioners on Sunday morning. The Association's Sponsorship Committee created a new category of sponsorship for this year, the Platinum level, and Applied Building Sciences generously chose to sponsor the meeting. ABS presented on qualitative sampling for construction defect investigations, and provided a human factors update on Sunday morning. The Workers' Compensation Substantive Law Committee then had another breakout educating participants on important recent case law. Kevin Malloy, Jay Thompson, Dick Willis and Gray Culbreath presented an update on recent rulings in products' liability cases and how they affect defenses in those claims. Finally, Mark Fava, general counsel for Boeing in South Carolina, presented a very educational and truly entertaining presentation about Boeing's recent union campaign.

The Summer Meeting Committee and the Association again extend their thanks to all the presenters and sponsors. It was a great weekend full of education and fun for all who came.





**SCDTAA  
EVENTS**



# Motions Practice Seminar

by Giles S. Schanen



On September 22, the SCDTAA held its second annual Motions Practice Seminar at the Greenville County Courthouse. The program was a success, as thirty lawyers came together to receive insight from a distinguished group of panelists and speakers and to practice their craft during mock hearings conducted before SCDTAA board members.

The program began with a panel of career law clerks who shared advice gleaned from their nearly fifty years of combined experience in the federal court system. We thank Heath Beard, Valerie McDonald, and Christine Schanen for providing practical pointers concerning federal court motions practice.

Next, Beattie Ashmore of Beattie B. Ashmore, P.A., spoke to the group about motions practice from the plaintiff's perspective. Among other things, Mr. Ashmore emphasized that sometimes the motions lawyers do not file are more important than those they actually file, and he discussed the specific types of motions lawyers should generally avoid filing. We are grateful to Mr. Ashmore for taking time away from his practice to speak to our group of defense lawyers.

After a short break, the participants were treated to a judicial panel consisting of United States District Judge Timothy M. Cain, United States Magistrate Judge Jacquelyn D. Austin, and South Carolina Circuit Judge Perry H. Gravely. This group of talented and witty judges offered insight concerning effective motion practice which undoubtedly will benefit all in attendance. We are very fortunate to have dedicated judges in South Carolina such as these, who are willing to give back to the legal community.

During our last session of the day, attendees observed a spirited and informative mock argument of a motion in limine by Dick Willis and William Brown, who is the immediate past president of the SCDTAA. These skilled lawyers demonstrated and explained the components of an effective oral argument, which later proved helpful to the attendees when they conducted their own mock arguments. In addition to Mr. Willis and Mr. Brown, we thank SCDTAA president David Anderson for judging this mock hearing.

After lunch, the participants argued mock dispositive motions and discovery motions in the courtrooms at the Greenville County Courthouse. We



thank David Anderson, Trey Watkins, Dick Willis, Josh Howard, and Mark Allison for judging these mock hearings. The participants were well-prepared, which ensured the hearings ran smoothly, and the trial observers and the judges provided excellent critique and feedback.

Special thanks to our sponsor, Legal Eagle, and to our Executive Director, Aimee Hiers, for her tireless work in coordinating the program. We hope to see more members at next year's Seminar!

# 2017 50th Annual Meeting

## Sea Island, GA • November 9 - 12

by Mark A. Allison

SCDTAA  
EVENTS

The Association will proudly celebrate its 50th Annual Meeting from November 9th through 12th, 2017 at The Cloister in Sea Island, Georgia. The Cloister is the only resort in the world to have received four Forbes five-star awards for eight consecutive years. We have assembled outstanding speakers and expect an excellent turnout for this milestone occasion. We are excited to share this time reconnecting with friends in a beautiful setting.

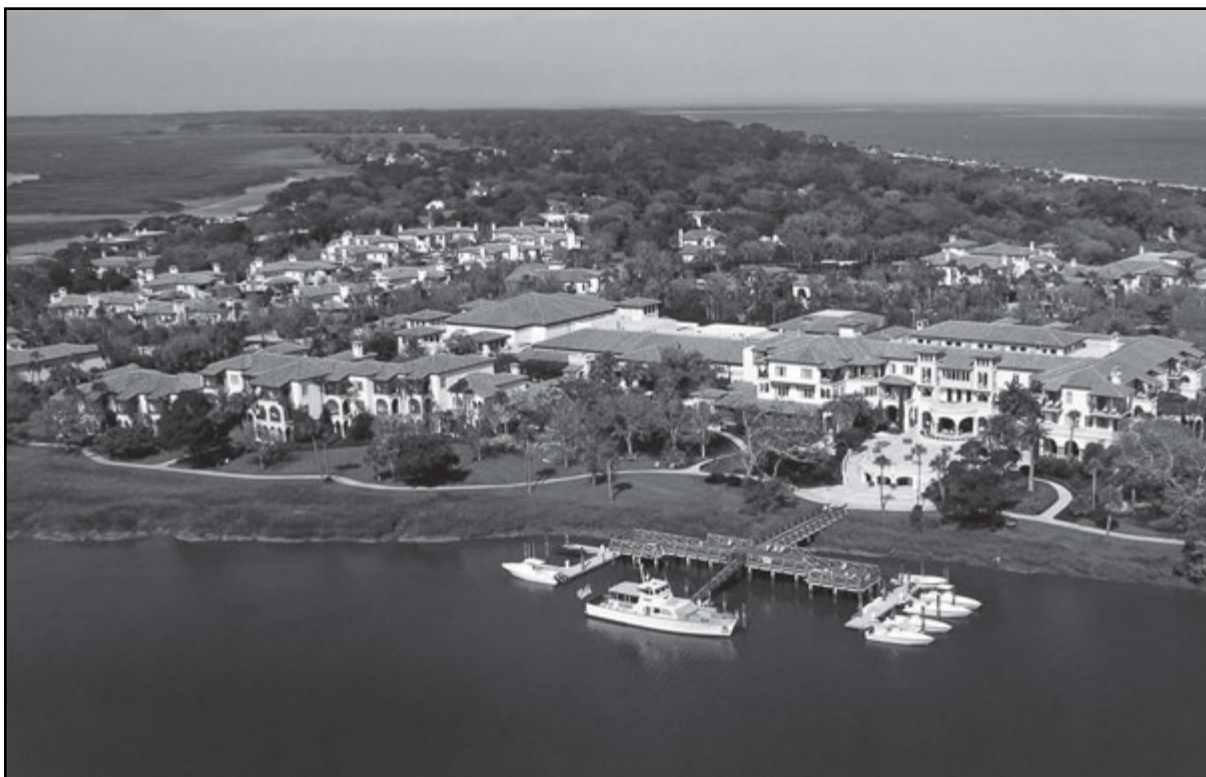
On Thursday evening, we will gather for the President's Welcome Reception before enjoying dinner at locations of the attendees' choosing.

On Friday morning, SCDTAA President David Anderson will welcome the attendees, followed by a presentation on life care planning and wage loss analysis from our friends at Inquis. A panel of circuit court judges will offer reflections on the bench and the legal practice. We will also hear from Timothy Pratt, general counsel with Boston Scientific. The

program will adjourn Friday afternoon for an array of recreational activities, including the Women in Law reception, a golf tournament, and a fishing excursion. Friday evening offers a cocktail reception followed by a black tie optional banquet and dancing.

On Saturday, we will enjoy remarks from Chief Justice Donald Beatty of the South Carolina Supreme Court, Dean Robert Wilcox of the University of South Carolina School of Law, and Chief Judge Roger Gregory of the Fourth Circuit Court of Appeals. Elliott Davis will also offer their expertise on economic damages. We will adjourn on Saturday afternoon and gather again Saturday evening for The Riverside BBQ and Oyster Roast.

Please register as soon as possible in anticipation of the expected turnout. We look forward to seeing you soon!





# Fall 2017 Legislative Update

by Jeffrey N. Thordahl, SCDTAA Lobbyist



The last legislative update recapped how the General Assembly dealt with a couple of high profile issues - road maintenance funding and reform of the State pension system. It was hard to imagine another issue like those that would take a similarly significant amount of legislative time and effort during this upcoming session. Then, the cancellation of the construction of the two nuclear plants in South Carolina was announced. Suddenly, there is an extra-

ordinary issue to be dealt with next year. Already, there are special House and Senate Committees looking into what happened and what can be done about it. The upcoming session is likely to now be dominated by this issue.

With that said, other legislative business will take place, and as the second year of a two-year session, there will be persistent efforts made at resolving outstanding legislation. The second big issue receiving much-needed attention is the opioid epidemic. Several bills have been introduced to address the problem from several different directions.

On the legal front, we will continue to keep an eye on the Magistrates Jurisdiction bill, which has passed the Senate and is now in the House Judiciary Committee. A new issue that may get some attention is the result of the recent South Carolina Supreme Court cases dealing with the application of the joint and several liability statute - *Machin v.*

*Carus Corporation* and *Smith v. Brown Trucking* on April 26, 2017.

On the judicial front, there are five open Circuit Court seats that have drawn heavy interest from applicants. Public hearings will begin November 13 before the Judicial Merit Selection Commission. The elections will likely be held in late January or early February, 2018. It has been typical over the last many years to hold a second round of elections to also fill judicial seats (often filling vacancies created by the first round of elections) late in the legislative session. With the new earlier end date to the legislative session, there is no longer time to coordinate the screening schedule and hold the elections.

As for elections, all 170 House members are up for re-election next year, as is the Governor and the other Constitutional Officers. Many legislators already know primary opponents and are beginning to get into "campaign mode." The Governor's race has grown to what looks like a 4-way Republican primary and a potential general election race along with a Democrat who is testing the waters. Republican challengers Catherine Templeton, current Lt. Governor Kevin Bryant (former Senator), and former Lt. Governor and Senator Yancey McGill are all canvassing the state fundraising and getting their message out. A Democrat member of the SC House of Representatives - James Smith - is exploring the possibility of a run on that ticket to face incumbent Governor Henry McMaster in the general election.





# In Memory of The Honorable Charles Weston Houck South Carolina District Court Judge



On July 19, 2017, South Carolina lost one of its most respected jurists with the passing of the Honorable Charles Weston Houck, United States District Court Judge for the District of South Carolina. Judge Houck was born in Florence on April 16, 1933 and graduated from the University of South Carolina School of Law with an LL.B. in 1956. Judge Houck practiced privately in 1956 before joining the U.S. Army, serving in 1957 and 1958.

Following his Army service, Judge Houck returned to private practice from 1958 to 1979. During this time, he served as Chairman of the Florence City-County Building Commission and also served as a South Carolina State Representative from 1963 to 1968. In consideration of Judge Houck's distinguished career in private practice and his years of public service, then-President Jimmy Carter nominated Judge Houck in June 1979 to a new seat for the United States District Court for the District of South Carolina. Judge Houck was confirmed by the United States Senate on September 25, 1979.

Judge Houck also held the position of Chief Judge for the District of South Carolina from 1993 to 2000. Judge Houck assumed senior status on October 1, 2003, where he continued to serve the public as he

had since the beginning of his career.

Judge Houck had a significant impact on the South Carolina Defense Trial Attorneys' Association and was instrumental in its founding. His colleagues fondly remember his love for being a judge. He is remembered for the devotion he had to the legal profession and his influence on the professionalism of his fellow attorneys.

As Robert H. "Bobby" Hood remembers,

It was a high honor in my years in the courtroom to have been before Judge Houck. He was always prepared and expected the same from the attorneys before him. He epitomized the adage that the practice of law is a profession, not a job. Diligence, preparation and a thorough knowledge of the factual and legal issues is what he brought to the bench each day, and in so doing, he had a profound impact on me and my practice as well as the many others who came before him. We will miss Weston as a friend, advocate and trial judge.

The members of the South Carolina Defense Trial Attorneys' Association extend their condolences to the family and friends of Judge Houck for their loss.

# Young Lawyers Division Update

by Claude T. Prevost III



2017 was a great year for the SCDTAA Young Lawyers Division. The YLD made a strong showing at the Trial Academy in May 2017. Dozens of young lawyers participated in the mock trials as litigators, witnesses, and jurors. The enthusiastic participation of the young lawyers in these capacities made the mock trials as realistic as possible, which served as a great teaching tool for all those involved. Many thanks to the young lawyers who volunteered their valuable time to the Trial Academy.

During the Trial Academy, the YLD also had well-attended social events, including a Columbia Fireflies baseball game and happy hour, where young lawyers had an opportunity to relax between mock trial preparations. It was a pleasure to see such well attended functions.

This year, brand new to the YLD is the YLD Summer Meeting Subcommittee. This new subcommittee was formed and geared toward young lawyer involvement at the SCDTAA Summer Meeting to support the Silent Auction. James Robey and Ben Joyce formed the inaugural YLD Summer Meeting Subcommittee. With the help of the Subcommittee

as well as YLD state wide representatives Batten Farrar, Jessica Waller, Mike Leech, Alex Joiner, and Stephanie Mascella, and Vice President Derrek Newberry, the YLD was able to raise over \$7,000 for the National Foundation for Judicial Excellence, the South Carolina Bar Foundation, and Kids Chance of South Carolina. The hard work of the Subcommittee and the statewide representatives in gathering donated auction items secured the success of the silent auction. Thank you to all those who participated in the silent auction.

If you have any ideas for the growth of the YLD, please feel to contact me or Derek Newberry.

The 2017 SCDTAA Annual Meeting will be held at The Cloister, Sea Island, Georgia. A large percentage of the defense bar and judiciary plan on attending this meeting. This is a wonderful occasion for young lawyers to mingle with members of the bar and bench.

The YLD is a great opportunity for lawyers in the early years of their practice to meet other lawyers, build relationships, and get involved in the SCDTAA. If you have any questions about the YLD, or would like to get involved, please contact me or Derek Newberry.

## Accepting Names for the YLD President Elect!

**The SCDTAA is now accepting names for the President Elect position of the Young Lawyers. The President-Elect's term is two years and at the end of those two years, that person will become President of the Young Lawyer's Division for two years. As President of the Young Lawyers Division, you will serve as an ex-officio member of the Board of Directors of the SCDTAA.**

**The Young Lawyers division includes "All members of the Association who have been engaged in the practice of law for 10 years or less are eligible for membership in the Division."**

**The election will take place via an online vote in the next few weeks.**

**For those that are interested in this position, please send Aimee Hiers [aimee@jee.com](mailto:aimee@jee.com) an email with a brief bio asking that she add your name to the ballot.**

# Young Turks & Elders: How it All Began

by Edward W. Mullins, Jr.  
SCDTAA President 1972 - 1973

In late 1967, Dewey Oxner (Haynsworth, Perry, Bryant and Marion), Mark Buyck (Wilcox Hardy Houck and Palmer), Jim Alford (McKay, McKay, Black and Walker), Bill Pope (Robinson, McFadden and Moore), Dana Sinkler (Sinkler Gibbs), Lowell Ross (Rogers, McDonald and Ross) Mike Glenn (Doyle and Glenn), Doug Gray (Watkins Vanderveer) and Carl Reasonover, assistant South Carolina Attorney General and I, along with several others who appear in the picture below, were all relatively young, active trial lawyers who specialized in defending civil damage suits. All of these firms have either changed names or merged with other firms. We had grown concerned at the rising influence of the South Carolina plaintiff's bar in our state legislature, where we were seeing a variety of pro-plaintiff laws being passed. There were a lot of plaintiff's lawyers in the legislature, and there existed then a very active South Carolina Trial Lawyers Association composed entirely of plaintiff's lawyers. The plaintiff bar not only took an active part in the passage of laws related to civil litigation but also exerted influence over the election of our state judges. So, our small group of civil defense litigators met informally on several occasions during the last quarter of 1967 and

well into 1968 to discuss our concerns, exchange information, and talk about topics relevant to defending civil actions in our state and federal courts. For the purposes of this article, let's call this group the Young Turks. We ultimately decided that to provide any kind of counterbalance to the rising tide of plaintiff-oriented influence in our state, we needed to form a defense lawyer association. Not only would this provide a forum for networking and improving our advocacy skills, it would also give us a platform from which we could address the issues of legislative influence we saw as critical to combat the increasingly well-organized plaintiff bar.

The biggest hurdle we Young Turks faced was to attract a sufficient number of defense lawyers interested in forming such an association. We learned that the South Carolina Claims Management Association was having a meeting in December of 1968 at the Adventure Inn in Hilton Head, SC. We saw this as a real opportunity to motivate defense lawyers to join our nascent organization. We felt that

Continued on next page



## Some of the Founders of SCDTAA



**Seated L to R: Carl Reasonover and Ed Mullins Jr.  
Standing L to R: Bernard Manning, Bill Pope, Mike Glenn, Harold  
Jacobs, Dana Sinkler, Jim Alford and Weston Houck**

if we could work with the Claims Association to put together a program relevant to our trial practice, and highlight the need for a state-wide defense lawyer's association, it would attract a substantial number of our fellow defense lawyers. The real drawing card would be the fact that most of their insurance company clients would be attending.

We approached Jack Barwick, a leader in the South Carolina Claims Management Association, who readily responded and was able to get the Association to support this initiative. We called it the South Carolina Defense Conference. Jack agreed to co-chair the conference with Lowell Ross of our group, and some of those mentioned above were very much involved. In fact, we Young Turks did the lion's share of the work of planning and putting on the conference. The conference was a resounding

**The conference was a resounding success, and seventy-five of the defense lawyers who attended signed up immediately to join a South Carolina Defense Lawyer Association.**

success, and seventy-five of the defense lawyers who attended signed up immediately to join a South Carolina Defense Lawyer Association.

Shortly before the South Carolina Defense Conference, we were made aware of the fact that Ben Moore, of the Charleston firm of Moore, Muzon and McGee, through his membership in the International Association of Defense Counsel, had been appointed as the DRI State Chairman for South Carolina. Ben Moore, we discovered, was already working with the DRI to form a South Carolina defense association. Indeed, this was one of the principal responsibilities of the DRI state chairman and we were informed that he was bringing with him a board member of the DRI, John Williams, a Texas trial lawyer. As the conference ended, we sat down with Ben and John Williams to see where they were on their efforts to form such an association. The meeting itself was a little tense, since Ben felt that our Young Turks effort had the potential to undermine his efforts to form a similar group. For our part, while we had heard of

DRI, none of us were active in it and were unaware of its relationship with state defense attorney organizations. We were amazed when Ben told us that not only had he rounded up six other older South Carolina attorneys, closer to his age, who were interested in forming a defense attorneys' association but also that they had already formed a defense attorney organization which they had named the South Carolina Defense Attorneys Association. For the purposes of this article, let's call them the Elder Group .

The Elder Group had adopted a set of bylaws patterned on a set that DRI had provided, and working through this framework had already taken some significant steps. Only Ben himself, Grady Kirvin of the Watkins Vanderver firm, and Harold Jacobs of Cooper, Gary, Nexsen and Pruet were present and participated in this Elder Group's November 14, 1968 formation meeting. Ben had been elected president, Grady president-elect, and Harold secretary-treasurer, while three of the remaining four lawyers in the seven member Elder Group had been elected to the association's Executive Committee. As the scope of the Elder Group's efforts became clear to us, we put aside our differences and both Ben and John Williams were pleased that, by taking the lead in putting on this defense conference, the Young Turks had successfully motivated a good many defense lawyers to join a state defense attorney association. Mr. Williams noted that while the Young Turks and the Elder Group had been travelling on different courses, it all ended in an even better result than either group could have foreseen.

We now had a sufficient number of defense attorneys interested in joining a state defense attorney association. A formal structure called the South Carolina Defense Attorneys Association was already in place for them to join, it having been formed under the auspices of DRI, just as other state defense associations had been formed in the past. The only thing left was to work out, between these two groups, the future leadership of this new organization. The three lawyers of the Elder Group who had been elected to the offices of president, President-elect and secretary-treasurer and the three elected to the executive committee at that November organizational meeting kept their positions until the first real annual meeting in October 1969, except for the fact that I was elected to the executive committee and appointed program chair of that meeting. It was held on October 10-11, 1969, at the Sheraton Hotel in Columbia, and by then we had 130 members. The highlight of the program was a very interesting talk by Roger Fritchie, a Baton Rouge attorney, on the then-hot topic of excess liability. Other speakers were Ken Nails, Assistant General Counsel of the American Mutual Alliance, on proposed no-fault insurance plans, our secretary-treasurer, Harold Jacobs, who explained the Waddell no-fault bill pending in the South Carolina legislature, and Frank Goodwin, a former professor of marketing at the



University of Florida, who spoke on the subject of "Why People Act As They Do." Grady Kirvin became President and Harold Jacobs was elected President-elect and myself Secretary-Treasurer, and Dana Sinkler was elected to the Executive Committee. The 1971 annual meeting saw Dana elected to be President-Elect, and I was reelected Secretary-Treasurer. Those of you who follow South Carolina history will note that this shift in positions mirrored the long-standing allocation of responsibilities among the regions of our great State. In this case, a low country lawyer would succeed Harold Jacobs, who was a Columbia lawyer, instead of having me, another capitol city attorney, take the position. So, I continued as Secretary-Treasurer and Jimmy Alford and Dewey Oxner were elected to the Executive Committee. At the following meeting, Dana was elected President, and I took his place as President-Elect.

During my presidency in 1972 – 73, our membership approached 200 attorneys and the dues climbed all the way from \$25 to \$30 a year. Dewey Oxner and Jim Alford followed me and were elected Presidents at the 1973 and 1974 meetings, respectively. You may note that all these attorneys were members of the Young Turks, and that the only attorneys from the Elder Group who were ever elected as officers of the association were the three that were elected at their November 14, 1968 meeting. Suffice it to say that beginning in 1969, the leadership of the organization gradually shifted to the Young Turks, and by the 1972 meeting, all the leaders came from that group. The Young Turks' alliance with the insurance industry also continued, with defense conferences in 1969, 1970, and 1971, held in conjunction with the meetings of the Claims Management Association. Most of these early defense conferences were held in December. shortly after the defense attorney's annual meeting in October, but to make the schedule more convenient for our members, the meeting was moved to the summer. It has been held during the summer months ever since. During this time, it also began to be referred to as "The Joint Meeting" with the Claims Management Association.

We developed a close relationship with DRI, which

in effect was the national organization of the defense bar as ATLA was for the plaintiff bar. One of its main functions was the establishment of new local defense associations and supporting existing ones. While there were many state defense associations existing at the time the South Carolina association started, there were several states without one. Kentucky, North Carolina and West Virginia did not have an association, and Virginia was in the process of organizing one. Each year we sent a representative to DRI's annual conference of local defense associations, where we were educated on how to be an effective organization in, among other things, recruiting members, legislative activities and conducting educational programs. As to the latter, DRI furnished outstanding speakers who were experts in their areas of practice. In 1974, our association was selected to host and put together the program for DRI's 7th annual conference of local defense associations, which was quite an honor for such a young organization. I was chairman of that conference and later became involved in in the founding of the North Carolina Defense Attorneys Association and in other leadership positions in DRI, becoming president in 1985. My law firm, Nelson Mullins Riley and Scarborough, has always been a strong supporter of the Association and DRI. Four of its lawyers followed me as president of SCDTAA and likewise four Nelson Mullins lawyers followed me as president of DRI.

The name of our association was later changed to the South Carolina Trial Defense Lawyers Association, to emphasize the fact that we were trial lawyers, or "trial dogs" as we used to refer to ourselves, and so as to not to be confused with the lawyers in the South Carolina Trial Lawyers Association, whose members were plaintiff lawyers. Indeed, it was due to the contributions, the spirit, and the hard work of both the Elder Group and the Young Turks that our association was created. Little did either group know, when they sat down for a tense meeting in 1968, that this organization would develop into such a high-profile legal association - one that would so benefit its members and their clients as well as the legal system and the public of the State of South Carolina

**VISIT US ON THE WEB AT  
[WWW.SCDTAA.COM](http://WWW.SCDTAA.COM)**

# DRI Update

by James R. Courie



**A**fter another long South Carolina Summer Fall has finally arrived. Leaves are turning, the air is getting cooler, and of course college football and the defending National Champion Clemson Tigers are back on the field. But wait—Fall also brings us the DRI Annual Meeting, one of my favorite business and networking events of the year. This year's Annual Meeting took place in Chicago at the Sheraton Grand Hotel October 4th – 8th. The

planning committee put together an outstanding week of CLE programming and networking events to create opportunities for attendees to:

- Engage. Hear from some of the world's foremost authorities on the legal landscape, the Supreme Court, foreign affairs, domestic politics and more including:
  - Jeffrey Toobin, Senior Legal Analyst, CNN Worldwide, Staff Writer at The New Yorker
  - John Brennan, Former Director of the CIA—National Security and Foreign Affairs
  - Eric Holder, Jr., Former U.S. Attorney General
- Learn about developing legal topics to stay abreast of the changes, and earn up to 12.0 hours of CLE credit, including up to 3.0 hours of ethics credit.
- Connect with colleagues while networking with over 1000 defense attorneys and in-house counsel throughout the week.
- Grow. Get involved—join your substantive law committee colleagues for their business meetings to learn about leadership opportunities.

Maybe the most compelling reason to attend this year's Annual Meeting was to support and honor two of our Members as John Cuttino passed the leadership gavel to John Kuppens. What an impressive statement to have back to back Presidents of DRI as Members of our Association and Bar. If you've not attended the DRI Annual Meeting in the past, I highly recommend you make plans to attend the meeting in the future. This year's Annual Meeting was a great opportunity to support our friends and colleagues and to recognize their dedication, hard work and national leadership. Going forward attendance by the SCDTAA members will help to continue South Carolina's strong presence in the DRI.

A few other DRI notes of interest...

- I just returned from the DRI Managing Partner and Leadership Conference. DRI is continuing to place greater emphasis on Law Firm Management and provide programming that assists law firms in working toward greater efficiency, profitability and long term success.

- DRI continues to provide outstanding educational opportunities and recognizes that the form of that programming continues to evolve. More cost efficient programming such as webinars will be expanded to meet the time and budget constraints of firms.

- DRI continues to advocate and act on behalf of our Members and the profession through such vehicles as Amicus Briefs, White Papers, State and National legislative involvement, and other means.

- DRI continues to address and work toward greater diversity and is proud that current membership is 31% female and that 2 of the 6 officers are African American.

- DRI is aware that Millennials and Generation Z will make up the majority of the work force in the next 10 years, and is committed to develop a value proposition to engage and encourage younger lawyers to engage and develop into future leaders of our profession.

#### Upcoming Seminars of note:

- December 7-8  
Insurance Coverage New York
- December 7-8  
Professional Liability New York

If you are already a member of DRI I encourage you to take full advantage of the many opportunities available. If you are not a member, please consider joining. DRI has some great membership specials available for new and returning members. It is a great investment in your practice.

*See the DRI  
Annual Meeting Recap  
on Page 30*

# Filling the Empty Chair: Balancing Incentives for Plaintiffs and Defendants After *Machin* and *Tiffany*

by R.I. Smith and Amber M. Hendrick

Borne out of the dicta of *Graves v. United States*,<sup>1</sup> the empty chair defense has been called a gamble,<sup>2</sup> “subject to much mischief,”<sup>3</sup> and difficult to apply.<sup>4</sup> Yet, it may now be the key to ensuring reasonable settlements. Two recent cases, *Machin v. Carus Corporation*<sup>5</sup> and *Smith v. Tiffany*<sup>6</sup> have significantly altered the litigation landscape by effectively limiting defendants’ ability to seek contribution from other tortfeasors, increasing the potency of the “plaintiff’s choice” rule, and emphasizing the role of the empty chair defense in defense strategy. While certainly not the outcome for which the defense bar had hoped, *Machin* and *Tiffany* provide dueling incentives to plaintiffs and defendants which, if effectively applied, may ensure that the scales are not further tipped in the plaintiffs’ favor.

At the heart of both *Machin* and *Tiffany* is the empty chair defense. The premise of this defense is simple—a defendant may point to a non-party tortfeasor as a contributor to the plaintiff’s injuries<sup>7</sup> to attack the plaintiff’s theory of proximate cause,<sup>8</sup> suggest that the plaintiff has already received fair compensation,<sup>9</sup> or to argue that the plaintiff has failed to present critical evidence to the jury.<sup>10</sup> While a part of South Carolina’s common law for many years,<sup>11</sup> the empty chair defense was codified as an amendment of the South Carolina Uniform Contribution Among Tortfeasors Act (UCATA)<sup>12</sup> in 2005.<sup>13</sup> UCATA was originally passed in 1988 and provided a right to contribution among tortfeasors,<sup>14</sup> provided factors for determining pro rata liability of tortfeasors, and codified releases and covenants not to sue or enforce judgment.<sup>15</sup> As a result, UCATA substantially weakened plaintiffs’ ability to extract settlements from, or selectively sue, potential tortfeasors with the deepest pockets, but not the greatest liability. The effect, as perceived at the time, was to shift the balance of power in litigation toward defendants.<sup>16</sup>

However, the 2005 amendments substantially modified UCATA. Section 15–38–15 partially abolished joint and several liability, provided a specific formulation for how juries were to determine fault among defendants, codified the empty chair defense, and carved out an exception to defendants whose

conduct was willful, wanton, reckless, grossly negligent, intentional, or involved alcohol or illegal drugs. In regard to joint and several liability, UCATA allows only defendants found to be more than fifty percent at fault to be made jointly and severally liable.<sup>17</sup> For a defendant who is less than fifty percent at fault, he is liable for only the percentage of damages apportioned to him by the jury.<sup>18</sup> Additionally, UCATA created a three-step process for the jury to apportion fault.<sup>19</sup> First, the jury specifies the plaintiff’s damages.<sup>20</sup> Second, the jury determines the percent of fault attributable to the plaintiff and reduces the damages award proportionately.<sup>21</sup> Third, in cases involving two or more defendants and indivisible damages, a defendant may move for the jury to apportion fault between the remaining defendants.<sup>22</sup> Although several suits regarding UCATA have reached the South Carolina Supreme Court, none have fully addressed the questions at issue in *Machin* and *Tiffany*. As a result, a basic understanding of *Machin* and *Tiffany* is necessary to deconstruct their effects.

## ***Machin v. Carus Corporation***

In *Machin*, the Plaintiff, while working for his employer, the Town of Lexington, was exposed to a chemical produced by Defendant Carus Corporation that allegedly caused Plaintiff to suffer from reactive airways syndrome as a result of his exposure. Plaintiff filed a workers’ compensation claim and was awarded benefits from his employer. Additionally, Plaintiff filed a civil action to recover damages from three companies involved in the production of the chemical—The Andersons, Carus Corporation, and Fetter & Sons. Fetter & Sons settled with the Plaintiff prior to trial. During the trial, both of the remaining defendants argued that the Town of Lexington’s negligence was the sole proximate cause of Plaintiff’s injuries. After jury deliberations began,



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the jury submitted a question to the trial court inquiring as to why the Town of Lexington was not included in the lawsuit. The court informed the jury that it could only consider the evidence presented during trial. During deliberations, the Andersons took a voluntary nonsuit and the jury form was amended to remove reference to the Andersons. The jury returned a defense verdict in favor of Carus Corporation. Subsequently, the Plaintiff filed a motion for a new trial asserting that the federal court erred when it failed to allow argument or jury instructions on workers' compensation while allowing the defendants to argue the empty chair defense placing responsibility for the Plaintiff's injuries on the Town of Lexington. The federal court then certified four questions to the Supreme Court of South Carolina.<sup>23</sup>

In responding to the certified questions from the federal court, the Supreme Court of South Carolina expressly affirmed that the empty chair defense is a viable defense that a defendant may assert.<sup>24</sup> The Court acknowledged that a defense that a "product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff."<sup>25</sup> Thus, the court determined that the ability to argue the empty chair defense was essential to the presentation of the defense by Carus Corporation. However, the court noted that where the empty chair defendant is an employer immune from suit under the exclusivity provision of the Workers' Compensation Act, the empty chair defendant cannot be found to be a legal cause of the Plaintiff's injuries.<sup>26</sup> The jury could hear argument regarding the employer's actions and could be informed that a separate proceeding would determine the employer's legal responsibility.<sup>27</sup>

Essentially, the Court determined that defendants reserve the right to argue the empty chair defense and that the jury can assess whether an employer's actions were responsible for Plaintiff's injuries, but only in the context of determining whether the Plaintiff has met his burden to prove the elements of his claim against the defendant.<sup>28</sup> As a result, the Court determined that an employer could not be allocated any fault, and as such, could not be included on the verdict form.<sup>29</sup> In reaching its decision, the Court analyzed the tension between subsections 15-38-15(C) and (D).<sup>30</sup> The Court noted that although subsection (D) contemplates that a defendant may choose to argue that "another potential tortfeasor . . . contributed to the alleged injury," subsection (C) only permits fault to be allocated among defendants.<sup>31</sup> Thus, whereas subsection (D) provides for the empty chair defense, subsection (C) prohibits the allocation of fault to non-parties.<sup>32</sup> Moreover, because the empty chair defendant in *Machin* was an employer granted immunity from

suit by the legislature, the Court determined that the employer could not rightfully be considered a potential tortfeasor and, as such, could never be allocated fault under any reading of S.C. Code § 15-38-15(C)-(D).<sup>33</sup>

The Court's decision in *Machin* demonstrates how much of a gamble the empty chair defense is. On the one hand, the *Machin* decision reinforces the availability and importance of the empty chair defense to defendants. If a defendant is successful in arguing that another non-party might be responsible for a plaintiff's injuries to such an extent that a jury could find that the plaintiff has not met his or her burden to prove its case against the defendant, then the empty chair defense can lead to a defense verdict. However, the decision also highlights the limitations of the empty chair defense. But, if a defendant's use of the empty chair defense can only demonstrate that a defendant is not 100% at fault, in part due to the actions of a non-party, the jury must allocate the entire defense share of fault to the defendant because fault cannot be allocated to non-parties. As a result, the use of the empty chair defense at trial is a zero-sum game in which either the defendant escapes liability and the plaintiff collects nothing from the defendant, or the defendant shoulders the entire amount of defense liability, and the plaintiff collects all from the defendant whether that defendant is actually fully responsible for the plaintiff's injuries or not.

By allowing defendants to use the empty chair defense at trial, but prohibiting juries from allocating fault to non-parties, the Court's decision raises the question: if defendants should only be required to pay damages commensurate with their respective degree of fault, where does *Machin* leave defendants who are not responsible for the entire share of fault that is not allocated to the plaintiff when the remaining non-plaintiff fault cannot be allocated to non-parties? However, based on the Court's decision, the responsibility for answering that question is a task the Court will leave to the General Assembly.<sup>34</sup>

### ***Smith v. Tiffany***

In *Tiffany*, the Court was presented with a familiar scenario. The Plaintiff was struck by Mizzell as he turned left from a parking lot onto U.S. 178. Mizzell could not see Plaintiff approaching because his view of oncoming traffic was obscured by Tiffany's tractor trailer, which was broken down on the side of the road. Prior to filing suit, Plaintiff entered into a covenant not to execute with Mizzell. Plaintiff then brought suit against Tiffany and related commercial entities. The defendants responded by asserting that Mizzell was at fault and sought to join him as an indispensable party or as a third-party defendant. Mizzell moved for summary judgment, arguing that section 15-38-50 discharged his liability as a settling tortfeasor. The trial court granted summary judgment and the defendants appealed.



On appeal, the Supreme Court of South Carolina affirmed, holding that a settling tortfeasor was not a necessary party to the suit, based upon the unambiguous language of UCATA.<sup>35</sup> Further, the Court held that the defendants had no right to contribution from Mizzell, as UCATA extinguished that right when the non-party driver entered into a covenant not to execute with the Plaintiff.<sup>36</sup> Lastly, the Court held that Mizzell could not be added to the jury verdict form because UCATA allows only *defendants*, rather than tortfeasors, to be apportioned fault.<sup>37</sup> Therefore, the only recourse that the defendants had was to advance an empty chair defense as an indirect method of apportioning fault.<sup>38</sup>

The Court's reasoning leaves little room for future litigation. As the Court centered its opinion on the unambiguity of UCATA and found that it both took priority over and was consistent with the Rules of Civil Procedure,<sup>39</sup> future challenges regarding construction of UCATA are likely to be unsuccessful. Further, although the Court did not address the matter,<sup>40</sup> challenges made based upon violations of the Due Process clauses or Equal Protection clauses of the South Carolina and United States Constitution are also likely to fail. The right to contribution is a statutory right, which did not exist in the common law.<sup>41</sup> Therefore, a challenge based upon a statute's fundamental unfairness of a right which exists only because of the very same statute will almost certainly be found meritless. As a result, for better or worse, *Tiffany* is likely to be a permanent addition to the law.

## Return of Plaintiff's Choice

In many ways, *Tiffany* represents a return to the Plaintiff's Choice rule as it existed prior to UCATA. Where defendants have come to rely on the right to contribution from other tortfeasors as a method to reduce their liability to levels closer to their actual share, *Tiffany* makes clear that this right is secondary to the plaintiff's right to compensation.<sup>42</sup> As a result, plaintiffs once again have the right to not only seek compensation from any tortfeasors, but to effectively determine which tortfeasors will be able to seek contribution from other tortfeasors. In many ways, this puts plaintiffs at an enormous advantage over defendants. However, the advantage is most acute in certain circumstances.

In terms of timing, the plaintiff's advantage is most pronounced prior to or soon after the plaintiff files suit. At this point, those defendants which have the highest liability and least ability to pay will be incentivized to settle as quickly as possible to minimize litigation and settlement costs. This is especially true in situations involving indigent defendants or cases involving both individuals and corporate entities. In such cases, the plaintiff is likely to be willing to accept a relatively modest settlement in order to increase pressure on non-settling defendants.

The reasons for accepting modest settlements are

two-fold: (1) the plaintiffs are likely to know that if these defendants remain in the case, they are unlikely to be capable of paying the damages for which they may be liable; (2) if the plaintiff accepts a higher-value settlement, other defendants will be entitled to greater offsets if the case makes it to verdict.<sup>43</sup> Therefore, plaintiffs are incentivized to set up a tiered auction between defendants. For the defendants with the worst ratio of ability to pay versus potential liability, the plaintiff will be incentivized to allow the most modest settlement. As the plaintiff seeks settlements with the remaining defendants, the plaintiff may demand more money to settle, as the remaining defendants' chances of being left jointly liable increase with each settling defendant.

For defendants, the incentives are mirrored. For the commercial defendants and those with the greatest ability to pay, UCATA provides strong incentives to offer higher-value settlements than might otherwise be expected, due to the risk of receiving no contribution. This is especially true for a situation involving two or more commercial defendants, as the plaintiff is likely to accept less than a maximum-offer settlement from a commercial defendant where he will still have the opportunity to pursue any remaining damages from the other commercial defendants. However, many of the advantages gained by plaintiffs through *Tiffany* may be blunted by the effective use of the empty chair defense, as *Machin* demonstrates.

## Filling the Empty Chair

Because the successful implementation of the empty chair defense may result in a defense verdict, plaintiffs may be incentivized to accept smaller settlements. Where the result in *Tiffany* may serve to drive up the settlement value, the result in *Machin* may drive down the settlement value for plaintiffs with injuries that may have been caused by non-parties. *Machin* allows defendants to argue that a non-party is responsible for a plaintiff's injuries even in situations where the non-party is immune from suit and cannot be held liable. Essentially, a defendant is permitted to place the actions of non-parties on trial in an effort to demonstrate that the defendant is not liable for the plaintiff's injuries.

This is especially important in the precise products liability context before the court in *Machin*, where there were allegations of product misuse or failure to heed warnings against the non-party employer. A plaintiff's burden in the products liability context is to demonstrate that the product which caused his injury was, at the time of the injury, in the same condition it was in when it left the hands of the defendant-manufacturer. If, through use of the empty chair defense, a defendant-manufacturer can successfully demonstrate that a non-party misused, abused, or modified the product prior to the plain-

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tiff's injury-causing incident, then a defendant can successfully eliminate the plaintiff's product liability claim. The mere prospect of the defendant's ability to produce such evidence which might allow it to effectively escape liability incentivizes plaintiffs to settle in order to recover at least some value, no matter how nominal, for their damages. At the settlement and mediation phase, the empty chair defense is an important tool defendants can use to drive down the settlement value of a case by showing plaintiffs that if a jury is convinced that the empty chair defendant is responsible for plaintiffs' injuries, then failure to accept a settlement is a gamble that may leave plaintiffs with nothing following a trial. In this respect, filling the empty chair at the defense table by placing blame on a non-party serves defendants by driving down settlement value, and by possibly allowing a defendant to escape liability should the case go to trial.

However, in situations where a defendant's empty chair defense may not be strong, the effect the use of the defense would have on the value of a settlement may be diminished. Should the case fail to settle and require the defendant to proceed to trial, the use of the weak empty chair defense at trial may have no effect on the result of the case because while blame can be attributed to non-parties during argument, fault cannot be attributed to non-parties in a judgment. Thus, absent other defenses that may spread liability among the parties at trial, a defendant that fails to effectively convince the jury that the empty chair defendant is responsible for a plaintiff's injuries will bear the entire burden of defense liability to the plaintiff. In that respect, Machin also requires defendants to fully assess the strength of their empty chair defense during the settlement phase and the effect that strength of the defense has on their bargaining position. As noted above, if the likelihood of success of the empty chair defense is strong, a defendant can use that to drive down settlement value significantly. But, if the likelihood of success of the empty chair defense is weak, then a defendant may still be able to drive down the settlement value of case, but should maintain realistic expectations of the extent to which the value can be driven down. The failure to properly assess the strength of the empty chair defense and its effect on settlement could damage settlement negotiations and force a case to trial that would expose the defendant to greater liability.

### **Trial Update on Machin**

*Machin* was retried in September of this year in federal court. Carus Corporation again asserted its empty chair defense, pointing to the the Town of Lexington's actions as the cause of the plaintiff's injury. This time, in addressing the Town and the workers' compensation, Judge Anderson charged the jury in accordance with the Supreme Court's opinion and suggested jury instruction. The trial lasted nine days. Ultimately, the jury returned a verdict in favor

of Carus Corporation, finding that the plaintiff's comparative negligence barred any recovery.

### **Footnotes**

- 1 150 U.S. 118 (1893).
- 2 *Farmers Mut. Ins. Co v. Appalachian Power Co.*, No. 02-2316, 2003 U.S. App. LEXIS 21105, at \*13 (4th Cir. Oct. 20, 2003) (unpublished); see generally *In re. Care & Treatment of Gonzalez*, 409 S.C. 621, 763 S.E.2d 210 (2014) (providing historical context to and describing the application of the empty chair defense).
- 3 See *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 477, 200 S.E.2d 681, 684 (1973) (Littlejohn, J. concurring).
- 4 Robert H. Stier, Jr., *Revisiting the Missing Witness Inference – Quietening the Loud Voice from the Empty Chair*, 44 Md. L. Rev. 137, 137 (1985).
- 5 419 S.C. 527, 799 S.E.2d 468 (2017).
- 6 419 S.C. 548, 799 S.E.2d 479 (2017).
- 7 *Id.* at 557, 799 S.E.2d at 484 (quoting S.C. Code Ann. § 15-38-15(D)).
- 8 See *id.*
- 9 See *Machin*, 419 S.C. at 532, 799 S.E.2d at 470
- 10 *In re. Care & Treatment of Gonzalez*, 409 S.C. 621, 629-30, 763 S.E.2d 210, 214 (2014).
- 11 *Id.* (citing *Davis v. Sparks*, 235 S.C. 326, 111 S.E.2d 545 (1959)).
- 12 S.C. Code Ann. §§ 15-38-10 to -70.
- 13 S.C. Code Ann. § 15-38-15(D).
- 14 *Smith v. Tiffany*, 419 S.C. 548, 565-66, 799 S.E.2d, 479, 488 (2017) (Pleicones, J., dissenting).
- 15 S.C. Code Ann. §§ 15-38-20 to -50.
- 16 See James T. Irvin III, *Easing a Client's Pain After the Game is Over: Contribution, Indemnification and Set Off*, 13 S.C. Lawyer 28, 28 (2001) (citing *Fernanders v. Marks Constr. of S.C., Inc.*, 330 S.C. 470, 477, 499 S.E.2d 509, 513 (Ct. App. 1998)).
- 17 S.C. Code Ann. § 15-38-50(B).
- 18 *Id.*
- 19 *Id.*
- 20 *Id.*
- 21 *Id.*
- 22 S.C. Code Ann. § 15-38-50(B).
- 23 The District of South Carolina certified the following questions:
  1. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the jury hear an explanation of why the employer is not part of the instant action?
  2. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may a defendant argue the empty chair defense and suggest that Plaintiff's employer is the wrong-doer?
  3. In connection with Question 2, if a defendant retains the right to argue the empty chair defense against Plaintiff's employer, may a court instruct

# Harleysville: Some Answers, More Questions on Reservation of Rights and Coverage

by Nicholas Farr and Jessica Waller

In *Harleysville Group Insurance v. Heritage Communities, et. al.*,<sup>1</sup> the Supreme Court of South Carolina answered some long-lingering questions in the coverage, and more specifically, reservation of rights world. But, the opinion also raised new questions about the duties imposed on a carrier, an insured, and defense counsel in a lawsuit.

The case presented cross-appeals from a declaratory judgment action to determine coverage under Commercial General Liability (CGL) policies issued by Harleysville.<sup>2</sup> The issues before the court involved separate actions with identical issues regarding insurance coverage for damages stemming from construction defects at condominium complexes.<sup>3</sup> The details of the underlying construction defect cases, other than the award of significant monetary judgments (both actual and punitive), are unimportant for purposes of addressing the issues related to reservations of rights and the various parties' duties with respect to coverage. In the declaratory judgment action, Harleysville argued it had no duty to indemnify the insureds for the judgments based on its coverage defenses and related exclusions.<sup>4</sup> It further contended, inter alia, that in the alternative, if any damages are covered, Harleysville was entitled to an accounting to parse jury verdicts to determine which portion constituted covered damages.<sup>5</sup>

The Special Referee rejected both of these contentions, based in large part on Harleysville's insufficient reservation of rights.<sup>6</sup> The Court affirmed.<sup>7</sup> In so doing, the Court created an exception to the general rule that a third party has no basis to assert inadequacies in an insurer's reservation of rights given the insured's defunct status and unique circumstances of the case. Moreover, the Court rebuked Harleysville's reservation of rights practice, noting that "generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) is not sufficient."<sup>8</sup>

Furthermore, while admonishing and rejecting Harleysville's alternative attempt to parse the verdicts into covered and non-covered damages, the court noted that Harleysville, not the insured or underlying plaintiff, had the exclusive right to control the litigation.<sup>9</sup> Such control, the Court

noted, carries with it certain duties, including but not limited to, the duty to specify in detail any and all bases upon which coverage might be contested, the duty to indicate that it disputed coverage for specific portions or types of damages, the duty to notify the insured of the carrier's right and/or intent to file a related lawsuit to contest coverage issues, and the duty to inform the insured that a conflict of interest may exist or that they should protect their interests by requesting an appropriate verdict or special interrogatories.<sup>10</sup> In the Court's view, Harleysville's failure to exercise its control of the litigation and obtain allocated verdicts in the underlying suit essentially prohibited the carrier from seeking a post-mortem allocation to reduce its exposure.<sup>11</sup>

Given the relatively minimal guidance previously provided by our courts, *Harleysville's* holdings regarding the requirements of a proper reservation of rights letter have, for good reason, garnered the bulk of the attention. As critical as those requirements are to insurers, however, what the Court said (or did not say) with regard to the issue that initiated those requirements may have an even greater impact, in practice, on insurers, insureds, and defense counsel alike. The crux of the Court's issues with Harleysville and its reservation of rights letters was that no steps were taken to obtain allocated verdicts in the underlying cases from which the Court could make a coverage determination. While the predicament a general verdict creates when trying to ascertain covered or non-covered damages is appreciated, *Harleysville's* ambiguous guidance on how to remedy the issue perpetuates challenges.

The bedrock principle at play in Harleysville is that when faced with a general verdict, an insurer must indemnify the insured for the entire verdict if at least one of several claims submitted to the jury is covered.<sup>12</sup> See *Owners Ins. Co. v. Clayton*, 614 S.E.



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2d 611. 614-15 (S.C. 2005). Traditionally, insurers have attempted to remedy the situation by moving to intervene in the underlying lawsuit for the limited purpose of obtaining a special verdict form and/or submitting special interrogatories to the jury. The rationale for the insurer's intervention being that an allocation must be obtained and defense counsel, retained by the insurer to represent the insured, is faced with an inherent conflict of interests and, thus, cannot request a special verdict form on behalf of his/her client. Despite insurers' best efforts, however, motions to intervene often brought limited success.

The *Harleysville* opinion brought a glimmer of light to insurers seeking to intervene to limit the problems created by a general verdict. Given the Court's harsh criticism of *Harleysville's* failure to seek an apportionment of the underlying verdicts, it is arguable that the opinion supports a finding that an insurer may intervene in a case as a matter of right. Unfortunately for insurers, the trial courts have not viewed *Harleysville* in the same light, as motions to intervene continue to be met with the same limited success. The trial courts continue to deny motions to intervene outright or, in the alternative, to permit an insurer to intervene only if the insurer becomes a party to the lawsuit, subject to discovery, with the burden of proving covered v. non-

covered damages at trial. This position arguably is not supported by even the most liberal reading of *Harleysville*.

So what does *Harleysville* say about allocation of verdicts, generally, and intervention, specifically? If nothing else, it is clear that *Harleysville* stands for the position that, if an insurer wishes to contest coverage, it is imperative that a verdict allocate damages between covered and non-covered claims. What is not clear, however, is what an insurer (or an insured) is supposed to do about it. In the opinion, there is no discussion about intervention, specifically. Rather, the Court speaks in terms of the "burden" to seek a verdict which apportions damages. The inherent problem with *Harleysville* is that the Court fails to clearly specify who must bear that burden. A clear answer to that question could alleviate all of the aforementioned issues.

In formulating its discussion on the need for a special verdict, the Court relies, in large part, on two opinions from foreign jurisdictions: (1) *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*,<sup>13</sup> 819 N.W.2d 602 (Minn. 2012), and (2) *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36F.3d 1491 (10th Cir. 1994).<sup>14</sup> While there is certainly nothing wrong with the Court relying on outside opinions given the lack of precedential authority in South Carolina, there is a problem when, as is the case with *Remodeling* and *Magnum*, those opinions stand for opposite positions on the key issue. Specifically, *Remodeling* and *Magnum* take counter positions with regard to the burden to seek an apportionment of damages. In *Remodeling*, the Minnesota Supreme Court held that:

[W]hen an insurer notifies the insured that it accepts the defense of an arbitration claim under a reservation of rights that includes covered and noncovered claims, the insurer not only has a duty to defend the claim, but also to disclose to its insured the insured's interest in obtaining a written explanation of the award that identifies the claims or theories of recovery actually proved and the portion of the award attributable to each. . . . When an insurer, however, fails to provide timely notice to the insured in this situation and the insured shows the conditions including prejudice to the insured are satisfied, then the insurer is estopped from claiming that the insured has the burden of proving allocation of the award.<sup>15</sup>

*Remodeling*, 819 N.W.2d at 618 (emphasis added). In other words, the insurer must notify the insured of the need for an allocated verdict and it is the insured's burden

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to do so unless the insurer fails to provide timely notice.

Conversely, in *Magnum*, the Fifth Circuit Court of Appeals held that:

[W]hen grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises between the insurer and the insured. If the burden of apportioning damages between the covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. [cite] The insurer is in the best position to see to it that the damages are allocated; therefore, it should be given the incentive to do so.<sup>16</sup>

*Magnum*, 36 F.3d at 1498-99 (emphasis added). Where *Remodeling* placed the burden on the insured to seek an allocation, *Magnum* places that burden on the insurer.

In *Harleysville*, the Court repeatedly cites to both *Remodeling* and *Magnum*, quoting the above passages, apparently with approval.<sup>17</sup> By doing so, we are left questioning who bears the burden of obtaining an allocating verdict. If it is the insurer, as *Magnum* suggests, then insurers should be permitted to intervene for the limited purpose of submitting a special verdict form to the jury and not impermissibly made parties to the suit with the burden of presenting evidence adverse to its insured.<sup>18</sup> See *Sims v. Nationwide Mut. Ins. Co.*, 145 S.E.2d 523 (S.C. 1965) (finding that a clear conflict of interest would have been presented if insurer required to present evidence of coverage defenses while providing a defense to the insured). Conversely, if the burden is on the insured, then the issue of intervention is obviated.

To be clear, there is no simple solution to handle the issues generated by the presence of covered and non-covered claims when coupled with the tripartite relationship between insurer, insured, and defense counsel. However, some clarity regarding the duties and responsibilities of the parties could go a long way. In our opinion, the Court should adopt the model set forth in *Remodeling* as it is the most efficient way to obtain the necessary result (allocated verdict) while addressing the primary concerns set forth in *Harleysville* (ensuring that an insurer provides proper notice of the coverage issues to the insured). Like *Harleysville*, *Remodeling* places the initial burden on the insurer to provide timely notice to the insured of the coverage issues and of the need for an allocated verdict. As discussed above, *Remodeling* then places the burden on the insured to see to it that damages are allocated. Of course, if the insurer fails to notify the insured, then *Remodeling* shifts the burden back to the insurer to seek an allo-

cation or otherwise prove covered v. non-covered damages.

The advantages of adopting the *Remodeling* framework are clear. First, adopting the *Remodeling* framework (or any framework for that matter) would clarify for the parties and for the trial courts how to appropriately address coverage issues without needlessly interfering in the plaintiff's case. Second, placing the burden on the insured to seek a special verdict form would alleviate any concerns the court may have about insurer intervention, as there would most often be no need for it. Third, if the *Remodeling* model is adopted, the conflict concerns of defense counsel retained by the insurer to defend the insured are nullified. If the insured maintains the burden of seeking an allocated verdict and bears the risk of having no insurance coverage if he/she fails to do so, then counsel must act to secure a special verdict form since it is now in his/her client's best interest.

Certainly, critics of the *Remodeling* model may argue that it lessens the burdens bestowed upon the insurer and, thus, places the interest of the insurer over that of its insured. The response to such criticism is simple. If the burden is bestowed upon an insurer to seek an allocation of damages, then the right should be freely given for an insurer to do so. Traditionally, such has not been the case. Perhaps a little guidance from the Court would help.

## Footnotes

1. *Harleysville Grp. Ins. v. Heritage Cmtys., Inc., et. al.*, No. 27698, slip op. at 1 (S.C. Jan. 11, 2017).

2. *Id.* at 3.

3. *Id.*

4. *Id.* at 5.

5. *Id.* at 5-6.

6. *Id.* at 6.

7. *Id.* at 3.

8. *Id.* at 10.

9. *Id.* at 12-13.

10. *See id.* at 11-13.

11. *Id.* at 15-16.

12. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560-61, 614 S.E.2d 611, 614-15 (2005).

13. *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602 (Minn. 2012).

14. *Magnum Foods, Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491 (10th Cir. 1994).

15. *Remodeling*, 819 N.W.2d at 618 (emphasis added).

16. *Magnum*, 36 F.3d at 1498-99 (emphasis added).

17. *Harleysville*, at 11-12.

18. *See Sims v. Nationwide Mut. Ins. Co.*, 247 S.C. 82, 85, 145 S.E.2d 523, 524 (1965) (finding that a clear conflict of interest would have been presented if insurer was required to present evidence of coverage defenses while providing a defense to the insured).

# DRI Annual Meeting Recap

by David A. Anderson



The DRI Annual Meeting was held in Chicago on October 4-8, and it was well attended by SCDTAA members. The highlight was witnessing our own John Cuttino of Gullivan White & Boyd, PA turn over his role as President of DRI to another SCDTAA member, John Kuppens of Nelson Mullins Riley & Scarborough, LLP. The conference was very informative and enjoyable with speakers such as Jeffrey Toobin, Senior Legal Analyst with CNN; John O.

Brennan, Former Director of the CIA; and Eric H. Holder, Jr. Former U.S. Attorney General, just three of the many spectacular speakers that spoke. SCDTAA leaders participated in the National



arranged by the DRI Mid-Atlantic Regional Director, John Owen of Harmon Claytor Corrigan & Wellman, P.C. and his SLDO Executive Director, Ms. Sherma Mather of the Virginia Association of Defense Attorneys. The Mid-Atlantic region is made up of the District of Columbia, Maryland, Virginia, North Carolina and South Carolina. Representatives from each of these SLDO's were present, and it provided the opportunity to continue to exchange ideas about our events, meetings, membership, fundraising, etc.

The SCDTAA is clearly one of the most active SLDOs. Everywhere I turned during the conference, I met attendees that commented on how strong our State Defense members are and how active they are in the various Defense Organizations. Other SLDO Leaders were very interested in our Trial Academy and various CLE offerings. DRI holds the SCDTAA in high regard, as is demonstrated by their willingness to support defense related initiatives in our State. If you are not a member of DRI or are one but inactive, consider becoming more active this coming year. DRI membership, like your membership in SCDTAA brings many benefits, including its excellent seminars and networking opportunities. Both organizations can be of great assistance to you in developing your practice and making life-long friends.



Program for State and Local Defense Organizations. The SLDO program was an excellent combination of idea sharing and tips from experienced leaders across the Nation. Also, the Mid-Atlantic Region held a wonderful dinner on Wednesday night that was



# Verdict Reports

VERDICT  
REPORTS

## Type of Action: Medical Malpractice

**Injuries Alleged:** Deep chemical burns and permanent scarring of the penis and surrounding genital area, associated pain and suffering, and psychological injuries

**Name of Case:** William P. Hengemuhle, Jr. v. Manuel Perez, M.D. and The Urology Group, Inc.

**Court:** Beaufort County, SC Court of Common Pleas

**Case Number:** 2014-CP-07-1993

**Tried Before:** Jury

**Judge:** The Honorable Carmen T. Mullen

**Amount:** Defense Verdict

**Date of Verdict:** January 20th, 2017

**Attorneys for Defendants:** Chilton Grace Simmons, Elizabeth W. Ballentine, and H. Lucius Laffitte, III of Buyek, Sanders & Simmons, LLC.

**Attorneys for Plaintiff:** John North and Pamela Black of North & Black, LLC

**Defense Experts:** Louis Plzak, M.D., urologist in Beaufort; Ian Marshall, M.D., urologist in Charleston; Heidi Williams, M.D., plastic surgeon in Charleston

**Plaintiff's Experts:** Lionel B Frasier, JR, MD (urologist), Matthew Lee, MD (pharmacology and toxicology), and Robert F Mullins, MD (treating burn surgeon in Augusta, GA)

### Description of Case:

The Plaintiff alleged that Defendant Dr. Perez was negligent in his treatment and participation in the procedure initiated on Plaintiff Mr. Hengemuhle on January 17, 2013, at Hilton Head Hospital. Specifically, Plaintiff alleged that Dr. Perez performed a procedure that was an overly aggressive treatment option for the removal of HPV lesions on his penis and surrounding genital region. He also alleged that the dispensation of the acetic acid from the Hilton Head Hospital Pharmacy required a physician's order from Dr. Perez specifying both the request and dilution for the acetic acid. Further, he alleged a "time out" was required prior to the procedure that included Dr. Perez independently and separately verifying the dilution of the acetic acid in the container handed to him for the procedure. Plaintiff alleged Dr. Perez's negligence caused or contributed to Plaintiff's injuries and sought damages for medical bills, pain and suffering, and other damages to be determined by the jury.

The defense successfully showed that Dr. Perez's care and treatment was reasonable and was not the cause of Mr. Hengemuhle's injuries. After an in-office patient consultation and informed consent discussion, both the Plaintiff and Dr. Perez chose to proceed with the laser ablation procedure as the preferred treatment for the removal of Plaintiff's genital HPV lesions. The procedure was a reasonable treatment option based on a multitude of factors, including the risk of increasing the chance for causing cervical cancer in his sexual partner. The defense alleged that 3% diluted acetic acid, which is the equivalent of table vinegar, did not require a physician's order. Further, the acetic acid was dispensed without such an order from the hospital's pharmacy, as was customary and consistent with its use in the past. The defense alleged and proved that the dispensation of the pure, undiluted acetic acid from the pharmacy to the operating room was outside the scope of Dr. Perez's purview. Dr. Perez did not observe the bottle of acetic acid before the procedure, and the solution had already been transferred to a separate container for use during the procedure when Dr. Perez entered the operating room. Dr. Perez could not have been reasonably expected to know, prior to the administration of the solution, that it was not the 3% diluted acetic acid typically used for the laser ablation procedure, or that the hospital even kept pure, undiluted acetic acid in the pharmacy. Likewise, a "time out" performed in the operating room verifies the patient and surgery but does not require a verification of the strength of all solutions to be utilized in the procedure, including the pre-procedure preparation of the surgical site.

As soon as the solution touched Plaintiff's skin, the defense highlighted that Dr. Perez instantly recognized the wrong solution had been provided and took immediate steps to protect the patient and reverse the damage as best as possible. He immediately irrigated the area and consulted with a plastic surgeon for treatment. The jury deliberated for approximately 3 1/2 hours and returned a defense verdict.

**Type of Action: Medical Malpractice**

**Name of case:** Robert J. Worley, as Personal Representative of the Estate of Philip Dean Worley v. John Calvin Sharp, Jr., M.D. and Savannah Cardiology, P.C.

**Court:** Beaufort County Circuit Court

**Case number:** 2015-CP-07-2747

**Name of Judge:** The Honorable Brooks Goldsmith

**Amount:** Defense Verdict

**Date of Verdict:** August 25, 2017

**Attorneys for the Defendant:** Chilton Grace Simmons, Hugh W. Buyek and H. Lucius Laffitte of Buyek, Sanders, & Simmons, LLC

**Attorneys for the Plaintiff:** Susan C. Rosen and David Haseldon of Rosen Law Firm, LLC

**Experts for Defendants:** David Harshman, MD (cardiology), Frank Cuoco, MD (interventional cardiology and electrophysiology), John Sutton, MD (cardiovascular surgery), and William Meggs (toxicology/ pharmacology)

**Experts for Plaintiff:** Steven Howe, MD (interventional cardiology) and Michael H. Cohen, MD (internal medicine and cardiology)

Treating physicians that testified at trial: Dale Daly, MD (cardiology), Jonathan MacCabe, MD (cardiology) and Brett Cargill, MD (emergency medicine)

**Description of the Case:** Plaintiff alleged that Defendant Dr. Sharp was negligent by failing to recognize decedent Mr. Worley’s dehiscence of his heart valve. Mr. Worley died suddenly of a cardiac event, and upon autopsy, it was determined he had 30% dehiscence of his mitral valve. Plaintiff alleged that caused his death, and that various symptoms before then should have prompted Dr. Sharp to have ordered and/ or performed more tests, such as a TEE, to effectuate that finding, which would have then prompted valve replacement surgery. Defendants alleged Mr. Worley died of a sudden cardiac arrhythmia that was both unpreventable and unforeseeable. The jury deliberated for 40 minutes and returned a defense verdict.



the jury that an employer’s legal responsibility has been determined by another forum, specifically, the South Carolina Workers’ Compensation Commission?

4. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the Court allow the jury to apportion fault against the non-party employer by placing the name of the employer on the verdict form?

*Machin v. Carus Corp.*, 419 S.C. 526, 530–31, 799 S.E.2d 468, 469–70 (2017).

24 *Id.* at 543, 799 S.E.2d at 476.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Machin v. Carus Corp.* 419 S.C. 526, 543–44, 799 S.E.2d 468, 477 (2017).

29 *Id.*

30 *Id.* at 544, 799 S.E.2d at 477.

31 *Id.* at 545, 799 S.E.2d at 477.

32 *Id.* at 545, 799 S.E.2d at 478.

33 *Machin v. Carus Corp.* 419 S.C. 526, 545, 799 S.E.2d 468, 478 (2017).

34 *Id.* at 546–47, 799 S.E.2d at 478 (“We have answered

the questions based on our discernment of legislative intent, for these matters are largely policy decisions for our legislature. We trust the General Assembly will respond to this opinion if it disagrees with our interpretation of the statutes.”) (internal citations omitted).

35 *Smith v. Tiffany*, 419 S.C. 548, 558–59, 553, 799 S.E.2d 479, 482, 484–85 (2017).

36 *Id.* at 561, 799 S.E.2d at 486.

37 *Id.* at 560, 799 S.E.2d at 485–86.

38 *Id.* at 557, 799 S.E.2d at 484.

39 *Id.* at 564–65, 799 S.E.2d at 488.

40 *See Smith v. Tiffany*, 419 S.C. 548, 558 n.3, 799 S.E.2d 479, 485 n.3 (2017).

41 *Id.* at 566, 799 S.E.2d at 489 (Pleicones, J., dissenting).

42 *See id.* at 562–63, 799 S.E.2d at 487.

43 *Cf.* S.C. Code Ann. § 15–38–15(E).

44 *See Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286, 170



# Case Notes

Prepared by Natalie Bialis, Helen Hiser, and Thomas Phillips

CASE  
NOTES

***Clemmons v. Lowe’s Home Centers, Inc. – Harbison and Sedgwick Claims Management Services, Inc., Op. No. 27708, Refiled June 28, 2017.***

Respondents’ (employer and insurance carrier) petition for a rehearing was recently denied following the highly-discussed South Carolina Supreme Court decision *Clemmons v. Lowe’s Home Centers, Inc.*, which held that the claimant returning to work does not solely rebut a presumption of permanent and total disability.

Henry T. Clemmons, Jr., a cashier at Lowe’s, severely injured his back in September 2010 when he slipped and fell while assisting a customer. Dr. Randall Drye diagnosed Clemmons with a herniated disc and severe spinal cord compression and performed surgery to remove his herniated disc and fuse his C5 and C7 vertebrae by screwing a rod into his spine. In June 2011, Dr. Drye opined that Clemmons had reached maximum medical improvement and assigned a 25% whole-person impairment rating based on his cervical spine injury, which converts to a 71% regional impairment to his spine. Dr. Drye further opined that Clemmons could return to work in his previous position subject to permanent work restrictions, which Lowe’s accommodated.

Lowe’s then requested a hearing before the Commission to determine whether Clemmons was owed any permanent disability benefits. Clemmons argued that, based on the consensus of all of the medical professionals who examined him, he was permanently and totally disabled under the scheduled-member statute based on his loss of use of at least 50% of his back. Lowe’s, however, argued that Clemmons was only entitled to permanent partial disability based on Dr. Drye’s 25% whole-person rating coupled with Clemmons’ return to work. The Single Commissioner agreed with Lowe’s and awarded Clemmons’ permanent partial disability under the scheduled-member statute. Both the full Commission and the Court of Appeals affirmed the Commissioner’s decision, holding that the findings of fact were supported by substantial evidence.

Clemmons appealed to the South Carolina Supreme Court, arguing that all of the medical evidence in the record supports at least a 50% loss of use of his back, entitling him to permanent and total disability under the scheduled-member statute. The Supreme Court agreed, noting that no evidence indicates that he sustained less than 50% impairment to his back. It was further noted that each medical professional who assigned an impairment rating indicated that Clemmons lost more than 70% of the use

of his back. Therefore, the Supreme Court did not distinguish the injury to Clemmons’ cervical spine from his spine as a whole and found the Commission’s findings to not be supported by substantial evidence, remanding to the Commission to determine an impairment percentage and whether the presumption of permanent and total disability under S.C. Code Ann. §42-9-30(21) has been rebutted.

***Foran v. Murphy USA and Liberty Insurance Corporation, Op. No. 5491, Filed June 14, 2017.***

The South Carolina Court of Appeals recently issued an opinion reversing and remanding *Foran v. Murphy USA and Liberty Insurance Corporation*, holding that Foran was performing a work task when she “suffered an injury by accident arising out of and in the course of her employment.” It was further held that the South Carolina Workers’ Compensation Commission’s Appellate Panel failed to strictly construe the idiopathic exception to coverage and found the Commission’s decision to be erroneous in light of the substantial evidence in the record.

On April 29, 2014, Jenna Foran alleged that she rolled her left ankle on the edge of a floor mat while stocking shelves as a cashier, resulting in torn ligaments that ultimately required surgery. Foran had surgery on the same ankle in 2004 but claimed that her ankle had healed and that she had no resulting physical limitations. Randolph Stokes Rogers, Foran’s supervisor, testified at a hearing before the single commissioner that Foran walked with a noticeable limp before her injury and complained multiple times about having a “bad ankle” but had no physical limitations that hindered any of her job duties. Rogers did remark, however, that he did not hear of Foran’s allegation that the floor mat caused the injury until a few weeks before trial, and Foran had told him that “her ankle kind of gave way” as she was stocking cigarettes. Respondents argued that Foran suffered an idiopathic injury due to a pre-existing instability of her left ankle. This was supported by Dr. Ross Taylor of Coastal



Bialis



Hiser



Phillips

Continued on next page

Orthopaedics who had noted that Foran’s “left ankle [was] grossly unstable, and the previous repair ruptured at the time of her most recent injury in all likelihood.”

The single commissioner reviewed the store surveillance and inspected the floor mat and determined that the injury was idiopathic and not caused or aggravated by her work or any special risk posed by her employment. The rationale for the decision was based on a discrepancy between Foran’s description of the accident and what was depicted on the video, Rogers’ testimony that he was unaware of Foran’s allegation that the floor mat caused her fall until two weeks before the hearing, Rogers’ additional testimony that Foran walked with a “significant and noticeable limp on the left side prior to April 29, 2014,” and a medical report indicating that Foran reported her ankle pain beginning after her fall but did not describe slipping a mat. The decision was affirmed by the Appellate Panel based on Foran’s chronic left ankle instability, the surveillance video, Foran’s testimony, and Rogers’ testimony.

Foran appealed, arguing that the Appellate Panel erred in finding her injury resulted from an idiopathic fall and was not compensable as a work-related injury. The Court of Appeals, which can reverse or modify the Appellate Panel’s decision if clearly erroneous or a result of an error of law, reviewed the surveillance video and agreed with Foran. The Court of Appeals agreed with the Appellate Panel that the video “was the key to the compensability of this case” but found the Appellate Panel’s determination that the injury occurred when Foran’s feet were both firmly on the mat was clearly erroneous and further found that Foran’s testimony describing the injury was consistent with the video.

After reviewing the medical evidence, the Court of Appeals agreed with Foran that her injury was not caused without explanation by an “internal failure or breakdown.” Her medical records following her prior surgery indicated that her ankle had good tension and stability. Furthermore, Foran’s “History of Present Illness” on her intake assessment at Doctors Care on the day of her accident noted that she was “stocking cigarettes this AM when she stood up and may have caught on a mat twisting her left ankle – since then it is painful to bear weight on it . . . since [her prior] surgery, had been pregnant and working and has had no issues with ankle pain, swelling or giving way – until today.” The Court of Appeals also considered Rogers’ testimony that Foran walked with a limp but similarly recognized his admission that this did not preclude Foran from performing her job.

The Court of Appeals, in reversing the denial of compensation and remanding to the Appellate Panel for a determination of benefits, determined that Foran was performing a work task when she was injured. It was additionally determined that the Appellate Panel committed an error of law in failing to strictly construe the idiopathic exception to coverage, and the Commission’s decision was clearly

erroneous in view of the substantial evidence in the record.

***Oaks at Rivers Edge Prop. Owners Ass’n, Inc. v. Daniel Island Riverside Developers, LLC, Op. No. 5507, Filed Aug. 2, 2017.***

In this opinion concerning defective construction, the South Carolina Court of Appeals affirmed the trial court’s award of damages to Respondents. Appellants unsuccessfully argued that (1) the trial court should have offset the damages with the amount Respondents previously received through settlement; (2) the trial court should have allocated the damages among the various defendants and erred by entering an order prior to Respondents’ election of remedies; and (3) the damages were excessive, speculative, and not supported by the evidence and constituted a double recovery.

The Oaks at Riverside Horizontal Property Regime (“The Oaks”) is located on Daniel Island and comprised of six buildings, with six condominium units in each building. The Oaks was constructed over a period from 2003 through 2006 (the “Project”). Daniel Island Riverside Developers, LLC (“DIRD”) was the developer of the Project, and contracted with Carriage Hill Associates of Charleston, LLC (“CHAC”) to be the construction manager of the Project. DIRD sold the units for an average of \$650,000, although many unit owners used intermediate third parties and paid in excess of \$700,000 for their units. DIRD also appointed board members to the board of the Oaks at Rivers Edge Property Owners Association (the “POA”) until control of the POA was turned over to the unit owners on or after December 7, 2006.

Prior to purchasing their units, prospective buyers received brochures marketing the condominiums that advertised an “incredible array of standard luxuries.” Although the luxuries included oak flooring, soundproofing between all units, and an exterior brick-and-stucco façade, the units were not soundproof and had numerous leaks caused by air-conditioning units, plumbing, and faulty installed windows and doors. As a result of the leaks, mold growth ensued, and the hardwood floors warped and separated in multiple places in the units.

Multiple lawsuits arose from the Project. As part of the litigation, the POA obtained an \$11,807,884 estimate to repair the Oaks. Prior to the scheduled trial date, several settlements occurred among the various parties. The total settlement amount paid to the POA was \$7,702,552. In consideration of \$3,700,000, the POA and individual unit owners (“Unit Owners”) (collectively “Respondents”) agreed to dismiss with prejudice all claims against Appellants, except breach of fiduciary duty, negligent misrepresentation, negligence, breach of contract, and breach of express and implied warranties, including, but not limited to, habitability, fitness for a particular purpose, and workmanlike service. They also agreed not to seek punitive damages or

attorneys' fees arising out of any cause of action. The remaining \$4,002,552 was paid by various companies in exchange for a release with regard to all damages resulting from the design, manufacture, sale, and installation of the windows, window units, exterior doors, exterior door units, railings, balustrades, framing, and caulking.

At the bench trial, several Unit Owners testified about the problems they experienced with their units, including sound transmission between the units, mold problems, and hardwood flooring separating. Appellants and Respondents then stipulated the remaining homeowners would testify to having the same sound problems with their units. Several Unit Owners also testified about their inability to sell their units. Others indicated the people renting their units had moved out because of mold, the lack of soundproofing, and other safety concerns. Unit Owners who were able to sell the units testified as to the amount of loss they sustained. Both sides also presented expert testimony about what needed to be done to correct the problems with the buildings.

The trial court found Appellants jointly and severally liable for negligence, gross negligence, and negligent misrepresentation. It also found DIRD liable to the POA for breach of fiduciary, and liable to the Unit Owners for breach of implied warranty of habitability. It also found CHAC liable to the POA and Unit Owners for breach of implied warranty of workmanlike service. Accordingly, the trial court awarded the POA \$7,934,704.06 for the cost of repair, \$793,470.41 for engineering fees at 10% of cost to repair, and \$641,520 for moving, storage, and replacement lodging. It also determined DIRD was liable for an additional \$19,440 for the failure to fund the reserves as promised. Furthermore, the trial court awarded individual Unit Owners differing amounts of damages specific to them. These damages included loss of market access, lost rent, inconvenience, out of pocket costs, and costs due to defective floors. Several of these Unit Owners had to elect between damages for loss of market access or loss of rent.

Appellants moved for allocation of damages and setoff, contending they were entitled to a setoff equaling the total amount of the settlement. Appellants also moved for judgment notwithstanding the verdict (JNOV), new trial absolute, new trial nisi remittitur, to alter or amend judgment, and relief from the order, arguing the damages award was not supported by the evidence, was speculative, and constituted a double recovery. Following a hearing and further memorandum, the trial court denied all of Appellants' motions. This appeal followed.

Judge Konduros, writing on behalf of the Court, first addressed the trial court's failure to setoff the damages with an analysis of both common law and the South Carolina Contribution Among Tortfeasors Act (the "Act"). Considering the two in unison, the Court held that despite a defendant's entitlement to setoff, whether at common law or under the Act, any

reduction in the judgment must be from a settlement for the same cause of action. In that regard, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset. Here, Appellants argued that the trial court should have setoff the amount of damages awarded with the amount already paid for the replacement of windows, doors, and brickwork as well as damages to sheathing in a settlement with the window manufacturer, installers, and framers. However, the trial court's order included repairs independent of those addressed by the settlement for the issues relating to the windows. For instance, the brick and stucco would have had to be replaced in its entirety to install the missing wall insulation that was not originally installed and to fix the incorrectly installed lath. Respondents, at the post-trial hearing, even explained they reduced their demand by 4,260,497.93 as a result of settlements. Ultimately, the Court agreed with Respondents in that Appellants already received the benefit of the settlements.

Turning to the Appellants' argument pertaining to the election of remedies, the Court reiterated that the basic purpose of election of remedies is to prevent double recovery for a single wrong. The Court further proclaimed that when an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both. As its name states, the doctrine applies to the election of "remedies" not the election of "verdicts". Taking this into consideration, the Court discerned the different types of damages:

- The loss of market access damages accounted for the loss Unit Owners experienced in the value of their units due to the downturn in the housing market. If not for the problems with the units, the owners could have had the choice to sell their units before or during the crash.

- The cost of repairs was simply the cost to replace the buildings and units in the physical condition they should have been in when the Developer initially sold them.

- The loss of quiet enjoyment is the loss the Unit Owners experienced in have to live in what was marketed to them as luxury condominiums but in reality hearing their neighbors in other units go about their daily activities.

As a result, the Court held that the cost of repairs and the loss of quiet enjoyment were separate and distinct from the loss of market access. The Court further found that the record contained evidence to support the trial court's finding the aforementioned damages were not a double recovery and thus there was no need to elect a remedy.

Finally, the Court addressed Appellants' argument with regard to damages unsupported by evidence. At the outset, the Court premised its analysis on the

Continued on next page



principle that the trial court is vested with considerable discretion over the amount of a damages award, and the Court's review of the amount of damages is limited to the correction of errors of law. Thus, in reviewing a damages award, the Court does not weight evidence, but determines if any evidence supports the award of damages. Consequently, the evidence must enable a jury to determine the amount of damages to a reasonable certainty or accuracy, although proof of mathematical certainty is not required. Furthermore, while no one is entitled to absolute quiet in the enjoyment of his property, the location and surroundings must be considered, together with the character and magnitude of the industry or business complained of and the manner in which it is conducted. The character and volume of the noise must also be taken into account.

Based on the record, the Court found that numerous Unit Owners had testified that tenants moved out because of the noise or that they themselves experienced noise problems that interfered with their lives. One resident complained of chemical odors, while others had problems with their floors warping and separating. Another Unit Owner even testified as to the costs cost for a hotel, storage and movers. Furthermore, although one of Appellants' experts testified that alterations to the ceiling had improved the sound problems, he acknowledged further improvements could be made by working on the floors. Accordingly, and in light of the fact that Appellants did not present any evidence of contrary prices, the Court found that the record contained evidence to support the trial court's amount for damages for these items.

In conclusion, the Court affirmed the decision of the trial court. Judge McDonald concurred in result only.

***Sellers v. Tech Service, Inc. and Builders Mutual Ins. Co., Op. No. 5508, Filed Aug. 9, 2017.***

The Court of Appeals affirmed the Commission's determination that a HVAC installer was an employee rather than an independent contractor in the attached case. Prior to March 2013, the claimant was an employee of Tech Service. In March 2013, the claimant's employment status changed from being a regular employee, whose wages were reported on a Form W-2, to what the employer alleged was an independent contractor status whose wages were reported on an IRS Form 1099-MISC. Relying on *Wilkinson v. Palmetto State Transp*, 382 SC 295, 676 SE2d 700 (2009) and *Shatto v. McLeod Reg'l Med. Ctr*, 406 SC 470, 753 SE2d 416 (2013), the Court held that all four factors of the employment test weighed in favor of finding the claimant was an employee. According the Shatto, he employment test factors include (2) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) the method of payment; and (4) the right to fire. In particular, the claimant's work was instructed and supervised by the employer, he wore a Tech Service uniform and used a Tech Service

credit card to purchase supplies, he sold Tech Service service contracts to customers, his tools were provided by Tech Service, the van used by claimant may have been provided by Tech Service (there was conflicting evidence on whether the van was sold or merely provided to claimant), the claimant was paid on a weekly basis and his pay was based on the amount of time he estimated it would take him to finish a job. The Court held that, because Tech Service inspected the claimant's work, it also had the right to fire him, although other evidence on this prong was less conclusive. Although not conclusive, the Court and Commission also noted that, in applying for the permit for the job on which the claimant was injured, Tech Service had represented to the City of Myrtle Beach that no subcontractors or independent contractors would be working on the project.

The Court discounted other facts presented by the employer, including that the claimant could work when he wanted (as evidenced by a gap in pay from Tech Service between March and November 2013), the fact that the claimant's wages were reported on a Form 1099-MISC, and that the claimant had purchased separate workers' compensation insurance. Although he purchased the policy, there was testimony that Tech Service gave him the money for the premium and, in addition, the claimant excluded himself from the policy believing that he was covered under the Tech Service policy.

***Nero v. S.C. Dep't of Transp., Op. No. 5477, Filed Aug. 23, 2017.***

In this revised opinion concerning adequate notice of a workplace injury, the South Carolina Court of Appeals reversed the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission (the "Appellate Panel"). Although the conclusion of its original March 29, 2017 opinion remains unchanged, the Court adds a finding to the revised opinion that substantial evidence in the record did not support the Appellate Panel's ruling that Appellant failed to put Respondent South Carolina Department of Transportation ("SCDOT") on notice of a potential injury. The revised opinion also includes the law of statutory interpretation as it relates to the Court's standard of review.

On June 20, 2012, Appellant was working on a SCDOT road crew supervised by lead man Benjamin Durant ("Durant") and supervisor Danny Bostick ("Bostick"). Appellant's work involved pulling a large "squeegee board" to level freshly poured concrete. At some point during the day, Bostick temporarily pulled Appellant off the squeegee board because he appeared to be overheated. Following a break, Appellant returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing their work and cleaning up, the crew, including Appellant, Durant and Bostick, was talking and joking when Appellant lost consciousness and fell to the ground. After Appellant regained consciousness, he told his supervisors he was fine and drove home. Once



home, Appellant again passed out while sitting in his driveway. His wife immediately took him to the hospital where he was admitted and treated.

At the hospital, Appellant filled out paperwork wherein he stated, "I passed out talking to my boss." Following a series of tests, Appellant's primary care physician diagnosed him with cervical stenosis and referred him to a neurosurgeon, who performed a fusion surgery. Prior to the surgery, Appellant provided SCDOT with his FMLA paperwork. He did not, however, mention the squeegee board incident in this submission, and under the section designated "approximate date condition commenced," Appellant stated, "several years – neck and syncope." It must be noted that at his deposition, Appellant testified he had not been treated for any back or neck problems prior to the squeegee board incident.

On January 6, 2014, Appellant filed a Form 50 to request a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 12, 2012. The single commissioner found Appellant's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Appellant's neck. The single commissioner also found Appellant had a "reasonable excuse" for not formally reporting his injury because Durant and Bostick were present and knew of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury; (2) Bostick and Durant both followed up with Appellant; (3) SCDOT was aware Appellant did not return to work following the accident; and (4) SCDOT was notified Appellant was hospitalized and ultimately had neck surgery. Finally, the single commissioner found the late formal reporting of the injury did not prejudice SCDOT. SCDOT appealed to the Appellate Panel.

The Appellate Panel reversed the single commissioner, finding that (1) although Durant and Bostick witnessed the incident, Appellant never reported that the squeegee board accident involved a "snap" in his shoulders and neck; (2) Appellant's excuse for not formally reporting the incident to SCDOT was not reasonable; and (3) SCDOT was prejudiced because Appellant's late reporting deprived it of the opportunity to investigate the incident and whether Appellant's work aggravated his preexisting cervical stenosis. This appeal followed, wherein Appellant argued the Appellate Panel erred when it found (1) SCDOT did not receive adequate notice under S.C. Code Ann. § 42-15-20(A); and (2) Appellant had demonstrated reasonable excuse for – and SCDOT was not prejudiced by – any late formal notice.

Judge McDonald, writing on behalf of the Court, began with an analysis of S.C. Code Ann. § 42-15-20. The Court also noted that, according to the record, the Appellant (1) never formally reported his injury to SCDOT; (2) was able communicate with SCDOT because he submitted his FMLA paperwork; and (3) had not alleged that any mental condition, physical

issue, or third party prevented his formal reporting to SCDOT. Accordingly, the question for the Court was simply whether SCDOT had knowledge of Appellant's accident pursuant to Section 42-15-20(A).

Remarking on the fact that Section 42-15-20 provided no specific method of giving notice – the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability – the Court held that notice is adequate when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim. The Court found that although Appellant never formally reported his injuries to his supervisors, Durant and Bostick both witnessed Appellant fall to the ground, unconscious, after completing physically challenging squeegee board work. The Court also stated that Durant's reason for not reporting Appellant's incident to Bostick was that Bostick was "right there." Therefore, and because our Supreme Court has long held that the statutory notice provision is to be liberally construed in favor of claimants, the Court found that the Appellate Panel erred in reversing the single commissioner's determining that SCDOT received adequate notice under Section 42-15-20(A).

Tuning to the question of "reasonable excuse", the Court articulated that Section 42-15-20(B) provided, in relevant part, that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby. Thus, once reasonable excuse has been established, the burden shifts to the employer demonstrate prejudice from the absence of formal notice. Moreover, lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied and, when determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to investigate the facts and question witnesses while their memories are unfaded, and to furnish medical care to the employee in order to minimize the disability and consequent liability upon the employer. Hence, although Appellant failed to give SCDOT formal notice, his excuse was reasonable because Durant and Bostick were present at the time of his injury and were aware of his treatment. In fact, the Court again noted that Durant's reason for not reporting Appellant's incident himself was that Bostick was "right there" during the incident. Furthermore, because SCDOT was aware that Appellant never returned to work after the accident and knew of his hospitalization and surgical treatment, no prejudice can be established.

# **Setting our Sights on 2018: The Fiftieth Year of our Association**

This is a tremendously exciting time for our organization. We will be celebrating our 50th Annual Meeting this November, which kicks off a year of celebrating fifty years of existence and excellence for the SC Defense Trial Attorneys Association. Founded in November 1968, the SCDTAA has become the preeminent defense trial organization in South Carolina and a model for defense organizations around the country.

The upcoming year will see some exciting events. We will continue our great traditions, as well as embark on new adventures. One new adventure comes in July with our Summer Meeting. We will move from the mountains of Asheville to the beaches of Hilton Head. The Royal Sonesta Resort on Hilton Head will be

the host of our Summer Meeting for 2018 and 2019. The Royal Sonesta is a world-class resort and we are excited about this new venue. The beach will be a wonderful getaway for our members and their families.

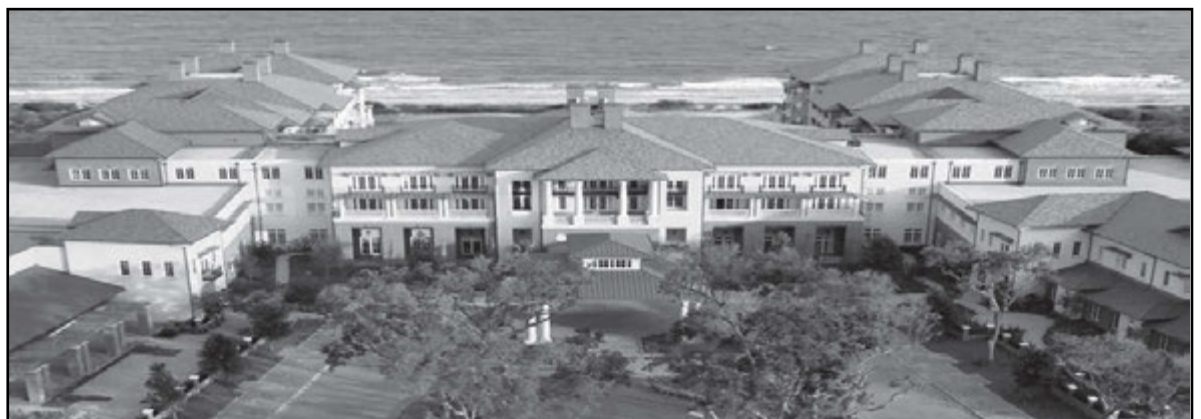
Our traditional events, such as the Trial Academy, are still going strong. In November, we return to The Sanctuary on Kiawah Island for our Annual Meeting. In between will be judicial and legislative receptions, seminars, and other opportunities for involvement.

The coming year promises to be great as we celebrate the past and look forward to the future. Please join us in as many events as you can, get involved, and give back to our Association.

## **The Sonesta Resort • Hilton Head Island, SC**



## **The Sanctuary • Kiawah Island, SC**



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# 2017

*Celebrating 50 years*

ANNUAL MEETING

November 9 - 12 • The Cloister • Sea Island, GA

# 2018

*Spring*

TRIAL  
ACADEMY  
Columbia, SC

*Summer*

SUMMER  
MEETING  
Sonesta Resort  
Hilton Head, SC  
July 27-29

*Fall*

ANNUAL  
MEETING  
The Sanctuary  
Kiawah Island, SC  
November 15-18

# 2019

*Spring*

TRIAL  
ACADEMY  
Charleston, SC

*Summer*

SUMMER  
MEETING  
Sonesta Resort  
Hilton Head, SC  
July 26-28

*Fall*

ANNUAL  
MEETING  
The Ritz-Carlton  
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