THE DEFENSE LINE

S.C. Defense Trial Attorneys' Association

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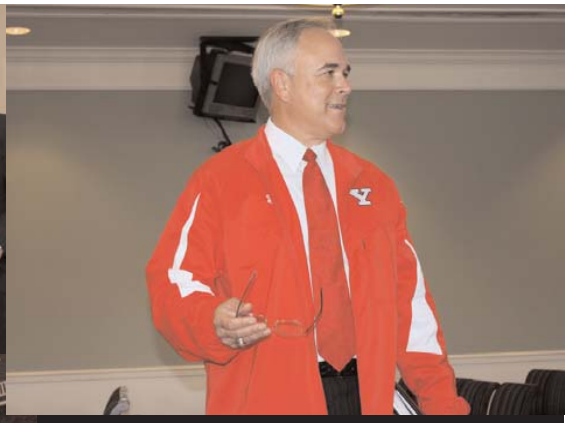

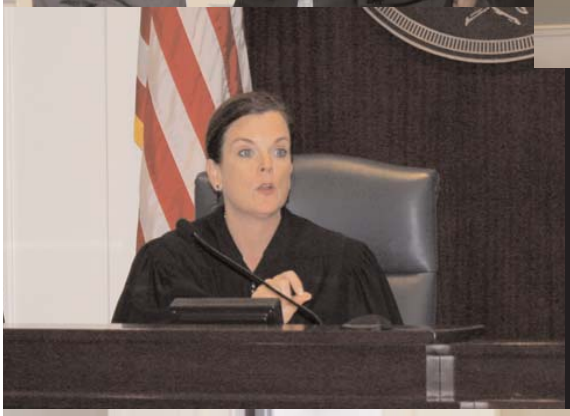

TRIAL ACADEMY
TRIAL SUPERSTARS
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SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

PRESIDENT'S MESSAGE

President's Message

by Molly H. Craig

A Big Thank You…

My term as President of the SCDTAA has been personally enlightening and professionally fulfilling due to the hard work and dedication of an outstanding Board of Directors. Each of these individuals has my deepest appreciation and admiration. The SCDTAA has enjoyed a whirlwind of successful events in 2012 as we continued to offer long-standing programs and introduce new ones. We kicked off the year in April with the Trial Superstars™ mock trial where South Carolina's finest trial lawyers from both sides of the aisle showcased their talents to a sold out courtroom of lawyers. The momentum continued in April when we enjoyed a record number of attendees at the Corporate Counsel Seminar in Columbia. Later in the Spring, we hosted judicial receptions in Columbia and Charleston, as well as a reception for the members of the South Carolina Legislature. The Third Annual PAC Golf Tournament was held in May and raised almost $17,000 with forty-eight golfers participating in the tournament. Our Worker's Comp Boot Camp in Columbia was very well attended in May. The 2012 Trial Academy was held in Charleston in June, and the participants received detailed instruction from a panel of seasoned trial lawyers and judges. The 45th Annual Summer Meeting at the Grove Park Inn was an enormous success with over one hundred members and their families in attendance. We were fortunate to have Judge Mark Hayes, Judge Roger Young, Judy Frank Addy as well as Andy Savage and Mark Fava from The Boeing Company participate as speakers at the Summer Meeting. Also during the Summer Meeting, the Young Lawyers Committee organized a silent auction filled with impressive offerings, and all proceeds from the auction were donated to Justice O'Connor's iCivics project, the National Foundation for Judicial Excellence and the South Carolina Bar Foundation. Following the Summer Meeting, we hosted the organization's first Products Liability Seminar in Columbia and our Second Annual Construction Law Seminar in Charleston. In September, Chief Judge John Few led a lively Evidence Boot Camp in Greenville which was followed by a judicial reception.

In addition to our seminars and receptions, our Board and membership published three outstanding editions of The DefenseLine, highlighting important and timely topics in the law. Likewise, the Association provided amicus support on two cases pending in the South Carolina Supreme Court and offered comments to CMS on the proposed rule changes to the Medicare Secondary Payer Act. We also continue to offer updates and improvements to the SCDTAA website and recently have made available to the membership draft orders, verdict forms and jury charges from different jurisdictions across the state.

I hope it is apparent that the SCDTAA Board is committed to providing tangible professional and social benefits to its members. As a measure of our success, the Association's total number of law firm memberships increased in 2012 and we currently have over a thousand members.

Our work is never done, however. We will continue to focus on the importance of diversity throughout the defense bar and intend to highlight diversity in our future programs and publications. We will continue to provide excellent substantive information in the editions of *The DefenseLine* and aggressively pursue a strong voice for the defense bar in the Legislature as we promote leveling the playing field for all litigants in South Carolina. In general, the Association plans to remain steadfast to its charge of providing excellent educational opportunities for the South Carolina defense bar and supporting justice through fair jurisprudence for all parties. We plan to celebrate the Board's diligence and success at the Annual Meeting at The Sanctuary at Kiawah Island. We are expecting record attendance from the judiciary and all attendees will enjoy the special events planned for this weekend.

I would like to extend a very special thanks to Sterling Davies, President-Elect, Curtis Ott, Treasurer, Ron Wray, Secretary and Gray Culbreath, Immediate Past-President. These gentlemen provided wisdom and guidance to me throughout the year while keeping a wonderful sense of humor and making my job fun and enjoyable. The future of the SCDTAA most certainly is in excellent hands with this group of talented leaders. Finally, our Executive Director, Aimee Hiers, deserves great recognition for her dedication to our organization over the past thirteen years. I hope you will take the opportunity to join me in thanking them for all they have done, and will continue to do for the SCDTAA.

It has been an enormous privilege and pleasure to be President of the SCDTAA. In particular, I would like to express my heartfelt thanks to all of the past leadership of the SCDTAA for building our Association into the institution it is today. The

Letter From The Editors

by David A. Anderson, Jack Riordan, Breon C. M. Walker and Assistant Editor, Michael Freeman

"Sanctuary" is variously defined as a place of refuge or a safe haven. As attorneys, we engage with clients during some of their most difficult and vulnerable times. Especially with regard to cases of contested or questionable liability, proper representation on their behalf may restore their sense of justice and provide a needed "safe haven." However, the continual burden of such responsibilities can be draining, depriving legal professionals of their own refuge. Unfortunately, some of the best and brightest among us seek relief through self destructive means.

A study by John Hopkins University found that among more than 100 occupations studied, lawyers were most likely to suffer from depression and were 3.6 times more likely than average to do so. A quality of life survey by the North Carolina Bar revealed that almost 26% of respondents exhibited symptoms of clinical depression and almost 12% said they contemplated suicide at least once a month. Suicide is the third leading cause of death among attorneys, after cancer and heart disease. This rate of death for lawyers is nearly 6 times the suicide rate for the general population. Suicide can be prevented. While some suicides occur without any outward warning, most do not. We can prevent suicide among lawyers by learning to recognize the signs of someone at risk, taking those signs seriously, and knowing how to respond to them.

The National Institute on Alcohol and Alcohol Abuse estimates that 10% of the US population is alcoholic or chemically dependent. In the legal profession, the abuse may be as high as 20%. Alcoholism is a factor in 30% of all contemplated suicides. Reports from lawyer's assistance programs indicate that 50 to 75% of lawyer discipline cases nationwide involve chemical dependency.

Whether you are the husband, wife, employee, judge, law student, law partner, law firm associate, friend, or colleague of a person challenged by depression or substance abuse, your understanding of the nature of the problem can play a vital part in helping that individual to achieve and maintain recovery. Please remember that there is hope, and there is help. You are not alone. Call the Lawyers Helping Lawyers toll free helpline at (866) 545-9590 or Life Focus Counseling Services, toll free at (866) 726-5252 to be referred to a counselor in your area.

Having established the need to find "refuge" for at least a brief period of time, it is hoped that you will join us November 8-11 as the SCDTAA Annual Meeting takes place (appropriately) at "The Sanctuary." Recipient of the Forbes Five Star Award and designated the #1 U.S. Resort Hotel by Andrew Harper's Hideaway Report, this venue on Kiawah Island should provide enjoyment for all in attendance. The SCDTAA Board and its members have devoted extensive time and effort to our organization and our practice during 2012 and look forward to briefly shedding some of those burdens during an informative, relaxing and blissful weekend.

J. Robert Turnbull, Jr., Director of the above described LHL program will provide an hour long presentation on substance abuse and mental health during the informative CLE program. Please join us for a weekend of "refuge." Perhaps we can thereafter assist in providing a "safe haven" not only for our clients, but for our fellow bar members.

Hope to see you at The Sanctuary.

David A. Anderson

Jack Riordan

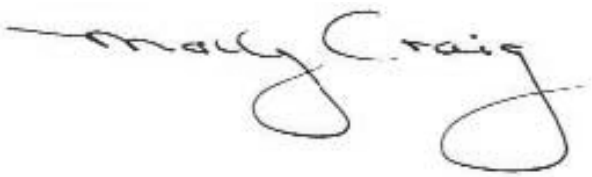
Breon C. M. Walker

Michael Freeman

Presiden't Message cont. from page 2

accomplishments completed this year were made possible by applying the wisdom from those before us. As Isaac Newton once said, "If I have been able to see further, it is only because I stood on the shoulders of giants."

A big thank you to the past giants of the SCDTAA and the future ones who undoubtedly will continue to strengthen, inspire and grow the Association in the years ahead.



SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

SCDTAA Docket

Smith Moore Leatherwood Named as Nominee for S.C. Chamber Diversity Award

Smith Moore Leatherwood, LLP has been named by the South Carolina Chamber of Commerce as one of the nominees for the 8th Annual Excellence in Workplace Diversity Awards, which recognize businesses' significant contributions to moving South Carolina forward in diversity initiatives. Several criteria are considered in choosing companies for the awards, including diversity initiatives, effectiveness and applicability/replicability. Smith Moore Leatherwood is the only law firm named as a nominee. Smith Moore Leatherwood's diversity initiatives include a minority scholarship program; firm-wide diversity training; a formal women's mentoring/networking group within the firm; an alternative work schedule policy; domestic partner benefits; and a commitment to community involvement. The firm was the recipient of the 2012 Upstate Diversity Leadership Award, presented by the Diversity Leaders Initiative and The Riley Institute, in the Business category.

Best Lawyers 2013 Honors Collins & Lacy's Attorneys in Numerous Practice Areas

Collins & Lacy, P.C. is pleased to announce Best Lawyers in America 2013 has honored several of its attorneys in multiple practice areas. Firm wide, eight Collins & Lacy attorneys received the 2013 Best Lawyers in America designation, and those attorneys were honored for their work in eight different practice areas. These include Jack Griffeth in Mediation and Arbitration; L. Henry McKellar in Banking and Finance Law and Litigation; Joel W. Collins, Jr. in Criminal Defense: White-Collar; Michael S. Pitts in Employment Law- Management and Labor & Employment Litigation; and, Ellen M. Adams, Peter H. Dworjanyn and Stanford E. Lacy in Workers' Compensation Law.

Turner Padget's Shawn Willis to Chair Regional Advisory Council

Turner Padget is pleased to announce that Shawn R. Willis has been selected as the Chairman for the Tri-Counties Regional Advisory Council of the South Carolina Chapter of the Community Associations Institute. The Community Associations Institute is a national organization, and the South Carolina Chapter's mission is to enhance property values and quality of life in community associations in South Carolina by promoting leadership, excellence and professionalism through education, communication and resources. The mission of the Tri-Counties Regional Advisory Council is to provide education, legislative advocacy and professional development for the benefit of community associations in Charleston, Berkeley and Dorchester Counties. Mr. Willis is an attorney in Turner Padget's Charleston office and has a general business practice involving both transactional and litigation matters. He is a member of the firm's Community Association and Private Clubs team which represents large, medium and small community associations and private clubs across South Carolina in their formation, governance and operation. Mr. Willis also authors the firm's Community Associations Blog.

Thirty lawyers from Haynsworth Sinkler Boyd recognized in Best Lawyers 2013

Thirty lawyers from Haynsworth Sinkler Boyd, P.A. were recently selected by their peers for inclusion in The Best Lawyers in America® 2013. These include Stephen E. Darling, Thomas C. Hildebrand, Jr., Bachman S. Smith, III, Joseph D. (Trey) Thompson, III, and John H. Tiller from the Charleston, SC office; Jamey Y. Brecker, William C. Boyd, John C. Bruton, Jr., Clarke W. DuBose, Thomas R. Gottshall, Manton M. Grier, Robert Y. Knowlton, Steve A. Matthews, and Hamilton Osborne, Jr., from the Columbia, SC office; J. Ben Alexander, Thomas H. Coker, Jr., W. David Conner, Christine Gantt-Sorenson, Ellis M. Johnston, II, H. Sam Mabry, III, W. Francis Marion, Jr., J.W. (Jay) Matthews, III, Moffatt G. (Mott) McDonald, Boyd B. (Nick) Nicholson, G. Dewey Oxner, Jr., Sarah M. (Sally) Purnell, J. Derrick Quattlebaum, H. Donald Sellers, and Matthew P. Utecht, from the Greenville, SC office.

Collins & Lacy Founding Partner Selected as Faculty Member for 2012 ABOTA National Trial College

Collins & Lacy, P.C. is pleased to announce founding partner, Joel Collins, has been selected as a faculty member for the 2012 American Board of Trial Advocates (ABOTA) National Trial College at Harvard Law School in Cambridge, Massachusetts, July 29 – August 4, 2012. The ABOTA National Trial College provides young trial lawyers with intensive training in the art of successful jury trial advocacy. Joel Collins is the co-founder of Collins & Lacy, P.C. and currently chairs the firm's Professional Liability practice group. Mr. Collins received his Juris Doctor from the University of South Carolina School of Law. He was the recipient of the 2002 Jeter E. Rhodes, Jr., Trial Lawyer of the Year Award, presented by the South Carolina Chapter of ABOTA. He is an Adjunct

Continued on next page

Member News cont.

Professor at the University of South Carolina Honors College, teaching a course on the United States Constitution. He is a member of the International Society of Barristers, Litigation Counsel of America, and serves as a board member of the South Carolina Chapter of the National Safety Council In 2005, he received the James Petigru Compleat Lawyer Award from the University of South Carolina School of Law and was most recently selected as a recipient of the 2012 Leadership in the Law Award by South Carolina Lawyers Weekly.

Lambert Elected Secretary of NCBP

Lanneau W. Lambert, Jr. has been elected secretary of the National Conference of Bar Presidents (NCBP). Holding the office of secretary is the first step toward serving as president of the NCBP. Mr. Lambert will succeed to the office of Treasurer in 2013, President-Elect in 2014 and President in 2015. All officers serve on the Executive Committee. Mr. Lambert, a past president of the South Carolina Bar, is a shareholder in the Columbia office of Turner Padget Graham & Laney P.A., and he serves as practice group leader for the firm's business transactions practice. The NCBP was founded in 1950 to provide information and training to state and local bar association leaders. The Executive Council and committees consist of bar presidents from across the country who attended NCBP conferences when they were leading their respective bars and who continue to share their experiences and perspectives on issues facing current bar leaders.

Best Lawyers Selects Six Nelson Mullins Columbia Attorneys as "Best of the Year"

Best Lawyers, a legal peer-review publication, has named six Nelson Mullins Riley & Scarborough LLP Columbia partners as the 2013 Best Lawyers of the Year in their respective practices: George B. Cauthen, Best Lawyers' 2013 Columbia-SC Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law "Lawyer of the Year,"David E. Dukes, Best Lawyers' 2013 Columbia-SC Personal Injury Litigation - Defendants "Lawyer of the Year," James C. Gray, Jr., Best Lawyers' 2013 Columbia-SC Administrative / Regulatory Law "Lawyer of the Year," Kenneth Allan Janik, Best Lawyers' 2013 Columbia-SC Employee Benefits (ERISA) Law "Lawyer of the Year," John F. Kuppens, Best Lawyers' 2013 Columbia-SC Product Liability Litigation - Defendants "Lawyer of the Year," and B. Rush Smith III, Best Lawyers' 2013 Columbia-SC Litigation - Banking & Finance "Lawyer of the Year."

Gallivan, White & Boyd, P.A. Attorney John T. Lay Elected to IADC Board of Directors

John T. Lay was elected as a new member to the International Association of Defense Counsel (IADC) Board of Directors at their Annual Meeting in July. The IADC is an invitation-only professional association for corporate and insurance defense lawyers around the world. John T. Lay will serve a three-year term on the IADC Board. Mr. Lay is a shareholder at Gallivan, White & Boyd, P.A. He has been recognized extensively by peers in the legal profession. He is AV Rated in Martindale Hubbell, and listed in Best Lawyers in America in three categories. He is also listed in South Carolina Super Lawyers. In 2009, he received the Exceptional Performance Citation from the Defense Research Institute (DRI). The next year, he received the organization's annual Fred H. Sievert Award, nationally recognizing an outstanding defense bar leader. In 2010, he was also awarded the "Leadership in the Law" Award by South Carolina Lawyers Weekly, and has been recognized by Columbia Business Monthly's "Legal Elite" issue. Mr. Lay is a past president of South Carolina Defense Trial Attorneys' Association, and a member of the Association of Defense Trial Attorneys. He is also on the Board of Directors of the South Carolina Chapter of the American Board of Trial Advocates and was elected to John Belton O'Neill Inn of Court.

Collins & Lacy, P.C. Attorney Jack Griffeth Begins S.C. Bar Foundation Presidency

Collins & Lacy, P.C. attorney Jack Griffeth assumes the office of President of the South Carolina Bar Foundation on July 1, 2012. His 35-year practice of law has focused on defense trial work, representing employers in employment-related litigation and mediation. Along with being a tireless advocate for the South Carolina Bar Foundation, Jack was the 2011 President of the Greenville Bar Association, Secretary/Treasurer for the S.C. Bar Foundation Board of Directors and a member of the House of Delegates for the 13th Judicial Circuit. He is a past member of the South Carolina Bar's nominations committee and past-president of the Bar's Alternative Dispute Resolution Council. Jack is a certified mediator by the South Carolina Bar and speaks frequently on the subject of mediation.

Todd R. Davidson joins Gallivan, White & Boyd Law Firm as New Partner

Gallivan, White & Boyd, P.A. is pleased to announce that Todd R. Davidson has joined the firm's Greenville office as a partner. With 23 years of experience as a transactional attorney, Todd will be a significant addition to the firm's Business and Commercial Practice Group. His practice will continue to focus on corporate and business transactions, economic development and incentives, banking and financial transactions, commercial real estate, non-profit organizations, and estate planning. Todd received his law degree, cum laude, from the University of Georgia School of Law in 1989. Prior to receiving his law degree, Todd received a B.A. degree in Business Administration from Furman University, and worked as a Business Analyst with Dun and Bradstreet Corporation.

Greenville Business Magazine recognizes Collins & Lacy Attorney as Legal Elite

Greenville Business Magazine has recognized Suzy Cole as one of the Legal Elite in the practice of workers' compensation. The 2012 Legal Elite is the first editorial listing of Greenville's top attorneys. This summer, 850 Greenville attorneys were asked to nominate the lawyers they consider the best in 20 practice areas. The top attorneys who received the most votes in each practice area are being recognized as Legal Elites in the October edition of Greenville Business Magazine. Suzy Cole is a shareholder in Collins & Lacy's Greenville office practicing in the area of workers' compensation. During her career, Cole has tried numerous cases before the South Carolina Workers' Compensation Commission and has argued before the South Carolina Court of Appeals and the South Carolina Supreme Court.

McKay Firm Partners Stephen Stubley and Mark D. Cauthen Receive AV Preeminent Rating, Awarded Highest Level of Professional Excellence

M.Stephen Stubley and Mark D. Cauthen, partners with McKay, Cauthen, Settana, & Stubley, P.A., have been awarded the AV Preeminent Rating by Martindale-Hubbell Peer Review Ratings. This designation signifies that they have received the highest possible rating for their legal abilities and ethical standards. This designation is given to a very small percentage of attorneys across the United States. Mr. Stubley, a graduate of The Citadel and a South Carolina native, is a member of the South Carolina Defense Trial Attorney's Association, the South Carolina Chamber of Commerce and the South Carolina Workers' Compensation Educational Association. He is also the Past President of the Columbia Area Citadel Club. Mr. Stubley practices in the areas of workers' compensation, subrogation, workers' compensation appeals, and civil litigation. Mr. Cauthen, a graduate of Wofford College and the Cumberland School of Law, is a South Carolina native and member of the South Carolina Defense Trial Attorney's Association and the South Carolina Chamber of Commerce. He also serves on the Educational Conference Committee for the South Carolina Workers' Compensation Educational Association and is on the Board of Directors for Kids' Chance of South Carolina. Mr. Cauthen practices in the areas of workers' compensation, subrogation, workers' compensation appeals, construction law and general litigation.

Nineteen Gallivan, White & Boyd Attorneys Named to Best Lawyers in America

Gallivan, White & Boyd, P.A.is pleased to announce that 19 of its attorneys have been named to the 2013 edition of Best Lawyers in America, one of the most respected peer-reviewed publications in the legal profession. The attorneys are recognized for their leadership in 23 different practice-based categories. These fine individuals include: W. Howard Boyd, Jr., James D. Brice, Deborah Casey Brown, A. Johnston Cox, Gray T. Culbreath, Stephanie G. Flynn, H. Mills Gallivan, William R. Harbison, Jennifer E. Johnsen, John T. Lay,C. Stuart Mauney, C. William McGee, Curtis L. Ott, Phillip E. Reeves, T. David Rheney, Luanne C. Runge, Gregory P. Sloan, Ronald G. Tate, Jr., and Ronald K. Wray II.

Collins & Lacy, P.C. Attorney Selected to Join International Amusement and Leisure Defense Association

Collins & Lacy, P.C. retail/hospitality law attorney Christian Stegmaier has been selected to join the International Amusement and Leisure Defense Association (IALDA) by its membership board. Christian is the only member selected from South Carolina. IALDA is a non-profit association of lawyers and other professionals who are actively engaged in representing the interests of the amusement and leisure industries, as well as those involved in bowling, roller skating, and other forms of entertainment. IALDA is not a trade association or a bar association, and membership must be approved by the Membership Committee. The mission of IALDA is to promote and protect the legal interests of the amusement and leisure industry through development of common litigation strategies and educational events for the industry and its insurers. Christian Stegmaier has published several related articles and presented to multiple trade groups on issues facing the hospitality/entertainment industry, including regulations required by the American with Disabilities Act, third-party assaults, premises liability and other emergent matters.

Best Lawyers in America Selects Marcy J. Lamar

Marcy J. Lamar has been selected for inclusion in The Best Lawyers in America® 2013 in the field of Workers'Compensation Defense for the fourth consecutive year. Ms. Lamar is a member of the McKay, Cauthen, Settana & Stubley's workers' compensation team and practices in the areas of workers' compensation, workers' compensation appeals, subrogation, and civil defense litigation. She is a member of the Workers' Compensation Committee for the South Carolina Defense Trial Attorneys' Association and serves on the Medical Seminar Committee for the South Carolina Workers' Compensation Educational Association. She is also the co-author of The Law of Workers' Compensation Insurance in South Carolina.

Governor Appoints Collins & Lacy Attorney to Board of Accountancy

Governor Nikki Haley has appointed attorney Kristian Cross to the South Carolina Board of Accountancy. The South Carolina Board of Accountancy is responsible for the administration and enforcement of the rules and regulations govern-

Continued on next page

ing the practice of accounting in the state. The board consists of nine members who are all appointed by the Governor, seven accountants and two members of the public who have no connection to the profession. In addition to her appointment to the South Carolina Board of Accountancy, Cross also is on the Workers' Compensation Committee for the South Carolina Defense Trial Attorneys' Association and serves on the executive board of Sexual Trauma Services of the Midlands.

Gibbs and Bayne Join MG&C's Columbia Office

The law firm of McAngus Goudelock & Courie is pleased to announce that Christopher Gibbs and Brett H. Bayne have joined the firm's Columbia, S.C. office.

Mr. Gibbs' practice focuses on general liability defense, including automobile negligence, premises liability and construction defects. He received his law degree from Charleston School of Law, where he was an active member of the Black Law Students Association. He holds a bachelor's degree in English from The Citadel. Prior to law school, Mr. Gibbs was a financial advisor with Merrill Lynch, where he obtained his Series 7, Series 66, and Life Health and Variable Annuity licenses. He is a member of the South Carolina Bar Association. Mr. Bayne's practice focuses on workers' compensation defense. He received his law degree from the University of South Carolina School of Law, where he was inducted into the John Belton O'Neall Inn of Court. He holds bachelor's degrees in political science and sociology from Baylor University. Prior to joining MG&C, Mr. Bayne served as law clerk to the Honorable G. Thomas Cooper, Jr.

Kelli Sullivan Selected for Leadership Columbia Class of 2013

The Greater Columbia Chamber of Commerce has chosen Kelli Sullivan, an attorney with McKay, Cauthen, Settana, & Stubley, P.A., as a member of Leadership Columbia, Class of 2013. The selection criteria for Leadership Columbia included civic involvement, leadership potential, diversity of perspective and commitment to the leadership program and the community. For 40 years, Leadership Columbia has helped participants better understand the local community, while building relationships with the region's current and future leaders. Ms. Sullivan is a certified mediator and has nine years of experience as a Plaintiff's attorney in medical malpractice, employment litigation and personal injury matters. She serves as a member of the Medical Malpractice Committee with the South Carolina Defense Trial Attorneys' Association, a member of the Ethics Advisory Committee of the South Carolina Bar Association, and a volunteer mediator for Magistrate's Court cases in Richland and Lexington Counties.

Jason A. Pittman Joins MG&C's Columbia Office

The law firm of McAngus Goudelock & Courie is pleased to announce that Jason A. Pittman has joined the firm's Columbia, S.C. office. Mr. Pittman's practice focuses on general liability defense including insurance defense, coverage and construction. He received his law degree from Charleston School of Law, where he received CALI Awards for Products Liability and Trial Advocacy. He holds a bachelor's degree in engineering from The Citadel and worked as an electrical engineer prior to becoming an attorney. He is a member of the Board of Advisors for The Citadel's Electrical Engineering Department and is also a member of the South Carolina Bar Association, Charleston County Bar Association and Federal Bar Association.

Richardson Plowden's Baxter Participates in Mission Trip to Africa

Douglas C. Baxter was one of 30 participants on a mission trip with First United Methodist Church of Myrtle Beach to visit Nakuru, Kenya. One of the main purposes of the trip, says Baxter, was to distribute and provide training for the use of water filters at two IDP refugee camps. Most afternoons the group also visited a school located at one of the IDP camps and engaged in activities with the students. The group gave more than 200 textbooks to the school, which educates nearly 500 Kenyan children each year. Also, the church group attended a joint service for ten local Churches in the Nakuru area, where they provided a meal and distributed food to 175 families from the Churches. Baxter is a defense trial attorney with Richardson Plowden in Myrtle Beach and has more than 25 years of courtroom experience and success. He and his family are active in their church, First United Methodist Church of Myrtle Beach. Having gone on smaller trips within the United States, Baxter hopes that this is the first of many mission trips he can make to other parts of the world.

Nelson Mullins Recognized by Chambers and Partners and The Legal 500

Legal directory publishers Chambers and Partners and The Legal 500 have recognized Nelson Mullins Riley & Scarborough LLP for its products liability litigation. Chambers and Partners also recognizes the law firm and its attorneys with state rankings for practices in South Carolina and Georgia. Rankings are based on interviews with law firms and clients and released in Chambers USA 2012. The Legal 500 recognizes the law firm for its pharmaceuticals and medical devices. In pharmaceuticals it singles out Columbia partner David Dukes. Chambers and Partners gives Mr. Dukes and Columbia partner Stephen G. Morrison a national ranking for their products liability and mass torts practices. The publishers also recognize Columbia partner Steve McKelvey in its national category for his work in transportation: road (carriage/commercial). The

publishers rank the Firm for its South Carolina general commercial litigation, corporate/mergers and acquisitions, and corporate work in banking and finance, and in Georgia for its healthcare practice. Chambers ranks the Nelson Mullins South Carolina corporate/mergers and acquisitions group and the corporate/mergers and acquisitions group in banking and finance as top-tier. The publication singles out Neil Grayson, Gus Dixon, Dan Fritze, John Jennings, Mason Hogue, and John Moore.

Two Roe Cassidy Attorneys Selected for Inclusion in Best Lawyers 2013

Roe Cassidy Coates and Price, P.A. is pleased to announce that two of its attorneys have been selected by their peers for inclusion in The Best Lawyers in America® 2013. Randy Moore has been selected for Litigation - Labor & Employment Law; Employment Law - Individuals; and, Employment Law- Management. Clark Price has been selected for Medical Malpractice Defense. The annual list is compiled by Best Lawyers after conducting surveys in which more than 39,000 leading attorneys confidentially evaluate their professional peers. Since attorneys are not required or allowed to pay a fee to be listed, Best Lawyers has come to be regarded by both the legal profession and the public as the most respected referral list of attorneys in practice.

David Anderson of Richardson Plowden elected to the Federation of Defense and Corporate Counsel

Richardson, Plowden & Robinson is pleased to announce that attorney David A. Anderson was elected as a member of the Federation of the Defense and Corporate Counsel (FDCC). The FDCC was founded in 1936 to further the principle of knowledge, justice and fellowship. Its members include experienced attorneys in private practice who specialize in the defense of civil litigation, corporate counsel, risk managers, and insurance claims executives. Members are selected after an extensive peer-review election process. Anderson focuses his practice on civil litigation with an emphasis on defending construction, premises liability, real estate professionals, and other insurance related matters. He earned his Juris Doctor from the University of South Carolina School of Law in 1996. In 2004, he received a Master's degree in strategic studies from the U.S. Army War College. Anderson is a member of the South Carolina Bar and the American Bar Association, as well as the South Carolina Defense Trial Attorneys' Association, the Defense Research Institute, and the Professional Liability Defense Federation.

Four Roe Cassidy Coates & Price Attorneys Named to Greenville Business Magazine's Legal Elite

Greenville Business Magazine has recognized four Roe Cassidy attorneys as among the area's Legal Elite. Jim Cassidy has been recognized for his work in Banking and Finance, Foreclosure law and Bankruptcy and Creditors Rights. Bill Coats as been recognized for his work in Criminal Law. Clark Price is honored for his work in Healthcare Law, and Randy Moody for his work in the Labor and Employment arena. In its first-ever survey, the magazine sent emails to 850 Greenville-area lawyers and asked them who, in their opinions, were the best lawyers in 20 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. A total of 95 lawyers were identified by their partners and peers as the Legal Elite of the Greenville area.

Jared Garraux of Richardson Plowden selected to 2012-2013 Class of Leadership Columbia

Richardson, Plowden & Robinson, P.A. is pleased to announce that attorney Jared H. Garraux was recently selected to the 2012-2013 Class of Leadership Columbia, sponsored by the Greater Columbia Chamber of Commerce. Leadership Columbia is a program for existing and emerging leaders in the Midlands of South Carolina. Its focus is to help participants better understand how the Midlands community works, build relationships with the region's current and future leaders, and become inspired to focus their talents in a way that will best serve the community. Garraux is one of 58 members in this year's class. Members engage in a 10-month curriculum including monthly learning sessions, class retreat, group project, and other enrichment activities. Since its inception in 1973, Leadership Columbia has celebrated nearly 1,700 graduates. Members were selected based on an extensive application, interview and panel review processes. Garraux is a former contractor and is now a member of the Richardson Plowden Construction Team where he focuses his practice on construction litigation, contract drafting and negotiation, claims resolution and avoidance, design professional malpractice, and insurance defense.

Turner Padget's Reginald W. Belcher Named Top Corporate Employment Attorney

Turner Padget Graham & Laney, P.A. is pleased to announce that Reginald W. Belcher has been named one of the top corporate employment attorneys in the nation for 2012 by Human Resource Executive® Magazine and Lawdragon.com. Belcher is recognized as one of the top "40 Up-and-Comers" for his exemplary work in the labor and employment law field. This list recognizes accomplished employment lawyers, like Belcher, who are likely to rank in the top 100 of the most powerful employment attorneys in the country in the near future.

Continued on next page

Richardson Plowden's Kelley selected as Chair of the Commission on Women

Richardson, Plowden & Robinson, P.A. is pleased to announce that attorney Michelle Parsons Kelley was recently selected as the chair of the South Carolina Commission on Women (SCCW) for 2012-2013, effective September 6. The SCCW is a statewide organization that strives to improve and promote the quality of life and the status of women in South Carolina. As Chair of this organization, Kelley will be responsible for leading the Commission in its role as an advising body to the Governor on issues related to South Carolina women and children. She will also preside over the Commission meetings. Kelley is a member of the Richardson Plowden Litigation Team where she focuses her practice in general litigation, including appeals and commercial litigation. She is active in her community, serving in a number of leadership roles. She is the statewide chair of the Cinderella Project, an appointed advisor for the South Carolina Federal Credit Union Board of Advisors, and is a member of American Mensa, Women in Law, Columbia Capital Rotary Club, and the Junior League of Columbia.

Thirty-Three Turner Padget Attorneys Chosen for Inclusion in the 2013 Best Lawyers in America

Since its inception in 1983, Best Lawyers has become universally regarded as the definitive guide to legal excellence. Corporate Counsel magazine has called Best Lawyers "the most respected referral list of attorneys in practice." Turner Padget is one of South Carolina's largest law firms with 91 attorneys and five offices in Charleston, Columbia, Florence, Greenville and Myrtle Beach. Listed from the firm's Charleston office are: John K. Blincow, Jr., Elaine H. Fowler, Michael G. Roberts, and John S. Wilkerson. Listed from the firm's Columbia office are: J. Kenneth Carter, Jr., Michael E. Chase, Danny C. Crowe, John E. Cuttino, Cynthia C. Dooley, Charles E. Hill, Catherine H. Kennedy, Lanneau W. Lambert, Jr., Edward W. Laney, IV, Steven W. Ouzts, Thomas C. Salane, Franklin G. Shuler, Jr., W. Duvall Spruill and D. Andrew Williams. Listed from the firm's Florence office are: Richard L. Hinson, J. René Josey, Arthur E. Justice, Jr., Julie J. Moose, J. Munford Scott, Jr., and John M. Scott, III. Listed from the firm's Greenville office are: Vernon F. Dunbar, Eric K. Englebardt, William E. Shaughnessy, Wilson S. Sheldon, Timothy D. St. Clair, and Charles F. Turner, Jr. Listed from the firm's Myrtle Beach office are: R. Wayne Byrd, Otis Allen Jeffcoat, III, and William E. Lawson.

Sweeny, Wingate & Barrow, P.A., Welcomes Richard McLawhorn

The law firm of Sweeny, Wingate & Barrow, P.A. is pleased to announce that Richard McLawhorn has joined the firm's Hartsville, South Carolina office. He received his Juris Doctor from the University of Alabama School of Law where he was a Senior Editor of the Alabama Law Review from 2009-2011. He holds a B.A. Degree in History from North Greenville University in Tigerville, South Carolina. Prior to joining Sweeny, Wingate and Barrow, Mr. McLawhorn worked as an Associate with Gardner, Willis, Sweat and Handelman in Albany, Georgia.

Richardson Plowden's Kelley selected as the "Face of Y'all" for USC

Richardson, Plowden & Robinson is pleased to announce that attorney Michelle Parsons Kelley was recently selected as this year's "Face of Y'all," which means she will be the 2012-2013 University of South Carolina (USC) Young Alumni Ambassador, representing the past ten years of USC graduates. As the Face of Y'all, Kelley will attend USC events, orchestrate a video campaign focused on highlighting the humanitarian efforts of USC alumni around the world, and create an award to recognize USC alumni who have made significant humanitarian contributions after graduation. Kelley is a member of the Richardson Plowden Litigation Team where she focuses her practice in general litigation, including appeals and commercial litigation. Kelley graduated Magna Cum Laude from the USC Honors College. She then earned her Master's of Public Administration from USC in 2007, while simultaneously completing her Juris Doctor from the USC School of Law, which she attended on a full academic scholarship as a Carolina Legal Scholar. She is a Commissioner for the South Carolina Commission on Women, an appointed advisor for the South Carolina Federal Credit Union Board of Advisors, and is a member of American Mensa, Women in Law, Columbia Capital Rotary Club, and the Junior League of Columbia. Kelley also serves as the statewide chair for the Cinderella Project, a nonprofit sponsored by the South Carolina Bar. In early 2012, she was recognized as a Rising Star by South Carolina Super Lawyers.

Smith Moore Leatherwood Announces 5 of Firm's Attorneys Named The Best Lawyers in America®

Smith Moore Leatherwood, LLP is pleased to announce that 5 of its attorneys have been selected by their peers for inclusion in The Best Lawyers in America® 2013. The following Smith Moore Leatherwood attorneys are included in The Best Lawyers in America 2013: Steven E. Farrar (Bet-the-Company Litigation, Commercial Litigation, Legal Malpractice Law (Defendants), Construction Litigation, Professional Malpractice Law (Defendants)); Robert D. Moseley, Jr. (Insurance Law, Personal Injury Litigation (Defendants); A. Marvin Quattlebaum (Real Estate Law); Jack Riordan (Personal Injury Litigation (Defendants)); Kurt M. Rozelsky (Personal Injury Litigation (Defendants), Product Liability Litigation (Defendants)).

Fowler Re-elected as Secretary-Treasurer of the South Carolina Bar Foundation

Turner Padget Graham & Laney, P.A. is pleased to announce that Elaine H. Fowler has been elected to serve as Secretary-Treasurer of the South Carolina Bar Foundation, which serves as the philanthropic arm of the South Carolina Bar. The mission of Foundation is to fund the advancement of justice by improving access to justice through civil legal aid, law related education for the public and improving the accountability and administration of the justice system. Ms. Fowler has also been elected to serve another term as Chair of the Leadership Development Committee of the Charleston Regional Development Alliance for FY 2012-2013 and will again be serving on the Executive Committee of CRDA. CRDA is a private nonprofit organization formed to promote long-term economic development in the Charleston region by leading a global marketing effort to attract world-class businesses and talent and to facilitate new, high-value business investment within Charleston, Berkeley and Dorchester Counties.

Ms. Fowler is a resident in the Charleston office and is a member of the firm's Business Transactions Group. In addition to devoting much time to her legal career, she is committed to service in her community and, among other activities, serves as Vice-Chair of the Sullivan's Island Planning Commission.

The McKay Firm Welcomes David M. Bornemann

McKay, Cauthen, Settana, & Stubley, P.A., is pleased to announce that David M. Bornemann has joined the firm's workers' compensation team. David, a South Carolina native, has practiced in the area of workers' compensation defense, subrogation and workers' compensation appeals since 2006. In addition to being a member of the South Carolina and Richland County Bar Associations, David is also a graduate of Leadership Columbia Class of 2012, member of the Contemporaries of the Columbia Museum of Art and a graduate of the South Carolina Bar Association's 2012 Leadership Academy. Prior to practicing law, David was a law clerk for the Honorable Paul M. Burch. David graduated from the University of South Carolina Honors College and the University of South Carolina School of Law.

Myada El-Sawi Joins Turner Padget

Turner Padget Graham & Laney, P.A. is pleased to announce that Myada El-Sawi has joined the firm's Greenville office. Ms. El-Sawi is a member of Turner Padget's Workers' Compensation Team and will concentrate her practice in that area. Ms. El-Sawi received her B.A. from Furman University and her Juris Doctor from the University of Georgia School of Law, cum laude. While in law school, she served as the Managing Editor of the Georgia Journal of International and Comparative Law. Ms. El-Sawi participated in the Public Interest Practicum where she represented small businesses and interned with the General Counsel of the American Cancer Society and the Atlanta Public School System. She also interned at the Department of Homeland Security where she worked with the trial attorneys in the Office of the Principal Legal Advisor.

Sam Sammataro Elected as President of the South Carolina Chapter of the Federal Bar Association

Sam Sammataro, a shareholder in the Columbia office of Turner Padget Graham & Laney, P.A., has been elected to serve as President of the South Carolina Chapter of the Federal Bar Association. Sam began serving his 2012-2013 term in September. Mr. Sammataro concentrates his practice in product liability and appellate matters. Mr. Sammataro will work with other officers and board members, targeting on-going and new programming designed to aid the federal bench and bar, including the annual CLE and reception to take place in Columbia in September 2013.

Wilkes Law Firm, P.A. Relocates

Wilkes Law Firm, P.A. is pleased to announce that it has relocated its Charleston office to 200 Meeting Street, Suite 205, Charleston, South Carolina, 29401. The firm is now located in the heart of downtown Charleston, and continues to focus its practice in all areas of civil litigation, including professional liability defense, construction litigation and personal injury defense. Derek Newberry, formerly of the firm's Spartanburg office, now practices full-time in the new Charleston location. Mike Wilkes continues to work out of both the Spartanburg and Charleston offices.

Collins & Lacy Founder Joel W. Collins, Jr., named Best Lawyers 2013 Lawyer of the Year in Criminal Defense: White Collar

Collins & Lacy, P.C. is pleased to announce founding partner, Joel W. Collins, Jr. has been named the Best Lawyers' 2013 Criminal Defense: White-Collar "Lawyer of the Year." The "Lawyer of the Year" is awarded to only a single lawyer in each practice area and designated metropolitan area. Collins' designation as "Lawyer of the Year" for White Collar - Criminal Defense in Columbia, SC reflects the high level of respect he has earned among other leading lawyers in the same community and the same practice area for his ability, professionalism, and integrity. He received his undergraduate degree from Clemson University in 1965 and earned his law degree from the University of South Carolina School of Law in 1968. Collins maintains an active role in several community organizations including the South Carolina Department of Juvenile Justice and the Lake Murray-Irmo Rotary Club. He currently serves on the National Board of Directors for the American Board of Trial Advocates (ABOTA) as well

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as a Trustee Emeritus for the ABOTA Foundation. Joel was the recipient of the South Carolina Lawyers Weekly 2012 Leadership in the Law Award, and is a member of the International Society of Barristers.

Elizabeth Fritz Bailey Joins Wilkes Law Firm, P.A.

Wilkes Law Firm, P.A., is pleased to announce that Elizabeth (Beth) Fritz Bailey has joined the firm in its Charleston office. Beth graduated with honors from the University of South Carolina Honors College in 1999 with a B.A. in Political Science, and earned her Juris Doctor from the University of South Carolina in 2002. While pursuing her Juris Doctor, Beth was active in the Order of the Barristers, Moot Court and the ABA Real Property, Probate and Trust Journal. Following law school, Beth practiced with Haynsworth Sinkler Boyd, P.A. in their Charleston office, and was an adjunct professor at the Charleston School of Law. She is a 2006 graduate of Leadership Charleston and active in the community including serving on the board of the BB&T Charleston Wine + Food Festival ® and on the Board of Managers for the South Carolina Historical Society. Beth's practice at Wilkes Law Firm, P.A., will include all areas of civil litigation, including professional liability defense, construction litigation, commercial litigation and personal injury defense.

H. Mills Gallivan of Gallivan, White & Boyd, P.A. Elected President of National Foundation for Judicial Excellence

H. Mills Gallivan, senior shareholder at Gallivan, White & Boyd, P.A., has been elected to serve as the President of the National Foundation for Judicial Excellence (NFJE). The NFJE, established in 2004, is a non-profit organization that supports an independent and well-versed judiciary in order to promote excellence and fairness in the civil justice system. The NFJE accomplishes this task through providing education to the judiciary as well as hosting an annual national symposium for state appellate judges. In addition to serving as President of the NFJE, Gallivan's long line of professional and community commitments include his prior service as President of the South Carolina Defense Trial Attorneys' Association, Vice Chair of the City of Greenville Planning Commission, Director of the Federation of Defense and Corporate Counsel, President of the Upstate S.C. American Inn of Court and President of Rotary Club of Greenville Foundation. Gallivan has previously received the Defense Research Institute Exceptional Performance Citation and was the 2010 recipient of the South Carolina Defense Trial Attorneys' Association's prestigious Robert Hemphill Award.

Wyche Lawyers recognized in Chambers USA

Wyche, P.A. is once again recognized in every practice area listed for the state of South Carolina in the 2012 edition of Chambers USA: America's Leading Lawyers for Business ("Chambers"). These practice areas are Litigation, Corporate/Mergers and Acquisitions, Labor & Employment, and Real Estate. In addition, nine Wyche attorneys were singled out as leading lawyers in South Carolina in their respective practice areas. Chambers determines its rankings by conducting interviews with clients and peers of the attorneys. Wyche is ranked as a top tier South Carolina firm in Litigation again for 2012. Wyche's Corporate/Mergers & Acquisitions team is also highly ranked again this year. Wyche attorneys Eric Amstutz and Cary Hall are highlighted as leading lawyers in this practice area. Wyche is also recognized as a leading law firm in South Carolina for its Labor & Employment practice group. Wyche attorneys Ted Gentry and Mark Bakker are named leading lawyers in this practice area. Wyche's Real Estate practice area is recognized again this year as well. Jim Warren, who chairs the firm's real estate group, was recognized as a leading lawyer in the state for his work in this area. Maurie Lawrence was also recognized for the first time this year as an "Up and Coming" Real Estate lawyer.

Best Lawyers Selects Four Turner Padget Attorneys as "Lawyers of the Year"

Best Lawyers, a legal peer-review publication, has named four Turner Padget attorneys as the 2013 Best Lawyers of the Year. Danny C. Crowe named Best Lawyers' 2013 Columbia, SC Mediation "Lawyer of the Year," Eric K. Englebardt named Best Lawyers' 2013 Greenville, SC Mediation "Lawyer of the Year," Catherine H. Kennedy named Best Lawyers' 2013 Columbia, SC Litigation – Trusts & Estates "Lawyer of the Year," and Timothy D. St. Clair named Best Lawyers" 2013 Greenville, SC Litigation – Intellectual Property "Lawyer of the Year." Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year" according to Best Lawyers. Lawyers are selected based on voting averages received during peer-review assessments.

SCDTAA Member Joins SC Bar Foundation Board

The South Carolina Bar Foundation announces attorney J. Boone Aiken III will be joining its board of directors. Aiken is a senior shareholder at Aiken Bridges Elliott Tyler & Saleeby, PA in Florence. His practice focuses on litigation and he is Circuit Court mediator and arbitrator. He earned his undergraduate degree from Wake Forest University and received his Juris Doctor from the University of South Carolina School of Law. He is a past president of the Florence County Bar. Aiken is a member of the S.C. Defense Trial Attorneys' Association, the S.C. Association of Justice and Defense Research Institute. He is a Fellow of the American College of Trial Lawyers.

Ott Joins Gallivan, White & Boyd's Columbia Office

Gallivan, White & Boyd, P.A. is pleased to announce that Curtis L. Ott has joined the firm's Columbia office as a partner. Ott is joining GWB's

Complex Litigation group, where his practice will continue to focus on product liability litigation, trucking litigation, drug and medical device litigation, commercial litigation, and appellate work. Ott has taken 75 cases to verdict in state and federal court and has argued before the South Carolina Supreme Court and Court of Appeals. Ott earned his law degree, cum laude, from Boston University in 1992 and his B.A. degree from Davidson College in 1989. He currently serves as the Treasurer of the South Carolina Defense Trial Attorneys' Association and is a member of the International Association of Defense Counsel and the Trucking Industry Defense Association. Ott has been listed in Best Lawyers in America, for commercial litigation and product liability litigation, and South Carolina Super Lawyers, for product liability litigation, continuously since 2009.

Turner Padget Recognized by Chambers USA

Chambers USA, America's Leading Lawyers for Business, has recognized three Turner Padget attorneys. Franklin G. Shuler, shareholder in Columbia, South Carolina, is listed in the area of Labor and Employment. John S. Wilkerson, shareholder in the Charleston, South Carolina, is listed in the area of Commercial Litigation. O. Allen Jeffcoat, located in Myrtle Beach, South Carolina, is listed in the area of Real Estate. The firm also is recognized in the publication as a leading firm in the area of Commercial Litigation.

Six Richardson Plowden Attorneys Selected to 2013 edition of Best Lawyers in America®

The 2013 edition of The Best Lawyers in America® features six Richardson, Plowden & Robinson, P.A. attorneys who were selected by their peers: Leslie A. Cotter, Jr., Frederick A. Crawford, Steven W. Hamm, Francis M. Mack, Frank E. Robinson, II, and Franklin J. Smith, Jr. Cotter was selected by Best Lawyers for his work in Legal Malpractice Law. This is the third consecutive year Cotter has been recognized by Best Lawyers. For the fifth consecutive year, Crawford, was recognized by Best Lawyers for his work in Health Care Law. Crawford focuses his practice on health care law, contracts, accounting malpractice defense, estate planning, and corporate law. Hamm was chosen by Best Lawyers for his work in Administrative and Regulatory Law. This is the fourth consecutive year that he has been recognized by Best Lawyers. Hamm focuses his practices on administrative and regulatory law and is the Firm's lead attorney on government relations. This is the thirteenth year that Mack has been recognized by Best Lawyers. This year he was selected for his work in three areas of law: Bet-the-Company litigation, Commercial Litigation and Construction litigation. Mack focuses his practice on complex commercial litigation in the areas of contract disputes, construction, fidelity and surety law, and insurance defense matters. Robinson was honored as a Best Lawyer in the area of Real Estate Law. This marks his twentieth consecutive year as a Best Lawyer. Robinson focuses his practice on business and commercial law and real estate. He is a member of the American Bar Association, South Carolina Bar and the Richland County Bar Association. Smith was selected by Best Lawyers in the area of Construction Litigation. This is his eleventh consecutive year being recognized by Best Lawyers. Smith's practice is focused on construction law, federal contract law, fidelity and surety law, insurance defense, and professional malpractice.

Special Thanks for our 2012 Summer Meeting Sponsors

Applied Building Sciences, Inc.
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2012 Summer Meeting Recap

by Anthony Livoti

The Grove Park Inn once again served as host for the 2012 SCDTAA Summer Meeting. It was a great weekend for our "rebranded" mid-year gathering. The weekend started on Thursday night with the Silent Auction where we were able to raise $6,142.00 for the National Federation for Judicial Excellence, the South Carolina Bar Foundation's Children's Program and iCivics. A great line-up of speakers presented a top-notch CLE program that was informative and entertaining. A technology recap from Trial Superstars kicked off our Friday morning, with input from sponsors and vendors. It was a tremendous presentation on the impact demonstrative evidence can make to a jury. Judge Mark Hayes gave a riveting talk on the importance of being a lawyer and fighting for an independent judicial system. Jay Bender made FOIA requests an incredibly interesting and entertaining topic. Substantive Law breakouts on new insurance limits disclosures and mediation informed our membership and rounded out our Friday meeting. Thunderstorms got the best of the golfers but did not damper the Friday night barbeque and the view of a Blue Ridge Mountain sunset was a perfect cap to a great day. Saturday presented more entertaining topics, with Andy Savage presenting a comprehensive media-primer on handling the media during litigation. Dr. Perry Woodside shared insights on deposing the plaintiff's economist and life care planner. Judge Roger Young and Judge Frank Addy gave a "Top Ten" list of do's and don'ts for state court motions practice. Rob Tyson discussed the redistricting trial he worked on and Mark Fava wrapped up our joint session with a discussion of Boeing's impact on South Carolina. The Workers' Compensation substantive committee did an exceptional job expanding the workers' comp offerings with over 4 hours of specific programming directed to comp lawyers as well as providing great access to the commissioners. All in all, the "new" Summer Meeting was enjoyed by all. A special thanks goes out to the committee of Anthony Livoti, Bill Besley, Erin Dean, Walt Barefoot and Mark Allison for tireless work in planning and executing an exceptional meeting. And none of it could be done without Aimee Hiers and her staff. We look forward to another great meeting next year.

The 2012 Annual Meeting at The Sanctuary on Kiawah Island is Ready to Start

by William S. Brown

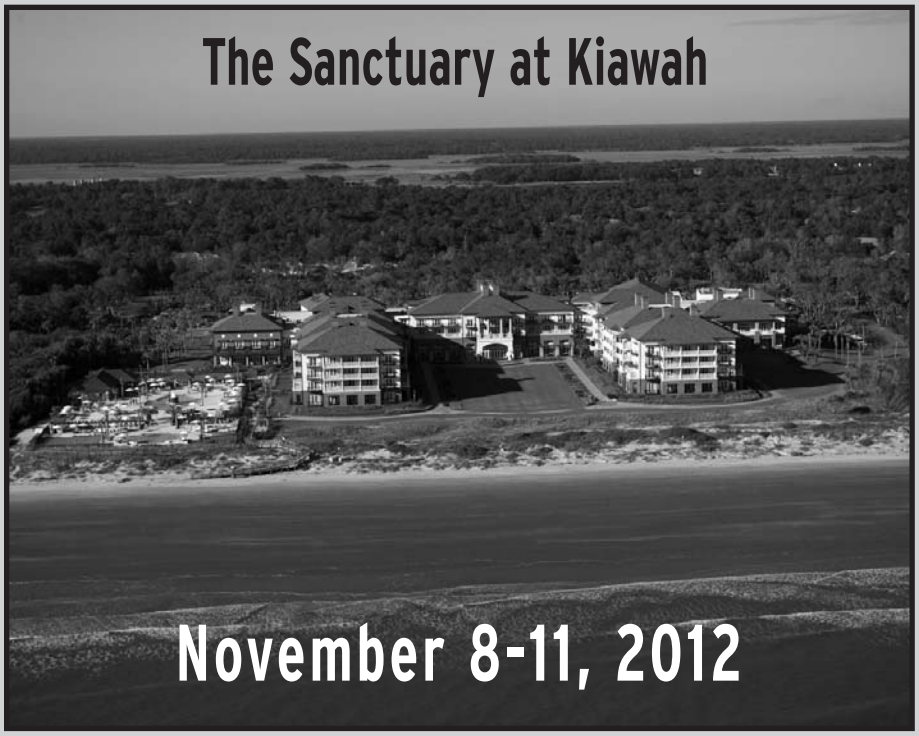
Kiawah is calling to you. Come join us at the 2012 Annual Meeting of the South Carolina Defense Trial Attorneys' Association at the Sanctuary. We will have a fabulous meeting, filled with informative and entertaining educational program and plenty time to connect and interact socially with your fellow defense attorneys and members of the judiciary.

Our program includes insight and wisdom provided by both trial and appellate judges, substantive law presentations directed at your specific area of practice, an analysis of ethics issues in the world of e-discovery, and much more. We are excited about each of our speakers and panel members.

The Sanctuary's 5-star accommodations provide the ideal venue for our program. From the magnificent main lawn, to the grand ballroom, to the luxurious guest rooms, you will be amazed by the beauty of the resort. The Sanctuary combines elegance with a relaxed beach atmosphere.

After the educational program, whether you chose to play on the world-class golf courses, enjoy the fantastic tennis facilities, take part in a day of backwater fishing, or simply relax to the sounds of the waves softly breaking on the beach while a gentle breeze blows through the ocean front dunes, you will not find a better place to spend an early November weekend than Kiawah. The evenings at the Annual Meeting will also be filled with opportunities to catch up and connect with friends, both old and new.

As Dr. Seuss once said, "Sometimes the questions are complicated and the answers are simple." Today we can be inundated with flyers for continuing legal education opportunities. How to achieve continuing legal education goals can be a complicated and confusing question. But, in this case, the answer is simple. You need to be at the 2012 Annual Meeting of the South Carolina Defense Trial Attorneys' Association at the Sanctuary. We look forward to seeing you at Kiawah November 8-11, 2012.



Evidence Boot Camp

by Eric K. Englebardt

On Thursday, September 27, the SCDTAA and sponsor Depositions And Inc. presented our first ever Evidence Boot Camp at the Hyatt Hotel in downtown Greenville. Thanks to the excellent program put together by South Carolina Court of Appeals Chief Judge John Few, a group of lawyers of all experience levels received a crash course in evidence and learned a few courtroom practice "tricks".

Judge Few began the boot camp with an outstanding lecture which hit on Judge Few's evidence theory, and discussed common evidence issues regularly faced by South Carolina litigators. The participants then split into groups to work on potential arguments on specific issues in the real case scenarios provided to them by Judge Few prior to the seminar. Then, Judge Few and Asstitant U.S. Attorney Andrew Moorman presented their own mock oral arguments regarding the admissibility issues of unfair prejudice versus probative value of disturbing photographs from the recent South Carolina Court of Appeals decision in State v. Collins. Finally, Judge Few and former SCDTAA President Sam Outten sparred in a mock Daubert motion.

The SCDTAA is extremely grateful to both Judge Few and Depositions And Inc. for this program, and looks forward to putting together more "hands on" type CLEs in the future.

Following the seminar, attendees were invited to attend a reception in honor of the South Carolina Judiciary. The party was hosted (and personally catered!) by Ellis and Mary Johnston at their beautiful home. In addition to the wonderful food prepared by the Johnstons, guests enjoyed a beautiful fall afternoon and fellowship with Judge William Traxler, Chief Judge of the U.S. Fourth Circuit Court of Appeals, U.S. District Judge G. Ross Anderson, Jr. and Judge Henry Herlong, Chief Judge John Few and Judge Aphrodite Kondorous of the South Carolina Court of Appeals, and South Carolina Circuit Court Judge V. Victor Pyle, Jr..

Many thanks to Ellis, Mary, and all who attended.

Reflections

Editors Note: This year we have selected past Association Presidents to provide us a look back at the beginning of our organization. Allston "Ben" Moore began this section in our Spring Edition followed by Ed Mullins in the Summer Edition. Jack Barwick, Jr. our Association President from 1976-1977 had graciously agreed to provide his comments for this edition. Unfortunately in June of this year, Jack passed away prior to providing us with his thoughts. We decided to dedicate this article to remembering his life and his contributions to both our organization and profession. Below is a narrative of Jack's life followed by comments from Association members who practiced with him. Our heartfelt sympathy goes out to his wife Nan and his family.

Jackson LaVelle Barwick, Jr. was Born on September 28, 1924, in Atlanta, Ga., he was the son of the late Jackson LaVelle Barwick Sr. and Evelyn Adams Barwick. He was senior partner of Belser, Baker, Barwick, Ravenel & Bender in Columbia until his retirement in 2000. As a young boy, he delivered postal telegraph messages by bicycle. He attended public schools in Atlanta, graduating from Tech High School. He served in the U.S. Army Air Corps from 1943-1945 as a B29 Bombardier/ Navigator. He worked at the Varsity Drive-in in Athens, Georgia while a student at University of Georgia. He graduated in 1948 from the University of Georgia with an AB Degree, majoring in Political Science. He attended the University of Georgia Law School, was a member of the Georgia Law Review and received a LLB Degree from the University of Southern California in 1949.

He was employed from 1949-1950 as an insurance adjuster with the Insurance Company of North America, Los Angeles, California and with United States Fidelity and Guaranty Company as Adjuster Assistant Superintendent, Claims Examiner and Claims Superintendent from 1950 to 1969. He was admitted to Georgia Bar in 1951, South Carolina Bar in 1969, the U.S. District and Circuit Courts and the U.S. Supreme Court. He was a member of American Bar Association, South Carolina Bar Association, Richland County Bar Association and Georgia Bar Association. He was the Past President of Columbia Claims Association, South Carolina Claims Association and Claims Management Association of South Carolina. In addition, he was Past President of South Carolina Defense Trial Attorneys' Association and was the recipient of the third annual Hemphill Award, given in honor of the late U.S. Judge Robert W. Hemphill, the award was presented to him for distinguished and meritorious service to the legal profession and the public.

Jack was an Elder at Lake Murray Presbyterian Church in Chapin. He married Nan Rutledge in Childress, Texas in 1945 and they recently celebrated their 67th wedding anniversary. Surviving are his wife, Nina "Nan" Rutledge Barwick; children, Jack L. Barwick III (Sandra) of Richmond Hill, Ga., Larry Barwick (Debbie) of Cameron, Janina Barwick Grimsley (Alan) of Columbia, Kimi Barwick Daly (Mike) of Chapin, Andy Barwick of Chapin.

> Jack Barwick was not a traditional legal researcher, but he was constantly clipping articles from professional publications which he kept in files he had built up over his years in practice. If you were working with Jack on a case that involved comparative negligence, for example, Jack would go to his file cabinet and pull out a folder with a sheaf of articles on the issue to help jump-

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JUDICIAL PROFILE

The Honorable Margaret B. Seymour
Chief Judge, US District Court

Margaret B. Seymour became Chief United States District Judge for the District of South Carolina in January 2012. She was appointed to the position of United States District Judge for the District of South Carolina on October 30, 1998. She served as United States Magistrate Judge for the Florence Division, District of South Carolina, from 1996 to 1998.

Prior to assuming the bench, Judge Seymour served in the Office of the United States Attorney, District of South Carolina, from December 1990 until May 1996. Judge Seymour was Interim United States Attorney from January to May 1996 and from April to May 1993. She was Chief of the Civil Division from June 1992 to May 1996, and an Assistant United States Attorney in the Civil Division from 1990-1992.

Judge Seymour spent a number of years in private practice in Columbia, South Carolina. Prior to relocating to South Carolina, Judge Seymour was a Senior Trial Attorney with the U.S. Department of Education, Office for Civil Rights, 1980-1988; Attorney Advisor with the Equal Employment Opportunity Commission, Office of Systemic Programs, 1979-1980; and held numerous policy positions with the U.S. Department of Health, Education, and Welfare, 1967-1979.

Judge Seymour was born in Washington, D.C. She received a Bachelor of Arts Degree from Howard University in June 1969 and a Juris Doctor Degree from The American University in June 1977.

Judge Seymour is a member of various bar associations and serves on the Boards of a number of civic organizations.

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

It sort of goes without saying that lawyers should answer questions from the court directly. Many times I will ask questions and lawyers won't answer my question--they want to tell me something else and they're not focusing on the specific question that I asked. Also, I think it's very important to be civil to each other and respect the court. Another thing, it's not a good idea to raise issues for the first time during oral argument because it does not give me a chance to research or be prepared to respond to those issues.

What are the mistakes you most often see lawyers make in cases before you that could easily be corrected? This may overlap the first question.

Yes, it's a little bit of an overlap because I think being prepared is so important--so a mistake would be being unprepared. It is my impression that sometimes lawyers aren't willing to admit when they don't know something and I think it's more important that I know that you don't know something rather than have me think you are making something up.

What factors led you to a career in the law?

When I worked in the Office of Civil Rights Department of Education I worked as an equal opportunity specialist and I worked as a hearing clerk in the Civil Rights Office. Being involved in civil rights cases and watching the lawyers handle those cases kind of piqued my interest in going to law school.

So all of those positions were as a non-lawyer?

Yes.

Who has been the biggest influence in your legal career?

Well, I have to start with my parents because they have always been very supportive of me. They always instilled in me a sense of fairness and doing the right thing. I respect them and they have also taught me to respect other people. And the other influence would be Judge Matthew J. Perry. He loved the law and he worked tirelessly for the interests of others. He had the ability to defuse anger and hate and that allowed him to be effective in litigating against injustice. The way he handled himself, both professionally and personally, helped shape my career.

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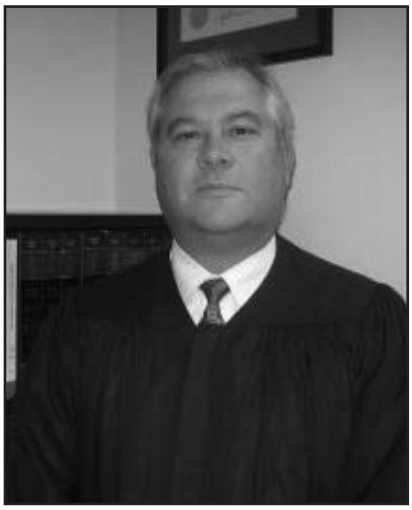
The Honorable Benjamin H. Culbertson
Fifteenth Circuit Court Judge



Judge Benjamin H. Culbertson Judge Benjamin H. Culbertson was born in Laurens, South Carolina on February 24, 1959. His parents are Ms. Laura H. Culbertson and the late Harley C. Culbertson. He is married to the former Renee Kinsey and they have 3 children, Jay, Max, and Maggie.

After attending Laurens County Public Schools, Judge Culbertson attended The Citadel from 1977 through 1981, graduating with a BA in History. Judge Culbertson then attended the University of South Carolina School of Law, graduating with a JD in 1984.

After completing law school, Judge Culbertson moved to Georgetown, SC and joined the firm of Schneider and O'Donnell, P.A., where he practiced for 5 years. From 1991 until 2007, he maintained a successful solo practice serving clients in Georgetown, SC. While managing his private practice, Judge Culbertson served first as an Assistant Municipal Court Judge for the City of Georgetown, SC from 1985 until 1996, then later as a Master-In-Equity for the County of Georgetown from 1996 until 2007. In May of 2007, he was elected to the Circuit Court to fill the unexpired term of Judge Paula Thomas.

Judge Culbertson is a member of the South Carolina Bar Association, the Citadel Alumni Association, the Brigadier Club, the Georgetown Cotillion Club, and the Winyah Indigo Society.

Judge Culbertson and his family make their residence in Georgetown, SC and are members of Duncan Memorial United Methodist Church.

Q. What has been the hardest part of transitioning to become a Circuit Court Judge?

Maintaining impartiality in a case. After being an advocate for so long, you have to remind yourself constantly that you are no longer a plaintiff's lawyer, defense lawyer, prosecutor or criminal defense lawyer. You have to look at the law and apply it without partiality.

Q. What has been the biggest challenge you face with the court system?

Keeping cases moving. With the number of civil cases filed each year, if you don't watch your docket, particularly in the complex construction cases, you can get backlogged pretty quick. Attorneys are constantly wanting continuances. Sometimes a continuance is necessary. However, when a case is continued to the next term of court, that continuance delays the trial of cases that were to be called the following term. There is a domino effect. On the criminal side, justice delayed is justice denied for both the State and the defendant.

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

I don't have any advice for experienced lawyers. They are better lawyers than I ever was. However, for the young lawyer who is just starting a legal career, I would advise him or her to go and observe good lawyers at trial. Not just to satisfy their Rule 403 requirements or learn procedure, but to learn great trial techniques. We have a lot of good trial lawyers in this state. I didn't realize how many until I became a judge and started presiding over trials. One can learn a lot from watching a good trial lawyer in action.

Q. The Fifteenth Judicial Circuit has mandatory mediation, how do you view mediation to resolve disputes and do you see it impacting the Fifteenth Circuit?

Mediation is invaluable in circuits with a heavy civil case load. Generally, cases that should settle will settle with or without mediation. However, without mediation, the court is usually not advised that a case has settled until it is called for trial. Often times, settlement negotiations do not begin until the case appears on a trial roster. Many terms of common pleas court pass without a trial because the parties never discussed settlement until the case appeared on the trial roster or because the court was not informed that a case had settled. With mediation, parties negotiate sooner and those cases that

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start your research. Jack would then take your legal research and distill it and present to a jury in language that was understandable to that lay audience, a skill that many lawyers never develop. Jack also loved the practice of law and the interaction with other lawyers, attributes that are not universally found in today's environment.

- Jay Bender

Jack was a superb trial lawyer and consummate professional. He was admired by his fellow lawyers for his down to earth approach to trying a case that resonated with a jury.

- Harold Jacobs

Jack was a dedicated supporter of the SC Defense Attorneys. A true friend, leader and mentor to many lawyers in S.C., most notably to his partner and our Chief Justice Jean Toal. Bernie and I had many good times with Jack and Nan. He will always be remembered as a leader of the defense bar in S.C. who was highly respected by the judiciary other defense attorneys and his adversaries.

- Robert H. Hood, Sr.

He spent many years in the claims business rising to claims manager before he began private practice, this gave him a unique ability to evaluate a personal injury case as to liability and damages and thus knew when to settle them and when to try them, the latter of which he did very well.

- Edward W. Mullins, Jr.

Jack was a great person and a great friend. He was devoted to both our profession and the Defense Attorneys. Jack was unofficial photographer and produced The Defense Line for many years.

- William S. Davies, Jr.

Seymour Profile cont. From Page 18

He was certainly a great jurist and someone whose influence will be known for years to come.

He was my mentor. Any opportunity I had to talk with him I would be there. He had a tremendous influence.

What do you enjoy doing off the bench (hobbies, weekends, etc.)?

I love to run and I like taking my dogs to the beach. I like gardening and I recently got into calligraphy.

Do you jog every day?

I do.

If you were to choose another profession, what would it be?

That's a hard one for me because there are so many things I like to do. But I have always wanted to be a classical ballet dancer, if that makes sense. And then, I love to cook so I could have my own cooking show or something like that. I also love to garden.

We congratulate Judge Seymour for being selected as the Chief Judge for the District of South Carolina and wish her much continued success.

Culbertson Profile cont. From Page 19

can be settled are settled quicker. The court is informed by the mediator when a case settles and those cases needing a trial progress up the trial roster quicker.

Q. From your observations how has the use of technology in the courtroom impacted trial practice?

If I had any advice for a lawyer today, it would be to get technology savvy. We have a new judicial center in Georgetown with all the state-of-the-art technology. I presided over a trial with a young lawyer who used power point presentations in his opening and closing arguments. The jury thought they were watching a TV show. They were more entertained and, I think, enjoyed their jury service.

Q. What was the last book that you read?

Unbroken, by Laura Hillenbrand. I highly recommend it.

ARTICLE

The (Not-So) Permanent Injury in South Carolina

by James E. Brogdon, III [1]

I. Introduction

Those of you who practice in the area of personal injury tort actions are more than familiar with South Carolina's law on "permanent injury." If you defend personal injury suits, when you hear the term "permanent injury" you likely roll your eyes with skepticism. If you file personal injury suits, you likely smile with affection when you hear the term "permanent injury."[2] This article will attempt to explain why South Carolina law provokes the above reactions, by examining the significance of a permanent injury charge and by analyzing various approaches to permanent injury charges. This article also addresses why South Carolina should change its approach to a more objective approach that distinguishes between latent and patent injuries. As you read the article, I ask you think like a "layperson" and ask yourself what injuries you believe you, as a layperson, would be qualified to determine are permanent and will last for an indefinite amount of time.

This article aims to highlight the lack of clarity and guidance regarding the sufficiency of the evidence of permanent injury charges in South Carolina and to propose a more accurate method for identifying true and legitimate permanent injury claims.[3]

The first question that needs to be answered is what is the minimum amount of evidence that a plaintiff must produce to present a permanent injury charge to a South Carolina jury? However, before I actually answer this question, it is important first to address (1) the significance of receiving a permanency charge, and (2) the South Carolina cases which I believe provide the right and wrong approach to permanent injury claims in South Carolina.

II. The Significance of a Permanent Injury Charge

Under South Carolina law, if a judge determines that the plaintiff produced sufficient evidence to allow a permanent injury charge, the plaintiff is also entitled to a jury charge on the mortuary (life expectancy) tables.[4] Regardless of the injury or amount of damages, I believe there is great value to the plaintiff in having a judge tell the jury that they are allowed to consider the life expectancy of the plaintiff when calculating damages. Of course, this also provides the added benefit of allowing the plaintiff's counsel to use the plaintiff's life expectancy as a multiplier for damages in closing argument. If nothing else, in my experience, it allows the plaintiff to "board" a larger number for the jury to ponder. For these reasons, plaintiffs reap a potentially sizable advantage when they produce sufficient evidence to obtain a permanent injury, or future damages, charge. It also provides the potential for a plaintiff to recover damages for a permanent injury that, in fact, is not permanent.

III. South Carolina's Conflicting Approaches to Permanent Injury Charges

South Carolina law requires a plaintiff to produce at least some evidence from which a "reasonable inference" of permanent disability can be drawn.[5] However, as a practical matter, it appears that in most instances the threshold for meeting the "reasonable inference" burden is rather low. In order to present a permanent injury charge to the jury,[6] the plaintiff simply needs to testify that, for a period of time, she has experienced and continues to experience some form of pain that she did not experience prior to the accident.[7]

Now, let's look at a few relevant South Carolina cases.

First, the good: In *Hall v. Palmetto Enterprises II, Inc., of Clinton*,[8] the Court of Appeals addressed the sufficiency of evidence supporting an award of future damages where the plaintiff lost his fingertip while operating a lift on the back of a truck in order to load a pinball machine into the bed of the truck. The only evidence produced by the plaintiff was the actual disfigured finger as well as the plaintiff's testimony regarding his ongoing pain from the loss of his fingertip. In rejecting the defendant's argument against the sufficiency of the evidence of permanent injury,

Continued on next page

ARTICLE CONT.

the court found that the evidence was sufficient to support an award of future damages (i.e., permanent injury). The court stated that "it was obvious to [the] jury that the tip would not grow back[.]"[9] Therefore, *Hall* tells us that a plaintiff can get a permanent injury charge to the jury by demonstrating an obvious or patent injury.

Now, the not so good: In *Johnston v. Aiken Auto Parts*,[10] an automobile accident victim sought to recover damages for permanent injuries, among others, that he sustained in the accident. The only evidence regarding the permanency of the injury to plaintiff's knee was the plaintiff's own testimony. He testified that his knee had "never gotten right[,]" and "nothing can be done" about his knee because "[i]t's too badly damaged."[11] The defendant objected to the permanent injury charge on the basis that the plaintiff failed to proffer any expert medical testimony regarding whether or not the injury was permanent.[12] In rejecting the defendant's argument, the court held that the plaintiff's testimony was sufficient to allow a permanent injury charge to the jury. *Johnston* illustrates the Plaintiff's ability to get a permanent injury charge to a jury based solely on the plaintiff's subjective testimony of a latent injury and without any expert testimony to corroborate the permanency of that injury.

IV. Georgia and North Carolina's Approaches to Permanent Injury Charges

Other states' approaches to permanent injury charges differ vastly as to the evidence required to obtain such a charge. For example, Georgia takes a similar approach to that of South Carolina and allows a plaintiff's testimony to serve as the basis for a permanent injury charge from the court.[13]

In *Southern Railway v. L.L. Lambert*, the plaintiff suffered injury when his truck stalled on a railroad crossing and was struck by a passing train.[14] In affirming a jury verdict in favor of the plaintiff, the Georgia Court of Appeals held that direct evidence was not required to prove the permanency of an injury. The court stated that evidence regarding an injury's existence, as well as the length of time of its presence, was sufficient to support the jury's award for permanent injury or impairment.[15]

In contrast, North Carolina takes the position that not only are lay plaintiffs incompetent to testify regarding how long an injury may last, but also that members of the jury as layman are unqualified to speculate as to how long the plaintiff's injuries may last.[16]

In *Short v. Chapman*, the North Carolina Supreme Court reversed the judgment and remanded the case for a new trial where the trial judge instructed the jury as to the law on permanent injury. The only evidence presented was the cross-claim plaintiff's testimony that at the time of the trial she was still experiencing pain in her head, leg and neck, as well as numbness in her left leg.[17] The court held that the cross-claim plaintiff, "[n]ot being a medical expert, … is incompetent to express an opinion as to how long such pain is going to continue in the future, and [t]he members of juries also being laymen should not be permitted to speculate how long, in their opinion, they think such pain will continue in the future, and fix damages therefore accordingly."[18]

V. Arguments in Support of South Carolina's Approach

Those who support South Carolina's low threshold for obtaining a permanent injury charge solely based on the plaintiff's testimony of his latent injuries take the position that jury members are free to give the evidence as much or as little weight as they so choose. These supporters reason that, if the jury members do not believe the plaintiff's testimony regarding the permanency of the alleged injury, they are free not to award damages for the permanency aspect of the injury. While I agree that jury members are allowed to allocate as much or as little weight to the evidence as they choose, I believe this approach ignores the fact that jury members are not qualified to make a medical determination regarding the existence of a permanent injury, without adequate supporting testimony. In my view, the court, as the "gatekeeper," must first determine whether the evidence is sufficient to allow for such a finding by the jury.

VI. The Plaintiff's Testimony and South Carolina Rule of Evidence 702

The analysis begins with South Carolina Rule of Evidence 702, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In addition to **allowing** expert testimony in certain cases, there are some areas where Rule 702 and South Carolina law **require** expert testimony because the subject matter is beyond a layperson's knowledge.[19] Whether a plaintiff's latent injury is permanent surely falls within the category of subject matters that fall beyond a layperson's knowledge. To hold otherwise allows the jury essentially to diagnose a plaintiff's injury as permanent, which defies the very purpose of Rule 702 and the basic structure of our society. For example, if you were experiencing pain for some period of time and wanted to know whether that pain would ever subside, who would you ask—the mailman or a doctor? Assuming your mailman does not moonlight as a physician, my guess is that you would see your doctor. Yet, in the courtroom, the law currently allows a jury composed

of laypeople to diagnose permanency based solely on the plaintiff's testimony.

While I agree that plaintiffs should be able to testify as to their injuries and the extent of their injuries, I do not believe that a plaintiff's testimony **alone** should be sufficient to warrant a permanent injury jury charge, because such testimony is outside the common knowledge of a layperson.

VII. The Right Approach

I readily concede that a plaintiff should not be required to have an expert testify that a patent injury (i.e., the loss of an extremity) is permanent because no specialized knowledge or skill is required for a jury to make that determination. Fingers, toes, legs and arms do not grow back—that we all know. However, latent injuries such as chronic aches and pains—those that the jury cannot see with their own eyes[20] —do require specialized skill or knowledge to determine whether they are in fact permanent. Thus, South Carolina law should continue to apply the law stated in Hall as to patent injuries, but South Carolina should abandon the "reasonable inference" approach applied in *Johnston* and move toward the North Carolina approach stated in *Short*. This approach is both fair and logical. A plaintiff should not be entitled to an award from a jury for "permanent" injury based solely on testimony that he still experiences some form of pain at the time of trial. Let's face it, not many plaintiffs testify at trial that they are 100% better and fully recovered from the accident.

By utilizing this new approach that distinguishes between latent and patent injuries for purposes of giving a permanent injury charge, the law will ensure that juries only consider awarding future permanency damages to those plaintiff's who actually suffer permanent injuries.

Footnotes

1 James Brogdon is an associate in the Columbia office of Gallivan, White & Boyd, P.A. He practices in the areas of personal injury and business and commercial litigation. In addition to these general areas of practice he has experience in maritime and employment law.

2 I recognize that most of the readers of a publication titled "The Defense Line" will be defense lawyers. However, because most good defense lawyers "love a good Plaintiff's case," I choose to speak to those alter-egos as well.

3 If you read the case law, it appears that under South Carolina law, it does not take much in order to get a permanent injury charge to the jury; however, as I will readily admit, the law is less than clear, and many times, depends on the person wearing the black robe sitting above eye level.

4 *See Gethers v. Bailey*, 306 S.C. 179, 410 S.E.2d 586 (1991).

5 *See Fishburne v. Short*, 268 S.C. 546, 235 S.E.2d 118 (1977).

6 *See Johnston v. Aiken Auto Parts*, 428 S.E.2d 737 (Ct. App. 1993).

7 This is not to say that a Plaintiff can not bolster their odds of getting a permanent injury charge to the jury and of succeeding on that claim by providing expert testimony; however, it does not appear to be necessary to simply get the charge to the jury.

8 *Hall v. Palmetto Enterprises Inc., of Clinton*, 317 S.E.2d 140 (1984).

9 *Id.* (citing Patiana v. Silverstone, 415 P.2d 139, 144 (Ariz. Ct. App. 1966)).

10 Johnston, 428 S.E.2d 737 (Ct. App. 1993).

11 *Id.* at 739.

12 *Id.*

13 *See S. Ry. Co. v. L.L. Lambert*, 120 S.E.2d 87, 91 (Ga. Ct. App. 1961) ("As to the duration or permanency of the impairment, it is not necessary that there be direct evidence that the injuries are permanent in character to authorize a charge on the subject, if, from the evidence of their existence and continuity and the length of time they have continued up to the date of the trial, the jury receives enough data to forms its own estimate as to their temporary or permanent character.").

14 *Id.* at 89.

15 *Id.* at 87.

16 See Short v. Chapman, 136 S.E.2d 40 (N.C. 1964).

17 *Id.* at 48.

18 *Id.*

19 *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) (J. Pleicones, dissenting) ("It is certainly true that some types of issues or evidence are ipso facto beyond the ken of a lay jury, and always require that the claim be supported by expert testimony. Classically, this is so where the issue is one of medical malpractice.") (citing *Linog v. Yampolsky*, 376 S.C. 182, 656 S.E.2d 355 (2008) (medical malpractice)).

20 I add the phrase "with their own eyes" for my father who, when he hears this phrase, always responds with "How else would they see it?"

SCDTAA Announces New Trial Order Database — and Seeks Submissions!

The SCDTAA is pleased to announce the launch of a new website feature containing useful trial court orders in a variety of practice areas! The database also includes requests to charge and verdict forms organized topically.

The topics for which we are publishing and soliciting trial court orders include the following:

1. **the Affidavit of Merit Statute;**
2. **Apportionment Among Defendants;**
3. **Contribution;**
4. **Discovery; and**
5. **Set-Off.**

This database is a special, password protected feature that is only available to SCDTAA members. To view the database, logon by inputting your email address and password in the top right corner at http://www.scdtaa.com/.

This new feature will be a great resource for SCDTAA members. However, the SCDTAA is still in the process of building this database and needs your help.

Please send trial court orders, requests to charge and verdict forms to Carrie Raines at CRaines@hnblaw.com to be included in the database. Anyone who contributes more than five orders, jury charges or verdict forms to this database will be mentioned in the next issue of *The DefenseLine*.

ARTICLE

Notice of Intent to Sue: Procedure and Recent Decisions on Requirement for Medical Malpractice Expert Affidavit

by Gary Lovell, Lee Weatherly, & Kristen Kelley

Beginning in 2005, the procedural rules regarding presentation and prosecution of Medical Malpractice claims and suits changed significantly. With the enactment of South Carolina Code Section 15-79-125, claimants wishing to purse a medical negligence claim against a health-care professional were required to file a Notice of Intent to Sue pleading outlining their claim, and to file an affidavit of a qualified expert to support their claim. However, as with many new procedural rules, questions arose regarding the procedural requirements on the content and timing of the filing of the expert affidavit. A recent case, *Ranucci v Crain*, involving our firm, answered, for now, some of those procedural questions. The only other case involving affidavit issues, *Grier v. AmiSub*, dealt with a more substantive requirement of proximate causation. This paper will outline *Ranucci*, and give some insight on other issues relating to these new procedural requirements. Plaintiff's application for a writ of certiorari to the Supreme Court of South Carolina remains pending at this time.

The South Carolina Court of Appeals reached a decision in January that confirmed the plain reading of South Carolina Code Section 15-79-125(A). In *Ranucci v. Crain*, 397 S.C. 168, 723 S.E. 2d 242 (2012) the court held that under section 15-79-125(A), failure to file an expert affidavit contemporaneously with the filing of the requisite Notice of Intent to File Suit pleading warrants dismissal without exception. In support of this finding, the court held that Sections 15-79-125 and 15-36-100 of the South Carolina legislature's tort reform are to be read independently of one another. Section 15-79-125 controls the requirements to file a Notice of Intent for medical malpractice, whereas section 15-36-100 controls the requirements to file a complaint for professional negligence, including medical malpractice. The requirement of Section 15-79-125 must be met as a condition precedent to compliance with the requirements of Section 15-36-100 in a medical malpractice claim.

BACKGROUND

On June 8, 2009 Plaintiff Shannon Ranucci filed a Notice of Intent to File Suit against surgeon Defendant Dr. Corey Crain. In her Notice of Intent, plaintiff alleged that the doctor was professionally negligent in performing a surgical breast biopsy on June 7, 2006. Despite having retained counsel at least thirty-four months before filing her Notice of Intent to File Suit, Plaintiff did not contemporaneously file an affidavit of an expert witness with her Notice of Intent, contending that she was unable to obtain the required expert affidavit due to unspecified "time constraints." Plaintiff sought solace under section 15-36-100(C)(1), which allows a plaintiff to supply the expert affidavit within 45 days of filing a complaint due to time constraints. (i) On July 23, 2009, exactly forty-five days after filing her Notice of Intent to File Suit, Plaintiff filed the expert affidavit of Richard L. Boortz-Marx, M.D., a physician practicing in the areas of anesthesiology and anesthesiology pain management, which included an alleged act of negligence on the part of the Defendant surgeon.

Gary Lovell

Lee Weatherly

Kristen Kelley

Defendant filed a Motion to Dismiss specifically asserting that the tolling provision of section 15-36-100(C)(1), which Plaintiff sought to invoke to excuse her failure to timely file the expert affidavit, was inapplicable to Notices of Intent to File Suit alleging negligence against medical doctors. Plaintiff again asserted this affidavit was timely under the tolling provisions, and having taken full advantage of the additional forty-five days, sought to continue her claim.

The Honorable S. Jackson Kimball heard oral arguments on the matter, and subsequently granted Defendant's Motion to Dismiss. In his Order, Judge Kimball noted: "I find and conclude that an affidavit was not timely filed, and that Plaintiff has not met the requirements of the statute. Thus, the Defendant is entitled to dismissal of the Notice, and to have the same stricken by the Clerk of Court from the file book." (ii) After a hearing on Plaintiff's Motion to Alter or Amend Judgment,

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Judge Kimball issued a Statement of Judgment by the court which clarified his previous order by stating that "S.C. Code Ann. § 15-79-125 and 15-36-100 operate independently of each other, and that § 15-36-100 does not offer a procedural alternative to § 15-79-125." (ii)

On appeal to the South Carolina Court of Appeals, Chief Judge Few and Judges Cureton and Konduros heard oral arguments from the parties. On January 25, 2012 the Court issued its opinion affirming the trial court's striking of Petitioner's Notice of Intent to File Suit. In that decision, the Court of Appeals ruled that the plain meaning of these two statutes does not now allow a Plaintiff to file a Notice of Intent to File Suit without a contemporaneous affidavit, without exception. Also, the Court gave practitioners some further instruction on how to navigate the procedural waters surrounding these two statutes.

THE STATUTES

When the South Carolina legislature enacted tort reform in 2005, it enacted the two separate statutes that are vital to attorneys handling medical malpractice cases. Section 15-36-100 controls the requirement for filing complaints related to claims for professional malpractice generally, and Section 15-79-125 specifically establishes pre-suit requirements for clams of medical malpractice. Section 15-79-125, commonly known as the Notice of Intent Statute, specifically controls the pre-suit requirements before a plaintiff may file a complaint for medical malpractice. Section 15-36-100, the Complaint Statute, applies to the requirements to file a complaint for a variety of professional malpractice actions, including medical malpractice. Stated differently, the Notice of Intent Statute specifically outlines the steps that must be taken "prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice." The Complaint Statute, as it relates to an array of other professional occupations, does not require a Plaintiff to complete these additional steps before a complaint may be filed with regard to non-medical malpractice suits.

Although the Complaint Statute generally requires an expert affidavit to be filed contemporaneously with a complaint, this statute explicitly contains an exception. Section 15-36-100(C)(1) does not require the filing of a contemporaneous expert affidavit when the statute of limitations will expire within ten days of filing the complaint. On the other hand, the Notice of Intent Statute, controlling medical malpractice actions pre-suit, contains no such exception. However, the Notice of Intent Statute does cross-reference the Complaint Statute when discussing the affidavit requirements. Specifically, it states:

> Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, **subject to the affidavit requirements established in Section 15-36-100** . . . (ii)

This cross-reference was the issue at the center of the *Ranucci* decision, in that the Plaintiff claimed that this cross reference gave her the ability to file a delayed affidavit. The Defendant argued that the cross reference simply referred to the "content" requirement of the affidavit.

THE ARGUMENTS

The crux of Plaintiff's argument centered on the notion that the Notice of Intent Statute and the Complaint Statute should not be read independently of one another but rather construed together. Specifically, Plaintiff argued that section 15-79-125's cross-reference to the affidavit requirements in 15-36-100 was not limited to the content and qualification of expert affidavits. Rather, Plaintiff argued, a correct reading of both sections required that the tolling provisions in Section 15-36-100(C)(1) were also applicable to the filing of an expert affidavit in a medical malpractice action initiated pursuant to the Notice of Intent Statute. Plaintiff argued that these provisions provided that, when the Notice of Intent to File Suit is filed within ten days of the applicable statute of limitations and the plaintiff alleges that there was not sufficient time to prepare an affidavit of the expert, the plaintiff would have an additional forty-five days to submit the affidavit. (iii).

In oral arguments Plaintiff argued that it was unfair for a Plaintiff who seeks last minute counsel to not be able to bring her cause of action. Chief Judge Few questioned whether the Rule 11 requirements of the South Carolina Rules of Civil Procedure, relating to the signing of pleadings, should preclude attorneys from filing these type of cases if they did not have sufficient time for an expert to review the case and determine that there are valid basis for allegations of negligence, regardless of any statutory requirement. Nevertheless, Plaintiff's argued her claim should survive the motion to dismiss.

The Defendant argued that the Notice of Intent Statute was clear and unambiguous in requiring that an expert affidavit be filed contemporaneously with the Notice of Intent to File Suit. He asserted the Notice of Intent Statute is the exclusive source for the procedural requirements for pre-litigation medical malpractice actions, while the cross-reference only applies to the content and qualification of expert's and their affidavits. Specifically, Subsection Section (A) of 15-36-100, sets forth the required qualifications of the expert witness executing the affidavit in detail. While, Subsection (B) and (C), referenced by Plaintiff as providing the tolling of the affidavit requirement, related only to actions against health care facilities or professionals other than medical doctors. Thus, the cross-reference did not include the additional procedures set forth in the Complaint Statute, as the Notice of Intent Statute, which solely governs medical doctors, was clear in the

respect that the affidavit must be filed contemporaneously. Accordingly, Defendant argued that the lower court was correct in finding that the statutes should be read separately and independently of one another.

Defendant's argued that this interpretation would ultimately show that the Plaintiff failed to meet the prelitigation requirements specific to medical malpractice suits, warranting a striking of the Notice of Intent from the Court record. In other words, the Plaintiff should not be able to invoke the tolling provision of subsection (C)(1) of the Complaint Statute to excuse her failure to comply with the plain language of the Notice of Intent Statute. As a result, the conditions precedent to filing the complaint had not been met, and the complaint was a nullity and invalid pleading. And, without a proper complaint having been filed by Plaintiff against Defendant, the three year statute of limitations had now expired. The Appellate court agreed.

THE DECISION

The Court of Appeals affirmed that Plaintiff had fatally failed to fully comply with the plain language of South Carolina Code Section 15-79-125 when attempting to initiate her suit for medical malpractice. Judge Cureton, writing for the Court, began by setting forth the well-known, cardinal rule of statutory interpretation that the intent of the legislature controls. As such, statutes that are clear and unambiguous must be given their literal meaning. (iv) The Court examined the language of the statutes and noted their different purposes. The Court noted that Notice of Intent Statute imposes *prelitigation* filing requirements upon plaintiffs intending to file *medical malpractice* suits, while the Complaint Statute sets forth requirements for filing *complaints* in damages claims based upon general *professional negligence*. The court called this language "clear and explicit" and concluded that "[d]espite the apparent confusion generated by their internal-cross references, these statutes do not conflict." (v) While the statutes refer to related situations, they each govern a "distinct time period during the litigation process, and those time periods are consecutive" rather than contemporaneous. (vi) The Notice of Intent Statute controls the process in medical malpractice action before the time of the filing of the complaint. This pre-complaint begins with the filing of the Notice of Intent to File Suit, contemporaneously with the expert affidavit, and ends with an unsuccessful prelitigation mediation. If mediation fails to resolve the dispute, then the Complaint Statute guides the parties through the preparation of initial pleadings and provides the "mechanisms for challenging and curing defects in the required affidavit." (vii)

The court highlighted that the Notice of Intent Statute sets forth two requirements on the affidavit: (1) that it be filed at the same time as the notice of Intent to File Suit, and (2) that it comply with the affidavit requirements of the Complaint Statute. In recognizing that the more narrow question in this dispute was precisely which requirements of the Complaint Statute constituted these affidavit requirements, the court pointedly defined this for future litigation: "We find section 15-79-125(A) invokes only the provisions of section 15-36-100 governing the preparation and content of the affidavit." (viii) In other words, only subsection (A) of the Complaint Statute, which sets forth the content and qualification for expert affidavits, applies in this setting.

The court found a recognizable difference between these two statutes in the type of document accompanied by the affidavit. In the Notice to File Statute, the affidavit accompanies a Notice to File Suit. That pleading begins pre-litigation limited discovery, and promotes efforts of the parties to resolve the dispute in mediation prior to any civil action commencement. Comparatively, in the Complaint Statute, the affidavit accompanies a complaint. Thus, the affidavit serves as part of the initial pleading that begins the formal litigation process. As such, it deserves the procedural provisions of the Complaint Statute, including giving the parties the right to challenge and cure any defects in the affidavit. In sum, the court found the "legislature clearly intended the two statutes to operate independently of one another and in distinct time frames, with the specific exception that they share the criteria for preparing affidavits of expert witnesses." (ix)

One important result of this opinion that should be noted by attorneys practicing in the area of medical malpractice law is that the Complaint Statute actually requires an expert affidavit to be filed with the complaint, in addition to the affidavit filed in the Notice of Intent to Sue phase. It is not difficult to imagine a scenario where the allegations in a Notice of Intent affidavit are no longer valid after some presuit discovery is completed, or a mistake in the defendant's expert specialty is discovered. Defense attorneys should make certain that the affidavit filed with the complaint is in compliance with the expert qualification requirements and applicable to the facts of the case known at that time.

Chief Judge Few wrote a marked concurrence taking the analysis a step further. The Chief Judge agreed with the statutory interpretation but found that a different conclusion was required in this setting. In his view, the Plaintiff's failure to file the affidavit also led her afoul of the applicable statute of limitations, since her civil action was never properly commenced. As such, her claim had expired and the issues raised in the appeal were moot and warranted dismissal.

Chief Judge Few pointed out the well-known requisite statute of limitations in medical malpractice suits is three years. In considering the facts of this case, Ms. Ranucci's claim accrued "no later than June 10, 2006 (x)," rendering her limitations deadline to file a complaint of June 10, 2009 well passed. At the time of the hearing on December 7, 2011, a complaint still had not been filed and the pre-litiga-

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tion Notice of Intent to File Suit steps had not been completed. Thus, without any sort of applicable tolling provision, the Plaintiff had missed her statute of limitations to file a complaint by two and a half years.

In evaluating the possibility of a toll, the Chief Judge held that there are no provisions in the Complaint Statute that toll any sort of statute of limitations outside of actually filing a complaint. Under the Complaint Statute, the complaint must be filed within the statute of limitations. Only when the Complaint has been filed, before the statute of limitations has expired, may the plaintiff then have the additional forty-five days to file an expert affidavit. The Chief Judge noted that the Notice of Intent Statute, once properly complied with in its initial requirements, did allow for the tolling of the applicable statute of limitations for only a maximum of 240 days. However, this is provided so that the pre-suit requirements of the statute may be completed. (xi)

In this case, the court noted that the Plaintiff did not participate in pre-suit mediation, a requirement of the Notice of Intent Statute, to gain the right to file a complaint under the Complaint Statute within the maximum of 240 days allowed by the Notice of Intent Statute. Plaintiff also did not actually file a complaint under the Complaint Statute within the 240 days maximum that the Notice of Intent Statute could toll her statute of limitations. Thus, Justice Few held that there was no provision of law which could allow a prospective plaintiff to commence any civil action for medical malpractice five-and-a-half years after the statute of limitations began to run. Therefore, even if the court had allowed the Plaintiff to file a delayed expert affidavit under the Notice of Intent Statute, Judge Few opined that Plaintiff still had failed to complete the mediation requirement of subsection (C) of the Notice of Intent Statute, or file her complaint, within 240 days. Therefore, the tolling of her statute of limitations under subsection (E) of the Notice of Intent Statute had already ended. In sum, Chief Judge Few held the statute of limitations on Petitioner's action had expired, "[t]he case [was] over, and the issues raised in this appeal [were] moot."(xii)

IMPLICATIONS & PRACTICAL CONSIDERATIONS FROM RANUCCI

What does this decision mean for future medical malpractice claims? Defendants should now carefully examine all Notice of Intent filings to ensure that proper expert affidavits are included with the initial filings. The Court of Appeals referred to this affidavit as a "threshold requirement a medical malpractice claimant must satisfy in order to seek disclosure of sensitive and often high technical information." (xiii) The importance the court attaches to this contemporaneous filing is made blatant as Judge Cureton refers to it as the "notice to potential defendants of the claim and qualifies potential plaintiffs and defendants to engage in prelitigation discovery."(xiv) An opportunity to dismiss a claim based upon this prelitigation requirement of the Notice of Intent Statute is an invaluable tool. The dismissal of a claim at the Notice of Intent phase may serve as a complete bar if the statute of limitation has expired at the time of the dismissal order.

The Court of Appeals made it abundantly clear that the only part of the Complaint Statute incorporated into the Notice of Intent Statute are the substantive affidavit requirements set forth in § 15-36-100 (A). A plaintiff may no longer protect a late filing via the Complaint Statute provisions any longer. The Complaint Statute's substantive affidavit requirements refer to the scheme for qualifying an expert witness as an affiant. It also requires that the plaintiff specify at least one negligent act or omission, the factual basis for that claim, and any available evidence known at the time of the filing. This is a lofty requirement that does not include the opportunity to cure any defects in the affidavit as is allowed for other professional negligence claims under the Complaint Statute. It appears that if the affidavit is defective a Plaintiff must re-file her Notice of Intent with a qualifying affidavit. The statute of limitations may serve to prohibit that correction and re-filing.

This decision also clears up any possible confusion about what point in the medical malpractice litigation process a specific statute controls. The Notice of Intent Statute controls pre-litigation limited discovery and resolution. It provides a timetable for this discovery and mandatory mediation, and provides for the tolling of the statute of limitations if mediation is unsuccessful. At that point, the Complaint Statute controls the rest of the litigation, including the filing of a summons, complaint, and another expert affidavit.

Especially important is Chief Judge Few's concurring opinion setting forth a 240-day maximum tolling period for medical malpractice claims under the Notice of Intent Statute. Specifically, the Notice of Intent Statute allows for the tolling of the applicable statute of limitations for a maximum of 240 days while the pre-suit requirements of the statute are completed. If a Plaintiff fails to participate and timely complete the pre-suit requirements, they arguably lose the right to file a complaint under the 240-day toll. Thus, Defense attorneys should pay close attention to the statute of limitations dates and ensure Plaintiffs meet all the requirements of the Notice of Intent Statute. If not, a Plaintiff may not take advantage of the 240-day toll and must file within the requisite three-year statute of limitations for medical malpractice claims.

However, most important may be the suggestions given by Chief Justice Few during oral arguments on the tools available to each side when there is a dispute as to the Plaintiff's compliance with the Notice of Intent Statute. He indicated that a Motion to Dismiss at the Notice of Intent phase is likely not required in cases where a Plaintiff files an untimely or defective affidavit. Instead, a Defendant may simply refuse to participate in the statutory mediation and file the Motion to Dismiss at the time a Plaintiff attempts to file a complaint without

completing all of the requirements of the Notice of Intent Statute. Similarly, Chief Judge Few indicated that if a Defendant refused to participate in mediation, a simple motion to compel mediation filed by the Plaintiff would be an appropriate avenue to force the completion of the Notice of Intent Statute requirements if the Plaintiff's compliance with the affidavit requirement was complete.

It remains to be seen if this strategy for defending a case with an absent or defective Notice of Intent affidavit would be successful. However, it is clear that this decision follows the arguments made by defense attorneys across South Carolina the last few years and will prove as a valuable guide to both Plaintiffs and Defendants in handling medical malpractice cases moving forward.

GRIER V. AMISUB & PROXIMATE CAUSATION OPINIONS

The case of *Grier v. Amisub*, 397 S.C. 532, 725 S.E. 2d 693 (S.C. 2012) decided in May 2012, further defined the requirements of the expert affidavit in the Notice of Intent to Sue phase of litigation. In that case, the Supreme Court held that the Notice of Intent Statute and proceedings did not require that the expert affidavit address the issue of proximate causation of injury or damages.

In *Grier*, the Plaintiff-estate representatives alleged that the health care professional employees of the Defendant-hospital were negligent in caring for the patient/decedent. Plaintiff attached the affidavit of a nurse alleging that the Defendant breached its duty of care to the decedent in multiple respects, and that those breaches were a contributing cause of the decedent's death. The Defendant filed a Motion to Dismiss on the grounds that the nurse affiant was not qualified to render an opinion as to cause of death. As such, the Notice of Intent was insufficient due to its failure to include an affidavit of a competent expert alleging the proximate cause of the acts of negligence to the injury and damages. The trial court agreed that the nurse was not competent to opine on the proximate causation issue and that the statutes required such expert testimony. The court gave the Plaintiff thirty days to provide a proper affidavit with proximate causation testimony. The Plaintiff failed to do so, and, as a result, the court granted the Motion to Dismiss. The appeal to the Supreme Court followed.

In reversing the trial court's decision, the Supreme Court found that the plain and unambiguous language of the Notice of Intent Statute (15-79-125(A)) only required the filing of an expert affidavit contemporaneously with the Notice of Intent to File Suit pleading and gave specific guidance as to the requirements for the notice document. They noted that the Notice of Intent Statute provides no specifics on the expert affidavit, but noted its reference to the Complaint Statute (15-36-100). The Court then opined that the Complaint Statute only required that the expert affidavit specify "at least one negligent act or omission claimed to exist and the factual basis for each claim . . . ."(xv) The Court reasoned that since the Complaint Statute only dealt with the "breach" element of a common law negligence claim and not causation, that the Notice of Intent Statute likewise only required that the expert affidavit address the breach element of a medical malpractice cause of action. The Court found that if the legislature had intended a proximate causation element to be required in the pre-suit Notice of Intent phase, it could have included language to that effect in the statutes. The Court noted that the plaintiff would still have the burden of providing causation evidence later in the litigation process.

EXPERIENCES AND LESSONS IN OTHER VENUES

One of the authors litigated medical malpractice cases in Georgia during the time of tort reform and institution of "expert witness" affidavit requirements. Much litigation at the trial court level and many hundreds of pages of appellate decisions were issued over the technical form of the affidavit. This included the form of the notarial jurat, whether copies could be filed in lieu of original affidavits, if exhibits relied upon were required to be attached to the affidavit, and other aspects of the document itself. Much more litigation followed regarding the content of the affidavit, including whether the affiant had personal knowledge of the event, the qualifications of the expert, the propriety of the expert opining in an area outside of his medical specialty, and other similar content-related areas. It is anticipated that similar arguments can, and will be, made in connection with South Carolina's foray into expert affidavits in medical malpractice cases.

Footnotes

i See S.C. Code. Ann. § 15-36-100(C)(1) (Supp. 2010)

ii S.C. Code Ann. § 15-79-125(A) (Supp. 2010).

iii S.C. Code. Ann. § 15-36-100(C)(1) (Supp. 2010).

iv *Ranucci*, 397 S.C. at 170, 723 S.E.2d at 244.

v *Id.* at 175, S.E.2d at 246.

vi *Id.*.

vii *Id.*. at 176, S.E.2d at 246 (emphasis added).

viii *Id.*.

xiv *Id.*.

x *Id.*. at 179, S.E.2d at 248. See also footnote 7 of the opinion where Chief Judge Few notes that Plaintiff's claim may have accrued as early as June 7, 2006 rendering the possibility that even her Notice of Intent to File Suit was perhaps beyond the statute of limitations.

xi Subsection (C) allows "one hundred twenty days from the service of the Notice" to participate in mediation with the possibility that a circuit judge may extend the deadline sixty days for good cause. Subsection (E) then requires that an action for malpractice "must be filed: (1) within sixty days after" mediation. The total of these provisions is a maximum of 240 days.

xii *Ranucci*, 397 S.C. at 181, 723 S.E.2d at 249.

xiii *Id.*. at 178, S.E.2d at 247.

xiv *Id.*.

xv *Grier* at 537 (emphasis added).

ARTICLE

Is the "Independence" of that Driver Being Maintained?

By P. Jason Reynolds

George Washington is driving a big rig east in the right-hand lane of I-26, headed to Charleston. Although Mr. Washington owns, operates and insures the tractor, it bears a company logo: "XYZ Transport." XYZ is a small South Carolina company that has contracts with several drivers like Mr. Washington to deliver loads for a network of regular customers throughout the state. At the moment, Mr. Washington is hauling an unmarked trailer he picked up in Spartanburg earlier that day after receiving a notification from XYZ dispatch. Suddenly, a minivan darts over from the left lane to make an exit near Orangeburg. Washington brakes hard in an effort to avoid the van and instinctively swerves partially into the left lane to miss it. Unfortunately, when Washington swerves left he hits a small car that was in his blind spot. The car is forced off the road and flips several times, causing serious injuries to the passengers. A claim is filed with the insurer of XYZ Transport and is denied on the basis that George Washington was not a named insured on the XYZ policy and was operating at the time of the accident as an independent contractor and not as an employee of XYZ. A lawsuit is filed naming both Washington and XYZ Trucking as defendants with a negligence cause of action asserted against Washington and respondeat superior against XYZ.

Your office is contacted by an adjuster for XYZ's insurer to defend XYZ. In this situation it is critical to quickly ascertain XYZ's potential liability so you can begin developing a strategy for defending the case. The key initial question is whether the driver is an independent contractor, as the driver and company thought, or an employee, potentially triggering vicarious liability. This could mean the difference between your client prevailing on a motion for summary judgment after minimal discovery or being involved in costly and protracted litigation with the potential to incur huge liability. While the independent contractor/employee distinction is a familiar concept, it is an area of law that has seen significant recent activity at both the national and state level and is unsettled at the present time due to pending litigation. Staying on top of these developments will enable you to advise your clients effectively to avoid potentially costly liability for an accident involving a driver the company believed to be an independent contractor.

The pending litigation referred to is recent national activity in independent contractor law including the ongoing FedEx Ground Package System litigation. The FedEx litigation involves drivers from many states, including South Carolina, who joined class actions alleging they were improperly classified as independent contractors rather than employees. These drivers sought to be classified as employees so that they could recoup business expenses and get overtime pay among other issues. These actions were consolidated, after which the parties cross-moved for summary judgment, in *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig.*, 758 F. Supp. 2d 638 (N.D. Ind. 2010). The Federal District Court granted summary judgment for FedEx as to many of the claims and remanded others for further proceedings. Although the litigation is far from settled, with some appellate opinions published and others still pending, this case and its many successive proceedings are instructive as a broad overview of the many factors which can distinguish independent contractors from employees. Theories and precedent from this huge piece of litigation will quickly make their way into transportation litigation here in South Carolina. Taken together with South Carolina precedent, we can identify specific contractual provisions *and* conduct of the driver and company that will form the basis of a court's decision as to the nature of the relationship between the trucking company and driver on a motion for summary judgment seeking to dismiss the carrier.

As the *FedEx* opinion notes, South Carolina courts employ the Right to Control Test, examining four factors to determine whether Mr. Washington is an employee or an independent contractor in our case outlined above: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire." *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); *See also Shatto v. McLeod Reg'l Med. Ctr.*, 394 S.C. 552, 557, 716 S.E.2d 446, 449 (Ct. App. 2011). Pursuant to *Wilkinson*, these factors are evaluated with equal weight to determine whether a worker is an independent contractor or employee. *See Wilkinson*, 382 S.C. at 300, 676 S.E.2d at 702 (2009) (overruling the more plaintiff-friendly *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000), which provided "any single factor is . . . virtually proof of [ ] the employment relation; while, in the

opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship"). Note that this test examines "not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." *Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

However, establishing that Mr. Washington is an independent contractor is not as easy as reviewing his contract with XYZ Transport and attaching it as an exhibit to your motion. Although the contract may clearly note that XYZ and Washington intend an independent contractor relationship, the *Wilkinson* court noted "[i]n evaluating the four factors, we are guided initially by the parties' independent contractor agreement. **But more importantly, we are guided by the parties' conduct**, which mirrored the terms of the contract." *Wilkinson*, 382 S.C. at 300, 676 S.E.2d at 702 (2009). Accordingly, when drafting an independent contractor agreement for a trucking company or advising clients on the nature of their liability for a driver's actions, it is critical to identify the types of contractual provisions *and* conduct that have previously been adjudicated to weigh in favor of either independent contractor or employee status. When litigation arises, interviews need to be scheduled early with XYZ and affidavits of key company personnel formulated to attach to the motion which set out the conduct of the company in executing the company-driver contract.

Direct evidence of the right or exercise of control involves the amount of oversight exercised by the company over the driver. What amount of oversight or guidance does XYZ have over Washington on a daily basis? In *Wilkinson*, a contract providing that the driver "shall determine the means and methods of the performance of all transportation services" was held not to show exercise of control. *Wilkinson*, 382 S.C. at 301, 676 S.E.2d at 703. Of course, it is important that the practices of the company and driver match the contract; courts can rely on testimony from the parties as to the nature of their relationship to determine employee status even if the written agreement states otherwise. *See id*. at 300, 676 S.E.2d at 702 (citing *Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n*, 313 S.C. 65, 68–69, 437 S.E.2d 48, 50 (1993)). XYZ Transport's contacting drivers with assignments and load locations, as in the our case above, does not establish the requisite control so long as the Washington has the right to refuse work, control the delivery, and choose the route. *See Wilkinson*, 382 S.C. at 301-02, 676 S.E.2d at 703. A company prohibition on drivers making personal stops after picking up a load could weigh against driver autonomy and evidence an employer-employee relationship. *See Liberty Mut. Ins. Co. v. D & G Trucking, Inc.,* 966 So. 2d 266, 269 (Ala. Civ. App. 2006).

Some circumstances are not so black and white. For instance, the *Wilkinson* court noted that while GPS monitoring of trucks seemed to show company control, it did not weight in favor of such a finding since the testimony indicated that it was for the benefit of the tracking of customers' shipments, not for the company to track drivers. 382 S.C. at 302, 676 S.E.2d at 703. Accordingly, if XYZ used tracking mechanisms placed in Washington's tractor to track Washington's deliveries then one issue to cover while meeting with XYZ is how the system is used. In advising your current clients, this topic should be discussed so that the client understands the potential ramifications of GPS tracking when used to do more than merely track loads. In this scenario less is likely more and this type of tracking inevitably leads to the question: "Well what if we use that system to make sure the driver is complying with Federal Motor Carrier Safety Regulations?" This is a tricky question as contractual provisions requiring drivers to comply with federal law have been held to not exhibit control. Id. Compliance measures such as displaying a company insignia on a leased tractor will not alone serve as evidence of right of control though using controls such as GPS tracking to insure certain safety measures are upheld by the driver could evidence control. *See id*., citing 49 C.F.R. § 376.11(c)(1) (2008) and 49 C.F.R. § 390.21 (2008). However, any use of the system to exert any degree of control over the driver could be evidence of an employee relationship.

The tractor is the most obvious concern when evaluating the furnishing of equipment. As noted above, a company logo on tractor is itself not necessarily an indicator of control as it must be present to comply with government regulations. *Id.*. at 303, 676 S.E.2d at 704. Therefore, Washington's tractor bearing the XYZ logo and federal identification code is not evidence of control. Instead, actual ownership and control of the vehicle will be determinative. Although Washington's ownership of the tractor points to an independent contractor status, the inquiry extends to responsibility for costs such as "fuel, oil, repairs, insurance, road taxes, fuel taxes, mileage taxes, and any weight violations," even with an exception that the driver "would be reimbursed for weight violations if he picked up a sealed trailer." *Id.* at 305 n.5, 676 S.E.2d at 705 n.5. Driver responsibility for furnishing equipment was also a factor in favor of independent contractor status found in the *FedEx* case.

How Washington is paid by XYZ is also important and should be discussed in that first meeting after representation is established. Payment per mile has been found to indicate that a driver is an independent contractor, and conversely a salary indicating an employee. *Id. Wilkinson* also indicated that a driver's filing of 1099 forms and filing as a sole proprietor indicated independent contractor status. In the *FedEx* litigation, payment "according to a complex formula that takes into account the number

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of packages delivered" was determined by the district court to weigh in favor of independent contractor status.

Specific terms in the contract outlining causes for termination can indicate that a driver is an independent contractor. *Id.* By contrast, testimony by company representative that indicates the company had a right to fire weighs in favor of an employer/employee relationship. *Id. See also Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 323, 713 S.E.2d 267, 273 (2011) (finding that employee testimony that a taxi company's drivers could be terminated for a variety of reasons more credible than a company owner's absolute denial of the ability to fire a purported independent contractor). Therefore, a careful review of the contract is key early in litigation and something that an advising attorney should discuss with a client, such as XYZ, who is consulting with the attorney to formulate their contracts.

As a final note, if Washington was also injured in the accident he would likely seek to file a worker's compensation claim with XYZ's workers compensation carrier. In that claim a distinction would be made as to whether Washington constituted a "statutory employee" at the time of the accident. It is important to distinguish the independent contractor/employee distinction from the determination that a worker is a statutory employee for workers' compensation purposes. XYZ could have an independent contractor relationship with Washington but also have employee drivers as well as this is common in the industry. In that case Washington may be deemed in his worker's compensation claim to be a statutory employee. Our South Carolina Court of Appeals has recently held that it is improper to use the employee/independent contractor test to determine whether an individual is a statutory employee. *Collins v. Charlotte*, Op. No. 5022 (S.C. Ct. App. filed Aug. 15, 2012) (Shearouse Adv. Sh. No. 28 at 74). The statutory employee concept is broader than the definition of an employee under general employment principles to prevent employers from using independent contractors to avoid workers' compensation liability. *Id*. Although the Court of Appeals was careful to limit its determination of employment status to workers' compensation purposes, the defense bar must be diligent to prevent a determination of statutory employment status in a parallel workers' compensation case to prove that a driver was not an independent contractor, or to allow arguments of judicial estoppel, in personal injury litigation arising out of the same incident.

On both a state and national level there is still much unsettled law surrounding the determination as to whether a trucking company's drivers are independent contractors or employees. Each case is fact specific as to the language used in the contract but, more importantly, in how the business is carried out between the driver and the company. South Carolina transportation defense attorneys must diligently structure contracts and advise client companies of the likely legal status of their drivers to ensure that the intentions of the parties to enter independent contractor or employee agreements are borne out. Once a company crosses into the realm of controlling drivers, issues surrounding hiring, training, supervision and retention in accordance with the Federal Motor Carrier Safety Regulations become paramount and thus carriers must be careful not to cross key lines inadvertently. A carrier who has unknowingly crossed the line between engaging independent contractor drivers to actually employing drivers has likely not planned for and implemented safety, training and hiring requirements set forth by the FMCSR. This opens a Pandora's box of compliance issues. A lack of oversight, planning and structure over drivers deemed employees could directly lead to great punitive exposure in the event of litigation.

The moral of the story? Asking the right questions of key client personnel will go a long way toward structuring the client's defense in the event of litigation and advising the client going forward to avoid inadvertent acts that may lead to unintended consequences.

ARTICLE

Application of South Carolina Equitable Indemnification Law in the Products Liability Case

by Brian A. Comer

South Carolina has long recognized the principle of equitable (non-contractual) indemnification.[1] The concept frequently rears its head in products liability actions where a distributor, retailer, or other vendor is named as a defendant in spite of the fact that it had no involvement in the design or manufacturer of the product. Based on South Carolina's strict liability statute, these parties are subject to potential liability. However, in the absence of any contractual indemnification, do these parties have any equitable indemnification rights against the manufacturer? What about other parties who are subject to liability because of their use of a product? This article seeks to answer these questions by surveying South Carolina's general law of equitable indemnification and summarizing its application in products liability cases.

South Carolina's General Equitable Indemnity Law

Generally, a party may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as a result of the tortious act of another.[2] In such cases, the right to indemnity is implied by operation of law and as a matter of equity.[3] Courts have allowed equitable indemnity in cases of imputed fault or where a "special relationship" exists between the party seeking indemnification ("indeminitee") and the party alleged to be liable for the imputed fault ("indemnitor").[4] The action can be asserted as a cross-claim between co-defendants during the litigation, as a third-party claim against a non-party, or as a subsequent action.[5] The statute of limitations for an indemnity action generally runs from the time judgment is entered against a defendant. [6]

For a party to recover under a theory of equitable indemnification, the indemnitee must prove (1) the indemnitor was liable for causing the plaintiff's damages, (2) the indemnitee was exonerated from any liability for those damages, and (3) the indemnitee suffered damages as a result of the plaintiff's claims, which were eventually proven to be the fault of the indemnitor.[7] The indemnitee must be "innocent."[8] If the indemnitee also has personal negligence in causing the injury, then there is no right of recovery.[9] "The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." [10] The rationale is that the actions of the wrongdoer have involved the innocent party in litigation and have caused the party to incur expenses to protect his interest.[11]

Allegations contained in the injured party's Complaint are not determinative of whether a party has a right to indemnity.[12] There must be an adjudication of fault.[13] If there is no adjudication, then the requirements are not satisfied. This provides an alleged tortfeasor with the argument that a special verdict form is necessary in order to determine and preserve the indemnitee's rights against the indemnitor. Furthermore, if a party settles during trial and the settlement agreement includes no language concerning allocation of fault (or includes language that there is no admission of liability), then the indemnitee will likely have a difficult time fulfilling the requirements for equitable indemnification.[14] There must be an evidentiary basis for the indemnitee's claim that he is without fault.[15]

With regard to the "special relationship" that must exist between the parties, South Carolina courts have held that the relationship between a contractor and subcontractor supports a claim for equitable indemnification.[16] A building owner who hires a contractor to do work – and the contractor's work results in injury/damage that subjects the owner to litigation – also satisfies the special relationship requirement.[17] However, if this relationship is too far removed or too attenuated, the special relationship contemplated by South Carolina jurisprudence is not present.[18]

There is no right of indemnity between mere joint tortfeasors under South Carolina law.[19] Joint tortfeasors are parties who act together in committing a wrong, or whose acts (if independent of each other) unite in causing a single injury. Stated differently, joint tortfeasors are two or more persons jointly or severally liable for the same injury to person or property.[20] "Parties that have no legal relation to one

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another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them." [21] Determining whether parties are joint tortfeasors requires a review of the factual evidence. [22]

Equitable indemnification allows recovery of any costs which are reasonably necessary to defend the litigation or otherwise protect the innocent party's interests.[23] The cost of settling a case is recoverable (1) if the settlement is bona fide, without fraud or collusion by the parties, (2) if, under the circumstances, the decision to settle is a reasonable means of protecting the innocent party's interest, and (3) the amount of the settlement is reasonable in light of the third-party's estimated damages and risk, and the extent of the defendant's exposure if the case goes to trial.[24] In such cases, the party seeking indemnification is not required to prove the injured party's actual liability to recover the amount paid in settlement so long as he proves he was potentially liable to the injured party.[25]

Application in Products Liability Cases

The primary equitable indemnification issue that arises in the context of a products liability action is whether co-defendant parties are joint tortfeasors. Joint tortfeasors have a common liability without a right of indemnity.[26] For example, South Carolina's strict liability statute makes each party in the chain of distribution (e.g., manufacturer, distributor, retailer) liable for sale of a defective product.[27] Therefore, if a plaintiff is injured by a product and sues a party in the chain of distribution, case law supports that there is no right of indemnification between the parties in the chain of distribution.[28] Each party has a common duty and common liability to the ultimate consumer under the strict liability statute, making them joint tortfeasors.

For example, *Scott v. Fruehauf Corp*., 302 S.C. 364, 396 S.E.2d 354 (1990), involved a plaintiff who was injured when he attempted to mount a wheel assembly on the axle of a trailer. The plaintiff settled his case against the wheel assembly manufacturer. [29] He brought suit against additional parties in the trailer's chain of distribution, i.e., a refurbisher of the trailer and a lessor of the trailer. The plaintiff won a verdict against the refurbisher based on strict liability and negligence, and he won a verdict again the lessor based on strict liability only. The jury also found in favor of the lessor with regard to its cross-claim for indemnity. Both parties appealed on various grounds, one of which was the submission of the lessor's cross-claim for indemnification to the jury.[30]

The refurbisher argued the trial judge erred in submitting the lessor's cross-claim to the jury because there is no right of indemnity between joint tortfeasors.[31] The court agreed. The defendants shared a common liability to the plaintiff based on South Carolina's strict liability law at S.C. Code § 15-73-10(2)(b).[32] "[Refurbisher] and [lessor] each contributed to the consumer's injury by selling a defective product. We hold common law indemnification does not apply among joint tortfeasors in strict liability." [33] The court reversed the judgment against the refurbisher on the lessor's cross-claim. [34]

Conversely, if a defendant's use of a product plays a role in causing injury to a plaintiff (independent of any fault of the defendant), then the product seller may be liable for indemnification.[35] For example, in *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983), the purchaser of a truck brought an indemnity action against the seller for recovery of settlement proceeds paid in a wrongful death suit arising from an accident involving the truck. The plaintiff needed mechanical harvesting equipment for his pulpwood business and contacted the defendant.[36] The defendant recommended a certain loader mounted on a used truck and represented to the plaintiff that it was suitable for the plaintiff's use, which included harvesting timber and driving from one site to the next. The first time the plaintiff attempted to drive the truck, the rear axle shifted when the driver applied the brakes, which caused him to lose control and collide with an oncoming vehicle. The collision killed the driver of the oncoming vehicle and injured the driver. During the underlying wrongful death lawsuit, the truck purchaser asked for the seller's involvement in the action, which the seller declined. The truck purchaser later settled the wrongful death claim on behalf of himself and his driver (after trial but before appeal), and he brought an action for indemnity against the seller. [37]

During the indemnity trial, the purchaser presented expert testimony that the equipment's rear axle assembly was defective, which caused the driver to have trouble controlling the vehicle when applying the brakes.[38] The seller presented evidence that the equipment was roadworthy and that the accident occurred because a rear axle slipped. [39] The seller also attempted to admit the transcript from the wrongful death trial to argue the purchaser was negligent and a joint tortfeasor. The trial judge determined the purchaser and seller were *not* joint tortfeasors. The purchaser's indemnity action asserted the seller was liable on grounds separate and apart from any of the purchaser's purported fault. Specifically, the purchaser's claim was that the seller sold a defective and unreasonably dangerous product and breached its warranty that the vehicle was roadworthy. The court noted the purchaser's action was not based on a right of indemnity from a joint tortfeasor. Instead, it was an action to recover damages sustained by the purchaser based on the seller's failure to ensure the safe condition of the equipment. [40] The purchaser's failure to discover and correct the defects in the equipment did not excuse the seller's breach.[41] The court emphasized that its inquiry focused on the seller's breach of warranty of fitness for a particular purpose and strict liability for

sale of a defective product.[42]

The federal district court reached a different conclusion in *Lightner v. Duke Power Co.*, 719 F. Supp. 1310 (D.S.C. 1989). Lightner involved an injury to a school maintenance man when a lawnmower operated by another school employee propelled a metal bolt left on school grounds into his back. The man brought an action against the Duke Power Company for leaving the bolt on the grounds. Duke brought a third-party action for indemnification against the lawn mower manufacturer.

On these facts, the court in *Lightner* dismissed Duke's third-party indemnification claim. First, the court noted the plaintiff's allegations against Duke were for separate negligent acts, and not for the allegedly defective condition of the lawn mower.[43] Therefore, if determined to be wholly or partly responsible for the plaintiff's injuries, Duke would not be entitled to indemnification on a negligence theory against the manufacturer (i.e., Duke would not be "innocent"). Alternatively, if Duke established that the manufacturer was the sole cause of the injury, Duke could not be indemnified because it would have none, and it could not be indemnified for defense expenses because the expenses would be incurred in defense of separate allegations of negligence against Duke alone. "It would not have defended against negligence imputed to it as the result of a tort committed by [the manufacturer], but instead would have defended against its own conduct using [the manufacturer's] negligence as a defense to causation." The lawnmower manufacturer also wed no duty to Duke to produce a lawn mower free from defect, and if Duke was liable to the plaintiff, the loss would only be intangible economic loss that is not recoverable in a negligence action.[44]

Significantly, the court also denied Duke's indemnity claims based in strict liability and breach of warranty. The court distinguished *Stuck v. Pioneer Logging Machinery Co.* by pointing out that the indemnitee in Stuck was a "user or consumer" of the product and within the language of South Carolina's strict liability statute.[45] The same could be said with regard to the breach of warranty cause of action in Stuck, which extended to "any natural person who may be expected to use, consume, or be affected by the the goods and whose person or property is damaged by the breach of the warranty."[46] The plaintiff in Stuck had standing for both of these actions. Conversely, Duke did not have standing because it did not use or consumer the lawnmower, and it suffered no damage to its person or property.[47]

Vermeer Carolina's, Inc. v. Wood/chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (1999), is probably the most significant state court products liability case involving equitable indemnification because it compares and contrasts the *Scott* and *Stuck* cases to summarize the law in South Carolina. *Vermeer* involved an indemnification action by a seller of a used wood chipper against the manufacturer. In an underlying action, the injured plaintiff purchased the wood chipper from Vermeer, and his right hand was amputated while using it.[48] The plaintiff sued both Vermeer and the manufacturer.[49] Prior to trial, the plaintiff requested a nonsuit with prejudice from the manufacturer, which was granted.[50] He then settled with Vermeer. Vermeer then brought an action for indemnification and contribution against the manufacturer. The manufacturer moved for summary judgment, and the trial court granted the motion. Vermeer appealed, and one of the bases for the appeal was that the trial court erred in finding Vermeer was not entitled to indemnification.[51]

The court provided an extensive review of the law of equitable indemnification.[52] The court then compared the decisions in *Scott* and *Stuck* to show the contrasting outcomes and the relationships between the parties in the context of a strict liability products liability case.[53] Applying this law to the case, the court noted that "[a]bsent a contractual provision whereby the upstream manufacturer agreed to indemnify the downstream retailer, the retailer cannot escape liability and, at the same time, prove the manufacturer negligently designed or manufactured a product."[54] Vermeer did not show there was a genuine issue of material fact that it was not a joint tortfeasor. Therefore, the court held Vermeer had no right of equitable indemnification against the manufacturer with regard to the strict liability claim.[55]

The lesson from *Stuck*, *Scott*, *Lightner*, and *Vermeer* is that the relationship between the indemnitor and indemnitee is of paramount importance in determining whether a party can obtain equitable indemnification in a products liability claim. To the extent that a party is in the chain of distribution in distributing the product, then the strict liability statute essentially "binds" the parties as joint tortfeasors, eliminating any rights of equitable indemnification. *Stuck* illustrates that a product user outside of the chain of distribution has equitable indemnification rights if the breach alleged as a basis of recovery is independent of the theory that was asserted against the party (i.e., alleged negligent driving versus a alleged defective product).

The question is whether a party in the chain of distribution can obtain equitable indemnification against another distributing party *outside* of the strict liability context. For example, if a retailer is found liable in a products liability lawsuit on a theory other than strict liability (e.g., negligent design/manufacture, failure to warn, breach of warranty, etc.), then is it possible for the retailer to obtain equitable indemnification against the manufacturer? This question does not appear to have been addressed by South Carolina courts. It is also unlikely scenario since no-fault, strict liability is likely the most strategically advantageous theory for

Continued on next page

a plaintiff to assert against potential defendants.

However, for purposes of argument, any theory of liability in a South Carolina products liability lawsuit requires a plaintiff to prove (1) the plaintiff was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant.[56] These common elements do not differentiate between manufacturer and (non-manufacturer) distributor/retailer. The fact that the same elements are required for every possible legal theory suggests that parties in the chain of distribution have common duties to product users and would be considered joint tortfeasors. An exception to this hypothesis may be if a retailer is found liable in strict liability and pursues indemnification against the manufacturer on a negligence theory. In a negligence action "the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." [57] If the non-manufacturing party seeking indemnification premises recovery on a conduct-based theory of negligence, then this theory may implicates duties separate and apart from statutorily-imposed strict liability duties, and that party may be able to achieve equitable indemnification.

Conclusion

Parties in the chain of distribution of a product are likely to have a difficult time establishing equitable indemnification rights against one another. South Carolina's strict liability statute makes these parties joint tortfeasors because of their common duty, and the common elements for all product liability theories supports joint tortfeasor status outside of the strict liability context. However, products liability defendants can use these same principles to avoid fault by individual defendants who seek to shift liability to a product. If the product user is also at fault, South Carolina law does not allow equitable indemnification.

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Footnotes

1 *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) ("Indemnity is that form of compensation in which a first party is liable to pay a second party of a loss or damage the second party incurs to a third party.") (citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d (1992)).

2 *Vermeer*, 336 S.C. at 60, 518 S.E.2d at 305; *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. South Carolina Medical Malpractice Joint Underwriting Association,* 394 S.C. 68, 72, 713 S.E.2d 639, 641 (Ct. App. 2011).

3 *Vermeer*, 336 S.C. at 60, 518 S.E.2d at 305.

4 *Id.*

5 See South Carolina Rules of Civil Procedure 13(g), 14(a). See also *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. South Carolina Medical Malpractice Liability Joint Underwriting Ass'n*, 394 S.C. 69, 713 S.E.2d 639 (2011) (involving subsequent action).

6 *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994).

7 *Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307.

8 *Id; see also Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983) ("According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person exposed to liability by the wrongful act of another in which he does not join.") (emphasis added).

9 *Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307.

10 *Id.*

11 *Id.* at 60, 518 S.E.2d at 305.

12 *Id.*. at 64, 518 S.E.2d at 307 (citing *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990)).

13 *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2010).

14 *See, e.g., id.* (holding that settlement during trial that did not include adjudication of fault precluded action for equitable indemnification).

15 *Id.*. at 487-89, 709 S.E.2d at 75-76.

16 *Rock Hill Tel. Co., Inc. v. Globe Communications, Inc.,* 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (citing *First Gen. Servs. of Charleston, Inc.*, 314 S.C. at 442, 445 S.E.2d at 448 (1994); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990), aff'd, 307 S.C. 128, 131, 414 S.E.2d 118, 120 (1992))

17 *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1972).

18 *Rock Hill Tel. Co.*, 363 S.C. at 390, 611 S.E.2d at 237 (holding that special relationship was not present where action for equitable indemnification was between utility and subcontractor who had been retained by intermediary independent contractor).

19 *Vermeer*, 336 S.C. at 64, 518 S.E.2d at 307 (citing *Scott v. Fruehauf Corp*., 302 S.C. 364, 396 S.E.2d 354 (1990); *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983); *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)).

20 *Vermeer*, 336 S.C. at 64, 518 S.E.2d at 307 (citing Black's Law Dictionary 839 (6th ed. 1990).

21 *Id.*.

22 *Id.*

23 *Vermeer*, 336 S.C. at 60, 518 S.E.2d at 305.

24 See, e.g., *Otis Elevator, Inc. v. Hardin Constr. Group*, 316 S.C. 292, 450 S.E.2d 41 (1994); *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990);

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ARTICLE

What Exactly is the Duty of a Developer?

by Emily Sheets and Robert Sansbury

If you've represented a developer you have inevitably struggled with the question of "what duty does the developer owe to a purchaser for construction defects?" After all shouldn't the general contractor who actually performed the work be the one responsible for any construction defects? And what happens when the Developer behaves like a General Contractor and not just a financier? Understanding recent developments in South Carolina law will help you better protect your developer client.

The first element in any negligence action is of course duty. While duty can be assigned to most any type of party based on what a reasonable actor would have done under the same set of circumstances, the question gets more complicated when looking at the duties of the developer. A developer by name is not a contractor therefore, does the developer owe any duty for defects created from the construction practices of other parties?

Developer liability in a construction defect case can potentially arise under two theories: negligence and warranty. In a negligence action, the threshold question becomes: "is there a duty?"

A. Negligence Causes of Action

Although the general rule is that parties owe a duty to act with due care, the question gets more complicated when looking at the duties of a developer. It is well settled in South Carolina that developers, builders, and even mere lenders are always liable for their own negligent actions; for example, when a mere lender negligently installs a septic tank in an attempt to salvage a home entering foreclosure, the lender would be liable for defective installation of the septic tank. *Kirkman v. Parex, Inc.* 369 S.C. 477; 632 S.E. 2d 854 (2006) (a [tortfeasor] is liable for defects in the portion of the house which they complete). Likewise, a developer will always be liable for its own negligent actions. However, a developer's liability under a negligence theory for the actions of its builders appears to be an unresolved question in South Carolina.

Other jurisdictions have held that a developer owes a non-delegable duty to ensure that the construction of a home is done properly, and impose absolute liability on the developer for the negligence of its builders. *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*, 517 A.2d 336, 347 (Md. Ct. App. 1986) ("The developer is, in a sense, the builder of the project, even though he may delegate to others the physical acts of construction."). Based on South Carolina's rejection of caveat emptor and imposition of caveat venditor in the sale of new residential homes, it follows that South Carolina would likely adopt this rule as well and hold a developer liable for the negligence of its builders. *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 502; 229 S.E.2d 728, 730 (1976) ("the court hearkened to the call of caveat veditor and observed that its superior excellence has been generally felt and acknowledged.").

While South Carolina courts are silent as to a developer's duties to hire and supervise competent contractors to carry out construction, the answer appears to be the common law standard of "what would a reasonable developer do under the same or similar circumstances?"

Emily Sheets

Robert Sansbury

B. Implied Warranty Causes of Action

South Carolina courts have made it clear that developers are liable for construction defects following the sale of a new home under the theory of implied warranty of habitability. Id. Indeed, the Supreme Court has affirmed judgments against developers several times in precisely this scenario, and has held that "[a developer's] liability is not founded on fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." *Id* at 503, 731. *See also Kincaid v. The Landing Development Corporation*, 289 S.C. 89; 344 S.E.2d 869 (1986) (affirming a judgment against a developer based on a theory of implied warranty of habitability). The distinction that the Court draws in imposing liability is the sale of land versus the sale of a home. South Carolina does not impose any implied warranties on the seller of land under the doctrine of merger of warranties; however, the courts view the sale of a

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home as the sale of a "product," and, therefore, with the sale of a new home, impose liability on a developer under an implied warranty theory. Lane, 501, 730 ("[the sale of] a house is the sale of a product.").

Nonetheless, a developer who does not profit and receive a fair price, as contemplated in Lane, and who instead steps into a project mid-way through only to salvage its investment and minimize losses, may have a shot at defeating the implied warranty of habitability, as "profiting and receiving a fair price" appear to be necessary elements for the warranty to arise. *Id*. In fact, South Carolina courts have held that where a mere lender (i.e. a bank) takes title to a home in lieu of foreclosure, and is not "substantially involved" in completing the home, the lender is not liable under an implied warranty theory. *Kirkman v. Parex, Inc.* 369 S.C. 477; 632 S.E. 2d 854 (2006). Whether a lender is "substantially involved" appears to be fact specific. *Id*. Kirkman does not address a developer's liability, but a good argument can be made that if a developer does not profit from the sale of a home and is not substantially involved in its completion, then the implied warranty of habitability would not attach.

Conclusion and Analysis

Although the full extent of a developer's liability for construction defects remains unresolved in South Carolina, recent decisions suggest that a developer's liability for the sale of a new home may be absolute. It is clear that a developer is not liable for the mere sale of unimproved land, and it is equally clear that a developer is always liable for its own negligent actions whether a home is new or not.

Resolution of a developer's liability for construction defects following the sale of a new home likely depends on which "type" of developer you represent: the developer/contractor who is involved from the inception until the final brick is laid, or the developer/financier who sells the subdivided land to a contractor and then completely detaches itself from the project? Although some jurisdictions hold that a developer's liability is non-delegable, South Carolina case law suggests that, to the extent the developer/financier only intervenes in the construction of a new home for the sake of minimizing a financial loss, this developer's exposure is minimized, and possibly even eliminated so long as the developer/financier did not profit. Indeed, the developer/financier's liability in warranty appears to be predicated upon receiving a fair price and profiting from the sale. Alternatively, the developer/contractor is almost certainly "on the hook" no matter what, and would do well to select his contractors carefully.

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25 *Otis Elevator, Inc.*, 316 S.C. at 296-97, 450 S.E.2d at 44.

26 *Scott*, 302 S.C. at 371, 396 S.E.2d at 358.

27 *Vermeer*, 336 S.C. at 65, 518 S.E.2d at 307-08 (citing to S.C. Code § 15-73-10 (1977)).

28 *See, e.g., Scott v. Fruehauf Corp*., 302 S.C. 364, 396 S.E.2d 354 (1990) (holding there was no right of indemnity between co-defendants involved in distribution of a defective wheel assembly that exploded and injured plaintiff because both co-defendants shared common liability under South Carolina's strict liability law).

29 *Id.*. at 367, 396 S.E.2d at 356.

30 *Id.*.

31 *Id.*. at 370, 396 S.E.2d at 357-58.

32 *Id.*., 396 S.E.2d at 358.

33 *Id.*.

34 *Id.*.

35 *See, e.g., Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983) (holding that purchaser of mechanical harvesting machine had right of indemnity against seller in case where harvesting machine was mounted on truck, caused purchaser to lose control of truck, and ultimately caused injury to passengers in oncoming vehicle).

36 *Id.*. at 23, 301 S.E.2d at 552.

37 *Id.*.

38 *Id.*.

39 *Id.*. at 24, 301 S.E.2d at 553.

40 *Id.*.

41 *Id.*. at 25, 301 S.E.2d at 553.

42 *Id.*. at 25-26, 301 S.E.2d at 554.

43 *Lightner v. Duke Power Co.*, 719 F. Supp. 1310, 1313 (D.S.C. 1989).

44 *Id.*.

45 *Id.* at 1314 (quoting S.C. Code § 15-73-10).

46 *Id.*. (quoting S.C. Code § 36-2-318).

47 *Id.*.

48 *Vermeer*, 336 S.C. at 57-58, 518 S.E.2d at 304.

49 *Id.*.

50 *Id.*. at 58, 518 S.E.2d at 304.

51 *Id.*.

52 *Id.*. at 60-63, 518 S.E.2d at 305-07.

53 *Id.*. at 64-67, 518 S.E.2d at 307-309.

54 *Id.*. at 67, 518 S.E.2d at 309.

55 *Id.*.

56 *Rife v. Hitachi Const. Mach. Co., Ltd.*, 363 S.C. 209, 215, 609 S.E.2d 565, 568 (Ct. App. 2005).

57 *Bragg v. Hi-Ranger, Inc*., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995).

ARTICLE

Vicarious Liability for Attorneys Engaging Co-counsel and Referrals in South Carolina

by Childs Cantey Thrasher*

By associating or referring outside counsel, attorneys in South Carolina may be exposing themselves to professional liability claims. Often times, an attorney licensed in one state will associate with or refer a case to an attorney licensed in another state when a case is brought in a state where the originating attorney is not licensed. At other times, an attorney will associate with or refer a case to another attorney because of an area of expertise or skill level helpful in a certain case. Depending on how the fee arrangement is orchestrated and the work load is distributed, such associations and referrals can open an attorney in South Carolina to potential professional liability claims based on the actions of the associated or referred attorney. However, by understanding the South Carolina Rules of Professional Conduct and the relevant case law, such claims can often be avoided.

When associating an outside lawyer, that attorney is generally treated as an independent agent of the client rather than an agent or a contractor of the firm. In fact, the Restatement Third of the Law Governing Lawyers states that, "a firm is not liable for the acts or omissions of a lawyer outside the firm who is working with firm lawyers as co-counsel or in a similar arrangement." Restatement Third of the Law Governing Lawyers, § 58, Comment e. However, there are exceptions to this general rule.

1. Joint Ventures

One such exception is a joint venture entered into by two or more attorneys or firms. In South Carolina, such a relationship is governed by partnership law. *In Re Fox*, 490 S.E.2d 265, 271 (S.C. 1997)(citing *Tiger, Inc. v. Fisher Agro, Inc.*, 391 S.E.2d 538, 543 (S.C. 1989)).

When an issue arises, the first question to ask is whether a joint venture has been created by a referral or association. The South Carolina Supreme Court provided insight into when a joint venture can be found to exist in *In Re Fox*. There, the Court stated that "where an attorney retained on a contingent fee to prosecute a claim engages another lawyer to assist in the litigation, upon an agreement to share the fee in case of success . . . [the attorneys] become joint venturers." *Id*. (citing 46 Am.Jur. 2d Joint Ventures § 54 (1994)). In this situation, the Court concluded, an attorney engaged in such an arrangement may be held liable to the actions of his or her co-joint venturer.

Childs Cantey Thrasher

South Carolina is not alone in its analysis of such relationships. The Supreme Court in Mississippi in *Duggins v Guardianship of Washington* rejected an attorney's argument that an associated attorney was an independent contractor because the two attorneys involved divided the responsibilities for preparing the case and split the fees equally. 632 So.2nd 420, 427 (Miss. 1993). The Court found that "each attorney [had] an equal stake in the outcome of the case and there would be joint control of the case." *Id.* As such, the Court found that the two attorneys amounted to joint venturers.

Had the other attorney in *Duggins* been an independent contractor, he would have been compensated under a fixed fee arrangement rather than a contingency fee arrangement. The Court reasoned that fraud committed by a partner acting within the scope of his actual or apparent authority could be imputed to the partnership. *Id*. at 430.

The South Carolina Rules of Professional Conduct allow for a division of fees between lawyers not in the same firm only if that division of fees is proportionate to the division of labor or if each lawyer assumes joint responsibility for the representation. SCRPC 1.5(e). Additionally, the rules also require that the arrangement be in writing, that the client agree to the fee arrangement and that the total fee be reasonable.

2. Sub-Agency

An attorney can also subject himself to vicarious liability if the associated attorney has no direct relationship with the client, thereby creating a sub-agency relationship. In such a situation, the associated counsel is acting as a sub-agent to the originating attorney and, thus, vicarious liability may be transferred to the originating attorney.

In fact, the New York Appellate Division has found that if a client has no contact with an associated counsel and only relies on and communicates with the originating attorney, the associated counsel is, in

Continued on next page

effect, a sub-agent of the originating counsel and, therefore, the originating counsel has a duty to supervise the associated, sub-agent attorney. *Whalen v DeGraff, Foy, Conway, Holt-Harris & Mealey*, 53 A.D.3d 912, 915 (N.Y.A.D 3 Dept., 2008).

3. Negligent Referrals

Negligent referrals can also expose an attorney to vicarious liability depending on the circumstances. When an attorney refers a case to another lawyer, he is acting as his client's agent and, therefore, owes the client a duty of care in selecting such an attorney. Ronald E. Mallen & Jeffery M. Smith, Legal Malpractice, § 5:9, at 679-81 (2009 ed.).

An attorney who is authorized to employ other attorneys to handle his client's affairs is under a duty to select competent and otherwise proper attorneys. Restatement of Agency 2d § 405(2). As such, the originating attorney may be liable to his client for loss caused by the referred to attorney's intentional wrongdoing. *Tormo v Yormark*, 398 F. Supp. 1159, at 1169-70 (D.N.J. 1975).

The Bankruptcy Court of the Southern District of Texas has found that "bringing an incompetent attorney on board" violates a lawyer's fiduciary duty his client. *Rainey v Davenport*, t 353 B.R. 150 (Bankr. S.D. Tex. 2006.) The referring attorney's duty relates to the referral itself, regardless of whether the originating attorney cedes responsibility for the matter after making the referral, or retains some level of responsibility in cooperation with referred to counsel. *Id.*

Under the South Carolina Rules of Professional Conduct, collecting a referral fee may cause a problem. Rule 1.5 discusses the reasonableness of attorneys' fees and includes a list of factors used to determine whether or not a fee is reasonable.

4. How to Protect Yourself

Current case law and the South Carolina Rules of Professional Conduct provide South Carolina attorneys guidance as to how to avoid vicarious liability when associating or referring a case to another attorney whether in state or out. Review the Rules and keep the following tips in mind with associating with or referring a case to other counsel.

How to Avoid Vicarious Liability for Attorneys Engaging Co-counsel and Referrals in South Carolina:

- Have a written fee agreement, which divides the fees in proportion to the work performed by each lawyer.
- To avoid any sub-agency liability, have your client directly engage the associated law firm. The engagement agreement should not be between your law firm and local counsel, but between the client and local counsel.
- Include a clear division of labor in any engagement agreement involving multiple attorneys not from the same firm.
- If acting as local counsel serving in a litigation support role with national counsel make sure that your engagement letter articulates your role and responsibilities as local counsel.
- Do not accept a referral fee.
- Use reputable sources to verify competence of any referral attorneys.
- Include a disclaimer in your engagement contract.
- Verify that the attorney you are referring has legal malpractice insurance.
- Choosing the right attorneys to work with can be the best way to prevent vicarious liability claims.

** Childs Cantey Thrasher is an associate in the Columbia office of Gallivan, White & Boyd, P.A. She practices in the areas of Business and Commercial Litigation, Environmental Law, Professional Negligence and ADA Compliance Premises Liability.*

YOUNG LAWYERS UPDATE

Hawk and Watkins Assume New Roles for Young Lawyers Division

The Young Lawyers Division is pleased to announce that John C. Hawk IV will begin serving his term as President of the Young Lawyers division in November, and that William "Trey" W. Watkins, Jr. was elected President-Elect. Hawk and Watkins will serve for two years in these positions, at which time Watkins will take over as President.

Hawk is an associate attorney with Womble Carlyle Sandridge & Rice, LLP in Charleston. He graduated from Davidson College in 1998 and the University of South Carolina School of Law in 2006. Hawk now practices in Womble's Business Litigation Practice Group, with an emphasis on lender liability, products liability, business disputes, and construction.

Watkins is an associate attorney with Wall Templeton & Haldrup, P.A. in Charleston. He graduated from the University of South Carolina School of Law in 2005, and is an "AV Preeminent" rated attorney by Martindale-Hubbell. Trey's practice focuses primarily on Insurance defense including construction disputes, serious personal injury, and complex litigation. Prior to attending law school, he worked in the surety industry as a Surety Bond Underwriter for Travelers.

The Young Lawyers Division of the SCDTAA is open to those members less than forty years old or practicing less than 10 years.

John C. Hawk IV

William "Trey" W. Watkins, Jr.

DRI UPDATE

Mid-Atlantic Regional Report

by Peggy Fonshell Ward

Exciting times at DRI! You have by now seen the extraordinary line-up of speakers and CLE presentations for the Annual Meeting, Oct. 24-27 in New Orleans. DRI will be welcoming only its second woman president in it 50 year history! If you were not able to get there this year, make sure you have the Annual Meeting on your calendar for 2013. It is always the best event of the year, including the unparalleled Mid-Atlantic Regional Dinner.

DRI has a new logo, more services for its members, including the ever-expanding Voice and the upgraded Expert Tracker – which allows you to follow the postings of CVs, inquiries, and other information about experts in the Expert Witness Database. Another incredible member service for no added cost. Then there is the Center for Law and Public Policy, a comprehensive collection of DRI's Amicus, Public Policy and Public Education Committees. The Center's mission will be to educate policy makers and the public on judicial issues and challenges important to the defense bar and, when internal DRI consensus exists, to act as an advocate for public policy change. Its overarching goal is to maintain the integrity and independence of the American judiciary.

Looking ahead, the Mid-Atlantic Regional Meeting will be held at The Homestead April 26-28. Be sure to reserve those dates. More information to come after the first of the year. In the meantime, I am looking forward to seeing all of my South Carolina DRI friends at your Annual Meeting in Kiawah Island in November - one of the best pleasures of the regional Director position! Be sure to grab me and let me know how you think DRI is doing to serve the SCDTAA and you individually as members.

Case Notes

Summaries prepared by Breon C. M. Walker

Janette Hamilton v. Charleston County Sheriff's Department, 731 S.E.2d 727 (Ct.App.2012)

This case stems from an alleged sexual assault by a prison guard against an inmate on June 19, 2003. Janette Hamilton ("Hamilton") sued the Charleston County Sheriff's Department ("Sheriff's Department") for negligent training and supervision. The trial court directed a verdict in favor of the Sheriff's Department after finding no evidence existed indicating the officer would commit such crimes and that the officer was acting in his own capacity when he engaged in the sexual misconduct. Hamilton appealed the trial court's decision. The sole issue on appeal was whether the trial court erred in granting the Sheriff's Department's motion for directed verdict on the negligent supervision claim.

At trial, Hamilton testified that she was sorting laundry in the break room during the late evening of June 19, 2003, when Officer Antonio Aiken ("Officer Aiken") entered the break room, began joking with her, then forced her to perform oral sex on him twice.

Hamilton argued the trial court erred in granting the directed verdict because the Sheriff's Department was grossly negligent in its supervision of Officer Aiken. Specifically, Hamilton's expert testified at trial that the Sheriff's Department failed to have in place rape prevention measures, maintain minimum national security standards, adopt adequate monitoring policies, and failed to adequately investigate Officer Aiken's background.

Numerous witnesses for the Sheriff's Department provided the following testimony: The break room had a camera that focused on the entrance to the break room and the busy service hallway, which met the minimum standards required by the South Carolina Department of Corrections and the American Correctional Association; the Sheriff's Department did not have any established policies concerning interactions of male guards and female inmates at the time of this incident; the officers were allowed to move around the jail as they desired in order for them to do their jobs; once the training for guards was completed they were no longer routinely supervised; Officer Aiken—and all guards—were trained on the Sheriff's Department's policies on sexual harassment and appropriate interaction with the inmates; and the Sheriff's Department immediately began investigating Officer Aiken once it was made aware of the incident and terminated him after the charges were filed against him.

The Sheriff's Department's Human Resources employee, Dana Herron ("Herron"), testified that she recommended Officer Aiken for the position after a pre-employment investigation. Ten days after she submitted her recommendation, however, she received two conflicting reports from the Charleston Police Department ("CPD"). The first report was a 1996 report from when Officer Aiken was in high school that said the CPD would "absolutely not" rehire Officer Aiken. There was also a note at the bottom of the report from when Officer Aiken interviewed for a dispatcher position in 2001 which said Officer Aiken was "not CPD material – for any position." The second report, however, was from 1998 when Officer Aiken worked as a clerk and in the control room during the summer. This second report stated that Officer Aiken was a nice young man who "took his job seriously." Herron stated that she did not re-open her investigation after receiving these additional reports because they did not contain any "red flags" or detail any misconduct by Officer Aiken. Herron also testified that the Sheriff's Department's psychological evaluation of Herron only indicated that he had a tendency towards being late and absent "more than three times" a year and that he could possibly be "terminated premature for wrongdoing." The test, however, concluded that Officer Aiken was at a low-risk for performance difficulties.

To be liable for negligent supervision, an employee has to "intentionally harm another" on the employer's premises and "[the employer] (i) knows or has reason to know that he has the ability to control his [employee], and (ii) knows or should know of the necessity and opportunity for exercising such control." Degenhart v. Knights of Columbus, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992) (quoting Restatement (Second) of Torts § 317 (1965)). Additionally, "a governmental entity is not liable for a loss resulting from responsibility or duty including…supervision, protection, control, confinement, or custody of any…prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60 (25) (2005).

HOLDING: The Sheriff's Department presented uncontradicted evidence that it met minimum security standards set for South Carolina. Additionally, there was no evidence that the Sheriff's Department knew, or should have known, of the necessity to exercise additional supervision over Officer Aiken.

Therefore, the only inference is that the Sheriff's Department exercised at least slight care in its supervision and the trial court properly granted a directed verdict in favor of the Sheriff's Department.

LeAndra Lewis v. L.B. Dynasty, Inc., d/b/a Boom Boom Room Studio 54 and the South Carolina Uninsured Employer's Fund, 2012 WL 3828465

This case stems from an incident that occurred while LeAndra Lewis was working as a dancer in an "exotic dance club" in Columbia, South Carolina. Lewis worked as an exotic dancer in various clubs throughout North and South Carolina, and would select which club she wanted to work in depending on the night.

On June 23, 2008, Lewis was injured while working as an "exotic dancer" at the Boom Boom Room Studio 54 (hereinafter "the club") on Two Road in Columbia, South Carolina. Specifically, Lewis was hit in the abdomen by a stray bullet after an altercation broke out in the club. Lewis sustained injuries to her intestines, liver, pancreas, kidney and uterus. As a result, Lewis filed a claim for benefits with the Workers' Compensation Commission. Lewis' claim was denied by both the single commissioner and the appellate panel based on the finding that she was not an employee of the club. Lewis subsequently appealed the decision to the Court of Appeals pursuant to § 42-17-60 of the South Carolina Code.

The sole issue on appeal was whether Lewis' job as an exotic dancer was one of an employee or independent contractor. In determining whether a claimant is an employee or independent contractor, the focus is on "the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of [her] work." Wilkerson ex rel. *Wilkerson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). The Wilkerson test lays out four factors to analyze the work relationship: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; and (4) right to fire. *Id.*

I. RIGHT TO CONTROL – Lewis argued that the club "controlled" her by searching her when she arrived, requiring her to pay a "tip out" fee, and directing her to the manager's office and then the dressing room. She further argued that she danced when the club told her to and that the club set her hours, selected the music, and required her to perform "on demand." The Court was not convinced by this argument, relying on the fact that the club did not "control" the manner in which Lewis danced and that her dancing was not subject to any limitations or control by the club.

II. FURNISHING OF EQUIPMENT – Lewis argued that the club furnished the stage for dancing, poles to assist dancers, private V.I.P. rooms, as well as tables, couches and chairs for customers. The club also provided cleaning solution, towels, baskets for collecting money, and lockers for the dancers to put their personal belongings. In response, the Court pointed out that it was not practical for Lewis to supply her own stage, poles, chairs, couches or bar glasses in her line of work. In fact, for purposes of the club and its patrons, the Court pointed out that Lewis brought her own "equipment" to perform her work.

III. METHOD OF PAYMENT – Lewis argued that the method of payment was inapplicable since the club did not actually pay her anything, yet took a cut of her tips. The Court noted that the club did not actually pay Lewis anything and that she only received money from patrons. In fact, Lewis actually paid the club for the right to perform in the form of a "tip out" fee she paid as a condition of entering the club. Additionally, Lewis paid the club a share of her V.I.P. fees and tipped the disc jockey and bartenders.

IV. RIGHT TO FIRE – Lewis did not deal with the right to fire directly, yet argued that the club would fine her or refuse her readmission for violation of club rules. The "rules" Lewis referred to included fighting or getting caught having sex with patrons in the club. The Court stated that this did not create an employment relationship and noted that any "relationship" between Lewis and the club was not meant to last more than one night. The club could "terminate" the relationship by kicking Lewis out and denying her readmission on a subsequent night. The Court noted that the restrictions Lewis referred to were no different from any independent contractor relationship, in that any business is free to terminate a relationship for violation of such rules. The Court further noted that the "rules" in this case simply include Lewis obeying the law.

Holding: The Court agreed with the Workers' Compensation Commission that Lewis did not meet the definition of an employee and that the Commission did not have jurisdiction to award benefits.

Travis A. Roddey, as personal representative of the Estate of Alice Monique Beckham Hancock, deceased v. Wal-Mart Stores East, LP, U.S. Security Associates, Inc., and Derrick L. Jones , 2012 WL 3711086

On June 20, 2006, Alice Hancock (hereinafter "Hancock") died as result of an automobile accident that occurred as she drove away from the Wal-Mart in Lancaster, South Carolina. Hancock was being pursued by Derrick Jones (hereinafter "Jones"), an employee of U.S. Security Associates, Inc., which provided security to Wal-Mart pursuant to a contract between the companies. Hancock's estate sued Wal-Mart, U.S. Security, and Jones for negligence. At trial, the court directed a verdict for Wal-Mart. The jury found Hancock to be 65% at fault and U.S.

Continued on next page

Case Notes Cont.

Security and Jones to be 35% at fault. Hancock's estate appealed the directed verdict.

On the evening at issue, Hancock was at Wal-Mart with her sister, Donna Beckham (hereinafter "Beckham"). Hancock left Beckham in the store and returned to her vehicle to wait in the parking lot. Shortly thereafter, Beckham attempted to shoplift several items by placing them in plastic bags. One of the store's employees, Hope Rollings (hereinafter "Rollings"), witnessed Beckham do this and alerted a store manager, Shaun Cox (hereinafter "Cox"). Rollings then went outside to speak with Jones about the situation. While Rollings and Jones were talking, Cox used a handheld radio to alert Jones that Beckham was heading towards the exit. At trial, Jones testified that he asked Cox what he should do as he did not have authority to detain her. He stated he was told, "try to delay her. Try to talk to her until we can get out there."

As Beckham attempted to leave the store, she was asked for her receipt by a Wal-Mart greeter. At that point, Beckham put down the plastic bags and continued to leave the premises. Jones saw Beckham walking in the parking lot and attempted to speak to her briefly. Hancock saw Beckham attempting to leave the store, pulled out of her parking space and drove towards Beckham, who jumped into the vehicle. At the same time, Jones drove his vehicle into the lane and attempted to block Hancock's vehicle, at which point, Hancock put her car in reverse, struck a median in the parking lot, turned around and drove towards the exit of the parking lot.

While this was going on, Cox radioed for Jones to get Hancock's tag number. Jones testified that he told "them" he could not see Hancock's license tag and that they were about to leave the parking lot. He testified that a Wal-Mart employee replied, "Man, well, you got to do what you got to do. You need to get that license plate number." Jones then left the parking lot in pursuit of Hancock and in violation of his training and U.S. Security policy. At some point, Hancock lost control of the vehicle, crashed and died at the scene. Jones testified that he lost Hancock for some period of time and did not find them again until he saw their vehicle on the side of the road with its hazard lights flashing.

Wal-Mart's directed verdict motion was based on three grounds: (1) Plaintiff presented no evidence that Wal-Mart breached its duty of care; (2) Wal-Mart's actions were not the proximate cause of Hancock's death because Jones' and Hancock's actions were not foreseeable; and (3) Hancock's fault in causing her own death was more than 50% as a matter of law. The Court of Appeals disagreed with the trial court regarding Wal-Mart's breached duty of care and the foreseeability issue, however, voted to affirm based on Hancock being more than 50% at fault.

The Court held that Hancock was more than 50% at fault for two reasons: First, the jury's factual determination of how fault should be apportioned between Hancock, Jones, and U.S. Security is binding on Hancock's estate even though Wal-Mart's actions were not included in the jury's analysis. Second, the trial court should have found Hancock to be more than 50% at fault as a matter of law.

Jury's Apportionment of Fault – The Complaint alleged that Wal-Mart was negligent in three ways. The first was that Wal-Mart was vicariously liable for Jones' actions, therefore, Plaintiff's right to recover depends solely on whether Jones was liable. The Court held that, because Wal-Mart's liability is derivative of Jones' liability, the jury's finding that Jones was only 35% at fault forecloses Wal-Mart's liability. The second and third allegations were that Wal-Mart failed to properly supervise Jones and "improperly advised or instructed" Jones to follow Hancock. Plaintiff argued that Hancock's proportion of fault could have been reduced to the point that her negligence was not greater than that of all the defendants if the jury considered Wal-Mart's conduct along with the other two defendants. The Court held that the jury's comparison of fault properly involved the actions of the two participants in the chase – Hancock and Jones. As such, the jury determined that Hancock's actions made her 65% at fault. Even under Plaintiff's theory, because Wal-Mart did not advise or instruct Hancock to flee, it could only be liable for some portion of the 35% the jury attributed to Jones, which would still not reduce Hancock's proportion of fault. Because Wal-Mart's actions could not have reduced Hancock's proportion of fault, the Court held that Plaintiff was not prejudiced by the trial court's decision to grant Wal-Mart a directed verdict.

Hancock's Fault as a Matter of Law – The Court also held that no reasonable jury could have concluded Hancock was 50% or less at fault. Although Beckham testified at trial that Hancock "had no idea" she was going into Wal-Mart to steal, the evidence showed that Hancock was at least aware she was fleeing a crime scene when Beckham jumped in the backseat and yelled to "get them the hell out of here." Therefore, the Court of Appeals affirmed on this basis as well even though the trial court failed to determine Hancock was more than 50% at fault as a matter of law.

HOLDING: The Court affirmed the trial court's decision to direct a verdict in favor of Wal-Mart based on Hancock being more than 50% at fault for two reasons: (1) The jury's factual determination of how fault should be apportioned is binding on Plaintiff even though Wal-Mart's actions and omissions were not included; and (2) Hancock was more than 50% at fault as a matter of law.

Verdict Reports

Type of Action: Medical Malpractice

Injuries alleged: Transected tendon

Name of Case: Linda H. Mason v. Jon Carter, M.D., and Robert Bostic, P.A.

Court: Circuit Court-Charleston County

Case number: 10-CP-10-4067

Name of Judge:
The Honorable Stephanie P. McDonald

Amount: Defense Verdict

Date of Verdict: May 24, 2012

Attorneys for defendant (and city):
Molly H. Craig, Chilton Grace Simmons, Anne S. Reid, Charleston, South Carolina

Description of the case: The Plaintiff sued an emergency medicine physician and physician's assistant alleging they failed to properly diagnose her hand injury during three visits to the emergency department resulting in permanent loss of motion and permanent damage. Plaintiff sued for actual damages, medical specials, lost wages, and pain and suffering. The Defendants alleged the injury was not diagnosable at the time of treatment, and the Plaintiff was comparatively negligent by failing to return for follow-up, as directed. The jury deliberated for one hour and returned a defense verdict finding the Defendants did not breach the standard of care.

Type of Action: Adulterated Food

Injuries alleged: Plaintiff alleged to have suffered emotional distress and physical injury from discovering an amphibean in her salad purchased from the defendant.

Name of Case: Smith vs. Poultry in Motion, LLC

Court:
Richland County Magistrate's Court, Central Division

Case number: 2011CP4001351

Name of Judge: The Honorable Timothy Edmond

Amount: Defense Verdict

Date of Verdict: July 17, 2012

Attorney for defendant:
James Brogdon, Columbia, SC

Type of Action: Medical Malpractice

Injuries alleged: Avulsion Injury to Leg, Infection and Permanent Damage

Name of Case: *Lawrence Charles Polk v. Bon Secours St. Francis Hospital, Steven A. Feingold MD and Charleston Emergency Services, LLC*

Court: Circuit Court-Charleston County

Case number: 10-CP-10-496

Name of Judge:
The Honorable Stephanie P. McDonald

Amount: Defense Verdict

Date of Verdict: August 31, 2012

Attorneys for defendant: Molly H. Craig, Jennifer F. Nutter, Anne S. Reid, Charleston, South Carolina

Description of the case: The Plaintiff presented at the emergency department following a crush injury with massive tissue loss which occurred when a large piece of concrete fell and injured the Plaintiff's left leg. The Plaintiff sued the emergency room physician alleging that he failed to properly clean the wound and failed to order prophylactic antibiotics to prevent infection of the wound. The Plaintiff argued that the contaminated material left in the wound caused a severe infection requiring subsequent surgeries and permanent damage. The Defendants proved the Plaintiff's injury was properly treated in the emergency department and prophylactic antibiotics were not medically indicated. Further, the Defendants proved that even if prophylactic antibiotics were ordered, these antibiotics would have no effect on the rare infection contracted by the Plaintiff. After a five day trial, the jury deliberated for less than an hour and returned a defense verdict finding the Defendants did not breach the standard of care.

Type of Action: Automobile Accident/Negligent Hiring

Facts: Defendant Hall, while performing "wear testing" on tires of corporate defendant, failed to yield the right of way and caused an accident with Plaintiff, an Anderson County Investigator. Plaintiffs alleged that corporate defendant should have ensured more stringent hiring standards for the driver's of such vehicles.

Continued on next page

Alleged injuries: Plaintiff police investigator alleged to have suffered injury to his left shoulder, eventually disqualifying him from his law enforcement position and causing an earlier than desired retirement. Psychiatric testimony suggested that the premature loss of such a position led to emotional problems and inability to maintain gainful employment.

Name of Case:
Turner and Turner v. Christopher Hall , et. al

Court: Greenville County Court of Common Pleas

Case #: 2010 - CP- 23-9875

Tried before: Jury

Judge: Gary Hill

Amount of verdict: Verdict for Plaintiff but for $0 damages

Date of verdict: June 15, 2012

Demand: $2.1 million plus punitives

Attorneys for Defendants: Christopher Hall represented by Jack Riordan of Smith Moore Leatherwood. Corporate Defendant represented by Eric Tonnsen of Gallivan, White & Boyd, P.A. at time of trial (now with Eller Tonnsen Bach)

Highest offer: $100,000 offer of judgment

Type of Action: Medical Malpractice

Injuries alleged: Short Bowel Syndrome and Loss of Consortium

Name of Case: *Doris F. Atkinson and William E. Atkinson, Jr. v. James A. Williams, Jr., MD and South Carolina Oncology Associate*

Court: Circuit Court-Richland County

Case number: 10-CP-40-5705

Name of Judge:
The Honorable George C. James, Jr.

Amount: Defense Verdict

Date of Verdict: October 12, 2012

Attorneys for defendant:
William C. McDow, Richardson Plowden & Robinson, PA., Columbia,, South Carolina

Description of the case: The Plaintiffs filed a medical malpractice action against a gynecologist-oncologist surgeon and his practice in connection with the injuries of a fifty-nine year old woman as a result of the removal of a pelvic mass worrisome for ovarian carcinoma and return to surgery for treatment of a partial small bowel obstruction. The Plaintiff had a previous history of surgery for a small bowel obstruction, re-obstruction resulting in small bowel removal during the same hospitalization and resulting abdominal adhesions. The Plaintiff alleged the doctor was negligent in performing the initial surgery, failing to diagnose a post-operative small bowel perforation and/or treat a small bowel obstruction, or in the alternative, failure to delay return to surgery until the hostile abdomen calmed down. There were also issues of lack of informed consent. Plaintiff did have a perforation after the second surgery, which resulted in an additional four surgeries and resulted in her short bowel syndrome. Medical bills totaled approximately $561,000. Defense presented expert testimony that the Defendant Doctor met the standard of care. The case was tried for a week and the jury returned a defense verdict.

Type of Action: Medical Malpractice

Injuries alleged: Death

Name of Case: Delwyn Williams, individually, and as the Personal Representative of the Estate of Jacqueline Williams v. Milestone Family Medicine, P.A. and Richard Leland, M.D.

Court: Greenville County Court of Common Pleas

Case number: 10-CP-23-5560

Name of Judge: The Honorable Garrison Hill

Amount: Defense Verdict

Date of Verdict: September 21, 2012

Attorneys for defendant (and city): Jamie Hood and Davis Rice (Charleston, South Carolina)

Description of the case: The Plaintiff filed a medical malpractice action against a family practice physician and his practice in connection with the death of the Plaintiff's spouse. Based on the autopsy report, the Plaintiff alleged that the decedent died from a heart condition known as Arrhythmogenic Right Ventricular Cardiomyopathy (ARVC). The Plaintiff alleged that the doctor should have referred the decedent to a cardiologist after the decedent presented with complaints of chest pain, and if a referral was made, the decedent's heart condition would have been diagnosed and treated. The defense presented expert testimony from two of the world's leading authorities on ARVC who concluded that the decedent did not have ARVC and that the autopsy pathologist had incorrectly diagnosed the decedent with this condition. The defense also presented testimony that the decedent's one time complaint of chest pain was inconsistent with a cardiac-related condition. The defense established that the doctor conducted an appropriate workup and evaluation, and that a cardiology referral was not warranted. The case was tried for five days, and the jury deliberated for less than one hour before returning a defense verdict in favor of the family practitioner and his practice.

2012

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SUMMER MEETING

See recap on page 14.

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November 8-11

The Sanctuary

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SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION
1 WINDSOR COVE, SUITE 305
COLUMBIA, SC 29223

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