THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

IN THIS ISSUE:

WINTER 2014
VOLUME 42
ISSUE 2
WWW.SCDTAA.COM

Summer Meeting
Grove Park Inn
Asheville, NC
July 23-25

Annual Meeting
Ritz Carlton
Amelia Island, FL
November 10-13

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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THE DefenseLINE

President's Message

by Curtis L. Ott

STATE OF THE SCDTAA (with a lot of Gratitude)

As the conclusion of 2014 draws nearer and I look forward to becoming the SCDTAA's Immediate Past President, I am privileged to report to you on the state of the SCDTAA. I am extremely proud to advise that our association remains as strong as ever with a bright future ahead. The leadership, both past and present, has created the best state legal defense organization in the country. With our current Board of Directors and the swelling interest and involvement of our younger members, we will see even greater success in future years.

One of the perks of my current position is the opportunity to brag about your Board and Executive Director. Collectively, they worked diligently to achieve our 2014 goals. Your Board consists of dedicated and hard-working members who not only accomplish what they are asked, but do so with the desire and ability to exceed expectations. I cannot personally thank them enough for making my experience a smooth and rewarding one, and we all owe them a round of applause.

Our major events in 2014 featured unsurpassed CLE programming and opportunities to grow our professional skills. From the Trial Academy to the Summer Meeting to the Annual Meeting, and everything in between, the content of the programs was timely and interesting. Our Construction, Corporate Counsel and Workers' Compensation seminars all provided focused information to our members practicing in those areas. The editions of this magazine continue to amaze us with their quality and beneficial material. We enjoyed our annual legislative reception at the Oyster Bar and the SCDTAA PAC remains financially strong, thus allowing our association to monitor and influence the politics and legislation affecting our membership. In 2014, we also focused on the next generation of members and diversity through receptions and programs dedicated to our Young Lawyers and Women in the Law committees. On the technology front, our website is being overhauled to improve access to the SCDTAA information that benefits our members.

Additionally, 2014 offered frequent opportunities for professional and personal interaction with state and federal judges and workers' compensation commissioners. These opportunities greatly enhance the civility that is vitally important to our profession. We are extremely grateful to the Justices, Judges and Commissioners for their support of the SCDTAA. Their regular and substantial participation in our educational and social events is one of the greatest benefits of SCDTAA membership. We also recognize the strong relationships the SCDTAA has with our sponsors and the importance of their support.

We all owe a special thanks to your current Executive Committee – Ron Wray, William Brown, David Anderson and Sterling Davies. I value their wisdom, encouragement and friendship. I also hope I never miss an opportunity to praise and thank the SCDTAA's Executive Director, Ms. Aimee Hiers. Aimee's institutional knowledge, organizational skills and resourcefulness greatly enhance all the benefits we provide to our members. I hope you will join me in thanking the Executive Committee, Aimee, and all our Board Members. We also are indebted to all the Past Presidents whose vision and leadership have made the SCDTAA what it is today.

My final thank you is for allowing me to serve on the Board for the past twelve years and for the very special privilege of being President. Nothing has enriched and benefitted my practice more than SCDTAA membership, and I treasure the relationships I have made through the association. As I repeated many times this year, you too can enjoy this same experience simply by deciding to become more involved. I hope to see you at the Annual Meeting in Pinehurst in November to celebrate a great year. I also am eager to watch our rising leaders take us to even greater heights.

Thank you,

Hemphill Award Given to W. Hugh McAngus

by John C. Hawk, IV

During the SCDTAA Annual Meeting on November 6-8, 2014, Past-President W. Hugh McAngus was awarded the SCDTAA's highest honor, the Hemphill Award. The award was presented by Hugh's long-time colleague and close friend, Rusty Goudelock.

The Hemphill Award, based on distinguished and meritorious service to legal profession and the public, is awarded to those instrumental in developing, implementing and carrying through the objectives of the SCDTAA. Hugh is only the 16th recipient of the Award.

Hugh is a 1972 graduate of the University of South Carolina and a 1976 graduate of the University of South Carolina School of Law. He was admitted to the bar in 1976 and has represented his clients with great professionalism and enthusiasm since that time. He is a founding member of one of the state's largest and most-respected firms, McAngus, Goudelock & Courie, and is a leader in the workers' compensation bar. He is also a South Carolina-certified arbitrator and mediator.

Professionally, Hugh has been an active member of the South Carolina Defense Trial Attorneys' Association. He served on the Executive Committee from 1985 through 1990 and as an officer from 1990 to 1994, culminating in his term as President. He is also a member of the American Bar Association, South Carolina Bar Association, Richland County Bar Association, Defense Research Institute, South Carolina Workers' Compensation Educational Association, South Carolina Self-Insurers Association, and the North Carolina Association of Self-Insurers. Hugh served many years on the South Carolina Self-Insurers Association Executive Committee and as their President in 2007. Hugh has also been recognized in Best Lawyers in America from 2003 to 2013. He is also consistently recognized by Outstanding Lawyers of America, Super Lawyers, and various other groups. He is widely-regarded as an excellent attorney.

Most importantly, Hugh is respected by all who know him. He is never too busy to mentor a young lawyer or to help resolve a conflict. He is a zealous advocate for his clients, but plaintiffs and defense attorneys will quickly agree that he does it with true professionalism and class. What separates Hugh from so many other defense lawyers is his friendship, commitment, honesty, integrity, professionalism, trustworthiness, kindness, and selflessness. Moreover, he has continued to be a great friend to the SCDTAA, playing a vital role on the Nominating Committee and as a Past-President representative.

Editor's Note

by John C. Hawk, IV, Graham P. Powell, J. Derham Cole, Jr., and Breon C. M. Walker

Being Thankful

This is a crazy time of year. As defense lawyers governed by the billable hour, our lives are busy year round (and when they're not, we're worrying about why they're not more busy). Then come November and December, and we transition from merely frantic to outright frenetic. As if year-end collections goals weren't enough, we throw in all the hustle and bustle that accompanies the holiday season. Sure-most of it is fun. The point is that, unless you're on a yoga retreat, there's not much time for personal reflection. So let's take a moment to reflect on what we're thankful for. As defense lawyers, it's a long list.

First, our clients. Sure, you worked hard your whole life to get here, including three grueling years of law school, but it'd all be for naught if it weren't for our clients. They allow us to make a living doing what we love. They put their absolute faith in us to guide them through the legal system. Along the way, they share insights about their professions and industries, making us better at what we do. Frequently they become friends. This is a great time of year to reach out to clients and tell them how much you appreciate their business.

Second, our colleagues. Lawyers from other states constantly marvel over the collegiality of the South Carolina bar. Need an extension? No problem. Trial date doesn't work for your witness? No biggie. For the most part, the lawyers we practice with every day are professional and civil, making our jobs that much more enjoyable. For that, we should give thanks.

Finally, the judiciary. We are blessed with some of the finest and most thoughtful judges in the country. Further, as we are reminded every year at the Annual Meeting, they are also some of the most personable. To the 34 judges who attended this year's Annual Meeting in Pinehurst, thank you for spending your free time with us and allowing us to get to know you better. It makes the practice of law that much more enjoyable.

We wish you all a wonderful holiday season.

John C. Hawk, IV

Graham P. Powell

J. Derham Cole, Jr.

Breon C. M. Walker

SCDTAA Launchs New Website

We are pleased to announce that the new SCDTAA website will be launching shortly. While everyone will surely enjoy the modern updates and features, the new website marks an important digital transistion for the Association. Previously the Association used a template provided by DRI which offered very limited features and functionality. The Association elected this year to make a capital improvement to develop its own "digital" infrastructure to allow the website, for the first time, to interact with the Association's other IT systems. While we hope everyone enjoys the new features (like Google search), the real magic is what is going on behind "the curtain." The new site offers flexibility as the Association grows its digital footprint. Take a second and give the new website a visit. We hope you like what you see.

www.SCDTAA.com

MEMBER NEWS

SCDTAA Docket

Collins & Lacy Attorneys Reflect Firm's Commitment to Community Service

Collins & Lacy, P.C. is pleased to recognize Brian Comer and Chet Chea for their commitment to community service. Both attorneys have been named to Board of Director positions in the Midlands and Upstate.

Collins & Lacy Attorney Recognized by National Academy of Distinguished Neutrals

Collins & Lacy, P.C. is pleased to announce Jack Griffeth has been recognized for his mediation experience by The National Academy of Distinguished Neutrals (NADN).

Greenville Business Magazine Names Collins & Lacy Attorneys as Legal Elite

Collins & Lacy, P.C. is pleased to announce Ross Plyler and Logan Wells have been recognized by their peers as members of Greenville Business Magazine's 2014 Legal Elite of the Upstate.

Collins & Lacy Celebrates New Beginnings with New Leadership

Collins & Lacy, P.C. is celebrating new beginnings with the establishment of a new management committee to lead the firm on its mission of protecting and defending South Carolina businesses. The management includes Scott Wallinger, Christian Stegmaier, and Christopher Adams.

Collins & Lacy Names Partners-in-Charge for Statewide Offices

Collins & Lacy, P.C. is strategically positioning the law firm for growth and success by appointing Partners-in-Charge for its statewide offices. The new Partners-in-Charge are Jack Griffeth in Greenville, Bennett Crites in Charleston, and Will Bryan in Myrtle Beach.

Collins & Lacy's 2014 Super Lawyers Showcase Diverse Practices and Statewide Service

Eleven Collins & Lacy, P.C. attorneys spanning the firm's four statewide offices have been named 2014 South Carolina Super Lawyers and South Carolina Rising Stars in 11 different practice areas.

2014 South Carolina Super Lawyers:

Columbia

- Andrew Cole, Construction/Surety
- Joel Collins, Civil Litigation: Defense
- Pete Dworjanyn, Insurance Coverage
- Stan Lacy, Workers' Compensation

Greenville:

- Jack Griffeth, Alternative Dispute Resolution
- Mike Pitts, Employment Litigation: Defense
- Ross Plyler, General Litigation

2014 South Carolina Rising Stars:

Columbia

- Charles Appleby, Employment & Labor

Charleston:

- Bennett Crites, Personal Injury Defense

Myrtle Beach:

- Will Bryan, Transportation/Maritime
- Amy Neuschafer, Professional Liability Defense

Collins & Lacy Mediation Practice Expands as Scott Wallinger Becomes Certified Circuit Court Mediator

Collins & Lacy, P.C. shareholder Scott Wallinger has been certified by The South Carolina Supreme Court's Board of Arbitration and Mediator Certification to be a Circuit Court Mediator.

Four Carlock, Copeland & Stair Attorneys Named to Best Lawyers & Two Named to Best Lawyers "Lawyer of the Year"

Carlock, Copeland & Stair congratulate Kent T. Stair & R. Michael Ethridge for being selected as a 2015 Best Lawyers "Lawyer of the Year" in different practice areas.

In addition, the following attorneys who have been selected by their peers for inclusion in The Best Lawyers in America 2015:

- Kent T. Stair
  Construction Law - Lawyer of the Year
  Legal Malpractice Law
  Litigation - Construction
  Best Lawyer Since 2006

- D. Gary Lovell, Jr.
  Personal Injury Litigation
  Best Lawyer Since 2013
  R. Michael Ethridge
  Insurance Law
  Litigation – Construction – Lawyer of the Year
  Best Lawyer Since 2014

- N. Keith Emge, Jr.
  Professional Malpractice Law
  Best Lawyer Since 2014

Carlock Copeland Attorney Appointed as Chair of South Carolina Bar's Task Force on Attorney Wellness

The President of the South Carolina Bar has selected Carlock Copeland Partner Michael Ethridge to serve as chair of the South Carolina Bar's Task Force on Attorney Wellness.

Carlock Copeland Attorney Awarded Certified Litigation Management Professional Designation

Carlock, Copeland & Stair Partner Michael Ethridge was awarded the designation of Certified Litigation Management Professional (CLMP) by the Claims & Litigation Management Alliance (CLM) after completing the extensive requirements of the Litigation Management Institute.

Laura Paton Graduates from 2014 Leadership Academy

Congratulations to Carlock, Copeland & Stair Attorney, Laura Paton, for graduating from the 2014 Leadership Academy of the South Carolina Bar.

Elmore Goldsmith Attorneys Recognized in The Best Lawyers in America© for 2015 and Named to Greenville Business Magazine's Legal Elite of the Upstate 2014

- L. Franklin "Frank" Elmore: Construction Law and Litigation–Construction
- Mason A. "Andy" Goldsmith, Jr.: Construction Law and Litigation–Construction

Elmore Goldsmith Attorneys Recognized as South Carolina Super Lawyers

Three attorneys from Elmore Goldsmith have been named by South Carolina Super Lawyers Magazine for 2014.

- L. Franklin Elmore – Construction Litigation
- Mason A. Goldsmith, Jr. – Construction Litigation

Elmore Goldsmith attorney recognized by Super Lawyers as a Rising Star:

Bryan P. Kelley – Construction Litigation

Twenty-One Gallivan, White & Boyd Attorneys Named to Best Lawyers in America

Columbia:

- Johnston Cox
- Gray T. Culbreath
- John E. Cuttino
- William R. Harbison
- John D. Hudson, Jr.
- John T. Lay, Jr.
- Shelley S. Montague
- Curtis L. Ott

Greenville:

- W. Howard Boyd, Jr.
- Deborah C. Brown
- Stephanie G. Flynn
- H . Mills Gallivan
- Jennifer E. Johnsen
- C. Stuart Mauney
- C. William McGee
- Phillip E. Reeves
- T. David Rheney
- Greg P. Sloan
- Ronald G. Tate, Jr.
- Thomas E. Vanderbloemen
- Daniel B. White
- Ronald K. Wray II

H. Mills Gallivan Elected Secretary-Treasurer of the Federation of Defense and Corporate Counsel

Gallivan, White & Boyd, P.A. is pleased to announce that senior shareholder H. Mills Gallivan has been elected Secretary-Treasurer of the Federation of Defense and Corporate Counsel (FDCC).

Attorney Janice Holmes Accepted into the Leadership Columbia Class of 2015

Gallivan, White & Boyd, P.A. is pleased to announce that attorney Janice Holmes has been selected into the Leadership Columbia Class of 2015.

GWB Attorneys Lead the Way in Participation on the South Carolina Bar's iCIVICS Day

Gallivan, White and Boyd, P.A. attorneys recently took part in the South Carolina Bar's Third Annual iCivics Day. GWB attorneys volunteered to travel to local schools to promote the educational project designed to teach students about civics and inspire them to be active participants and leaders in the country's democratic system.

Attorney Jennifer Johnsen Honored with Appleman Award by the Federation of Defense and Corporate Counsel

Gallivan, White & Boyd, P.A. is pleased to announce that shareholder Jennifer Johnsen has been honored with the John Alan Appleman Award by the Federation of Defense and Corporate Counsel (FDCC).

Chambers & Partners Rank Gallivan, White & Boyd, P.A. and Three Attorneys as Leaders in New Law

Gallivan, White & Boyd, P.A. is pleased to announce it has been selected for inclusion in the 2014 edition of Chambers USA, Leading Lawyers for Business as a Leading Law Firm in Commercial Litigation. Additionally, firm attorneys Daniel B. White, Gray T. Culbreath, and John T. Lay, Jr. were chosen as leading business attorneys in the field of Commercial Litigation.

Continued on next page

Member News cont.

Ten GWB Attorneys Recognized as Legal Elite by Greenville Business Magazine

Gallivan, White & Boyd, P.A. is pleased to announce that ten of the firm's attorneys were recognized as being among Greenville's Legal Elite for 2014 by Greenville Business Magazine. Gallivan, White & Boyd's Legal Elite include:

- W. Howard Boyd, Jr. – Civil Litigation
- Todd R. Davidson – Corporate Law, Mergers & Acquisitions
- Jennifer E. Johnsen – Insurance
- Phillip E. Reeves – Insurance
- T. David Rheney – Insurance
- Luanne Lambert Runge – Healthcare
- Ronald G. Tate, Jr. – Construction
- Thomas E. Vanderbloemen – Intellectual Property
- Daniel B. White – Civil Litigation
- Michelle DeLuca Yarbrough – Workers' Compensation – Defense

Attorney Stuart Mauney Appointed to ABA Commission on Lawyer Assistance Programs Advisory Committee

Gallivan, White & Boyd, P.A. is pleased to announce that firm shareholder Stuart Mauney has been appointed to a one year term as a member of the ABA Commission on Lawyer Assistance Programs Advisory Committee.

David Rheney Named Lawyer of Year by Best Lawyers in America

The law firm of Gallivan, White & Boyd, P.A. is pleased to announce the selection of T. David Rheney as "Lawyer of the Year" in Insurance Law for Greenville by Best Lawyers.

Gallivan, White & Boyd Has Fourteen Attorneys Recognized by Super Lawyers

The law firm of Gallivan, White & Boyd, P.A. is pleased to announce that fourteen Gallivan, White & Boyd, P.A. offices have been selected for inclusion in Super Lawyers 2014. GWB attorneys appearing in the 2014 edition of Super Lawyers include:

Greenville:

- W. Howard Boyd, Jr. – Business Litigation
- Phillip E. Reeves – Insurance Coverage
- T. David Rheney – Personal Injury Defense: General
- Luanne Lambert Runge – Business Litigation
- Daniel B. White – Personal Injury Defense: Products

Columbia:

- Gray T. Culbreath – Class Action/Mass Torts
- John E. Cuttino – Civil Litigation Defense
- John T. Lay – Business Litigation
- Curtis L. Ott – Personal Injury Defense: Products

In addition, five GWB attorneys have been recognized as Rising Stars by Super Lawyers. Those attorneys include:

Greenville:

- Steven Edward Buckingham – Civil Litigation Defense
- W. Duffie Powers – Bankruptcy & Creditor/Debtor Rights
- Thomas E. Vanderbloemen – Business Litigation

Charlotte:

- James M. Dedman, IV – Personal Injury Defense: General

Columbia:

- Breon C.M. Walker – Personal Injury Defense: General

Breon C. M. Walker Chosen by the South Carolina Chamber's Diversity Council as a Committee Member

Gallivan, White & Boyd, P.A. is pleased to announce Breon C. M. Walker has been chosen by the South Carolina Chamber's Diversity Council as its newest committee member.

The McKay Firm's Senior Partner Named to Super Lawyers 2014 List

McKay, Cauthen Settana & Stubley, P.A. is excited to announce the firm's Senior Partner, Julius W. "Jay" McKay, II, has been named to the South Carolina Super Lawyers 2014 list for the sixth year in a row.

17 MGC Attorneys Included in the 2015 Edition of The Best Lawyers In America

McAngus Goudelock & Courie is pleased to announce the inclusion of 17 attorneys in the 2015 edition of The Best Lawyers in America. Additionally, Greenville attorney Mark Allison has been honored as "Lawyer of the Year" for Workers' Compensation.

Charleston:

- Mark Davis – Workers' Compensation Law - Employers
- Amy Jenkins – Employment Law – Individuals; Employment Law – Management; Litigation – ERISA; Litigation – Labor & Employment

Columbia:

- Weston Adams – Appellate Practice
- Sterling Davies – Commercial Litigation
- Scott Garrett – Workers' Compensation Law - Employers
- Mundi George – Workers' Compensation Law – Employers
- Rusty Goudelock – Workers' Compensation Law – Employers
- Jason Lockhart – Workers' Compensation Law – Employers
- Tommy Lydon – Commercial Litigation;

Litigation – Banking & Finance
- Hugh McAngus – Workers' Compensation Law – Employers
- Mullen Taylor – Water Law

Greenville:
- Mark Allison – Workers' Compensation Law – Employers
- Tom Chase – Insurance Law; Litigation – Insurance
- Vernon Dunbar – Workers' Compensation Law - Employers
- Erroll Anne Hodges – Workers' Compensation Law – Employers
- Doc Morgan – Commercial Litigation; Insurance Law; Litigation Insurance; Personal Injury Litigation – Defendants; Product Liability Litigation - Defendants
- Bill Shaughnessy – Workers' Compensation Law – Employers
- Shayne Williams – Workers' Compensation Law – Employers

MGC Long Run Partners with USO South Carolina

The MGC Long Run 15k and 5k races will return to Famously Hot Columbia, SC on Saturday, February 7, 2015. Net proceeds from the races will benefit USO South Carolina, whose mission is to lift the spirits of America's troops and their families.

Happel Scurry Joins MGC's Charleston Office

McAngus Goudelock & Courie is pleased to announce the addition of Happel Scurry in the Charleston office.

Eleven MGC Attorneys Named in 2014 South Carolina Super Lawyers Magazine

McAngus Goudelock & Courie is pleased to announce that eleven attorneys have been selected by their peers to the 2014 South Carolina Super Lawyers and Rising Stars lists.

Six attorneys were selected to the 2014 South Carolina Super Lawyers list and five attorneys were selected to the 2014 South Carolina Rising Stars list.

Those selected for the 2014 S.C. Super Lawyers listing include:
- Rusty Goudelock (Columbia) – Workers' Compensation
- Erroll Anne Hodges (Greenville) – Workers' Compensation
- Amy Jenkins (Charleston) – Employment & Labor
- Tommy Lydon (Columbia) – Business Litigation
- Hugh McAngus (Columbia) – Workers' Compensation

• Dominic Starr (Myrtle Beach) – Civil Litigation Defense

Those selected for the 2014 S.C. Rising Stars listing include:
- Amanda Blundy (Charleston) – Business Litigation
- Trippett Boineau (Columbia) – Construction Litigation
- Andy Delaney (Columbia) – Business Litigation
- Jason Pittman (Columbia) – Civil Litigation Defense
- Robert Sansbury (Charleston) – Civil Litigation Defense

The Long Run 2014 Raises $20,000 for Souper Bowl of Caring

McAngus Goudelock & Courie is pleased to announce that the inaugural Long Run 15k and Not-So-Long Run 5k raised $20,000 for Souper Bowl of Caring.

42 Nelson Mullins Columbia Attorneys Included in Best Lawyers in America

Forty-two Nelson Mullins Riley & Scarborough attorneys based in Columbia have been selected for inclusion in The Best Lawyers in America 2015.

Columbia:
- Stuart M. Andrews, Jr., Healthcare Law
- George S. Bailey, Trusts and Estates Litigation, Tax Law, Trusts and Estates
- Edward D. Barnhill, Jr., Real Estate Law, Real Estate Litigation
- C. Mitchell Brown, Appellate Law, Commercial Litigation
- Thomas A. Brumgardt, Corporate Law, Mergers & Acquisitions
- George B. Cauthen, Bankruptcy and Creditor-Debtor Rights/Insolvency and Reorganization Law, Bet-the-Company Litigation, Bankruptcy Litigation
- Karen Aldridge Crawford, Environmental Law, Environmental Litigation
- Christopher J. Daniels, Personal Injury Litigation - Defendants, Product Liability Litigation Defendants
- Travis Dayhuff, Healthcare Law
- Gus M. Dixon, Corporate Law, Mergers & Acquisitions Law, Securities/Capital Markets Law
- Dwight F. Drake, Government Relations
- David E. Dukes, Bet-the-Company Litigation, Commercial Litigation, Patent Litigation, Securities Litigation, Personal Injury Litigation - Defendants, Product Liability Litigation Defendants
- Mark C. Dukes, Intellectual Property Litigation, Technology Law
- Debbie Durban, Litigation – Labor & Employment

Continued on next page

- Carl B. Epps III, Personal Injury Litigation - Defendants
- Robert W. Foster, Jr., Personal Injury Litigation - Defendants, Product Liability Litigation Defendants
- Daniel J. Fritze, Corporate Law, Mergers & Acquisitions Law, Securities/Capital Markets Law, Securities Regulation
- James C. Gray, Jr., Administrative/Regulatory Law, Insurance Law
- Sue Erwin Harper, Employment Law – Management, Litigation – Labor & Employment
- Alice V. Harris, Healthcare Law
- Bernard F. Hawkins, Jr., Environmental Law, Environmental Litigation
- P. Mason Hogue, Jr., Corporate Law, Mergers & Acquisitions Law, Mergers & Acquisitions Litigation, Securities/Capital Markets Law
- William C. Hubbard, Commercial Litigation, Banking & Finance Litigation, Mass Tort Litigation /Class Actions - Defendants
- S. Keith Hutto, Commercial Litigation, Franchise Law, Banking & Finance Litigation
- Kenneth Allan Janik, Employee Benefits (ERISA) Law, ERISA Litigation, Tax Law
- J. Mark Jones, Commercial Litigation
- Frank B.B. Knowlton, Litigation – Bankruptcy, Mortgage Banking Foreclosure Law, Product Liability Litigation - Defendants
- D. Larry Kristinik III, Commercial Litigation, Securities Litigation
- John F. Kuppens, Commercial Litigation, Product Liability Litigation – Defendants
- James K. Lehman, Commercial Litigation, Mergers & Acquisitions Litigation, Securities Litigation
- Steven A. McKelvey, Jr., Franchise Law
- Edward W. Mullins, Jr., Bet-the-Company Litigation, Commercial Litigation, Personal Injury Litigation – Defendants
- Edward Poliakoff, Government Relations
- James Rogers, Mass Tort Litigation/Class Actions - Defendants
- R. Bruce Shaw, Mass Tort Litigation/Class Actions - Defendants, Personal Injury . LitigationDefendants, Product Liability Litigation - Defendants
- B. Rush Smith III, Bet-the-Company Litigation, Commercial Litigation, Banking & Finance Litigation, Mass Tort Litigation/Class Actions – Defendants,
- Stacy Taylor, Environmental Law
- David G. Traylor, Jr., Mass Tort/Class Actions – Defendants, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants
- Ralston B. Vanzant II, Real Estate Law
- Daniel J. Westbrook, Healthcare Law
- Thad Westbrook, Banking and Finance Litigation
- George B. Wolfe, Economic Development Law, Government Relations

Additionally, seven Columbia attorneys have been selected "Best of the Year" in their practice areas. The "Best of the Year" attorneys are:

- David G. Traylor, Jr., Person Injury Litigation – Defendants, Columbia
- Frank B.B. Knowlton, Litigation, Bankruptcy, Columbia
- Gus M. Dixon, Securities/Capital Markets Law, Columbia
- James C. Gray, Jr., Insurance Law, Columbia
- James F. Rogers, Mass Tort Litigation/Class Actions – Defendants, Columbia
- Kenneth A. Janik, Litigation – ERISA, Columbia
- Robert W. Foster, Jr., Product Liability Litigation – Defendants, Columbia

Nelson Mullins' Karen Crawford Selected for Who's Who Legal

Legal publisher Law Business Research has selected Nelson Mullins Riley & Scarborough LLP's Columbia, S.C. partner Karen Aldridge Crawford for its Who's Who Legal: Environment 2014 directory.

Sarah Eibling Invited Into Claims and Litigation Management Alliance

The Claims and Litigation Management Alliance has invited Sarah Eibling, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, to join its membership.

Corky Harper Elected To College of Labor and Employment Law

Sue Erwin "Corky" Harper, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office was recently elected as a Fellow in the College of Labor and Employment Lawyers.

Bill Latham Receives Mediation, Arbitration Certifications

Bill Latham, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, has received certifications, as both a mediator and arbitrator, by the South Carolina Supreme Court's Board of Arbitrator and Mediator Certification.

Legal Publisher Chambers and Partners Recognizes Nelson Mullins Columbia Attorneys

Legal directory publisher Chambers and Partners has recognized Nelson Mullins Riley & Scarborough LLP in its national category for its products liability and mass torts litigation.

Chambers recognized Mr. Dukes for his product liability and mass tort practice and Mr. McKelvey for transportation: road (carriage/commercial).

The organization also ranked Nelson Mullins' South Carolina practices in:

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

Columbia:

- Karen Aldridge Crawford, Environment
- Gus Dixon, Corporate/M&A
- David Dukes, Product Liability and Mass Torts, Litigation: General Commercial
- Daniel J. Fritze, Corporate/M&A
- Sue Erwin Harper, Labor & Employment
- Bernard F. Hawkins Jr, Environment
- John T. Moore, Corporate M&A: Banking and Finance

Greenville:

- William H. Foster III, Labor & Employment
- Neil E. Grayson, Corporate/M&A, Corporate/M&A: Banking and Finance
- John M. Jennings, Corporate/M&A, Corporate/M&A: Banking & Finance
- Samuel W. Outten, Litigation: General Commercial
- Marvin Quattlebaum Jr., Litigation: General Commercial
- Bo Russell, Corporate/M&A

Charleston

- G. Mark Phillips, Litigation: General Commercial

Legal Guide Publisher Legal 500 Recognizes Nelson Mullins Attorneys, Practices

Legal directory publisher The Legal 500 has recognized Nelson Mullins Riley & Scarborough LLP in two practice areas along with 6 attorneys.

Product liability and mass tort defense: pharmaceuticals and medical devices:

- David E. Dukes (Columbia, SC)
- J. Mark Jones (Columbia, SC)
- James F. Rogers (Columbia, SC)
- Samuel W. Outten (Greenville, SC)

Product liability and mass tort defense: automotive/transportation:

- Christopher C. Genovese (Columbia, SC)
- Deirdre S. McCool (Charleston, SC)

Twenty Columbia Nelson Mullins Attorneys Selected for 2014 Super Lawyers

Twenty Nelson Mullins Riley & Scarborough LLP attorneys based in Columbia have been selected by their peers to the 2014 list of South Carolina "Super Lawyers" and "Rising Stars" for their respective practice areas. Additionally, Columbia partner George Cauthen was among the top ten vote-getters in statewide balloting.

Columbia:

- Stuart M. Andrews Jr., Healthcare
- George S. Bailey, Estate Planning & Probate
- Mattison Bogan, Appellate (Rising Star)
- Mitchell Brown, Appellate
- George B. Cauthen, Bankruptcy & Creditor/Debtor Rights
- Karen Aldridge Crawford, Environmental Litigation
- David E. Dukes, Class Action/Mass Torts
- Carl B. Epps III, Business Litigation
- Robert W. Foster, Jr., Business Litigation
- James C. Gray, Jr., Business Litigation
- Sue Erwin Harper, Employment & Labor
- William C. Hubbard, Business Litigation
- S. Keith Hutto, Business Litigation
- Francis B.B. Knowlton, Bankruptcy & Creditor/Debtor Rights
- John F. Kuppens, Personal Injury Defense: Products
- Steven A. McKelvey, Business Litigation
- John T. Moore, Bankruptcy & Creditor/Debtor Rights
- Edward W. Mullins Jr., Business Litigation
- Matthew D. Patterson, Business Litigation (Rising Star)
- James F. Rogers, Personal Injury Defense: Medical Malpractice
- R. Bruce Shaw, Class Action/Mass Torts
- Carmen Harper Thomas, Banking (Rising Star)
- Daniel J. Westbrook, Healthcare

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

Nexsen Pruet remains on The National Law Journal's list of the 350 largest law firms in America. This year, only two South Carolina-based firms made the list.

Nexsen Pruet Awards Four Scholarships

Nexsen Pruet presented scholarships to law school students planning legal careers in North and South Carolina at a 'NP Scholars Day' event at its offices on Main Street in Columbia.

The scholarship recipients are Christina Anderson (University of North Carolina School of Law), Victoria Bennett (North Carolina Central University School of Law), Ashia Crooms (University of South Carolina School of Law) and Akemini Isang (University of South Carolina School of Law).

Nexsen Pruet Attorneys Named Super Lawyers

Charleston

- Marvin Infinger (Business Litigation)
- Brad Waring (Business Litigation).

Greenville

- David Moore (Insurance Coverage),

Continued on next page

Myrtle Beach

- Elbert Dorn (Personal Injury Defense: Products)

Additionally,Amy Harmon Geddes (Insurance Coverage) is listed as a "Rising Star"

Brad Waring Reappointed to the South Carolina Judicial Council

Nexsen Pruet attorney Brad Waring has been reappointed by SC Supreme Court Justice Jean Toal to serve an additional four-year term on the South Carolina Judicial Council. His term will expire on June 30, 2018.

Two Roe Cassidy Attorneys Selected for Inclusion in Best Lawyers 2015

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 2015.

Randy Moody – Litigation - Labor & Employment; Employment Law - Individuals; Employment Law - Management.

Clark Price - Medical Malpractice - Defense.

Seven Roe Cassidy Attorneys Names to Greenville Business Magazine's Legal Elite 2014

- Pete Roe – Bank and Finance Law
- Bill Coates – Criminal Law
- Clark Price – Healthcare Law
- Randy Moody – Labor and Employment
- Trey Suggs – Civil Litigation
- Josh Smith – Environmental Law
- Ella Barbery – Estates and Trust

Four Roe Cassidy Attorneys Selected for Inclusion in 2014 South Carolina Super Lawyers and Rising Stars

Roe Cassidy Coates and Price, P.A. is pleased to announce that four of its attorneys have been recognized in the 2014 South Carolina Super Lawyers and Rising Stars lists.

Super Lawyers:

- Bill Coates – Business Litigation
- Randy Moody – Business Litigation

Rising Stars:

- Trey Suggs – Professional Liability Defense
- Josh Smith – Business Litigation

Richardson Plowden's Bias (center) Presented with Jonathan Jasper Wright Award

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Sheila M. Bias was presented with the Jonathan Jasper Wright Award by the University of South Carolina (USC) School of Law's Black Law Students Association (BLSA).

Five Richardson Plowden Attorneys Selected to 2015 edition of Best Lawyers in America

The 2015 edition of The Best Lawyers in America features five Richardson Plowden & Robinson, P.A. attorneys who were selected by their peers: Leslie A. Cotter, Jr. for legal malpractice law; Frederick A. Crawford for health care law; Steven W. Hamm for administrative and regulatory law; Frank E. Robinson II for real estate law; and Franklin J. Smith, Jr. for construction law.

Frederick A. Crawford of Richardson Plowden Certified as a Circuit Court Mediator

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Frederick A. Crawford has been certified as a circuit court mediator by the South Carolina Supreme Court's Board of Arbitrator and Mediator Certification. Crawford joins 11 other Richardson Plowden attorneys who are certified arbitrators and mediators.

Six Richardson Plowden Attorneys Selected to 2014 South Carolina Super Lawyers:

Richardson Plowden & Robinson, P.A., is pleased to announce that five of its attorneys from the Columbia office, George C. Beighley, Emily R. Gifford, Eugene H. Matthews, William C. McDow, and Franklin J. Smith, Jr., and one of its Myrtle Beach attorneys, Marian W. Scalise, have been selected to the 2014 South Carolina Super Lawyers listing.

Smith Moore Leatherwood Announces 5 of the 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 2015.

Charleston:

- H. Michael Bowers: Commercial Litigation

Greenville:

- Steven E. Farrar (10): 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)
- Jack Riordan: Personal Injury Litigation (Defendants)
- Kurt M. Rozelsky: Personal Injury Litigation (Defendants), Product Liability Litigation (Defendants)

Smith Moore Leatherwood Receives Rankings in 2014 Chambers Guide

Two Smith Moore Leatherwood attorneys earned recognition in the 2014 Chambers USA Guide by Chambers and Partners, publisher of the world's leading guides to the legal profession.

Litigation:

- Steven E. Farrar, Greenville, SC
- Robert D. Moseley, Greenville, SC

Smith Moore Leatherwood Attorney Steve Farrar Appointed to Lawyers for Civil Justice Board of Directors

Smith Moore Leatherwood Partner Steve Farrar has been appointed to the Lawyers for Civil Justice (LCJ) Board of Directors, a national organization of defense lawyers and corporate counsel dedicated to fairness and improvements within the civil justice system.

Two Smith Moore Leatherwood Attorneys Named 2014 Legal Elite by Greenville Business Magazine

Two attorneys from Smith Moore Leatherwood have been selected by their peers as part of Greenville Business Magazine's 2014 Legal Elite.

- Steve Farrar (Insurance)
- Jack Riordan (Criminal)

Smith Moore Leatherwood Attorneys Honored as South Carolina Super Lawyers and Rising Stars

Six attorneys from Smith Moore Leatherwood have been recognized by South Carolina Super Lawyers magazine in 2014. Steve Farrar, a litigator in the Greenville office, was recognized as one of the top 10 attorneys honored overall in South Carolina.

Four lawyers were named as Super Lawyers by the publication and three others were honored as South Carolina Rising Stars of 2014.

The Smith Moore Leatherwood attorneys honored as South Carolina Super Lawyers in 2014 are:

- Michael Bowers (Business Litigation)
- Steven Farrar (Business Litigation), South Carolina "Top 10"
- Robert Moseley, Jr. (Transportation/Maritime)
- Kurt Rozelsky (Transportation/Maritime)

The Smith Moore Leatherwood attorneys honored as South Carolina's Rising Stars of 2014 are:

- Jason Maertens (General Litigation)
- Fredric Marcinak III (Transportation/Maritime)

Forestbrook Middle School Mock Trial Team Takes Top Honors

Forestbrook Middle School Mock Trial Team, coached by Audra McCall Byrd, an attorney in the Myrtle Beach office of Turner Padget Graham & Laney, P.A., won the state championship. More recently, the Forestbrook Team won the inaugural "Battle of the Carolinas" where they defeated seven other teams from North and South Carolina.

Turner Padget Attorney Earns National Recognition for Excellence in Publication

Turner Padget Graham & Laney, P.A. is pleased to announce that David C. Marshall, a Columbia-based attorney, has been selected as the 2014 recipient of the G. Duffield Smith Outstanding Publication Award, presented by DRI, The Voice of the Defense Bar.

Julie Moose Elected Secretary of SCWLA

Turner Padget Graham & Laney, P.A. proudly announces that Julie J. Moose has been elected Secretary of the South Carolina Women Lawyers Association at the annual meeting.

South Carolina Super Lawyers at Turner Padget Graham & Laney

Turner Padget Graham & Laney, P.A. is pleased to announce that sixteen of the firm's attorneys have been named by Super Lawyers magazine as top attorneys in South Carolina for 2014.

Columbia:

- Reginald W. Belcher – Employment & Labor
- J. Kenneth Carter, Jr. – Personal Injury Defense, Products
- Catherine H. Kennedy – Estate & Trust Litigation
- Lanneau W. Lambert, Jr. – Real Estate
- Edward W. Laney, IV – Insurance Coverage
- Steven W. Ouzts – Class Action
- Thomas C. Salane – Insurance Coverage
- Franklin G. Shuler, Jr. – Employment & Labor

Charleston:

- John K. Blincow, Jr. – Professional Liability Defense
- Richard S. Dukes, Jr. – Personal Injury Defense – Products
- Elaine H. Fowler – Business/Corporate
- John S. Wilkerson – Insurance Coverage

Florence:

- J. Rene Josey – Business Litigation
- Arthur E. Justice, Jr. – Employment & Labor

Myrtle Beach:

- R. Wayne Byrd – Business/Corporate
- Otis Allen Jeffcoat, III – Real Estate

In addition, seven attorneys are named as South Carolina Rising Stars.

Charleston:

- Julian K. Allen – Personal Injury Defense General
- Ashley S. Heslop – Professional Liability Defense
- Nosizi Ralephata – Business Litigation
- Shawn R. Willis – Real Estate

Florence:

- C. Pierce Campbell – Business Litigation
- J. Jakob Kennedy – Professional Liability Defense

Myrtle Beach:

- Audra M. Byrd – Civil Litigation Defense

Collins & Lacy Attorneys Selected to Serve on Statewide Legal Committees

Collins & Lacy, P.C. is pleased to announce Andrew Cole will serve as chair of the Practice and Procedure Committee for the South Carolina Bar for

Continued on next page

Member News cont.

2014-2015, and Blakely Molitor will serve on the Narcotics Use Advisory Committee for the South Carolina Workers' Compensation Commission.

Best Lawyers in America Selects McKay and Stubley

McKay, Cauthen, Settana & Stubley, P.A. is pleased to announce that Julius W. "Jay" McKay, II and M. Stephen Stubley have been selected for inclusion in The Best Lawyers in America 2015.

McKay Firm Partner, Janet Brooks Holmes, Selected to Join Miss South Carolina Scholarship Organization Board of Directors

McKay, Cauthen, Settana & Stubley, P.A. is excited to announce that firm Partner, Janet Brooks Holmes, has recently been selected to join the Miss South Carolina Scholarship Organization Board of Directors.

McKay Firm's Brandon Jones Selected for Leadership Columbia Class of 2014- 2015

The Greater Columbia Chamber of Commerce has selected Brandon Jones, an attorney with McKay, Cauthen, Settana, & Stubley, P.A., as a member of Leadership Columbia, Class of 2014-2015.

McKay Partner, Kelli Sullivan, Named Chairwoman of the SC Bar Ethics Advisory Committee

McKay, Cauthen, Settana & Stubley, P.A. is proud to announce that Partner, Kelli Sullivan, has been asked to Chair the South Carolina Bar Ethics Advisory Committee. Sullivan has been a member of the committee for 10 years.

McKay, Cauthen, Settana & Stubley Featured as Leading Attorneys in Town & Country Magazine

McKay, Cauthen, Settana & Stubley, P.A. has been selected to be a featured firm in Town & Country magazine's annual 2014 Leading Attorneys Profile section. This special section highlights leading law firms throughout the country.

Best Lawyers in America Names 18 Ogletree Deakins Attorneys to 2015 List

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree Deakins announced today that 18 attorneys from the firm's South Carolina offices were selected by their peers for inclusion in The Best Lawyers in America 2015. The South Carolina-based Ogletree Deakins attorneys appearing on the 2015 Best Lawyers in America list include:

- Thomas A. Bright (Employment Law - Management, Litigation - Labor and Employment)
- William L. Duda (Employment Law - Management, Litigation - Labor and Employment)
- James H. Fowles, III (Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment)
- L. Gray Geddie, Jr. (Bet-the-Company Litigation, Commercial Litigation, Employment Law - Management, Labor Law - Management, Litigation - Environmental, Litigation - Labor and Employment)
- John C. Glancy (Employment Law - Management, Labor Law - Management)
- Katherine Dudley Helms (Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment)
- Matthew K. Johnson (Employment Law - Management)
- Phillip A. Kilgore (Commercial Litigation, Employment Law - Management, Labor Law - Management)
- Charles E. McDonald III (Employment Law - Management)
- Leigh M. Nason (Employment Law - Management, Litigation - Labor and Employment)
- Elizabeth B. Partlow (Environmental Law, Litigation - Environmental)
- R. Allison Phinney (Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment)
- Michael M. Shetterly (Employment Law - Management, Litigation - Labor and Employment)
- Charles T. Speth II (Employment Law - Management, Litigation - Labor and Employment)
- J. Hamilton Stewart III (Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment)
- Mark M. Stubley (Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment)
- Fred W. Suggs, Jr. (Employee Benefits (ERISA) Law, Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment, Litigation - ERISA)
- M. Baker Wyche III (Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment)

Smith Moore Leatherwood Attorney Steve Farrar Named Fellow by Litigation Counsel of America

Smith Moore Leatherwood Partner Steve Farrar has been selected as a Fellow of the Litigation Counsel of America (LCA), which recognizes the country's top trial attorneys.

Reggie Belcher Recognized by 2014 LawDragon

For the third consecutive year, Reggie Belcher, a shareholder in the Columbia law office of Turner Padget Graham & Laney P.A., has been recognized as one of the "Nation's Most Powerful Employment Attorneys – Up and Comers" in the June issue of Human Resource Executive magazine.

Turner Padget is pleased to announce that J. René Josey, a shareholder in our Florence office, has been appointed by the Supreme Court of South Carolina to serve on the Commission on Continuing Legal Education and Specialization.

21 Turner Padget Attorneys Chosen for Inclusion in the 2015 Best Lawyers in America

Lambert and Shuler Named Best Lawyer of the Year

Turner Padget Graham & Laney, P.A., is pleased to announce that twenty-one of its attorneys have been listed in the 2015 edition of Best Lawyers in America.

Charleston:

- John K. Blincow, Jr., Medical Malpractice – Defendants
- Elaine H. Fowler, Mergers and Acquisitions, Real Estate
- Michael G. Roberts, Health Care, Tax, Trusts & Estates
- John S. Wilkerson, III, Professional Malpractice Law – Defendants

Columbia:

- J. Kenneth Carter, Jr., Product Liability Litigation - Defendants
- Michael E. Chase, Workers' Compensation – Employers
- Cynthia C. Dooley, Workers' Compensation - Emloyers
- Catherine H. Kennedy, Litigation – Trusts & Estates, Trusts & Estates
- Lanneau W. Lambert, Jr., Banking and Finance Law, Corporate Law, Mergers and Acquisitions Law, Real Estate Law
- Edward W. Laney, IV, Personal Injury Litigation - Defendants
- Steven W. Ouzts, Mass Tort Litigation/Class Actions – Defendants; Product Liability Litigation - Defendants
- Thomas C. Salane, Insurance Law
- Franklin G. Shuler, Employee Benefits (ERISA Law), Employment Law – Management, Litigation – ERISA, Litigation – Labor & Employment, Mediation
- W. Duvall Spruill, Commercial Litigation, Litigation, Banking and Finance, Litigation, Construction, Litigation, Real Estate

Florence:

- J. René Josey, Appellate, Criminal Defense: Non-White-Collar and White-Collar
- Arthur E. Justice, Jr., Employment Law, Management; Litigation, Labor & Employment
- Julie Jeffords Moose, Commercial Litigation
- John M. Scott, III, Tax

Greenville:

- Eric K. Englebardt, Arbitration, Mediation

Myrtle Beach:

- R. Wayne Byrd, Commercial Litigation, Litigation: Banking & Finance, Mergers & Acquisitions, Trusts & Estates
- William E. Lawson, Litigation – Construction

Chambers USA Releases Turner Padget 2014 Rankings

Turner Padget Graham & Laney, P.A. is pleased to announce the inclusion of the firm and several of its attorneys in the 2014 edition of Chambers USA: America's Leading Lawyers for Business. In addition to the firm being noted for its Commercial Litigation and Labor and Employment practices, the six Turner Padget attorneys listed below have been recognized as leading attorneys in their fields.

Columbia:

- Reginald W. Belcher, Labor & Employment
- J. Kenneth Carter, Commercial Litigation
- Lanneau W. Lambert, Jr., Real Estate
- Franklin G. Shuler, Jr., Labor & Employment

Charleston:

- John S. Wilkerson, Commercial Litigation

Myrtle Beach:

- O. Allen Jeffcoat, Real Estate.

Cook Approved Certified Mediator

Turner Padget Graham & Laney, P.A. is pleased to announce that Matthew R. Cook has recently been approved by the South Carolina Board of Arbitrator and Mediator Certification as a Certified ADR Mediator.

Englebardt Selected for Furman Diversity Leaders Initiative

Eric K. Englebardt, managing shareholder of the Greenville office of Turner Padget Graham & Laney, P.A., will participate in the 18th Upstate class of the Riley Institute at Furman's Diversity Leaders Initiative (DLI).

Fowler Elected President of S. C. Bar Foundation

Turner Padget is pleased to announce that Elaine H. Fowler, a shareholder in the Charleston office and a member of the firm's Business Transactions Group, has been elected to serve as the 2014-2015 President of the South Carolina Bar Foundation effective July 1.

Continued on next page

Member News cont.

Jaclynn Bower Goings has transferred to the Columbia office of Turner Padget Graham & Laney, P.A. She previously worked in Turner Padget's Charleston office.

Justice Appointed to ABA Committee

Art Justice, a shareholder in the Florence office of Turner, Padget, Graham & Laney, P.A., has been appointed by ABA President William Hubbard to a three-year term on the ABA Standing Committee on Lawyers' Professional Liability.

Kunz Appointed to DRI YL Steering Committee and Named Vice Chair of DRI YL Corporate Counsel Subcommittee

Turner Padget is pleased to announce that Andrew ("Andy") Kunz, an attorney in our Columbia office, has been appointed to the DRI Young Lawyers Steering Committee and selected as the Vice Chair of the Corporate Counsel Subcommittee.

Frank Shuler Named 2014 Distinguished Lawyer Award

Turner Padget Graham & Laney, P.A. is proud to announce that Franklin G. Shuler, Jr., a certified specialist in employment and labor law, will be honored by the South Carolina Bar's Labor and Employment Law Section as the 2014 recipient of the Distinguished Lawyer Award.

Turner Padget Expands Business Transactions Practice with Marshall Tinsley

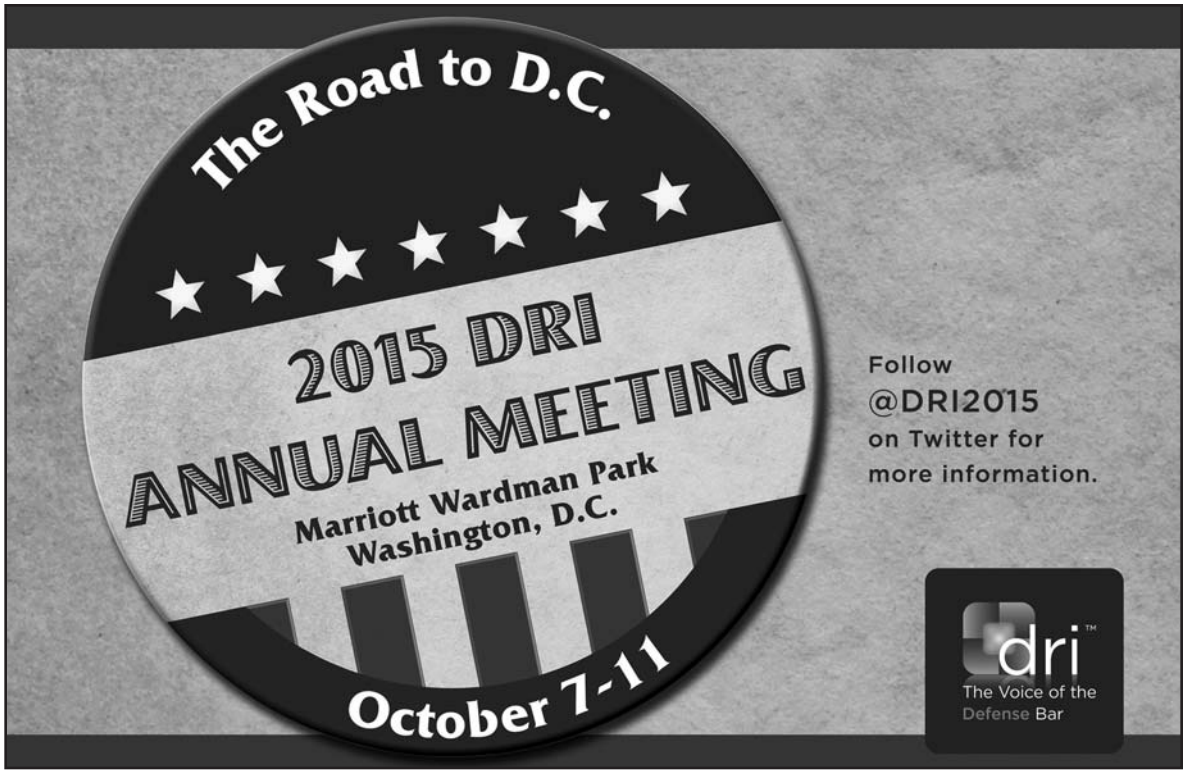
Turner Padget Graham & Laney, P.A. is pleased to announce that Marshall Tinsley has joined the firm's Business Transactions practice group in the Columbia office.

Shawn Willis Graduates from S. C. Bar Leadership Academy

Turner Padget Graham & Laney, P.A. is pleased to announce that Shawn R. Willis has graduated from the 2014 South Carolina Bar Leadership Academy and all eighteen participants were recognized at the Bar's House of Delegates meeting on May 8.

Andrew Countryman Elected to Professional Liability Defense Federation Board of Directors

Congratulations to Carlock, Copeland & Stair Attorney Andrew Countryman on his election to the Board of Directors of the Professional Liability Defense Federation ("PLDF") for 2014-2015.



2014 Summer Meeting Wrap Up

by William G. Besley

July 24-26, 2014 marked the 47th South Carolina Defense Trial Attorneys' Association's Summer Meeting. Members and their spouses were treated to a spectacular mountain weekend at the recently renovated Grove Park Inn. For those who missed the 47th Summer Meeting, you won't want to miss next year's meeting to experience the beautifully renovated property and the opportunity to enjoy one of the Association's premier meetings. Johnston Cox, Mark Allison, Trey Watkins, and I served as the Summer Meeting Committee, and we worked hard to plan a weekend that balanced cutting-edge CLE with networking and recreational activities. With the assistance of each CLE presenter, we were able to offer diverse and timely educational programming as well as entertaining social gatherings.

On Thursday, the meeting attendees arrived in Asheville finding old friends as well as many new faces. The Welcome Reception remains one of the highlights of the weekend as we all have a chance to step away from the office and spend some time with our friends and their families. The Young Lawyers' Division, headed by Trey Watkins, hosted a fantastic silent auction which included exciting items ranging from football tickets to weekends in the mountains to fishing trips. Every item that was auctioned was bid on and purchased, and we were thrilled to raise a record amount for our designated charities.

Friday morning kicked off with Judge Gary Hill, who provided an outstanding perspective on how defense litigators can best connect with the jury. Judge Hill concluded his presentation by taking questions from the audience on a variety of jury-related topics based upon his many years on the trial bench. The meeting attendees were then honored to have United States Senator Tim Scott address our association and provide his perspective on our roles as citizens and lawyers in the rapidly changing world.

The Substantive Law Committees for both Trucking Defense and Medical Malpractice Defense organized programs on relevant topics within their specialties, and each was well-attended. The Workers' Compensation Practitioners had an interactive discussion with all of the Commissioners. The breakouts were followed by a panel discussion on Law Firm Management by S.C. Bar President Cal Watson, Past SCDTAA President Jay Courie and SCDTAA Executive Board member Mitch Griffith, and moderated by Past SCDTAA President David Rheney. They jointly discussed the challenges facing our firms in the coming years and offered solutions as to how they respectively handle difficult issues within their firms.

Friday afternoon was a beautiful day, and there were a host of recreational activities from which to choose. Whether you played in the annual golf tournament, bounded through the treetop canopy on the zipline adventure, or visited the local micro-brewery for a tour and tasting, the wide variety of activities in and around Asheville offered something for everyone. After a full

Continued on next page

day of meetings and socializing, everyone gathered for the Bluegrass, Blue Jeans and Barbeque on the Blue Ridge. The setting was casual and so relaxing, some of us found it difficult to leave.

We started Saturday morning with a breakfast with the Workers' Compensation Commissioners, who were kind enough to spend some time with us. This gathering offered our members the opportunity to hear directly from the Commissioners and allowed them to discuss current trends that they are facing.

Following the SCDTAA membership meeting on Saturday morning, the attendees got to hear from two outstanding corporate counsel: Sam Konduros, who is the Executive Director of the Greenville Health System and Research Development Corporation, and Valerie Williams, the Deputy General Counsel for Michelin North America. Both Sam and Valerie gave outstanding presentations on their responsibilities and challenges as corporate counsel, and how they best interact with defense counsel with the various legal issues that affect their respective companies. The Workers' Compensation committee organized another great breakout session for the Workers' Compensation attendees, which was well attended.

We were then honored to hear a candid talk from the Honorable Aphrodite Konduros of the South Carolina Court of Appeals, who instructed us as to the best methods to place objections on the record and what to do when it seems futile. In the late morning, we had Substantive Law Breakouts from both the Law Firm Management Committee, and the Woman in Law Committee, which were well attended and informative. Our program ended on a high note Saturday with an outstanding presentation from Jim Cooney, of Womble Carlyle, who spoke on the Anatomy of a Hoax, the Duke Lacross Case.

The Summer Meeting continues to provide fantastic networking, professional development and social opportunities. It is also a great family vacation as the Grove Park Inn's children's program offers activities for children of all ages in the afternoons and evenings. So, if your schedule wouldn't allow you to get away to Asheville this past summer, be sure to join us next year. Until then, we look forward to seeing you in Pinehurst at our Annual Meeting!

THANK YOU TO OUR 2014 SUMMER MEETING SPONSORS

ABS

SEA

AWR

South Carolina Bar

CSI

South Carolina Bar Foundation

Dixon Hughes Goodman

Warren Forensic Engineers and Consultants

Exponent

Gallivan White & Boyd

McAngus Goudelock & Courie

Wilkes Law Firm

Robson Forensic

Womble Carlyle

Annual Meeting Recap

by James B. Hood

The Annual Meeting at Pinehurst kicked off on Thursday night with the Welcome Reception hosted by President Curtis Ott and his wife, Melrose. Members, judges and their guests enjoyed the outdoor reception while visiting with friends before heading to dinner. On behalf of the Association, I would like to express our appreciation and gratitude to all of our state and federal court judges and their families who were able to join us for this informative and fun-filled meeting.

On Friday morning, Matt Cairns, Past President of DRI, gave a thought provoking and inspiring talk about leadership in your organization, your firm and your life. The Association was delighted to recognize Matt as an honorary SCDTAA member and to thank him for his service to our profession. Chief Justice Jean Toal followed Matt and provided an enlightening update on the state of the judiciary. Next, Ron Diegel talked about the reptilian theory in trucking and transportation cases, and Amy Geddes provided an analysis of a recent corporate law decision Hansen v. Fields Company, LLC. The first day of our CLE session concluded with a judge's panel discussion led by Morgan Templeton. We would like to thank Judges Childs, Young, Newman and Lewis for providing helpful advice regarding motions and we even gleaned some insight on perspectives of kale salad.

On Friday afternoon, numerous social activities were offered and enjoyed by all who attended. The women in law subcommittee hosted a lively reception complete with specialty cocktails like strawberry mojitos. Our golfers and quail hunters enjoyed ideal weather on the greens and in the woods. As you may expect, there were plenty of stories about the guides and dogs at the hunt on Friday night and plenty of tall tales of the unconfirmed golf successes. The wine and food demonstration also earned rave reviews.

On Friday evening, we hosted our annual black tie dinner and dance. The gala was highlighted by the awarding of the Hemphill Award to Past President Hugh McAngus. It was a pleasure to honor such an avid supporter of the SCDTAA and we all enjoyed seeing Hugh surrounded by his entire family and colleagues who were eager to celebrate the well-deserved Hemphill Award. After dinner, The Finesse Band drew crowds to the dance floor for another memorable evening.

Continued on next page

On Saturday, the CLE commenced with a legislative update from Representative Derham Cole. He was followed by presentations from David Marshall who tackled the unique issue of damages in cases involving illegal aliens, Trey Suggs offered useful insight on the reptile tactics as seen in medical malpractice cases, Derek Newberry brought the group up to speed on recent developments in construction law, and Walt Barefoot educated the trial lawyers on how workers' compensation directly impacts their practices. The final presentation was a critical evaluation of the perception of jurors regarding the roles of men and women on trial teams. This presentation was enlightening and will certainly compel those attending to contemplate the composition of their next trial team. On Saturday afternoon, the avid golfers found their way back to the golf course where the famous No. 2 course challenged even our best golfers. On Saturday evening, we enjoyed a Taste of North Carolina with incredible oysters and seafood as well as a full offering of barbeque.

Thank you again to our brothers and sisters of the judiciary who attended. The SCDTAA always enjoys the opportunity to bring attorneys and judges together in great venues to foster the collegiality between the bench and the bar. For those who missed this year, we hope that you will join us next year when we return to the Ritz at Amelia Island November 4-8th.

The SCDTAA Needs You!

- ❑ Alternative Dispute Resolution
- ❑ Amicus Curiae
- ❑ Annual Meeting
- ❑ Commericial Litigation
- ❑ Construction Law
- ❑ Corporate Counsel
- ❑ Defense Line
- ❑ Employment Law
- ❑ Boot Camp Seminars
- ❑ Happy Hour Seminars
- ❑ Insurance and Torts
- ❑ Diversity/Membership
- ❑ Judicial
- ❑ Law Firm Management
- ❑ Legislative
- ❑ Medical Malpractice
- ❑ Marketing
- ❑ PAC Golf Tournament
- ❑ Products Liability
- ❑ Sponsorship
- ❑ Summer Meeting
- ❑ Trial Academy
- ❑ Trucking
- ❑ Website
- ❑ Women in the Law
- ❑ Workers' Compensation
- ❑ Young Lawyers

If you are interested in serving on a committee, please contact Aimee Hiers
SCDTAA Headquarters • 803-252-5646 • aimee@jee.com

PAC Golf Classic Recap

by J. Andrew Delaney

The Fifth Annual SCDTAA PAC Golf Classic was held on September 5, 2014 at the Columbia Country Club. The event drew our largest field to date with fourteen teams participating and raised over $14,000. The chief focus of the event is to give our Association a voice with the General Assembly. Past President Gray Culbreath remarked that he has been told by two General Assembly members that the SCDTAA's presence is beginning to be felt at the State House. This year's tournament was again sponsored by SEA Limited and CompuScripts once again sponsored the Hole in One contest. Additional sponsors included: EveryWord Court Reporting; Copper Dome; McKay Cauthen; Wall, Templeton & Holdrup; Murphy & Grantland; Sowell Gray; Nelson Mullins; and RIMKUS. The committee chairs of Johnston Cox, Anthony Livoti, and Andy Delaney along with Executive Director, Aimee Hiers, worked to put on a successful event.

The teams that participated came from the following firms and businesses: McAngus, Goudelock & Courie; Murphy & Grantland; Gallivan, White & Boyd; Richardson Plowden; The Hood Law Firm; A. W. Roberts Court Reporting; Nexsen Pruet; Aiken & Bridges; Sowell Gray; NOVA; Haynsworth Sinkler & Boyd; SEA; and Nelson Mullins. Low gross went to the McAngus, Goudelock & Courie team of Sterling Davies, Bo Williams, Andy Delaney, and Mark Allison. Low net went to the Nexsen Pruet team of Amy Geddes, Tim Hewson, Tanya Gee and Dennis Lynch.

We look forward to seeing you all again at the 2015 South Carolina Defense Trial Attorneys' Association PAC Golf Classic.

YOUNG LAWYER UPDATE

Silent Auction Sets New Record for Charitable Giving

by William W. Watkins, Jr.

The total effectiveness of a group of things each interacting with one another is different or greater than their effectiveness when acting in isolation from one another. Or, as Aristotle stated, "the whole is greater than the sum of its parts." This concept was proven true by this year's silent auction. Our organization set a new record bringing in over $12,700.00 to donate between the National Foundation for Judicial Excellence, the South Carolina Bar Foundation's Children's Fund, and Kid's Chance of South Carolina.

The success of the silent auction is due to our members, vendors, sponsors, management team and leadership who set forth new ideas and worked together to provide a great silent auction experience. Our members across the state were very helpful in obtaining auction items this year, and special recognition goes to those members who procured items with a total value of $1,000 or greater: Claude Prevost of Collins and Lacy, David Marshall of Turner Padget, Jay Thompson of Nelson Mullins, Alan Jones of McAngus Goudelock & Courie and Jamie Hood of the Hood Law Firm. In addition to many vendors who provided items for our auction this year, special recognition goes to those who were both sponsors of our meeting and who contributed to the silent auction: Applied Building Sciences, A. William Roberts, Jr. & Associates and Dixon Hughes Goodman.

Thanks to the vision of our executive director Aimee Hiers, we changed the format for the bidding process and all bids this past year were electronic via a mobile app. While the change in format had its challenges and hiccups, the overall experience for the bidders was a much more exciting auction. Therefore, we plan to continue using this format in the future, so download the "Handbid" app for your mobile device.

With the 2014 auction behind us, we are looking forward to our next event at the annual meeting. I look forward to seeing you at the Grove Park Inn in 2015.

Thank You to all of our Silent Auction Donors

Columbia Marriott,
Pinehurst Resort
Westin – Savannah
Mills House Hotel
Kiawah Sanctuary
Ritz Carlton Amelia Island
The Omni Grove Park Inn
The Cloister at Sea Island
New York Prime
Chesapeake House
Alabama Theatre
McAngus Goudelock & Courie
Legends in Concert
National Golf Management Company
Columbia County Club
Off Broadway Shoes
Brittons
Riverbanks Zoo
Chase Irons
Marjorie Stuart
Capital Ballroom Dance Studio
Pivotal Fitness
Stone River
Barre3 Columbia
Gallivan, White & Boyd
Richardson Plowden
Clines
Petal
Balsam Mountain Preserve,
Turner Padget Graham & Laney
Crescent Olive
Cooper Wilson
Wilkes Law Firm
Rue De Jean

Aiken Bridges
Hood Law Firm
Carowinds
Woodcreek and Wildewood
Shops of Provence
Handgun Planet
Clemson University
Happy Café
Three Fox Riding Farm
Allie-Mac
Womble Carlyle
McAngus Goudelock & Courie
Sports, Preservation Society
United States National Whitewater Center
Dixon Hughes Goodman, LLP
Wall Templeton
Charleston Pilots Association
Sporting Adventures International
Cantey Technology
AWR Court Reporting
Charleston Battery
Brackish Bowtie
Old South Carriage Company
Magna Court Reporters
9 80 Sauce
Rosen Litigation Technology
Williams Knife Company
Brookgreen Gardens
Applied Building Science
Celadon
Nelson Mullins
David Friedman
Home Design
Womble Carlyle

Commissioner Aisha Taylor

South Carolina Workers' Compensation Commission

by Derham Cole

Commissioner Aisha Taylor was appointed to the SC Workers' Compensation Commission on January 31, 2013. Her term will expire on June 30, 2020. Before her appointment to the Commission, Commissioner Taylor was a shareholder with Collins & Lacy, P.C., practicing primarily in workers' compensation defense and employment law. Commissioner Taylor graduated from the University of South Carolina in 2002 where she was a team captain of the 2002 Women's Track & Field National Championship Team. Commissioner Taylor graduated from the USC School of Law in 2006. Following graduation from law school, Commissioner Taylor clerked for the Honorable Brooks P. Goldsmith of South Carolina's Sixth Judicial Circuit. She and her husband, Henry, live in Blythewood with their two children.

Q. What has been the hardest part of transitioning from private practice to Commissioner?

A. The hardest part of the transition has been learning the administrative and policy aspects of my role as a Commissioner. In addition to hearing cases, the Commissioners also serve in a quasi-legislative capacity wherein we establish policies and procedures that affect the entire workers' compensation system.

Q. What has been the biggest challenge you face with the workers' compensation system?

A. The biggest challenge I've faced with the system has been a divide between those who fully embrace a change to a paperless, more technology based system, and those who are "old school" and prefer paper. Fortunately, I'm pretty flexible with either system, but we are definitely trending towards a completely paperless system.

Q. What advice do you have for lawyers appearing before you?

A. KNOW YOUR CASE!!! I am always so surprised when it is clear the attorney is not prepared for the hearing. I see it on both sides. It makes my role as a fact finder even harder when the lawyers cannot succinctly tell me their position and what facts to looks for in order to support it. An attorney who knows his or her case well enough to outline the position, the relief sought, and the supporting facts, within 5 or 10 minutes, is definitely preferable.

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

A. I often see lawyers come into a workers' compensation hearing and approach it as if we were in civil court. Many of the Rules of Civil Procedure and Rules of Evidence do not apply to workers' compensation hearings unless they are expressly codified in the Act or in our Regulations. An example that may be of particular interest to the SCDTAA is the whole idea of putting settlements on the record. In circuit court, Rule 43(k), SCRCP provides a settlement agreement placed on the record in open court is binding on the parties if the terms of such agreement are set forth in the record. This is not the case in workers' comp. Our Act and Regulations require all settlement agreements to be signed by the parties and either approved by or filed with the Commission before it is binding.

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

A. I knew I wanted to be a lawyer since I was 13 years old. I had success in debate club as well as mock trial during high school, and even though athletics altered my path a bit, I always had a deep passion for advocacy. I could always argue my side of a particular issue; however, when I began arguing just for the "sport" of it, I knew a career in the law was for me.

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

A. After law school, I had the privilege to clerk for The Honorable Brooks P. Goldsmith in the 6th Judicial Circuit. I learned so much during that year, and it has really shaped the attorney and Commissioner I have become. Judge Goldsmith was very careful and deliberate in his decision-making, and he had the most respectful judicial demeanor towards all of the litigants. As I prepared for my cases as an attorney, I often considered what Judge Goldsmith would say or think about a particular argument. Now, as a Commissioner, I try to conduct my hearings in the same manner I observed during my clerkship. I think this benefits all of our stake-

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DRI UPDATE

DRI Update

By Gray T. Culbreath

2014 has been a busy year for South Carolina and DRI. In May South Carolina hosted the annual DRI Regional meeting. The Mid-Atlantic Region, led by our own Sam Outten, joined with 2 other regions for a meeting in Charleston May 2 and 3 at the Charleston Marriott. The meeting brought together the Alabama, Georgia, Kentucky, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and Washington D.C State and Local Defense Organizations (SLDOs). The meeting, which had almost 50 attendees, included programming, a networking dinner and a Saturday morning address from Chief Judge John Few of the Court of Appeals.

Many of you received an email from me in September about FREE DRI membership opportunities that exist for members of the South Carolina Defense Trial Attorneys' Association who have never been a member of DRI. If you fit into that category, you can join DRI for the first year for free. If you are a young lawyer, defined as less than five years in practice, you are entitled to not only the free membership but also a free seminar voucher which is an up to an $800.00 value. This is an excellent opportunity to get your new associates who recently passed the bar plugged into DRI. Please contact me if you want more information as well as to obtain the membership documents.

The DRI Annual Meeting, which was chaired by our own John Kuppens, was held in October in San Francisco. The meeting took place at the San Francisco Marriot Marquis, and had not only fabulous CLE programs but also numerous networking opportunities. At that meeting John Kuppens was elected to the position of Second Vice President of DRI. This means that John Kuppens will be President of DRI in 2018, as he follows John Cuttino in that role. SCDTAA is honored to have two of our members from Columbia serve back to back as President of DRI.

The spring of 2015 will bring another "super regional" meeting that South Carolina will participate in – most likely in Florida. Prior the DRI regional meeting, the officers of the SCDTAA will attend the DRI leadership conference in Chicago in January.

If any of you have any questions about DRI please do not hesitate to contact me at gculbreath@gwblawfirm or 803-724-1850.

JUDICIAL PROFILE CONT. FROM PAGE 23

holders because Judge Goldsmith was such a great influence.

Q. From your observations, how has the use of technology impacted workers' compensation practice?

A. Technology has enabled attorneys to try more complex workers' compensation claims more effectively. All of the Commissioners have iPads and laptops, which allow for reviewing high volume medical records while we are on the road. Additionally, I have used my iPad to look at pictures, x-rays, and brain scans while the hearing is taking place. I can also view surveillance evidence simultaneously with hearing testimony, which allows for better perspective on the issues being presented. As stated earlier, lawyers will have to customize their use of certain technologies based upon the particular Commissioner's preferences; however, I believe technology opens the door for new and more innovative ways of presenting evidence.

Q. Is there a particular pet peeve that you have as it relates to conduct in your courtroom or for practitioners before you?

A. I do not like for attorneys to be overly animated when listening to testimony from the other side. By overly animated I mean extreme eye rolling, loud sighs, sucking teeth, slamming pens down, etc. It is rude and unnecessary. I hold employer representatives to the same standards as the attorneys.

Q. Attorneys take an oath that requires fairness, integrity and civility not only to the court but also in all written and oral communications. Has this been a problem you have observed?

A. Not at all! That is probably the biggest reason I love workers' compensation. The workers' compensation bar is relatively small and the large majority of attorneys get along very well.

Q. What do you enjoy doing in your spare time?

A. I love working out! I have been getting ready for a couple of 5K runs later this fall, and I recently started going to BodyPump at the YMCA.

Q. What was the last book you read?

A. I just finished Invisible by James Patterson. I love a good murder mystery!

ARTICLE

Judicial Hostility or Hospitality: The Enforceability of Arbitration Agreements in South Carolina

by Timothy M. McKissock, Erin R. Stuckey, and Brandon S. Smith [1]

In 1925, the Federal Arbitration Act ("FAA") was enacted in response to "widespread judicial hostility to arbitration agreements,"[2] and to "overcome courts' refusals to enforce agreements to arbitrate."[3] The landscape has changed regarding the enforcement of arbitration agreements under the FAA, and recent South Carolina decisions provide important guidance to businesses navigating the dispute resolution process. Specifically, South Carolina courts now analyze interstate commerce under a broader definition, which often implicates the FAA, making a carefully drafted arbitration agreement significant. This article will address: (1) the FAA's preemptive effect on South Carolina law, and (2) how interstate commerce is interpreted in the context of an arbitration agreement such that the agreement invokes the FAA.

I. FAA Preemption

The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" so long as there is "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract."[4] In other words, a party seeking to compel arbitration under the FAA must demonstrate: (1) the existence of a written arbitration agreement, and (2) that the written agreement is contained within a contract involving interstate commerce. The United States Supreme Court has long held that the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."[5] The conflict between state and federal law arises most commonly when states expressly prohibit arbitration of certain types of disputes or of claims between certain classes of persons. South Carolina serves as a prime example.

In the South Carolina Uniform Arbitration Act, the General Assembly explicitly carved out exceptions for the enforceability of arbitration agreements, excluding agreements between employers and employees, lawyers and clients, and doctors and patients, as well as agreements to arbitrate personal injury claims.[6] Although the FAA encompasses *any* written agreement to arbitrate provided the agreement involves interstate commerce, the South Carolina Uniform Arbitration Act applies to only certain written agreements.

This conflict raises preemption issues, which were directly addressed in the United States Supreme Court's 2012 decision in *Marmet Health Care Center, Inc. v. Brown*.[7] In *Marmet*, the Court held that West Virginia's refusal to enforce, as a matter of public policy, arbitration agreements that applied to claims alleging personal injury or wrongful death against nursing homes, was invalid. The Court held that the FAA preempted state law because the FAA was intended to ensure that arbitration agreements concerning interstate or foreign commerce are enforceable despite a state's prohibition of a particular type of arbitration agreement. In so holding, the Court concluded that the "FAA reflects an emphatic federal policy in favor of arbitral dispute resolution" which makes no exception for personal injury or wrongful death claims.[8] The Court made it clear that "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[9]

McKissock

Stuckey

Smith

Importantly, and consistent with the doctrine of preemption, the FAA does not prevent states from establishing additional requirements than are set forth in the FAA. Indeed, states may freely create rules for arbitration agreements so long as they do not "undermine the goals and policies of the FAA."[10] For example, the South Carolina Uniform Arbitration Act requires arbitration agreements to be "typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract,"[11] while the FAA contains no such requirement.

The South Carolina Supreme Court addressed this issue in *Bradley v. Brentwood Homes, Inc.*[12] In *Bradley*, the defendant conceded that its arbitration

Continued on next page

ARTICLE CONT.

agreement did not comply with the technical requirements of the South Carolina Uniform Arbitration Act because the arbitration provision was not underlined and did not appear on the first page of the contract. The Court recognized that although the application of South Carolina law "would have rendered the arbitration agreement completely unenforceable, consideration of the applicability of the FAA [was] required" because "the FAA would preempt application of . . . state law to the extent it invalidated the arbitration agreement."[13]

II. "Involving" Interstate Commerce

The FAA provides that a written provision in any contract "involving commerce" that requires disputes be resolved by arbitration shall be valid, irrevocable, and enforceable.[14] How courts should make the determination of whether interstate commerce is implicated has been the subject of numerous court decisions. The following cases illustrate the progression of the law in South Carolina regarding the interstate commerce requirement.

A. *Timms v. Greene*

In *Timms v. Greene*, the South Carolina Supreme Court held that a contract containing an arbitration provision between a nursing home and resident did not involve interstate commerce sufficient to invoke the FAA.[15] *Timms* involved a nursing home resident who suffered head and ear injuries when she was allegedly left unattended under a hair dryer. The Court reasoned that because the contract was for nursing home services performed in South Carolina, no interstate commerce was involved. To determine whether the agreement involved interstate commerce, the Court gave greater weight to whether the parties contemplated interstate commerce over the nursing home's actual interstate economic activity. Although the nursing home offered evidence of interstate involvement, namely the purchase of goods and supplies from out-of-state businesses that were used to serve its residents, the Court concluded that this was insufficient. Following the Supreme Court's opinion in *Timms v. Greene*, numerous South Carolina courts struck down arbitration agreements on the grounds that there was an insufficient nexus between the contract at issue and interstate commerce, and thus refused to compel arbitration pursuant to the FAA.

B. *Allied-Bruce Terminix Cos., Inc. v. Dobson*

In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, the United States Supreme Court held that the FAA should be read broadly and more consistent with Congress's Commerce Clause power, in this case preempting Alabama's anti-arbitration statute.[16] *Allied-Bruce* involved a contract between a homeowner and termite company that included an arbitration provision. The Court defined "interstate commerce" as the "functional equivalent of the phrase 'affecting commerce,' which normally signals Congress' intent to exercise its commerce power to the full."[17] The Court also determined that a broad interpretation of interstate commerce is consistent with the FAA's purpose to put arbitration provisions on equal footing with other terms in the contract, which would avoid creating an "unfamiliar test lying somewhere in no man's land" that would ultimately "breed[] litigation from a statute that seeks to avoid it."[18]

C. South Carolina Case Law Following *Allied-Bruce*

The South Carolina Supreme Court recently applied *Allied-Bruce*, and overruled *Timms v. Greene* and a similar case, *Mathews v. Fluor Corp.*, holding that a court can find that an agreement involves within interstate commerce without regard to whether the parties contemplated an interstate transaction.[19] In *Dean v. Heritage Healthcare of Ridgeway*, the Court held that "[t]o ascertain whether an arbitration agreement implicates interstate commerce and the FAA, 'the court must examine the agreement, the complaint, and the surrounding facts,' focusing particularly on 'what the terms of the contract specifically require for performance.'"[20] *Dean* involved a plaintiff who filed a medical malpractice claim against the defendants following the death of her mother, who was a resident of the defendants' nursing home. In applying the standard set forth in *Allied-Bruce*, the Court reasoned that the "common theme" of nursing home residency contracts "entail[s] providing residents with meals and medical supplies that are inevitably shipped across state lines," which amounts to involvement interstate commerce.[21] In so holding, the Court explicitly overruled *Timms* in its entirety as "a relic of the past" decided before the broad definition of interstate commerce was established in *Allied-Bruce*.[22]

Similarly, in enforcing a motion to compel arbitration in *Cape Romain Contractors, Inc. v. Wando E., LLC*, the South Carolina Supreme Court modeled its analysis according to the three instrumentalities of interstate commerce used by the United States Supreme Court in *United States v. Lopez*.[23] *Cape Romain* involved an arbitration agreement contained in a standard form contract distributed by the American Institute of Architects. The contract was between a subcontractor and general contractor for the construction of a marina. When the project engineer refused to certify further payment to the subcontractor due to the alleged defective construction of a dock, the subcontractor brought an action to recover payments against the general contractor and the property owner, who in response moved to dismiss and compel arbitration. The Court noted the following facts in determining that the parties' transaction involved interstate commerce:

> (1) that certain raw materials used in constructing the marina originated in Ohio [instrumentalities of interstate commerce] (2) that Cape Romain transported the raw materials on its equipment and barges

> through the navigable waterways of the Charleston Harbor and up the Wando River to the project site [use of channels of interstate commerce]; and (3) that the marina was constructed in navigable waterways under a permit issued by the Army Corps of Engineers [use of a federal permit substantiates the marina as being built within a channel of interstate commerce].[24]

In holding that the subcontractor's claim must be arbitrated, the Court applied the *Lopez* test to objects needed for the performance of the contract, rather than relying on the contemplation of the parties.

South Carolina courts have recognized that "[d]espite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration."[25] For example, in *Bradley v. Brentwood Homes*, the Court held that an arbitration provision contained within a home purchase agreement was not enforceable under the FAA because the agreement involved intrastate, not interstate, commerce.[26] In considering the surrounding facts, the Court adhered to the established view that the development of real estate is "an inherently intrastate transaction,"[27] even though materials, subcontractors, and suppliers from outside of South Carolina were used the construction of the home; the purchaser received financing from a North Carolina lender; and the agreement stated that any claims under the warranty would be submitted to an office in Georgia.[28] However, since "[a]ll the legal relationships concerning land are bound by state law principles" the Court concluded that the FAA could not apply because "the essential character of the Agreement was strictly for the purpose of a completed residential dwelling and not the construction."[29]

III. Implications and Conclusion

Following the United States Supreme Court's decision in *Allied-Bruce*, the test for determining whether an arbitration agreement involves interstate commerce, and thus whether state law governing the agreement is preempted by the FAA, is applied under a broad definition coinciding with the limits of Congress's Commerce Clause power. Under this standard, South Carolina courts will analyze the parties' agreement, the complaint, and the surrounding facts instead of relying on the contemplation of the parties to determine if the contract containing an arbitration agreement involves interstate commerce. If the agreement involves interstate commerce, state law is preempted to the extent that only state law governing validity, revocability, and enforceability can apply. Therefore, whether drafting the agreement or seeking to enforce it, corporate and litigation attorneys must remain cognizant of the lens through which courts view arbitration agreements in South Carolina.

Footnotes

1 Timothy M. McKissock is a partner, Erin R. Stuckey is Of Counsel, and Brandon S. Smith is an associate in the Columbia office of Nelson Mullins Riley & Scarborough, LLP.

2 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

3 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

4 9 U.S.C. § 2.

5 *See Perry v. Thomas*, 482 U.S. 483, 490 (1987).

6 S.C. Code Ann. § 15-48-10(b).

7 132 S. Ct. 1201 (2012).

8 *Id.* at 1203.

9 *Id*. (quoting *AT&T Mobility*, 131 S. Ct. at 1747).

10 *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ*., 489 U.S. 468, 478 (1989).

11 S.C. Code Ann. § 15-48-10(a).

12 398 S.C. 447, 730 S.E.2d 312 (2012).

13 *Id*. at 453, 730 S.E.2d at 315.

14 9 U.S.C. § 2.

15 310 S.C. 469, 472, 427 S.E.2d 642, 644 (1993) (overruled by *Dean v. Heritage Healthcare of Ridgeway*, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014)).

16 513 U.S. at 280.

17 *Id*. at 265.

18 *Id*.

19 *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014) (overruling *Timms*); *see also Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538 542 S.E.2d 360, 363 (2001) (overruling *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880).

20 *Dean*, 408 S.C. at 380, 759 S.E.2d at 732 (citations omitted).

21 *Id*.

22 *Id.*

23 405 S.C. 115, 123, 747 S.E.2d 461, 465 (2013) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (holding that the "proper analysis" involves consideration of: "(1) use of channels of interstate commerce; (2) regulation of persons, things, or instrumentalities in interstate commerce; and (3) regulation of activities having a substantial relation to interstate commerce.").

24 *Cape Romain*, 405 S.C at 122, 747 S.E.2d at 464.

25 *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 591, 553 S.E.2d 110, 115-16 (2001).

26 398 S.C. at 459, 730 S.E.2d at 318.

27 *Bradley*, 398 S.C. at 456, 730 S.E.2d at 317 ("The development of land within South Carolina boarders is the quintessential example of a purely intrastate activity.") (citations omitted); *see also Saneii v. Robards*, 289 F. Supp. 2d 855 (concluding that "a residential real estate sales contract does not evidence or involve interstate commerce.").

28 *Bradley*, 398 S.C. at 456, 730 S.E.2d at 317.

29 *Id.*

LEGISLATIVE REPORT

Legislative Update

by Jeffrey N. Thordahl, SCDTAA Lobbyist

The 2015 Legislative session is around the corner, officially beginning the second Tuesday in January, January 13th. While that is the official start of the new two year session, several committees have been meeting over the summer and fall to debate and look for solutions to several individual issues. There are committees looking at possible reform to the Ethics law, expungement laws, criminal domestic violence laws, abuse and neglect of children laws, animal welfare issues, bail bond laws, the Certificate of Need program and medical marijuana use.

In addition the Civil Justice Coalition is once again looking to put forward Tort Reform legislation. As you may remember, SCDTAA Board member and Senator, Shane Massey, sponsored the legislation last year. Since this is a new legislative session the legislation will need to be reintroduced and start over in the committee process.

One other legislative issue to watch is possible Judicial Election reform. While popular election of judges is not likely to a part of the discussion, there is a growing call for some changes to how Judges are elected. These ideas revolve around changing the makeup of the Judicial Merit Selection Commission and perhaps having the Governor play a role at some appointment level with voting or confirmation by the General Assembly.

In other news, it appears likely that the acting Speaker, Jay Lucas, will be the new Speaker of the House of Representatives when the House organizes in December after the elections. As many know, Jay is an attorney and Partner with Lucas, Warr and White with offices in Hartsville and Florence. Speaker Lucas has an aggressive agenda which includes amending the House Rules to include term limits for the Speaker. He has also appointed committees to look at how to pay for road infrastructure improvements and Ethics Reform. IN fact SCDTAA Board member Derham Cole is the Chairman of the Special Ethics Committee.

In the November Elections two new House members who are attorneys were elected. Gary Clary (District. 3 – Pickens) is a retired Circuit Court Judge. In addition, Jeff Johnson (District 58 – Horry), is an attorney in Conway and has his own law firm. Also note that current House member Ronnie Sabb won the special election primary for Senate District 32 and the General Election. This seat was vacated by Yancey McGill when he became Lt. Governor. Mr. Sabb is an attorney with offices in Kingstree and Lake City

ARTICLE

Potential Statute of Repose Defense to Product Liability Suits

by Kyle J. White [1]

If you ask contractors, engineers, and others in the construction business in South Carolina, they will likely tell you that they retain construction project records for eight years. The reason for this practice is that South Carolina has a statute of repose for improvements to real property which bars suits for construction defects, unless they are brought within 8 years of when the certificate of occupancy is issued. Construction lawyers are well aware of this statute of repose, but lawyers in other areas of practice should be aware of it as well, as it applies with equal force outside of the construction context. For example, the statute of repose is broad enough to protect manufactures or sellers of a products which later become permanent additions to real property. [2]

For readers who have not dealt with a statute of repose since law school, a statute of repose "creates a substantive right in those protected to be free from liability after a legislatively determined period of time." [3] In establishing South Carolina's statute of repose for improvements to real property, the legislature sought to "address those instances where 'persons involved in improvements to real property are subject to the economic and emotional burdens of litigation and liability for an indefinite period of time upon allegations of defective or unsafe conditions.'"[4] The length of the applicable statutory period has varied over the years. For example a previous version provided a thirteen year period of repose, and the thirteen year period of repose may still apply if substantial completion of the improvement occurred prior to July 1, 2005.[5] South Carolina's statute of repose for improvements to real property currently provides that "[n]o actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." [6]

The statute also specifies the types of actions and defendants to which it applies. Section 15-3-640 provides that actions which trigger the statute of repose include "an action to recover damages for personal injury, death, or damage to property."[7] The South Carolina Supreme Court has made it clear that the protection of the statute extends beyond those who construct the improvement. In fact, a previous version of the statute of repose was declared unconstitutional because no rational basis for limiting the statute of repose to engineers, contractors, etc. existed.[8] As the statute is currently worded and interpreted, *any defendant* against whom an action is brought based on a defective or unsafe condition of an improvement to real property is afforded protection from the statute of repose.

The South Carolina Supreme Court has set forth a test for determining whether something qualifies as an "improvement," as the term is used in the statute of repose.[9] In *S. Carolina Pipeline*, a product liability action in which the explosion of a buried natural gas pipeline caused injury and property damage, the Supreme Court was asked to determine whether the gas pipeline qualified as an "improvement" for purposes of the statute of repose.[10] In holding that it did qualify, the Court first disagreed with the "rigid interpretation" advanced by the plaintiff that to qualify as an improvement something must be a "permanent addition to realty."[11] The Court found the preamble to the statute of repose made clear "the legislature's intent to extend the protection contained in the statute of repose to additions which have 'lengthy useful lives.'" [12] Hence, given that the gas pipeline (1) made the real property more valuable to the owner; (2) involved the investment of labor and money, and (3) "was permanent as that phrase is commonly understood – it had been in place for 38 years when the explosion occurred," the Court determined that the gas pipeline had a "lengthy useful life" and was, therefore, an improvement to real property for purposes of § 15-3-640. [13] The Court's opinion on the issue is probably best expressed by its statement that "[p]ermanence is necessarily a relative term when applied to improvements, since no improvement, whether the Tower of Pisa or the Pyramids at Giza, is truly permanent. They do, however, have 'lengthy useful lives'—as set forth in the preamble to § 15-3-640."[14]

Continued on next page

This issue often arises in the manufacturing setting. For example, if it is alleged that a defective overhead crane affixed to the ceiling of a manufacturing facility caused personal injury or property damage, there may be a statute of repose argument. In such a case, it will be important to establish the date that the overhead crane was affixed to the facility. If installation occurred more than eight years before suit was filed (or thirteen depending on the date of installation), it will then be necessary to determine whether the machinery satisfies the lengthy useful life factors. The analysis is factually intensive, so it will need to be developed through discovery along with any other defenses. The statute of repose argument should then be included in any motion for summary judgment at the appropriate time.

Footnotes

1 Kyle J. White is an associate with Gallivan, White, & Boyd, PA in Greenville, South Carolina. He practices primarily in the fields of product liability and complex civil litigation, along with toxic tort, mass tort, and insurance subrogation.

2 This article focuses on the protections afforded to manufacturers and sellers in product liability lawsuits, but the statute is broad enough to include numerous other groups which are not specifically addressed herein.

3 *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Section 15-3-640(6) is a statute of repose setting forth the outside time period in which an action arising out of the defective condition of an improvement to real property must be brought, which date begins to run from completion of the project.").

4 *Ocean Winds Corp. of Johns Island v. Lane,* 347 S.C. 416, 420, 556 S.E.2d 377, 379-80 (2001).

5 The statute of repose has been amended several times, with the most recent amendment in 2005 serving to reduce the time period from thirteen years to eight years. The 2005 amendment to the statute of repose, however, only applies to improvements which were completed after 2005. See 2005 South Carolina Laws Act 27 (H.B. 3008) ("(2) Section 2 [which includes amendments to the statute of repose of repose] takes effect on July 1, 2005, and applies to improvements to real property for which certificates of occupancy are issued by a county or municipality or completion of a final inspection by the responsible local building official after the effective date."); *see also Snavely v. Perpetual Fed. Sav. Bank*, 306 S.C. 348, 350, 412 S.E.2d 382, 384 (1991) (finding that the legislature intended that "§ 15-3-640 be applied to buildings constructed prior to May 12, 1986.").

6 S.C. Code Ann. § 15-3-640.

7 S.C. Code Ann. § 15-3-640(3), (9).

8 *See Broome v. Truluck*, 270 S.C. 227, 231, 241 S.E.2d 739, 740 (1978) ("While it is broadly stated that a vital distinction exists between architects, engineers, and contractors on the one hand, and owners and manufacturers, on the other, such vital distinction is nowhere pointed out such as to justify granting immunity to one group and not to the other."); *see also Snavely*, 306 S.C. at 351, 412 S.E.2d at 384 (holding that a revised version of the statute which "increases the period of liability from ten years to thirteen years and extends immunity to current or prior owners and manufacturers" was constitutional).

9 *See S. Carolina Pipeline Corp. v. Lone Star Steel Co.*, 345 S.C. 151, 155, 546 S.E.2d 654, 656-57 (2001) (finding that a gas pipeline was an improvement to real property).

10 *See id.* at 655.

11 *Id*. at 656.

12 *Id*. at 656-57.

13 *Id*. at 657; *cf. Ervin v. Cont'l Conveyor & Equip. Co., Inc.*, 674 F. Supp. 2d 709, 720 (D.S.C. 2009) (following the S. Carolina Pipeline factors for determining whether something is an improvement, and finding that an incline conveyor system that had been "actually disassembled and moved to a new location" was a piece of "moveable equipment" which did not qualify as an improvement.).

14 *Id*. at 657 n.3.

ARTICLE

Colonna and Beckman One Court, One Year, Two Different Definitions of "Affected"

By Mark Allison and Patrick Martin [1]

The South Carolina Court of Appeals has issued two opinions since April 2013 that address the meaning of an "affected" body part as it relates to the determination of a permanent disability award. The central issue is whether "affected" requires that a second scheduled member have an impairment/functional disability, or if radicular-type pains are sufficient for that member to be "affected." The meaning of this word controls whether an injured worker can receive benefits under S.C. Code Annotated 42-9-10, 42-9-20, or 42-9-30. Based on the existing precedent, a conclusion that "affected" requires some level of functional disability or impairment seems most supported.

Pursuant to *Singleton v. Young Lumber Company* [2]:

> Where the injury is confined to the scheduled member, and there is no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation [pursuant to section 42-9-30] . . . . To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is *affected*. (*emphasis* added).

In *Colonna v. Marlboro Park Hosp.* [3], Colonna injured her right foot and ankle.[4] After significant treatment Colonna reached maximum medical improvement and received a permanent disability award of 50% loss of use of the right lower extremity.[5] Colonna alleged a change of condition and received a spinal cord stimulator in 2008 to address RSD symptoms.[6] Colonna again reached maximum medical improvement in March, 2009.[7] Marlboro Park filed a Form 21 to address the extent of permanent disability as a result of her alleged change of condition.[8] Colonna maintained she was permanently and totally disabled on account of injuries to her right knee, left knee, back, neck, and right shoulder.[9] The hearing commissioner found that Colonna failed to prove compensable injuries to her right knee, left knee, back, neck or right shoulder.[10] The Hearing Commissioner further concluded that Colonna suffered no additional permanent impairment (and no permanent and total disability).[11] The Full Commission affirmed in full, as did the Circuit Court.

On appeal, Colonna argued that the implantation of the spinal cord stimulator "affected" her back, and thus she was entitled to apply 42-9-10 instead of 42-9-30.[12] The Court of Appeals rejected this argument on the basis that Colonna failed to show: "that the implantation of the spinal cord stimulator injured her back or caused additional back impairment."[13] The Court of Appeals specifically noted that the treating physician, Dr. Sonia Pasi, noted pain in Colonna's left leg, back, neck and shoulder; "but only diagnosed her with RSD of the 'lower limb.'"[14] Thus, the term affected required some impairment to an additional body part.

Allison

Martin

Approximately one year after the *Colonna* opinion, the Court of Appeals issued an opinion in *Beckman v. Sysco Columbia, LLC.* Beckman sustained a compensable injury to his back on March 25, 2010.[15] He alleged additional injuries to his buttocks, both legs and right foot.[16] Sysco provided treatment and filed a Form 21 seeking a determination of maximum medical improvement on March 8, 2012.[17] Beckman alleged wage loss pursuant to S.C. Code Ann. 42-9-20.[18] Beckman introduced evidence that separately rated his sacro-iliac joint and his back.[19] The Single Commissioner and the Full Commission both found Beckman suffered injury to his back only and was not eligible for wage loss because it was a single member injury. On appeal, Beckman argued that the sacro-iliac joint and the back were two separate members, relying on *Gilliam v. Woodside Mills*.[20] Sysco alleged the sacro-iliac joint and the back were the same scheduled member based upon *Sanders v. MeadWestvaco Corp*.[21] In its determination, the Court of Appeals focused on the presence of Beckman's radiculopathy.[22] The treating physician noted numerous times that Claimant had radicular symptoms, despite EMG/NCS to the contrary.[23] Tthe Court of Appeals did not cite any evidence regarding

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the existence of a separate rating or impairment to the legs or buttocks on account of the radiculopathy; merely the diagnosis. The Court of Appeals concluded that due to radiculopathy, Beckman's "injur[ies are] not confined to a scheduled member."[24] Thus, the term "affected" did not require an actual impairment to the second allegedly injured member.

The Court of Appeals appears to have defined "affected" differently for the purpose of applying the "two body part rule." *Colonna* requires that there must be an impairment for a scheduled member to be affected; and *Beckman* does not require an impairment to be affected. *Beckman* did not specifically overrule or even site *Colonna*, so the interplay is uncertain. *Colonna* is on a petition for Writ of Certiorari; and *Beckman* was remanded to the Workers' Compensation Commission for a determination of an award under SC Code Ann. 42-9-20.

I. A plain reading of the language from *Singleton* supports the *Colonna* definition.

The *Colonna* Court discussed the wording of *Singleton* in great detail. Specifically, *Colonna* drew attention to the first part of the statement: "Where the injury is confined to the scheduled member, and there is no *impairment* of any other part of the body because of such injury…". *Beckman* did not consider the fact that Claimant had no impairment to his leg; only that the injury was not "confined" to a single member.

There are two different ways to approach the *Singleton* statement. The first is that it is a two element test: 1) the injury is confined to a scheduled member, and 2) there is no impairment to another part of the body; then the Claimant is limited to recovery under S.C. Code Ann. 42-9-30. Because radiculopathy is inherently an injury to the nerve root[25], there is often no specific injury to the legs or arms where the pain is felt; but rather the injury is at the nerve root in the spine. If the radicular injury creates a functional impairment to the extremity (i.e. it is not "confined"), then there is an impairment that can be measured and rated. If the injury does not create a functional impairment to the extremity; then inclusion of the extremity is in essence accounting for pain and suffering or discomfort. "[C]ompensation under the Act is not awarded for the physical injury as such, but for 'disability' produced by such injury. The disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Loss of earning capacity is the criterion. *There is no recognition of the elements of pain and suffering, or of increased discomfort and difficulty in performing the work*, as long as there is no diminution in earning capacity."[26] Further, the Commission has gone so far as to state: "It is axiomatic that the Workers' Compensation Act does not compensate Claimants for pain and suffering."[27] Thus, any test which accounts for pain and suffering without an impairment would operate contrary to prior interpretations of the Worker's Compensation Act.

Beckman treats the *Singleton* statement as a two element test. If the injury is confined and there is no other impairment, then Beckman receives compensation under S.C. Code Ann. 42-9-30. Beckman's injury is not confined, so he is not limited to S.C. Code Ann. 42-9-30. However, as outlined above, the use of *Singleton* in this fashion would account for pain and suffering.

The second interpretation of *Singleton* is that the measure of whether an injury is confined to the body part is the existence of an impairment to another body part. This approach is based on the presence of a physical deficiency in the "affected" member. *Colonna* takes this stance and cites to two other opinions in support.[28] Because this interpretation requires an impairment, there is no contradiction with an inclusion of pain and suffering. However, it still leaves the question of whether the "affected" language cited to in *Singleton* was meant to require an impairment.

Singleton's statement was not original, and referred back to five other decisions.[29] Though what "affected" means is not addressed in any of those opinions, an analysis of subsequent precedent shows that the State of Texas (*Consolidated Underwriters v. Langley*) took the stance that: "pain caused by an injury to a particular member and felt in another part of the body is not, of itself, sufficient to support a recovery for anything more than the original specific injury."[30] In subsequent case law, a Georgia appellate court held (*Godbee v. American Mutual Liability Insurance Company et al.*): "Case law has long recognized that an employee sustains a compensable 'superadded injury' where, in consequence of a specific member work-related disability, the employee suffers a disabling injury to another portion of the body."[31] Both of these subsequent interpretations require something beyond pain in the member, and the State of Georgia specifically requires a "disabling" injury to the "affected" member.[32]

Based on the foregoing, it appears that a definition of "affected" that requires an impairment to the second member is the most supported conclusion and does not create the potential conflict that arises with the *Beckman* interpretation.

Footnotes

1 Mark Allison and Patrick Martin are attorneys in McAngus Goudelock & Courie's Greenville office. Both focus on workers' compensation defense.

2 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960).

3 404 S.C. 537, 745 S.E. 2d 128 (Ct. App. 2013).

4 *Id*. at 540, 745 S.E.2d at 130.

5 *Id*. at 541, 745 S.E.2d at 131.

Continued on bottom of page 40

ARTICLE

Eroding the Notice of Intent Statute

by Sheila Bias [1]

Before you file that Motion to Dismiss for a plaintiff's failure to comply with provisions of S.C. Code Ann. § 15-79-125, the Notice of Intent to File Suit ("Notice of Intent") statute in medical malpractice cases, thoroughly consider whether your particular case actually presents a "situation of non-compliance mandating dismissal." [2] When first codified in 2005, the Notice of Intent statute was enacted as part of comprehensive tort reform related to medical malpractice actions. The statute's many technical requirements often provided the defense bar with successful grounds for early Motions to Dismiss in the medical malpractice arena. However, recent decisions from our appellate courts appear to have taken away some of the potency of the Notice of Intent statute. This article discusses the most recent decisions before the South Carolina Supreme Court and Court of Appeals.

A. S.C. Code Ann. § 15-79-125

Section 15-79-125 was enacted to provide "an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." [3] The statute achieves this purpose by providing, what initially appeared to be mandatory, pre-suit requirements for initiating a medical malpractice action. The statute requires a plaintiff file a Notice of Intent before the Plaintiff may initiate a civil action. "The Notice of Intent must contain a statement of the facts upon which the plaintiff's claim is based, be accompanied by an affidavit of an expert witness identifying at least one negligent act or omission claimed to exist, and include standard interrogatories required by the South Carolina Rules of Civil Procedure" [4] Further, "[f]iling the Notice of Intent to File Suit tolls applicable statutes of limitations" and requires the parties to participate in pre-suit mediation. [5] The statute further provides that the South Carolina ADR Rules govern the mediation, that the circuit court has jurisdiction to enforce the statute, and it provides for limited discovery. Additionally, Section 15-79-125 directs that upon a mediator's determination that the meditation is not viable, an impasse exists, that mediation should end, or prior to the expiration of the statute of limitations, whichever is later, the plaintiff may continue to pursue their claim by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure.

Because the Notice of Intent is a creature of statutory creation and is not a Complaint, practitioners have inconsistently handled the requirements and potential remedies sought for noncompliance with the provisions of Section 15-79-125 when dealing with this statute. For example, and as demonstrated by the procedural posture of the various cases cited herein, some defendants respond to the Notice of Intent by filing an Answer. Others seek to file Motions to Dismiss under Rule 12, SCRCP, for failure to state claims or lack of jurisdiction. Some practitioners will file Motions to Compel mediation or compliance with the statute. Because of the myriad of procedural postures presented to trial courts, the appellate decisions have the appearance, in a vacuum of, interpreting narrow portions of the statute. However, with each new interpretation, the Court is arguably loosening the requirements of the statute and providing more opportunities for plaintiffs to bypass the requirements of this statute. This is despite the consistent findings that Section 15-79-125 is a statute in derogation of the common law and must be strictly construed. [6]

B. Appellate Court Decisions

i. *Ranucci I* [7]

Decided by the Court of Appeals in 2012, *Ranucci I* interpreted to what extent Section 15-79-125 incorporates the provisions of the expert witness affidavit requirements in S.C. Code Ann. § 15-36-100. Section 15-36-100 governs the requirements for filing complaints in actions for damages based on all types of professional negligence.

The plaintiff, Shannon Ranucci, filed a Notice of Intent, but did not contemporaneously file the affidavit of a medical expert. Instead, Ranucci stated "time constraints" precluded her from contemporaneously filing the affidavit of a medical expert and that she would file one within forty-five days or that the negligence alleged would be within the ambit of common knowledge and experience—both allowable exceptions to the contemporaneous filing requirement that can be found in Section 15-36-100. Ranucci subsequently filed an expert witness affidavit. Dr. Crain filed an Answer to the Notice of

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Intent and a Motion to Dismiss based on Ranucci's failure to contemporaneously file the expert affidavit and that the statute of limitations barred Ranucci from filing her action against him because her expert affidavit was defective. The trial court granted the Motion to Dismiss, finding the expert affidavit was not contemporaneously filed with the affidavit; however, the Court found the Notice of Intent did not constitute an action, so it denied the Motion to Dismiss to the extent it addressed the applicable statute of limitations.

The Court of Appeals affirmed, finding the statutory language "at issue here is both clear and explicit."[8] Specifically, the Court of Appeals found,

> Despite the apparent confusion generated by their internal cross-references, these statutes do not conflict. Each statute governs a distinct time period during the litigation process, and those time periods are consecutive. Section 15–79–125 controls the portion of the process that commences with the filing of a Notice of Intent to File Suit and ends with prelitigation mediation. If the parties are unable to resolve their dispute through mediation, Section 15–36–100 guides them through the preparation of initial pleadings and provides mechanisms for challenging and curing defects in the required affidavit. . . . We find Section 15–79–125(A) invokes only the provisions of Section 15–36–100 governing the preparation and content of the affidavit. In particular, Section 15–79–125(A) implicates the scheme for qualifying an expert witness as an affiant and the instruction that the affidavit "must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." § 15–36–100(A), (B).[9]

Chief Judge Few authored a concurrence, which addressed the statute of limitations language in Section 15-79-125 and Section 15-36-100. He opined that the statute of limitations had expired as to Ranucci's claim and he would dismiss the appeal as moot.[10]

Ranucci I provided the Defense Bar with an additional strategic option for defending medical malpractice actions. Its language, requiring strict compliance with Section 15-79-125, enforced the goals of Section 15-79-125, by further providing an orderly process for proceeding with medical malpractice actions to ensure that only the most meritorious and properly brought claims would be litigated. *Ranucci I* was appealed to the South Carolina Supreme Court.

ii. *Grier v. AMISUB of South Carolina, Inc.* [11]

Grier was decided by the South Carolina Supreme Court four months after *Ranucci I. Grier* arose from the granting of a Motion to Dismiss a Notice of Intent on the ground that the expert opinion, authored by a nurse, was insufficient because the nurse was not qualified to render an opinion as to the cause of death. Thus, the defendants argued, the affidavit did not contain a competent causation opinion.

Writing for the Court, Justice Hearn answered the question of whether "the pre-suit affidavit a plaintiff is statutorily required to file before bringing a medical malpractice claim must contain an expert opinion as to proximate cause."[12] The Court found Section 15-79-125 "imposes no content requirements for the expert affidavit and specifically delegates that task to 15-36-100."[13] Ultimately, the Court held the expert affidavit required by Section 15-36-100 need not contain an opinion as to causation.

Following *Ranucci I* and *Grier*, the Notice of the Intent "playing field" appeared level. The Defense Bar had compelling language from *Ranucci I* requiring strict compliance with the statute, which led to successful Motions to Dismiss for failure to comply with the statute. Plaintiffs had *Grier*, which, in essence, lessened their burden of proof at the Notice of Intent stage. After *Grier*, plaintiffs need only identify a negligent act or omission committed by the defendant, but need not demonstrate that such negligent act or omission proximately caused their damages.

iii. *Ross v. Waccamaw Community Hospital* [14]

A year after *Grier*, the South Carolina Supreme Court issued its opinion in *Ross*. The *Ross* decision essentially held that the failure to hold a mediation conference within the statutorily required 120 days from the filing of the Notice of Intent does not automatically divest the circuit court of jurisdiction nor does it categorically mandate dismissal of the case.[15] Importantly, Justice Kittredge, writing for the majority, stressed that dismissal may still be appropriate in cases where mediation does not occur and that the trial judge maintains discretion to determine those circumstances were dismissal of the action is appropriate.[16]

The Court further stated, "the circuit court retains discretion to permit the mediation process to continue beyond the 120-day time period . . . "[17] Notably, the Court went on to state,

> This is not to say the 120-day time period of meaningless. Indeed it demonstrates the Legislature's desire that mediation takes place expeditiously. And the failure to comply with the 120-day time period could result in dismissal (as the SCADRR provides) but as a function of the court's discretion based on the fact and circumstances, and not as a mandated one-size-fits-all result."[18]

Perhaps one of the most important lessons from *Ross* for the defense is gleaned from the dicta. The Court states the respondents, defendants below, urged the Court to adopt an interpretation of Section 15-79-125 that "is ripe for mischief, as defendants

counsel could easily thwart timely completion of the mediation conference, and then seek dismissal of the Notice of Intent and reinstatement of the Statute of Limitations." [19] The Court's language, arguably, suggests nefarious intent on behalf of the Defense Bar in the attempt to seek dismissal of medical malpractice claims at the Notice of Intent stage. Additionally, the Court's language can be construed as a signal to the trial courts to let slide some of the technical requirements of Section 15-79-125 in favor of proceeding on the merits. This is curious concept to reconcile with the model that the "technical hurdles" of Section 15-79-125 were arguably put in place by the Legislature to effectuate the statute's purpose—culling frivolous medical malpractice actions so that only the meritorious proceed.

Although *Ross* does not completely foreclose the dismissal of an action at the Notice of Intent state, its strong language will likely deter trial judges from doing so when a plaintiff is merely technically non-compliant with the parameters of Section 15-79-125.

iv. *Ranucci II* [20]

In July of this year, the Supreme Court reviewed *Ranucci I* and reversed the Court of Appeals. *Ranucci* argued that the Court of Appeals erred in finding the affidavit of her medical expert was not timely filed because Section 15-79-125 incorporates Section 15-36-100, which includes a "safe harbor" provision that extends the time for filing the expert affidavit.[21] The Supreme Court agreed, finding Section 15-79-125 incorporates Section 15-36-100 in its *entirety*. [22]

The Supreme Court reviewed the legislative history of the two statutes and determined that the Legislature intended Section 15-79-125 and Section 15-36-100 to be read *in pari materia*.[23] Thus, according to the Court, Section 15-36-100

> completes the pre-litigation process at it (1) defines the term "expert witness" and identifies the requisite qualifications; (2) identifies the content of the expert witness affidavit; (3) extends the time for filing an expert witness affidavit when the statute of limitations will soon expire and authorizes a defendant to move for dismissal of a plaintiff's case for failure to file an expert witness affidavit; (5) codifies the common knowledge exception; (6) outlines the procedure for addressing allegedly defective affidavits; and (7) authorizes the trial court to dismiss a plaintiff's case for non-compliance. [24]

The Court also clarified that its current interpretation could be reconciled with *Grier* and *Ross*. Justice Beatty, writing for the Court, reminded the bar that the Court has sought to interpret Sections 15-79-125 and 15-36-100 in a manner that effectuates the intent of the Legislature to establish a unique two-step procedure that filters frivolous claims while at the same time permitting the filing of potentially meritorious claims.[25]

One benefit to *Ranucci II* is that the Court reiterated that the 120-day time period for mediation was not meaningless and could still result in dismissal of the action at the Notice of Intent stage.[26] However, the full incorporation of Section 15-36-100 gives plaintiffs additional time in which to file their expert affidavits, which as a practical matter, could profoundly impact pre-suit mediation. The affidavit "safe harbor" in Section 15-36-100 allows a plaintiff up to forty-five (45) days to file an expert affidavit after the filing of the Notice of Intent. However, Section 15-79-125 requires that pre-suit mediation must occur within ninety (90) days and no later than one hundred-twenty (120) days after the filing of the Notice of Intent. The extra time plaintiffs now have file affidavits shortens the time frame of conducting a fully informed pre-suit mediation—i.e. one where the defendant is privy to an expert opinion as to the negligent acts or omissions which are the basis of the claims against him—almost in half. Thus, in those situations, defendants may wish to consider waiting until the outer limits of the time frame to hold pre-suit mediations or risk going into early mediation without the pertinent facts and/or expert opinions as to negligence. Accordingly, *Ranucci II* may very well taper the ability to have meaningful pre-suit meditations.

v. *Wilkinson v. East Cooper Community Hospital, et al* [27]

The same day *Ranucci II* was issued, the Supreme Court also issued an opinion in *Wilkinson v. East Cooper Comm. Hosp., Inc*. Similar to *Ranucci*, *Wilkinson* did not contemporaneously file an expert witness affidavit with her Notice of Intent, but filed the affidavit slightly over thirty days later.[28] *Wilkinson*, however, is distinguishable from the *Ranucci* cases, in that the dismissal of Wilkinson's claims also involved a failure to comply with the expert affidavit requirements attendant to the filing of a medical malpractice Complaint.[29] Thus, the Court also had to determine whether the failure to file an expert affidavit with her Complaint warranted dismissal of her claim.[30]

Using *Ranucci II*, the Court determined the failure to contemporaneously file the expert affidavit with the Notice of Intent was not fatal to Wilkinson's claim since she could take advantage of the "safe harbor" provisions of Section 15-36-100.[31] The Court further found that there was no need to file an additional affidavit upon the filing of the Summons and Complaint following the completion of the pre-litigation requirements.[32]

Importantly, the Court stated that any assignment by the clerk of court of separate Common Pleas case numbers to the Notice of Intent and subsequent Complaint does not convert the action into two separate cases. "The assignment of a different case number to the pre-litigation pleadings and the litigation pleadings is of no consequence because they both comprise a single medical malpractice claim."[33] This "single action" language may have unintended

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consequences. The "merging" of pre-litigation conduct with post Summons and Complaint activities could impact other aspects of litigation. For example, will participation in the pre-suit activities constitute a waiver of any potential pre-Answer defenses since they now comprise one single medical malpractice claim?

vi. *Brouwer v. South Carolina ENT, et. al.* [34]

Brouwer, [35] issued a week after *Ranucci II* and *Wilkinson*, completes the integration of Section 15-36-100 into the Notice of Intent requirements of Section 15-79-125. Like Ranucci and Wilkinson, Brouwer failed to file her expert witness affidavit contemporaneously with the Notice of Intent. [36] Here, however, Brouwer contended her allegation of medical negligence was within the "ambit of common knowledge" and therefore required no expert affidavit. [37] The Supreme Court agreed based on its holding in *Ranucci II*. [38]

C. What's left?

After this line of cases, it is clear the appellate courts disfavor dismissal of claims at the Notice of Intent stage based on procedural noncompliance with Section 15-79-125. The Courts have attempted to strike a balance between precluding the disposition of claims on highly technical grounds and ensuring that only the most meritorious of claims go forward. Practitioners need prepare themselves for fewer dismissals on technical grounds going forward—or be able to articulate why their particular case is a situation of noncompliance warranting dismissal.

Footnotes

1 Sheila Bias is an associate at Richardson Plowden & Robinson, P.A. focusing her practice on appeals and employment law. She also oversees the Firm's law clerk program. A graduate of the University of South Carolina School of Law, she worked at the South Carolina Supreme Court as a Staff Attorney before joining Richardson Plowden. Sheila is an active member of the Richland County Bar, is active the Young Lawyers' Division of the South Carolina Bar, and serves on the Board of Directors for the South Carolina Women Lawyers Association.

2 *Ross v. Waccamaw Community Hospital*, 404 S.C. 56, 744 S.E.2d 547 (2013).

3 *Id*.

4 *Id*.

5 *Id*.

6 *See Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012); *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012); *Ross*, at 63, 744 S.E.2d at 550.

7 *Ranucci*, at 168, 723 S.E.2d at 242.

8 *Id*.

9 *Id*.

10 *Id*. (Few, J.) (concurring)

11 397 S.C. 532, 725 S.E.2d 693 (2012)

12 *Id*.

13 *Id*.

14 *Ross, supra*. In *Ross*, the plaintiff brought suit against various entities for alleged medical malpractice. In accordance with the statute, the parties scheduled mediation prior to the expiration of 120 days of filing of the Notice of Intent as mandated by S.C. Code Ann. § 15-79-125. However, due to a scheduling conflict, plaintiff's counsel requested that mediation be postponed one week—still within the 120-day time period. Thereafter, plaintiff's counsel was thereafter required to appear for trial in another case, and the mediation conference was rescheduled once again; except this time, with the consent of all the parties, it was scheduled outside the 120-day time period. No party requested an extension, and everyone proceeded as though the mediation would occur, even after the 120-day deadline elapsed. However, six days before mediation was scheduled to take place, defendants refused to participate in any mediation, claiming the mediation conference was untimely under § 15-79-125 because plaintiff failed to seek an extension from the circuit court. Defendants argued 15-79-125 is a jurisdictional statute and that, absent an extension, the Notice of Intent automatically expires if mediation is not conducted within 120 days, thereby divesting the circuit court of subject matter jurisdiction to hear the matter. Plaintiff then filed a motion to compel the mediation and defendants moved to dismiss the Notice of Intent under Rule 12(b)(1), SCRCP. The trial court dismissed the action.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*.

19 *Id*.

20 Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014). At the time of submission of this article, the Supreme Court granted the respondents an extension of time in which to file a Petition for Rehearing until August 18, 2014. As such, we may not have the final word on *Ranucci*.

21 *Id.*

22 *Id*. (emphasis added).

23 *Id*.

24 *Id*.

25 *Id*.

26 *Id*.

27 Op. No. 27423 (S.C. Sup. Ct. filed July 23, 2014). At the time of submission of this article, the Supreme Court granted Respondents an extension of time in which to file a Petition for Rehearing until August 18, 2014. As such, we may not have the final word on *Wilkinson*.

28 *Id*.

29 *Id*.

30 *Id*.

31 *Id*.

32 *Id*.

33 *Id*.

34 Op. No. 27427 (S.C. Sup. Ct. filed August 7, 2014). At the time of submission of this article, the time for filing a Petition for Rehearing to the South Carolina Court Supreme Court had not elapsed.

35 It is worth noting that the Court certified this appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules—meaning the matter was never heard by the South Carolina Court of Appeals.

36 *Id*.

37 *Id*.

38 *Id*.

ARTICLE

What to Expect When Employees are Expecting:
EEOC issues new guidelines on Pregnancy Discrimination in the Workplace

by Brian L. Quisenberry and Stephanie Ramia [1]

Quinsenberry

Ramia

Introduction

Employers in South Carolina and throughout the country are facing an increase in pregnancy discrimination complaints. The number of pregnancy discrimination claims filed with the Equal Employment Opportunity Commission (EEOC) has steadily increased over the past ten years.[2] Despite the fact that Congress enacted the Pregnancy Discrimination Act (PDA) over thirty-five years ago, employers continue to struggle to fully comply with pregnancy discrimination laws.

Congress enacted the PDA in 1978 in response to the U.S. Supreme Court's opinion in *General Electric v. Gilbert*,[3] which held that pregnancy discrimination was not covered under Title VII. Congress' enactment of the PDA clarified that "discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII)."[4]

Under the PDA, an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions *and* women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but who are similar in their ability or ability to work.[5] The first clause of the PDA provides that an employer may not discriminate (i.e. take adverse employment action) against an employee based on the employee's pregnancy, childbirth, or related medical conditions. The second clause of the PDA, while not giving a woman any absolute right to accommodations based on pregnancy, childbirth, or related medical conditions, does provide a group to which pregnant employees may be compared. This comparison allows for determining the possible accommodation a woman may be entitled with regard to pregnancy, childbirth, or related medical condition.

Although the statute itself is straightforward, courts have applied the statute inconsistently.[6] Thus, the EEOC recently issued enforcement guidance concerning the PDA.[7] The Enforcement Guidance addresses all aspects of pregnancy and all aspects of employment, including hiring, firing, promotion, health insurance benefits, and treatment in comparison with non-pregnant persons who are similar in their ability or inability to work, as well as the PDA's implementation in the context of disability under the Americans With Disabilities Act (ADA). The Enforcement Guidance provides description of the different types of discrimination prohibited by the PDA as well as the impact of the expansive amendments to the Americans with Disabilities Act (ADAAA).

This article sets forth a summary of significant points derived from Enforcement Guidance and discusses the impact on employers as well as how the guidance may affect employment litigation going forward.

What is pregnancy discrimination?

The EEOC broadly defines pregnancy discrimination. The most obvious type of discrimination prohibited by the PDA is discrimination against an employee based on her current pregnancy. This occurs when an employer refuses to hire, fires, or takes other adverse action against a woman because of her pregnancy.[8] The Enforcement Guidance provides that lack of notice from the employee is no defense. Even if an employee has not notified her employer of her pregnancy, the employer may nonetheless be considered aware of the pregnancy through "office gossip or because the pregnancy was obvious."[9]

The EEOC also discusses stereotypes and assumptions about a pregnant employee's job capabilities and commitment. The Enforcement Guidance provides that an employer may be liable where the employer refuses to hire a pregnant woman based on an assumption that she will have attendance problems or leave after the child is born.[10] Additionally, under this same premise of stereotypes and assumptions, an employee or applicant may not be discriminated against based on *past* pregnancy, childbirth, or related medical conditions.[11] Similar to general Title VII discrimination analysis, if there exists a close temporal proximity between the claimant's past pregnancy and/or recent childbirth, then a

ARTICLE CONT.

causal connection will more likely be found between the past pregnancy and the challenged action taken by the employer.[12] Nonetheless, the Enforcement Guidance explicitly advises that "[a] lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination" if evidence establishes that the pregnancy, childbirth, or related condition motivated the employer's action.[13]

The EEOC also interprets the PDA as prohibiting employers from discriminating against women generally with regard to job opportunities or benefits because of their ability to become pregnant.[14] In other words, employers cannot discriminate on the basis of a woman's fertility or reproductive risk, including any false assumptions regarding the same.[15] In addition, according to the Enforcement Guidance, Title VII prohibits an employer from discriminating against an employee because of her intention to become pregnant. The EEOC instructs that employers "should not make inquiries into whether an applicant or employee intends to become pregnant [because the] EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker."[16] As for infertility treatments, while the EEOC does not prohibit exclusions of fertility treatments from employer-provided insurance plans, it does prohibit discrimination of an employee seeking fertility treatment.[17]

The Enforcement Guidance also addresses discrimination based on use of contraception. The EEOC indicates that employers "can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes."[18] The Enforcement Guidance goes on to say that "[b]ecause prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes prescription contraception but otherwise provides comprehensive coverage. To comply with Title VII, an employer's health insurance plan must provide prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy." This guidance will likely spark debate considering the recent U.S. Supreme Court decision in *Burwell v. Hobby Lobby*[19] concerning contraception and certain employers' right to exclude that coverage from employee policy based on religious beliefs.

The EEOC also provides guidance regarding medical conditions related to pregnancy or childbirth. The EEOC states that lactation and related requirements such as breastfeeding are pregnancy-related medical conditions. Courts, however, have been inconsistent on this issue.[20] The EEOC is clear that it views the less favorable treatment of a lactating employee as raising an inference of unlawful discrimination.[21] Consequently, the EEOC states that "[i]f an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions, then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances."[22]

Courts have held that Title VII does not cover employment decisions based on the cost of providing medical care to an employee's child.[23] The EEOC, however, states that taking an adverse action against an employee to avoid insurance costs arising from pregnancy-related impairment of the employee or the impairment of the employee's child, may violate Title I of the ADA if the employee's or child's impairment constitutes a "disability" within the meaning of the ADA. The EEOC also indicates such an employment action may also violate Title II of the Genetic Information Nondiscrimination Act (GINA) and/or the Employee Retirement Income Security Act (ERISA).[24]

Accommodation requirements for pregnant employees

The most controversial part of the EEOC's guidance has been the agency's position regarding required accommodations. According to the EEOC, Title VII requires employers to treat an employee affected by pregnancy, childbirth, or related medical conditions in the same manner it treats other non-pregnant employees similarly unable to work by providing accommodations, including modified tasks, alternative, assignments, leave, or fringe benefits.[25] "Light duty" is likely the most common accommodation requested by an employee covered under the PDA. The Enforcement Guidance provides that an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work, regardless of the employer's general policy for light duty.[26] The EEOC's position rejects the position recently taken by the Fourth Circuit in *Young v. United Parcel Serv., Inc.*[27] In *Young*, the Court held the PDA does not require an employer to provide such accommodation if the employer's practice or policy limits light duty to workers injured on the job and/or to employees with disabilities under the ADA.[28] The EEOC's guidance directly contradicts the Fourth Circuit's ruling. Notably, the EEOC issued its guidance on this issue shortly after the U.S. Supreme Court granted *certiorari* to hear the Fourth Circuit case.

What does the Enforcement Guidance mean for employers and litigation

The Enforcement Guidance impacts how employers should manage pregnant employees. While the Enforcement Guidance does not have the power of law, it will govern how the EEOC evaluates discrimination charges and investigates employers. Thus, prudent employers will take immediate steps to comply with the EEOC's new requirements and avoid allegations of pregnancy discrimination. Although courts do not have to follow the EEOC guidance as law, many courts will defer to the Enforcement Guidance in making decisions under the PDA. Thus, lawyers handling PDA litigation for employers should be ready for plaintiff's counsel to cite to the Enforcement Guidance to support discrimination claims. As current and future PDA claims progress through the courts, it will be interesting how much deference the EEOC receives and whether employers are able to adjust their policies accordingly.

Footnotes

1 Brian L. Quisenberry is a partner and Stephanie Ramia is an a associate with the firm Young Clement Rivers, LLP in Charleston. Both Brian and Stephanie practice in the firm's Employment and Labor Law Practice Group. Brian and Stephanie represent employers in state and federal courts, as well as before administrative agencies such as the NLRB, the EEOC and the S.C. Human Affairs Commission.

2 http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm

3 429 U.S. 125 (1976).

4 "Enforcement Guidance: Pregnancy Discrimination and Related Issues", *Overview*, No. 915.003 (hereinafter "Enforcement Guidance").

5 42 U.S.C. § 2000e (k). The term "employer" refers to any entity covered by Title VII.

6 *Hall v. Nalco*, 534 F.3d 644, 2008 WL 2746510 (7th Cir. 2008); *Asmo v. Keane, Inc.*, 471 F.3d 588 (6th Cir. 2006); *Wagner v. Dillard Dep't Stores, Inc*., 17 F. App'x 141 (4th Cir. 2001) (unpublished); *EEOC v. Houston Funding II, Ltd.*, 2012 WL 739494 (S.D. Tx. Feb. 2, 2012), vacated, 717 F.3d 425 (5th Cir. May 30, 2013); *Garcia v. Courtesy Ford, Inc.*, 2007 WL 1192681 (W.D. Wash. Apr. 20, 2007); *Solomen v. Redwood Advisory Co*., 183 F. Supp. 2d 748 (E.D. Pa. 2002).

7 Enforcement Guidance.

8 Enforcement Guidance, § I(A).

9 Enforcement Guidance, § I(A)(1)(a).

10 Enforcement Guidance, § I(A)(1)(b).

11 Enforcement Guidance, §I(A)(2).

12 *Id*.

13 *Id*.

14 *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. V. Johnson Controls*, 499 U.S. 187, 206 (1991).

15 Enforcement Guidance, § I(A)(3)(a), citing *Johnson Controls*, 499 U.S. at 206. "An employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity." *Id*.

16 Enforcement Guidance, § I(A)(3)(b).

17 Enforcement Guidance, § I(A)(3)(c). The EEOC indicates employment decisions related to such treatment implicate Title VII under limited circumstances, such as when an employee is penalized for taking time off from work to undergo such a procedure.

18 Enforcement Guidance, § I(A)(3)(d).

19 134 S. Ct. 2751 (June 30, 2014).

20 *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983); *EEOC v. Houston Funding II, Ltd*., 2012 WL 739494 (S.D. Tx. Feb. 2, 2012), vacated, 717 F.3d 425 (5th Cir. May 30, 2013); *Wallace v. Pyro Mining Co*., 789 F. Sup. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991); *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1991); *Allen v. Totes/Isotoner*, 915 N.E.2d 622 (Ohio 2009).

21 Enforcement Guidance, § I(A)(4)(b).

22 *Id*. Such rights are also implicated by other laws including the Affordable Care Act, which requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk. *See* Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207.

23 *Fleming v. Ayers & Assocs*., 948 F.2d 993 (6th Cir. 1991); *Barnes v. Hewlett Packard Co*., 846 F. Supp. 442, 445 ("There is, in sum, a point at which pregnancy and immediate post-partum requirements—clearly gender-based in nature—end and gender-neutral child care activities begin.").

24 Enforcement Guidance, § I(A)(4)(a).

25 Enforcement Guidance, § I(A)(5).

26 Enforcement Guidance, § I(A)(5) and (C)(1).

27 *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013).

28 Enforcement Guidance, § I(C)(1)(b) & (c).

Verdict Reports

Type of Action: Medical Malpractice

Name of Case: Beverly Johnson and Steve Johnson v. Dr. Randall Royal, and Werner, Royal & Csakany, LLC
Court: Beaufort County Court of Common Pleas
Case number: 2011-CP-07-4136
Name of Judge: The Honorable Kristi Lea Harrington
Amount: Defense Verdict
Date of Verdict: October 3, 2014
Attorneys for defendant: Molly H. Craig, Jennifer F. Nutter and Brian E. Johnson of Hood Law Firm, LLC, Charleston, SC

Description of the case: Plaintiffs alleged medical malpractice during a robotic laparoscopic hysterectomy surgery which was performed by the Plaintiff's gynecologist. The surgery was performed on the DaVinci robotic laparoscope. During the hysterectomy surgery, the Defendant doctor transected the Plaintiff's left ureter in two different places. The injuries were not recognized until five days after the surgery requiring multiple surgeries to repair the injured ureter and address additional resulting damage. The subsequent care required an uretal implantation with a psoas hitch and other medical procedures. The Plaintiff also alleged ongoing medical problems related to the ureter injury requiring future surgeries and continued pain.

The defense presented testimony from the Defendant, expert physicians, and treating physicians who testified that a ureter injury is a known complication of a laparoscopic hysterectomy that can occur in the absence of medical negligence. The Defendants also proved that the injury diagnosed five days following the surgery was timely and recognition of the injury within this timeframe was within the standard of care. Additionally, the defense proved that the Plaintiff's ongoing complaints of painful urination and pain during sexual intercourse, anxiety and depression were caused by medical conditions unrelated to the ureter injury.

The jury returned a verdict in favor of the Defendant physician and his practice.

ARTICLE CONT. FROM PAGE 32

6 *Id*. at 542, 745 S.E.2d at 131.

7 *Id*.

8 *Id*.

9 *Id*.

10 *Id*. at 542, 745 S.E.2d at 132.

11 *Id*.

12 *Id*. at 545, 745 S.E.2d at 133.

13 *Id*. at 546-47, 745 S.E.2d at 133.

14 *Id*. at 547, 745 S.E.2d at 133.

15 *Beckman v. Sysco Columbia, LLC*, 2014 S.C. App. LEXIS 41, 2014 WL 1047090, (Ct. App. 2014).

16 *Id*. at 1.

17 *Id*. at 2.

18 *Id*.

19 *Id*. at 4.

20 319 S.C. 385, 461 S.E.2d 818 (1995).

21 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006).

22 *Id*. at 11-12.

23 *Id*.

24 *Id*. at 14.

25 "**Radiculopathy**- Any pathological condition of the nerve roots." AMA Guides to the Evaluation of Permanent Impairment, 6th edition, Radiculopathy, p. 602.

26 *Keeter v. Clifton Mfg. Co*., 225 S.C. 389, 392, 82 S.E.2d 520, 522, 1954 S.C. LEXIS 47, 5 (S.C. 1954) (emphasis added)

27 *Perry v. City of Charleston*, 2011 SC Wrk. Comp. LEXIS 94, 47.

28 *See Wigfall v. Tideland Utils., Inc*., 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003) ("The Singleton Court intended "impairment" to encompass a physical deficiency.") and *Bixby v. City of Charleston*, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) ("[A]ffected" required a residual disability).

29 *See Brown v. State Workmen's Ins. Fund*, 131 Pa. Super. 226, 200 A. 174; *Consolidated Underwriters v. Langley*, 141 Tex. 78, 170 S.W.2d 463; *Godbee v. American Mutual Liability Insurance Company et al.*, 95 Ga. App. 86, 96 S.E.2d 648; and *Armour & Company v. Walker*, 99 Ga. App. 64, 107 S.E.2d 691, and *Globe Indemnity Co. et al., v. Brooks*, 84 Ga. App. 687, 67 S.E.2d 176, 178.

30 *Travelers Ins. Co. v. Marmolejo*, 383 S.W.2d 380, 381, 1964 Tex. LEXIS 698, 3, 8 Tex. Sup. J. 46 (Tex. 1964), citing *Texas Employers' Ins. Ass'n. v. Espinosa*, Tex. Sup., 367 S.W. 2d 667; *Argonaut Ins. Co. v. Newman*, Tex. Sup., 361 S.W. 2d 871; and *Texas Employers' Ins. Ass'n. v. Brownlee*, 152 Tex. 247, 256 S.W. 2d 76.

31 *Standridge v. Candlewick Yarns*, 202 Ga. App. 553, 554, 415 S.E.2d 10, 11-12, 1992 Ga. App. LEXIS 103, 4, 103-10 Fulton County D. Rep. 10B (Ga. Ct. App. 1992), citing *ITT Continental Baking Co. v. Comes*, 165 Ga. App. 598, 599 (1) (302 S.E.2d 137) (1983);

32 A cursory search of Pennsylvania case law citing to the *Brown* opinion was performed, however no appellate history defining the term came up.

Case Notes

Hansen v. Beechwood Dev. Grp. of South Carolina, LLC, Op. No. 27436 (August 20, 2014).

This case considers whether a limited liability company (LLC) can be held liable for its promoter's pre-incorporation contracts or torts. Clifford Hansen, an entrepreneur, sought to purchase Hickory Springs Water Company, Inc. the company's owner. After meeting with Hickory Springs' owner and agreeing to a letter setting forth the initial terms for purchase, Hansen needed additional capital and he was introduced to Robert Fields. Fields was a Charleston businessman who was involved in and acted on behalf of multiple corporate entities including Beechwood Advisory Group ("Advisory Group") which was owned by Fields, Dennis Byrd, Andrew Easter, and Richard Gregg.

Hansen and Advisory Group entered into an agreement in December 2013, in which Advisory Group agreed to represent Hansen in procuring capital for the purchase of Hickory Springs. However, their representation was terminated in January 2014 due to Hansen's failure to pay as prescribed by the agreement. At this time the four partners of Advisory Group (Fields, Byrd, Gregg, and Easter) created a new corporation, Beechwood Development Group, Inc.

Hansen and Fields then executed a second agreement whereby Advisory Group agreed to assist Hansen in securing capital and negotiating the purchase of Hickory Springs. Fields proposed multiple deals to potential investors with varying terms, some that included Hansen and others that did not. The relationship between Fields and Hansen became strained and in May 2014 Fields, again, terminated Advisory Group's representation on Hansen's behalf.

On July 7, Hickory Springs Water, LLC was incorporated. The Hickory Spring's members were Beechwood Development Group of South Carolina, LLC and Greenbax Enterprises, Inc. On July 12, Beechwood Development Group of South Carolina, LLC was formed. Hickory Springs Water Company, Inc. was ultimately purchased by Hickory Springs, LLC.

Hansen then brought suit against Beechwood Development Group of South Carolina, LLC and other defendants. Hansen claimed that the defendants were jointly and severally liable for interference with prospective contractual relations, among other things. The circuit court denied the LLC's motion for a directed verdict and the jury returned a damages verdict in the amount of $1,189,408.00 for Hansen.

Beechwood Development Group of South Carolina, LLC appealed the denial of its motion for directed verdict contending that there was no evidence from which a jury could conclude that it is liable to Hansen.

On appeal the Court first considered if and when a limited liability company can be held liable for preformation contracts. The Court adopted the prevailing rule that "because a corporation cannot have agents, contract for itself, or be contracted with prior to its incorporation, it is not liable on any contracts that a promoter makes for its benefit prior to incorporation unless it assumes the obligation by its own act after incorporation." The Court held that the directed verdict should have been granted as to Hansen's contract claims because Hansen failed to present any evidence that the LCC ratified any preformation contract or that the LLC accepted any benefits of Fields' contracts with Hansen.

Next the Court considered if and when a limited liability company can be held liable for the preformation torts of a corporate entity's promoter. Here the Court adopted the rule that "a corporation is not liable for torts that its promoters committed before it came into existence." The Court supported this rule with three policy concerns: 1) that there is no agency relationship between a promoter and a non-existent corporate entity; 2) the individual tortfeasor (the promoter) is still liable for any tort he committed and the injured party may recover from the promoter; and 3) a contrary rule would permit innocent investors to be financially harmed due to tortious conduct they neither aided nor were aware of and this could stifle investment by potential investors.

Whigham v. Jackson Dawson Communications, Op. No. 27440 (August 27, 2014)

According to the South Carolina Supreme Court, injuries resulting from kickball are apparently within the course of employment at Jackson Dawson, a marketing, advertising and public relations company.

As part of his employment, Claimant, Stephen Whigham, the Director of Creative Solutions at Jackson Dawson attended bi-monthly meetings wherein the managers discussed, among other

things, the importance of team-building. At one such meeting, Whigham proposed the idea of having a company kickball game to his superior who instructed him to move forward with the idea. Whigham was authorized to spend $440 of company funds to procure a rental facility, T-shirts, drinks, and snacks for the event. After organizing the event, Whigham utilized the company intranet to promote the game and encourage attendance. Ultimately, roughly half of Jackson Dawson's employees, including Whigham, attended and/or participated in the game. On the last play of the apparently intense kickball game, Whigham shattered his tibia and fibula after landing awkwardly on his right leg while attempting to avoid being thrown out by the opposing team. He underwent two surgeries to repair his leg and, according to his doctor, needs a knee replacement in the near future as a result of the injury.

Whigham filed a workers' compensation claim, which was denied by the single commissioner on the grounds that his injury did not arise out of or in the course of his employment. Adopting the single commissioner's order, the full commission affirmed, finding that Whigham was neither required to attend the event, nor was the company benefitted by the game beyond general employee morale. On appeal, the Court of Appeals also affirmed in a memorandum opinion, citing cases involving the substantial evidence standard.

The Supreme Court reversed, however, finding the event was within the scope of Whigham's employment. In so finding, the Court emphasized that, "[a]lthough the event may have been voluntary for company employees generally, the undisputed facts unequivocally indicate Whigham was expected to attend as part of his professional duties. … [B]oth Whigham and his superior plainly considered his presence vital to his job of executing the event."

South Carolina Prop. and Cas. Ins. Guar. Association v. Brock, Op. No. 27458 (October 29, 2014).

This case concerns the construction and application of the South Carolina Property and Casualty Insurance Guaranty Association Act. Specifically, the case dealt with the interpretation of the exhaustion/non-duplication provision of the statute.

The plaintiff, Roger Brock, was injured while he was riding as a passenger in a vehicle driven by Brian Mason. Mason and the driver of the other vehicle, Ryan Stevens, were found to be jointly responsible for the accident. At the time of the accident Stevens' vehicle was insured by Aequicap.

Brock suffered injuries as a result of the accident and agreed to a settlement with Aequicap for $185,000.00. However, before Brock received any payment from Aequicap the company was declared insolvent. Thus, Brock sought payment of the settlement amount from the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty).

Guaranty argued that it was entitled to offset all payments made to Brock by solvent insurers according to S.C. Code Ann. § 38-31-100(1).

Brock received $22,500.00 from Mason's liability coverage; $40,590.45 from Brock's own private medical insurance carrier; $25,000.00 from Brock's parents' uninsured motorist coverage; and $5,000.00 from Brock's parents' PIP coverage. (Note: Brock was able to reach back to his parents' coverages because he was a resident relative; also, uninsured motorist coverage was triggered by Aequicap's insolvency). Totaling $93,090.45.

The circuit court found section 38-31-100(1) ambiguous and allowed Guaranty to offset some of the payments received from the other insurers, but not all of them. Specifically, Guaranty was allowed to offset for the uninsured motorist payments and the PIP benefits; but could not offset benefits received under Mason's policy or Brock's medical insurance.

On appeal the Supreme Court of South Carolina held that the statutory language was not ambiguous and that the statute provides for an offset of all payments from all solvent insurers to Brock as a result of the accident.

The Court found that the claims were paid "under an insurance policy" and arose from "the same facts, injury or loss," and thus, according to the plain language of section 38-31-1000(1), Guaranty was entitled to an offset of all the payments made.

Therefore, Guaranty was permitted to offset the entire $93,090.45 that was paid to Brock from the other insurers and Brock was only entitled to $91,909.55 to be paid by Guaranty.

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