

THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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2015 ANNUAL MEETING NOVEMBER 5 - 8

RITZ CARLTON
AMELIA ISLAND, FL

FALL 2015
VOLUME 43
ISSUE 2
WWW.SCDTAA.COM

PAC Golf Tournament
Spring Valley CC
Columbia, SC
September 24

Annual Meeting
Ritz Carlton
Amelia Island, FL
November 5 - 8



President's Message

by Ronald K. Wray, II

State of the SCDTAA (With Many Thanks)

When my son Christopher was born, friends and family warned me how quickly time would pass, telling me he would be grown before I knew it. Two and a half years later, I received similar advice when my daughter Katie was born. It seemed a bit silly to me at the time, wondering how 18 plus years in our house could possibly go by quickly. But now as Christopher prepares to enter his second year at Wofford College and Katie is entering her junior year of high school, I understand exactly what they meant!

The same could be said as I approach the end of my year as president of SCDTAA. I am amazed at how quickly the year has gone by and at all we have accomplished this year. As I prepare to transition to my role as immediate past president and hand the reigns of this great organization over to William Brown as your new president, I am pleased to report that our organization remains as strong as ever. Due to the incredibly hard work by your officers, Board, and Executive Director, SCDTAA remains the best state legal defense organization in the country. More importantly, as I observe the talent and commitment of our Board and the leadership already being demonstrated by many members of our organization, I am confident we will reach even greater heights in years to come.

Looking back over the past year and peeking a bit into the future as we close out the year, I continue to be amazed at the number of opportunities and programs we are able to offer our members. I can also tell you that when we share our programs with DRI and other state defense organizations in our region and throughout the country, they remark with envy at everything we accomplish. Everyone is familiar with our "Big 3" events – Trial Academy, Summer Meeting, and Annual Meeting. While critically important and outstanding programs, these events represent only a small portion of what we accomplished in 2015. Indeed, I am perhaps most proud of some of the "behind the scenes" things we accomplished this year on behalf of our members. I want to share a few of those with you.

Most of you are no doubt familiar with the South Carolina Supreme Court's opinion in the *Skipper v. ACE* appeal. In that case, South Carolina joined the majority of states in holding that assignment of legal malpractice claims between adversaries in litigation

are void as against public policy. This was an issue of critical importance to defense lawyers in South Carolina, as a disturbing pattern had been emerging of insureds assigning potential malpractice claims against panel counsel hired by the carrier in exchange for a covenant not to execute any judgment against the insured. SCDTAA, on behalf of our members, filed an amicus brief demonstrating why these assignments should be prohibited. Special thanks go out to David Marshall and Alan Jones who principally wrote the brief for SCDTAA. The brief was outstanding, and the Supreme Court's ruling was consistent with the arguments presented by SCDTAA.

Similarly, our legislative committee, with the help and support of our lobbyist, Jeff Thordahl, continued to monitor and keep us advised of legislation that posed potential harm to defense attorneys and our clients. Due to hard work and persuasive arguments, we were able to successfully derail legislation contrary to our interests. Additionally, our substantive law committees continue to thrive and provide opportunities for our members to become published authors, speak at CLE events, and exchange ideas and strategies with other attorneys practicing in the same area of law.

Scattered throughout the year were many other events that provided fun, fellowship, and top-notch educational programs. Our legislative reception at the Oyster Bar once again allowed us to interact with legislators, strengthening our relationships with them and giving us an opportunity to discuss matters of interest to us. The SCDTAA PAC, together with our annual PAC golf outing, provides us with needed funds to pursue our legislative interests. Additionally, *The DefenseLine* continues to be an exceptional publication filled with scholarly articles and important information regarding the successes and activities of our members. Meanwhile, our construction law committee will hold its annual seminar in October, and the young lawyers and women in law committees continue to grow and offer unique networking opportunities.

I am particularly proud of our women in law committee, chaired by Erin Dean, and supported by board members Beth McMillan, Sarah Whetmore, and Amy Geddes. This committee is putting together our first ever women in law seminar and



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SCDTAA Board of Directors Positions Available

The SCDTAA Nominating Committee is now accepting applications for the SCDTAA Board of Directors. Anyone wishing to be considered must submit a Potential Board Information Sheet.

There are currently eight (8) seats that will be filled by the Nominating Committee at the Annual Meeting:

- District 1 - 1 seat
- District 2 - 1 seat
- District 4 - 1 seat
- District 5 - 1 seat
- At large - 4 seats

Anyone who wishes to be considered should complete the Potential Board Information Sheet and return it along with a current biography to:

Aimee Hiers at SCDTAA Headquarters by **Monday, October 12, 2015**.

The Potential Board Information Sheet can be found on the SCDTAA website at www.SCDTAA.com or you may email aimee@jee.com to request a copy.

If you have any questions, please contact Aimee Hiers at (803) 252-5646 or aimee@jee.com.

PRESIDENT'S MESSAGE CONT.

President's Message

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reception to honor Chief Justice Jean Toal. We are all extremely grateful for the service Chief Justice Toal has provided to our profession, and we are privileged to honor her and thank her for her many years of service.

All of these events are made possible through the extremely hard work of your Board of Directors and your Executive Director, as well as many non-board members who contributed their time and efforts to make our events a success. I remain amazed at how hardworking and diligent your Board is, making my job as president so enjoyable. Personally, I cannot thank the Board enough for everything they have done this year. As an organization, we owe them a significant debt of gratitude for their tireless efforts on behalf of our organization.

Likewise, we all owe tremendous thanks to our justices, judges, and commissioners for attending our events, speaking at our seminars, and supporting our group by regularly participating in our educational and social activities. This interaction is one of the greatest benefits of SCDTAA membership.

We also owe a special thanks to our current executive board – William Brown, David Anderson, Anthony Livoti, and Curtis Ott. These gentlemen served as liaisons for our major events, and a sounding board to keep me on track throughout the year. Thanks guys! An even greater thank you goes to our

Executive Director, Aimee Hiers, without whom our organization would not be what it is today. Each of these folks goes above and beyond the call of duty to make our organization successful, and it has been my sincere honor and pleasure to serve with them this past year. I hope you will take time to thank each of them as well as all of our other board members for their service to our organization.

I would also like to extend a special thank you to our past presidents. The benefits of SCDTAA membership we enjoy today would not be possible if not for the foresight and commitment of the exceptional group of leaders who built this organization. I am beyond humbled to have been chosen to lead this amazing organization, and I would be remiss if I did not thank our past presidents for giving me this opportunity and for everything they have done to lay the foundation for what we now enjoy.

Thank you again for allowing me to serve on the board for the past decade and for the very special privilege of serving as your president. I hope to see you at Amelia Island for our annual meeting in November and to have the opportunity to thank each of you personally. This has been the highlight of my career and I am deeply appreciative. I look forward to watching our organization continue to grow in the years to come.



Editor's Note

by Graham P. Powell, Giles M. Schanen, Jr.,
Amy H. Geddes, and Alan G. Jones

Collaboration that matters.

We hope this issue of *The DefenseLine* demonstrates how those who make invaluable contributions to the SCDTAA come together to provide you with information that proves beneficial to your practice.

Palpable change has taken place in our world since our Spring, 2015 edition. Significant world and local events have taken place, and our federal and state legislatures and judiciaries have addressed major issues. At times, it is difficult to keep up with the rapid pace of this change. However, as professionals it is our job to keep up, and so we do. Under these circumstances, it sure is nice to have people who care to help.

We express our sincere gratitude to all who have contributed to this edition of *The DefenseLine*. We expect that you will take something valuable from

one or more of them. Like us, you see the time and devotion it takes to provide the type of content we want to provide, and for this we know you are also grateful. A special thanks to all who drafted articles, prepared case notes, submitted updates covering all aspects of this organization, provided previews of great things to come, and provided all of the editing needed to bring you this publication.

This issue reflects the positive qualities of our organization because it comes from good people in our organization who continue to provide a valuable resource to our readers well worth picking up. Collaboration that matters.



Graham P. Powell



Giles M. Schanen



Amy H. Geddes



Alan Jones

SUBMISSIONS WANTED!

HAVE NEWS ABOUT CHANGES
IN YOUR FIRM, PROMOTIONS, MEMBERSHIPS AND ORGANIZATIONS OR
COMMUNITY INVOLVEMENT?

PLEASE SEND ALL FIRM NEWS
TO AIMEE@JEE.COM
IN WORD FORMAT.

TO SUBMIT VERDICT REPORTS:
THE FORM CAN BE FOUND ON THE SCDTAA WEBSITE AND SHOULD BE
SENT IN WORD FORMAT TO AIMEE@JEE.COM

SCDTAA Docket

The American Law Institute Elects Nelson Mullins Partner Cory Manning to Membership

The American Law Institute has elected Cory E. Manning, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, to its membership. The organization produces scholarly work to clarify, modernize, and otherwise improve the law. Membership includes lawyers, judges, and law professors. They draft, discuss, revise, and publish Restatements of the Law, model statutes, and principles of law.

Collins & Lacy Co-Founder to Commemorate 800th Anniversary of Magna Carta in Runnymede, England

Collins & Lacy, P.C. co-founder, Joel Collins, traveled to Runnymede, England to observe the 800th Anniversary of the sealing of Magna Carta, where an approximate 5,000 people are expected to be in attendance. Collins, President of the American Board of Trial Advocates (ABOTA), has been representing the organization in England and has helped orchestrate the major international celebration. He presented a commemorative plaque to the Lord Mayor of Runnymede, Derek Cotty, at a dinner banquet on June 15, 2015.

Collins & Lacy Attorney Graduates from South Carolina Bar Leadership Academy

Collins & Lacy, P.C. is pleased to announce Amy Neuschafer has graduated from the 2015 South Carolina Bar Leadership Academy. The Leadership Academy is a selective program designed to train the next generation of Bar and community leaders. Class members participate in networking opportunities, professionalism and leadership training, and community awareness activities, aimed at giving back to the profession and positioning themselves as leaders in the communities.

Nelson Mullins Enters New York Legal Market with the Opening of 15th Office

Nelson Mullins Riley & Scarborough LLP has entered the legal market in New York City with the opening of an office at 415 Madison Ave. and the addition of corporate attorneys experienced in financial services. JPMorgan Chase Bank Executive Director Steve Hantz joins as a partner in Nelson Mullins' real estate capital markets group, and will assist the 20-plus member team from his base in New York City. Joining him is associate Gillian Deutch, who has previous real estate and corporate finance experience from other New York law firms.

"For the last several years, Nelson Mullins has eval-

uated potential candidates and groups of lawyers in New York City with the goal to open an office to support our Corporate Group's capital markets, private equity, public securities, real estate, mergers and acquisitions, and general corporate practices," said James K. Lehman, Nelson Mullins' managing partner. "We look forward to growing our 15th office and enhancing our services to clients."

Emily R. Gifford of Richardson Plowden Certified as a Circuit Court Mediator

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Emily R. Gifford has been certified as a circuit court mediator by the South Carolina Supreme Court's Board of Arbitrator and Mediator Certification. Gifford joins 11 other Richardson Plowden attorneys who are certified arbitrators and mediators. The firm offers alternative dispute resolution services on a statewide and national basis for business, civil, and personal injury matters. Her statewide litigation practice focuses on construction law, including surety law and commercial litigation.

Turner Padgett Shareholder Earns National Recognition as a Top Employment Attorney

Turner Padgett Graham & Laney P.A. is pleased to announce that, for the fourth consecutive year, Reginald "Reggie" Belcher has been included among Human Resource Executive's annual list of the nation's "most powerful employment attorneys." Belcher defends businesses in a variety of employment matters before state and federal courts, and before governmental agencies. He writes employee handbooks, affirmative action plans, employment contracts, severance agreements, and non-compete and restrictive covenants. Additionally, Belcher counsels supervisors and managers on compliance issues involving wage and hour laws, workplace harassment and union avoidance.

Big Celebrations for Willcox, Buyck, & Williams

Willcox, Buyck & Williams law firm located in Florence and Myrtle Beach celebrated the 120th anniversary of its founding on April 17, 2015. The firm was founded by Philip A. Willcox and Fred L. Willcox in 1895 and is one of the longest continuing law firms in South Carolina. The firm has 12 lawyers and a number of paralegals and staff operating out of the principal office in Florence and the beach office. Managing Partner Reynolds Williams said that the celebration on April 17 coincides with the grand opening of the Play Me I'm Yours festival in Florence.

Mark W. Buyck, Jr. is the Chairman of the Board of the firm and Hugh L. Willcox, Jr. is the third equity partner.

Four Roe Cassidy Attorneys Selected for Inclusion in 2015 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 2015 South Carolina Super Lawyers and Rising Stars lists. Following are the Roe Cassidy attorneys selected for inclusion, as well as the practice areas in which their work is recognized.

Super Lawyers

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

Rising Stars

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

Seven MGC Attorneys Named in 2015 South Carolina Super Lawyers Magazine

McAngus Goudelock & Courie, a regional insurance defense firm, is pleased to announce that seven attorneys have been selected by their peers to the 2015 South Carolina Super Lawyers and Rising Stars lists. Four attorneys were selected to the 2015 South Carolina Super Lawyers list and three attorneys were selected to the 2015 South Carolina Super Lawyers Rising Stars list.

Super Lawyers

- Rusty Goudelock (Columbia) – Workers' Compensation
- Amy Jenkins (Charleston) – Employment & Labor
- Tommy Lydon (Columbia) – Business Litigation
- Hugh McAngus (Columbia) – Workers' Compensation

Rising Stars

- Trippett Boineau (Columbia) – Construction Litigation
- Jason Pittman (Columbia) – Civil Litigation Defense
- Happel Scurry (Charleston) – Construction Litigation

24 Turner Padget Attorneys Selected as 2015 South Carolina Super Lawyers® and RisingStars®

Turner Padget is pleased to announce that 15 of its attorneys have been included among South Carolina Super Lawyers for 2015, and an additional nine attorneys have been recognized as Rising Stars by the publication.

Charleston

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

- Ashley S. Heslop – Personal Injury Medical Malpractice (Rising Star)
- Kristen N. Nichols – Creditor Debtor Rights (Rising Star)
- Nosizi Ralephata – Business Litigation (Rising Star)
- Shawn R. Willis – Real Estate (Rising Star)

Columbia

- Reginald W. Belcher – Employment and Labor
- J. Kenneth Carter, Jr. – Personal Injury - Products: Defense
- Catherine H. Kennedy – Estates and Trust Litigation
- Lanneau Wm. Lambert, Jr. – Real Estate
- Steven W. Ouzts – Class Action
- Thomas C. Salane – Insurance Coverage
- Franklin G. Shuler, Jr. – Employment and Labor
- Nicholas William Gladd – Personal Injury – Products (Rising Star)
- Andrew W. Kunz – Personal Injury – General (Rising Star)
- Joshua D. Shaw – Class Action (Rising Star)

Florence

- J. Rene Josey – Business Litigation
- Arthur E. Justice, Jr. – Employment and Labor
- C. Pierce Campbell – Business Litigation (Rising Star)

Greenville

- Eric K. Englehardt – General Litigation

Myrtle Beach

- R. Wayne Byrd – Business/Corporate
- Audra M. Byrd – Civil Litigation: Defense (Rising Star)

Twenty-two Columbia Nelson Mullins Attorneys Selected as 2015 South Carolina Super Lawyers® and RisingStars®

Twenty-two Nelson Mullins Riley & Scarborough LLP attorneys based in Columbia have been selected by their peers to the 2015 list of South Carolina "Super Lawyers" and "Rising Stars." Additionally, Columbia partner George Cauthen was among the 10 attorneys in the state to receive the most votes.

Columbia

- Stuart M. Andrews Jr., Healthcare
- George S. Bailey, Estate Planning and Probate
- Mattison Bogan, Appellate (Rising Star)
- C. Mitchell Brown, Appellate
- George B. Cauthen, Bankruptcy: Business
- Karen Aldridge Crawford, Environmental
- David E. Dukes, Class Action
- 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, Creditor/Debtor Rights
- John F. Kuppens, Personal Injury Defense: Products
- Steven A. McKelvey, Business Litigation
- John T. Moore, Bankruptcy: Business
- 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
- Carmen Harper Thomas, Banking (Rising Star)

Collins & Lacy Attorneys Selected as 2015 South Carolina Super Lawyers® and RisingStars® with Two Named as South Carolina Top 25 and One as Top 10

Eight Collins & Lacy, P.C. attorneys have been selected to the 2015 South Carolina Super Lawyers® and South Carolina Rising Stars® list, two of whom were ranked among the South Carolina Top 25 lawyers list and one in the Top 10.

Greenville – 2015 South Carolina Top 10

- Jack Griffeth

Columbia – 2015 South Carolina Top 25

- Joel Collins

Columbia – 2015 South Carolina Super Lawyers

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

Greenville – 2015 South Carolina Super Lawyers

- Jack Griffeth, Alternative Dispute Resolution
- Ross Plyler, General Litigation

Greenville – 2015 South Carolina Rising Stars

- Logan Wells, Insurance Coverage

Myrtle Beach – 2015 South Carolina Rising Stars

- Amy Neuschafer, Personal Injury General: Defense

Richardson Plowden & Robinson Attorneys Selected as 2015 South Carolina Super Lawyers® and RisingStars®

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 2015 South Carolina Super Lawyers listing.

Four attorneys from Columbia were selected to the 2015 Rising Stars: Jared H. Garraux, Michelle P. Kelley, Jocelyn T. Newman, and Joseph E. Thoensen;

and two attorneys from Charleston were selected: Drew H. Butler and Samia H. Nettles.

Wall Templeton & Haldrup Attorneys Selected as 2015 South Carolina Super Lawyers® and RisingStars®

Wall Templeton & Haldrup congratulates shareholders Mark H. Wall and Morgan S. Templeton for their selection as 2015 South Carolina Super Lawyers. Mr. Wall was selected in the area of Personal Injury – General: Defense. Mr. Templeton was selected in the area of Insurance Coverage.

Wall Templeton & Haldrup would also like to congratulate shareholders Graham P. Powell and William “Trey” W. Watkins, Jr. for their recognition as 2015 South Carolina Rising Stars. Mr. Powell was recognized for his expertise in General Litigation. Mr. Watkins was recognized for his achievements in Construction Litigation: Business.

Elmore Goldsmith Attorneys Selected as 2015 South Carolina Super Lawyers® and RisingStars®

Four attorneys from Elmore Goldsmith have been named by South Carolina Super Lawyers Magazine for 2015. Super Lawyers recognizes attorneys who have distinguished themselves in their legal practice and less than five percent of lawyers in each state are selected to this exclusive list.

Super Lawyers

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

Rising Stars

- Bryan P. Kelley – Construction Litigation

Sweeny Wingate & Barrow PA Attorneys Selected as 2015 South Carolina Super Lawyers® and RisingStars®

Sweeny Wingate & Barrow PA congratulates P. Jason Reynolds in his recent nomination for his second consecutive year as Super Lawyers South Carolina Rising Star – 2015.

Sweeny Wingate & Barrow PA congratulates Ryan Holt in his recent nomination as Super Lawyers South Carolina Rising Star – 2015.

McKay, Cauthen, Settana, & Stuble, PA's Charles Kinney selected for DRI's The Voice

McKay, Cauthen, Settana, & Stuble, P.A. is excited to announce that attorney, Charles Kinney, has been selected for the new member spotlight in The Voice. The Voice is a weekly newsletter published by DRI - The Voice of the Defense Bar. Charles Kinney practices in the areas of government defense, general insurance defense and trucking and transportation law.

Turner Padget Boosts Business Litigation Practice with Three Attorneys

Turner Padget Graham & Laney, P.A. is pleased to announce that three attorneys have joined the firm's litigation practice. Tiffni Shealy joins as Florence-based of counsel, Brittany F. Boykin as a Charleston-based associate, and R. Taylor Speer as a Greenville-based associate. These additions bring the number of new hires since January to five lawyers, following the firm's strategic commitment to building its South Carolina offices.

Shealy joins the firm's Professional Liability and Workers' Compensation practices, and brings 18 years of experience to its health care clients, specifically in the areas of professional liability, insurance defense, HIPAA compliance and workers' compensation. Additionally, she is certified by the American Medical Association as a professional in health care risk management, and currently serves as an officer in the South Carolina Chapter of the American Society of Hospital Risk Managers.

Boykin brings six years of litigation experience to Turner Padget's Insurance Litigation practice. She represents the interests of carriers, individuals and businesses, and has a wide practice, which includes defending personal injury claims, construction defects, and trucking and transportation matters.

Speer brings more than seven years of experience to Turner Padget's Insurance Litigation practice, and will also handle corporate and employment litigation matters. His diverse experience ranges from representing clients in matters common to the formation, growth and dissolution of small-to-medium-sized businesses, to defending employers from racial discrimination claims, and class action wage and hour claims.

Nexsen Pruet Celebrates 10th Next Steps Class for Girls in Middle School

Nexsen Pruet celebrated 18 Chapin Middle School girls for their completion of NP's 10th Next Steps Class. The students, who were chosen by their teachers and staff based on leadership qualities and potential, were recognized at a luncheon at the firm's office in Columbia. Nexsen Pruet attorney Laurie Becker helped create the Next Steps program, which teaches leadership skills to middle school girls in the Midlands of South Carolina. Over the course of the semester, professional businesswomen from across the Midlands cover topics such as the definition of leadership, leadership among peers, social interaction and networking, financial independence, planning for the future, the importance of a mentor, and responsibility to the community. The final session provides a real-world experience in professional networking.

Collins & Lacy Attorneys Present at International Legal Organization's Convocation

Three Collins & Lacy, P.C. attorneys were selected as presenters for the 2015 Primerus Defense Institute (PDI) Convocation held in Amelia Island, Florida in April. The Convocation is an annual event where experienced insurance coverage and defense attorneys, in-house counsel, risk management and other insurance executives gather to share best practices.

Christian Stegmaier, chair of the firm's Retail & Hospitality Practice Group, spoke on a timely legal topic titled: Reptile Theory – What is it and How Does it Work? The Defense Response – Defending the Company Witnesses & Powerfully Persuading Juries.

Brian Comer, chair of the firm's Products Liability Practice Group, gave a presentation titled: Products Liability Implications of 3-D printing and Driverless/Autonomous Cars.

Pete Dworjany, chair of the firm's Insurance Coverage Practice Group, served as a panelist discussing Additional Insured and excess coverage issues.

Turner Padget Launches Business Litigation Blog

Turner Padget Graham & Laney P.A. is pleased to announce the launch of the firm's Business Litigation Blog as a resource to South Carolina businesses and national companies with interests in the state. The regularly updated blog, available at <http://www.turnerpadget.com/south-carolina-business-litigation-blog/>, includes legal case studies, practical application of business strategies and guidance to employers. Topics covered on Turner Padget's Business Litigation Blog include those relevant to banking and finance, class action litigation, corporate law, employment, family-owned businesses, hospitality, litigation strategies, product liability and real estate, among others. Turner Padget's attorneys who regularly contribute come from the firm's diverse range of practice areas, so that the content will serve as a thorough resource for business owners who are looking to avoid – or better manage – litigation.

Turner Padget Earns National Recognition for Three Practices - Seven Shareholders Also Recognized as Leaders in Their Field

Turner Padget Graham & Laney P.A. is pleased to announce that the firm has earned national recognition in the 2015 edition of Chambers USA, a highly-regarded legal directory, featuring client-led intelligence on America's leading lawyers for business. Turner Padget received the top rankings among South Carolina law firms in three practice areas: Labor and Employment, Litigation -- General

Commercial and Real Estate. In addition, seven of the firm's shareholders are ranked as leading practitioners in their respective fields. The Turner Padgett attorneys recognized by Chambers USA in the 2015 guide, along with the practice areas in which they were selected, are:

Charleston

- John S. Wilkerson, Litigation – General Commercial
- Shawn R. Willis, Real Estate

Columbia

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

Myrtle Beach

- R. Wayne Byrd, Litigation – General Commercial

Legal Publisher Chambers and Partners Recognizes Nelson Mullins S.C. Attorneys

Legal directory publisher Chambers and Partners has recognized Nelson Mullins Riley & Scarborough LLP in its national category for the Firm's product liability and mass torts litigation. The organization also recognized the General Commercial, Corporate/M&A, Corporate/M&A: Banking & Finance and Environmental practices. The publishers also single out Columbia partners David E. Dukes in product liability and mass tort and Steven A. McKelvey Jr.

in transportation: road (carriage/commercial) as notable practitioners nationally in their practice areas. Charleston partner Robert H. Brunson and Columbia partner James T. Irvin III also are listed as recognized practitioners in nationwide products liability.

Individual attorneys singled out in Columbia are:

- Karen Aldridge Crawford, Environment
- Gus M. Dixon, Corporate/M&A
- Daniel J. Fritze, Corporate/M&A
- Sue Erwin Harper, Labor & Employment
- Bernard F. Hawkins, Jr, Environment
- P. Mason Hogue, Corporate/M&A
- John T. Moore, Corporate M&A: Banking and Finance

The Greenville attorneys listed and their practices are:

- 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

The Charleston attorney listed is:

- G. Mark Phillips, Litigation: General Commercial

The SCDTAA Needs You!

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

**If you are interested in serving on a committee,
please contact Aimee Hiers**

SCDTAA Headquarters • 803-252-5646 • aimee@jee.com

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

The law firm of Gallivan, White & Boyd, P.A. is pleased to announce it has been selected for inclusion in the 2015 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.

Turner Padgett Continues Litigation Practice Growth with Three Attorneys

Turner Padgett Graham & Laney, P.A. announces the continued expansion of its litigation practice with the addition of three attorneys. Ian McVey joins as a Columbia-based of counsel, and Elizabeth Blackwell and Nickisha Woodward as Charleston-based associates. These attorneys bring the number of new hires since January to six lawyers, supporting the firm's strategic commitment to building its South Carolina offices.

McVey brings diverse experience, from real estate and banking transactional matters to contract disputes. He counsels lenders, creditors, businesses and individuals in complex litigation matters.

Blackwell brings six years of experience in corporate, banking, creditors' rights and finance litigation matters. Additionally, she assists clients with changes to state and federal regulations, including compliance with financial regulations as enacted by the Consumer Financial Protection Bureau (CFPB).

Woodward brings experience in personal injury claims, premises liability and construction defect matters. She began her career as an associate accountant for a Fortune 500 Company, where she acquired the skills needed to successfully balance her business acumen while representing the interests of clients.

Nexsen Pruet up Nine Spots on Largest Law Firms List

Nexsen Pruet has climbed nine spots on The National Law Journal list of the 350 largest law firms in the nation - coming in at #215. The firm remains only one of two South Carolina-based law firms to make the list.

Each year, the numbers are based on a January survey of attorneys in Nexsen Pruet's eight offices in the Carolinas. The firm hit #224 in 2013 and 2014, but strategic hiring based on client needs played into the jump this year.

Attorney Completes Riley Institute Diversity Leaders Initiative: Nexsen Pruet Congratulates Hollingsworth

Nexsen Pruet lawyer Jennifer Hollingsworth recently completed participation in the 8th Midlands Class of The Riley Institute at Furman Diversity Leaders Initiative (DLI). In all, 40 professionals took part in the five-month long course that is "driven by timely, relevant case studies and other experiential learning tools designed to maximize interactions and productive relationships."

Hedrick Gardner Welcomes New Partner Jonathan Roquemore

Hedrick Gardner Kincheloe & Garofalo LLP, a leading litigation and dispute management law firm, announced that Jonathan Roquemore will be joining the firm as a partner in its Columbia office where he will practice in the area of civil litigation. Jonathan has tried nearly 90 cases to verdict since beginning his legal career in 2000. He has navigated the state and federal courts of South Carolina handling cases of all shapes and sizes, including auto accidents, trucking accidents, premises liability, products liability, construction defect, assault and battery, and liquor liability.

James Brogdon and Lindsay Joyner Named "Stars of the Quarter" by the South Carolina Bar's Young Lawyers Division

Gallivan, White & Boyd, P.A. is pleased to announce that Columbia attorneys James Brogdon and Lindsay Joyner have been honored by the South Carolina Bar's Young Lawyers Division as "Stars of the Quarter." The award recognizes Brogdon and Joyner for their contributions and dedication to the Young Lawyers Division during the fourth quarter of the 2014-2015 year.

Brogdon takes an active role in the Young Lawyer Division's as co-chair of the Protecting Our Youth Committee. Joyner currently serves the South Carolina Bar's Young Lawyers Division as Secretary-Treasurer and serves the South Carolina Bar on the Attorney Wellness Taskforce as the Chair of the Subcommittee for the creation of a Statewide Wellness Plan. Brogdon has devoted a significant portion of his practice to personal injury claims involving injuries from soft tissue to catastrophic injuries such as traumatic brain injuries.

Joyner's practice places an emphasis on banking, business and commercial litigation, professional negligence, and economic development. A significant portion of Joyner's legal practice is devoted to banking. She handles a wide variety of banking issues, including advising bankers on policy and customer issues that arise as well as litigating matters.

Nelson Mullins' John Kuppens Selected for Who's Who Product Liability Defense

Legal publisher Law Business Research has selected John F. Kuppens, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, for its Who's Who Legal Product Liability Defense 2015 directory.

Mr. Kuppens is a member of the firm's Consumer Product Safety, Risk Prevention and Regulatory Practice Group and its Consumer & Mechanical Products Litigation Group. He has experience in consumer product risk prevention and regulatory counseling, product liability litigation, commercial litigation, and state procurement matters.

2015 Annual Meeting

Amelia Island • November 5-8

by Ryan A. Earhardt



Mark your calendars now for the Forty-Eighth Annual Meeting of the South Carolina Defense Trial Attorneys' Association. From November 5th through 8th, we will return to the stunning Ritz Carlton at Amelia Island. It will be a great opportunity to reconnect with friends, colleagues and our Judiciary at a spectacular location where your

Annual Meeting Committee is hard at work to ensure that this weekend is equal parts education and recreation. With outstanding golf, tennis, fishing, and incredible beaches, Amelia Island has something for everyone. You can also expect a cutting edge CLE at our Annual Meeting. Our featured speaker will be Bob Blakely, formerly of the Warren Commission, to discuss the JFK assassination and lingering issues. We are excited to present two judicial panels this year. Molly Craig will moderate a discussion with a panel of trial judges to address some of the most common issues encountered by trial lawyers. Our second judicial panel will focus on key appellate issues moderated by Mitch Brown. Chief Justice Toal will present the annual State of the Judiciary Speech. Barbara Seymour will provide the ethics hour with a presentation on email and social networks. We will continue to bring you more content in shorter increments to ensure that you are up to date on the recent legal developments in a fast-paced format intended to inform and entertain.

Our social activities will begin on Thursday evening, the 5th, with the President's Reception. On Friday night, we will enjoy a cocktail reception before the dinner and dance. You can expect to enjoy golf, the beach and all Amelia Island has to offer on Saturday before the Oyster Roast. We also promise to feature the Carolina and Clemson games so we can all cheer (or jeer) our favorite schools. This will be a weekend you do not want to miss. Make your plans now and enjoy another exceptional Annual Meeting.

AGENDA

FRIDAY NOVEMBER 5, 2015

Membership meeting

Opening Remarks

HIPAA - Are you protecting your client?

Trey Suggs

Emerging Liability

Sheila Bias

Understanding is Believing:

Teaching Science to Product Liability Juries

Richard H. Willis

State of the Judiciary

The Honorable Jean Hoefler Toal

Judicial Trial Panel

Moderator: Molly Craig

Panelists: Judge Michelle Childs, Judge DeAndrea

Benjamin, Judge Roger Young, and Judge Doyet Early

Ethics hour

Barbara Seymour

SATURDAY NOVEMBER 6, 2015

Assigning Legal Malpractice Claims? What you should know

Gray Culbreath

The JFK Assassination: The Unanswered Questions

G. Robert Blakey, Professor of Law Emeritus, Notre Dame Law School Former Chief Counsel and Staff Director, United States House Select Committee on Assassinations

Judicial Appellate Panel

Moderator: Mitch Brown

Panelists: Chief Judge Jean Hoefler Toal and Justice Costa Pleicones

Legislative Update

Honorable James H. "Jay" Lucas, Speaker of the House

The Evidence is Closed - now what?

48th Annual Summer Meeting in Review

SCDTAA
EVENTS

by Sarah E. Wetmore and Mark A. Allison, Program Co-Chairs

Everyone arrived at The Grove Park Inn smiling, despite heavy rain on the drive up! The inclement weather cleared in time for a well-attended young lawyers' meeting on the terrace where the attendees could enjoy the view. Trey Watkins and his team conducted a tremendous silent auction on Thursday night, which will benefit several worthwhile charitable recipients. Following the welcome reception and auction, many attendees enjoyed dinner at the various restaurants at the resort or in nearby Asheville.



Friday morning began with Mike Ethridge of Carlock Copeland providing a captivating analysis regarding stress and vulnerability which left us to reflect on our own wellness. The momentum continued with a terrific presentation from the Honorable Tanya Gee, sharing her very practical and often humorous tips from the bench. The crowd was delighted to discover that Judge Gee can really tell a joke!



After a break, the workers' compensation practitioners and Commissioners conducted a breakout session. Back in the main meeting, Lee Weatherly, also of Carlock Copeland, explained the ramifications of the *Ranucci* decision on medical malpractice cases and highlighted effective practice pointers for those facing similar issues. Our distinguished barrister and professor, Warren Moise, shared his thoughts on arbitration before the substantive law breakout, which offered a detailed discussion of the recent *Skipper v. ACE* ruling.

Friday afternoon was full of activity, or for those who enjoyed the spa, inactivity! A good time was had by those on the Brewery & Distillery Tour and on the Zipline Adventure, although the latter group exercised more than just their drinking hand. This was the

second summer for a ladies' golf clinic and, once again, it did not disappoint. The course staff was great, and the refreshments kept the group cool. We have some talented tennis players among this group, so the tennis tournament was a hit.

The golf outing was well attended again this year. The event provided members an opportunity to socialize and network while competing in the closest to the pin and longest drive competitions. Our golfers should mark their calendars for the PAC Golf Tournament scheduled for September 24, 2015 at the Spring Valley Country Club.

Continued on bottom of next page



Wetmore



Allison



25th Annual Trial Academy Recap

by William "Trey" W. Watkins, Jr.



The 25th Annual Trial Academy for the South Carolina Defense Trial Attorneys' Association was held May 20-22, 2015, in Greenville, South Carolina. Every year the SCDTAA Trial Academy provides young lawyers from across the state with three days of intensive "nuts and bolts" training in the actual handling of a trial. This year's Trial Academy began with two days of lecturers on various aspects of trial from some of the top trial lawyers in the state. The

Trial Academy culminated in mock trials on May 22nd at the Greenville County Courthouse with the participants handling a trial from opening statements through jury verdicts. This year, students were divided into two-person teams and assigned the roles of plaintiff counsel or defense counsel. They had to prepare and handle opening statements, evidentiary motions, direct and cross-examination of witnesses, and closing statements based upon a mock trial fact pattern modeled after *Buoniconiti v. The Citadel, et al.* Each of our trials were presided over by a sitting state or federal court judge who, along with experienced lawyers, acted as trial observers to provide constructive criticism to the

participants at the conclusion of each trial. Volunteers were recruited to serve as jurors and play the roles of various witnesses.

This year, the SCDTAA Trial Academy hosted twenty-four students and conducted six trials. The Trial Academy Committee led by Jack Reardon, Johnston Cox, Beth McMillan, and Trey Watkins put together a great program. Special thanks go out to the following judges for giving their time to preside over the trials: Judge Frank Addy, Judge Derham Cole, Judge Garrison Hill, Judge Robert Hood, Judge Cordell Maddox, and Judge Kevin McDonald. We also thank the numerous speakers and break-out leaders who participated and helped with the Trial Academy. Additional thanks go out to Dixon Hughes for providing economic loss experts to testify at the trials. Of course, the Trial Academy could not happen without Aimee Hiers and her wonderful staff who did an excellent job coordinating and putting on the event. Talent abounds in this organization and the witnesses showcased their acting talents, even bringing tears to the witness stand.

All in all, the 2015 Trial Academy was another success. The Trial Academy returns to Greenville in 2016, and I encourage you to sign up your young lawyers for next year's event.

Friday evening's "Bluegrass, Bluejeans and Barbeque" is always a favorite event at the Summer meeting, and this year the barbeque, the sauces, and all of the food was tasty! Some followed the dinner up with a trip downstairs to Elaine's dueling piano bar, but what happens in Elaine's stays in Elaine's, so we can't share any details here.

Saturday morning we enjoyed another delicious breakfast and held the membership meeting before the CLE portion began. First, mediators Eric Englehardt, Ben McCoy, Bo Wilson and Jon Austen related their perceptions of mediation strategies based on their years of experience at the head of the negotiating table, complete with a few insightful anecdotes. The mediation panel was followed by the Honorable Bruce Hendricks sharing her often humorous lessons from the federal court bench.

The workers' compensation folks held another successful breakout session on Saturday. The main audience enjoyed a fascinating presentation from attorney Sheila Bias of Richardson Plowden about drone liability, complete with some funny clips from *Modern Family*. Next, Anne Macon Smith, Charles Boykin, and Cindy Martellini were kind enough to

join us for a panel focused on handling governmental and municipal claims.

The summer meeting wrapped up with speaker Liz Huntley, a defense attorney, speaker, and author from Birmingham, Alabama, who challenged attendees to take time away from our crazy schedules to make a difference in our communities. She was also kind enough to offer praise to South Carolinians for the way we have come together with our message of grace and strength in the wake of the tragic killings at the Mother Emanuel AME Church in Charleston.

We sincerely appreciate the hard work of our summer meeting committee, David Anderson, Andy Delaney, Trey Watkins and Trey Suggs. As always, things ran smoothly because of the hard work of Aimee Hiers and her team, Lynsey Cichon and Courtney Waldrup. We also were glad to see a number of first-time attendees, who we hope will be back for our next meeting. Last but not least, we must thank our incredible sponsors once again. Their support helps make these meetings possible. Don't forget to contact our sponsors for litigation support! See you at the next event!

SUMMER
MEETING
CONT. FROM
PAGE 13

Mark Your Calendars for our Upcoming SCDTAA Seminars

Workers' Compensation September 15, 2015

On September 15, 2015, the South Carolina Defense Trial Attorneys' Association will host a Workers' Compensation CLE Seminar for its members to be held at the Columbia office of McAngus Goudelock & Courie. The seminar's topic will be "The Digital Smoking Gun: Using Social Media as Evidence in Workers' Compensation Hearings." The program will last from 4:30 pm to 6:00 pm and will feature a power-packed examination of the use of social media such as Facebook, Twitter, and Instagram as evidence in hearings. Chairman and Commissioner T. Scott Beck and Vice Chair and Commissioner Susan S. Barden of the South Carolina Workers' Compensation Commission will present on these topics. In addition, attorney Kirsten Barr of Trask & Howell, LLC will be part of the panel along with a private investigator in order to provide a thorough examination of this issue. A reception will be held for presenters and attendees following the seminar from 6:00 pm to 7:00 pm. Don't miss out on this excellent opportunity to learn more about the positives and pitfalls of social media in your practice! To register, go to the SCDTAA website at www.scdtaa.com.

Women In Law September 23, 2015

Mark your calendar for Wednesday September 23, 2015, when South Carolina Defense Trial Attorneys' Association, through its Women in Law committee, present a CLE designed to bring some of the best and brightest female attorneys and judges in South Carolina together to discuss issues and topics they have encountered in the practice of law. The seminar will take place from 3:00 – 5:00 pm and will consist of two panel discussions. The first will feature prominent female attorneys discussing how to build a practice, rainmaking, networking, and other tips for success. The second panel will feature several of South Carolina's female Circuit Court Judges and Appellate Justices as they discuss topics such as transitioning from private practice to the bench and practice tips for female attorneys in the courtroom. The seminar will conclude with an interview with Chief Justice Jean Toal of the Supreme Court of South Carolina, a talk no one should miss. A reception for the presenters and attendees will immediately follow the seminar. This will be a great learning opportunity, and another great chance to network with others in the field. To register, go to the SCDTAA website at www.scdtaa.com.

Construction Law October 21, 2015

Set aside time for a working lunch and an afternoon as the South Carolina Defense Trial Attorneys' Association presents a Construction Law CLE seminar on October 21, 2015. The seminar will be held at the Mills House Hotel in Charleston, beginning at 11:30 am and ending at 5:00 pm. For those in the construction defect or coverage practice or those anxious to expand into those areas, this seminar will provide the perfect opportunity to learn more. The program will feature an ethics component for those needing CLE hours in that area. Then, a live demonstration will take place to show attendees first-hand the practices and procedures that go into the installation of commonly litigated building components. A panel will then address the ever-present issues involved with coverage in construction litigation, including commentary and tips from both the plaintiffs' and defense bar. The topic of amalgamation and successors in interest will also be addressed. A judicial reception will immediately follow. The cost includes lunch as well as the seminar. To register, go to the SCDTAA website at www.scdtaa.com.

Silent Auction Another Success

by William "Trey" W. Watkins, Jr.



The Young Lawyers Division hosted a silent auction in conjunction with the 48th Annual Summer Meeting for the South Carolina Defense Trial Attorneys' Association on July 23, 2015. The Young Lawyers Division is in charge of the silent auction and uses the proceeds from the auction to fill its charitable giving mission. This year's auction brought in approximately \$10,500 to donate to the National Foundation for

Judicial Excellence, the South Carolina Bar Foundation's Children's Fund, and Kid's Chance of South Carolina. We were excited to break the \$10,000 mark for charity for just the second time in the history of the auction and the second year in a row.

The continued success of the silent auction is due to our members, vendors, sponsors, management team and leadership who worked together to provide a great auction experience. Members from across the state were 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: Mike Leech of Clawson & Staubes, Childs Thrasher of Gallivan White and Boyd, Andy Delaney of McAngus Goudelock & Courie, Claude Prevost of Collins & Lacy, and Trey Watkins of Wall Templeton. 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 contributors to the silent auction: A. William Roberts, Jr. & Associates and Dixon Hughes Goodman. The auction would not be possible with-

out our Executive Director, Aimee Hiers, and her staff. With the 2015 auction behind us, we look forward to seeing you at our Annual Meeting.

Election Year

I have enjoyed serving as President of the Young Lawyers Division for the past two years. The Young Lawyers Division is in great shape as the President-Elect, Claude Prevost, takes over at the end of this year. This is an election year and the Young Lawyers Division is seeking a new President-Elect for the organization. A young lawyer with the South Carolina Defense Trial Attorneys' Association is defined as someone who has been practicing law for ten years or less. I encourage all who are interested to run for the position of President-Elect. This position requires serving a two-year term as President-Elect and an additional two year term as President. Please note that this position requires significant time and effort to address all of the responsibilities involved. In addition to attendance at approximately four meetings of the Executive Committee each year, The Young Lawyers President is expected to attend and preside over a mid-year and annual meeting, and is responsible for obtaining jurors and witnesses for the Trial Academy and procuring items for the silent auction at the Summer Meeting.

Aimee Hiers will contact the membership for nominations, and we will conduct an election via an online vote. Those who are interested in the position, please contact Aimee by email at Aimee@Jee.com to have your name added to the ballot.

OUR THANKS TO:

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Dixon Hughes Goodman
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Grove Park Inn
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Old South Carriage Co.
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Westin - Savannah
Wilkes Law Firm
Womble Carlyle
Woodcreek & Wildewood

Legislative Update

by Jeffrey N. Thordahl, SCDTAA Lobbyist

The tragic shooting in Charleston, which resulted in the deaths of nine wonderful people, will forever change the history of South Carolina. As everyone undoubtedly knows, one of the nine people killed was State Senator Clementa Pinckney, who was only 41, and who leaves behind his wife and two young daughters. He was a kind and gentle spirit who would not only take the time to listen to you, but also to look you in your eyes in a way that made you feel he was truly focused on you. Out of the tragedy, Governor Nikki Haley and the General Assembly quickly took action to have the Confederate battle flag removed from the statehouse grounds.

While the emotions of the tragedy will linger over South Carolina and the General Assembly, there are already signs that the legislature is focused on unfinished business. At the forefront of that list is the issue of how to provide an infusion of money to repair and expand the roads and bridges across the state. As in the past session, the issue of road funding will take much time and attention of the General Assembly. Another item on the list may be a bond bill focused on higher education and armory infrastructure needs.

Further, there are several pending issues that relate specifically to the legal community, including:

- Judicial pay raises;
- Judicial election reform;
- Election of a new Supreme Court justice and other judges;
- Continued discussion of tort reform;
- Consideration of workers' compensation legislation; and
- 2016 elections.

A strong effort, led by Chief Justice Jean Toal, was made to increase judicial salaries. At times there was support by both the House and the Senate in the budget for significant pay raises—as much as 12%. Ultimately, however, the budget did not include an increase. While there is clearly strong support for a salary increase, the effort stalled seemingly due to a desire to review the salaries of all state employees. A report will be submitted to the General Assembly early next year comparing the pay of state employees to those in other states.

In addition, there are ongoing discussions concerning potential changes to the Judicial Merit Selection Commission ("JMSC") membership, and to the process of electing judges. For instance, a bill

that passed the House this year would remove the requirement that the JMSC report out only three qualified candidates for each seat. Attorney General Alan Wilson is considering possible changes to the election process and will be sharing his ideas next year.

Of course, there will be judicial elections for several seats whose terms expire June 30th of next year. The General Assembly will hold an election for these seats most likely in early February. The application deadline for these seats is noon on August 10. The seat garnering the most attention is Seat 2, currently held by Justice Pleiconis. Upon his swearing in as Chief Justice at the end of 2015, that seat will become vacant with an unexpired term ending July 31, 2016.

Tort reform continues to be a topic of discussion mainly within the Senate Judiciary Committee. Senator Shane Massey's two tort reform bills have been the subject of several hearings. A subcommittee will continue to debate the best way to proceed, but there is no consensus on a way forward. Given that this is the second year of the two-year session, it is not expected that the Tort Reform bills will pass in 2016.

New on the list of legislative issues is workers' compensation reform. Late in the 2015 Session, three bills were introduced that would dramatically reform the existing system. S. 697 was introduced by Senator Shane Martin from Spartanburg and was referred to the Senate Judiciary Committee; H. 4171 was introduced and referred to the House Judiciary Committee; and H. 4197 was introduced and referred to the House Labor Commerce and Industry Committee. None of these bills was the subject of a hearing. Again, with one year left in the two-year session, it is unlikely any of these bills will proceed favorably. However, the issue has been raised and the bills may be the subject of committee hearings.

Finally, it is important to take note of where we are in the election process. All of the House and Senate seats are up for election in 2016. Add in the already active Presidential election, and 2016 will be a busy election year.



2015 PAC Golf Classic

Thursday, September 24

Go to the **EVENTS** tab at www.scdtaa.com for more info



Thursday, September 24, 2015 – Spring Valley Country Club, Columbia, SC

Spring Valley Country Club
1234 Spring Valley Road
Columbia, SC 29229
For more information, call
Aimee Hiers at SCDTAA headq.
5646 or (800) 445-8629 or email



Agenda:

- 11:00 a.m. Registration, Box Lunch & Putting Contest
- 12:00 p.m. Shot Gun Start
- 5:30 p.m. Awards

Sponsorships:

Sponsorship includes signage on the course, & recognition at the tournament. Check the appropriate sponsorship.

- Beverage Stations\$500
- Hole Sponsors.....\$500
- Driving Range.....\$500
- Closest to Pin.....\$350
- Longest Drive.....\$350

Hole-in-One Contest with chance to win a Hawaiian Islands (Polynesian) Vacation for 4 to include business class airfare, deluxe accommodations and tours!
Contest sponsored by

CompuScripts, Inc.,



All taxes are the responsibility of the prize winners. The tournament committee's decisions are final. Consumption of alcohol is at the consumer's risk.

Registration:

Registration fee includes a golfer gift, greens fee, cart, lunch, range balls, beverages, prizes & awards. We encourage you to put in a foursome – guaranteeing play with those of your choice. If you choose not to submit a full team, please know that the committee will do its best at placing you on a mutually beneficial team.

Golfer/Company	Handicap/Avg. Score
1.	
2.	
3.	
4.	

Payment:

Contact _____
 Company _____
 Address _____
 Telephone () _____
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 Email _____

Circle selection	Individual	Foursome
BEFORE 8-31-15	\$225.00	\$850.00
AFTER 8-31-15	\$250.00	\$1,000.00

Sponsorship	\$
Donation to SCDTAA PAC	\$
Total DUE	\$

Make checks payable to **SCDTAA PAC.**

PAYMENT DUE on/before date of tournament.

MAIL TO: SCDTAA PAC, 1 Windsor Cove, Suite 305, Columbia, SC 29223

FAX TO: (803) 765-0860

EMAIL TO: aimee@jee.com



The Honorable Benjamin H. Culbertson

South Carolina Circuit Court Judge

Judge Benjamin H. Culbertson was born on February 24, 1959 in Laurens, South Carolina. He remained in the Laurens area during his childhood and attended Laurens District 55 High School. After high school, he finally left the Laurens area to attend The Citadel in Charleston. He completed his education at The Citadel in 1981.

Following his undergraduate studies, Judge Culbertson moved to Columbia to attend the University of South Carolina School of Law. Three years later, he graduated and began his successful legal career. From 1985 until 1990, he was employed with the law firm of Schneider and O'Donnell, P.A. He began as an associate and eventually became a partner. His practice included all areas of the law except tax law. During that time he also served as Assistant Municipal Court Judge for the City of Georgetown, South Carolina.

As the Assistant Municipal Court Judge, he presided over criminal cases occurring in the city where the penalties for convictions were a fine of not more than \$500.00 and/or imprisonment of not more than 30 days. He also conducted preliminary hearings and set bonds for defendants charged with General Sessions offenses, excluding capital murder offenses and charges with a penalty of life imprisonment. Judge Culbertson remained in that position until April of 1996 when he became the Master-In-Equity for Georgetown County, South Carolina.



In 1991, he left Schneider and O'Donnell and opened up his own firm. He maintained that practice until 2007 when he became Circuit Court Judge for the Fifteenth Judicial Circuit.

Judge Culbertson currently resides in Georgetown with his wife Renée Culbertson. They have three children: Jay, Max, and Maggie.

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

Be prepared. Make the job easy for the judge.

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

One of the biggest challenges is keeping the docket moving, in both civil and criminal court.

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

I enjoy reading, boating, and spending time at the beach.

4. What advice do you have for young lawyers entering the practice of law?

I suggest becoming educated with technology and learn how to use it effectively when presenting evidence to the jury. Technology can be entertaining to a jury.

5. What is your favorite television show?

My favorite television show is "House of Cards."

6. What was the last book you read?

The last books that I read were "In Dubious Battle" by John Steinbeck and "The Girl on the Train" by Paula Hawkins.

DRI Update

by Gray T. Culbreath



As the South Carolina State Representative to DRI, I have had the opportunity to attend events on behalf of South Carolina where I am able to network with other State Representatives and SLDO leaders as well as DRI leaders. These meetings are always productive and often present opportunities to further issues that are important to us in South Carolina. One such meeting was the DRI Super

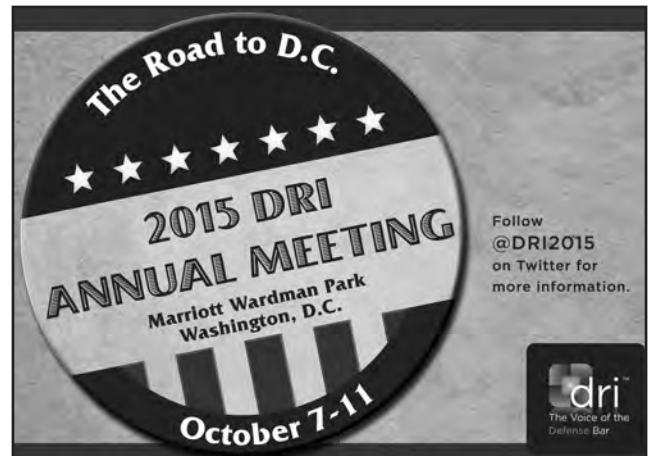
Regional Meeting at Marco Island, Florida in May which I attended along with all the officers of SCDTAA as well as our Regional Director, Sam Outten. The meeting, which brought together the Mid-Atlantic Region, Southeast Region, and the Southern Region was well attended and provided us with lots of information helpful to the South Carolina defense bar. DRI provides a number of services to its members and SLDOs not the least of which is the submission of amicus briefs. During the course of the meeting, I discovered that DRI will be submitting an amicus brief in Georgia in a case addressing joint and several liability and the allocation to non-parties. This is an issue that is now pending before the South Carolina Supreme Court on a certified question. Because of my attendance at the meeting, I was able to learn about the Georgia case and, as a result, I am pleased to report that DRI and SCDTAA have discussed partnering to submit an amicus brief in the South Carolina case on the issues related to the application of the joint and several statute to employers and non-parties.

As always, DRI offers a wide variety of seminars for both the experienced and the beginning practitioner. Among the seminars remaining this year are two directed at the new lawyer. The first, the Deposition Institute, will be held in Chicago from September 8th-11th and will provide in-depth, intensive training on how to take depositions. With excellent faculty and small group instruction, this program is perfect for the young lawyer in your office that you want to start out on the right foot. Another seminar designed for the new lawyer is the Boot Camp for New Life, Health, and Disability Lawyers being held Friday, November 13. While the date has been set, the location has not been determined. Keep an eye out for more information about this seminar.

For the experienced lawyer, including law firm managers, the Data Breach and Privacy Loss seminar will be held in Chicago on November 5th-6th is a

must attend. As we have learned from many high-profile data breaches, you cannot prevent people from breaking into computer systems. This is particularly true given the human element of computers since it is difficult to stop people from clicking things that they should not whether it be your client or your law partner. This seminar will put you on the cutting edge of this intersection of law and technology.

In addition to these informative educational opportunities, DRI will once again hold its Annual Meeting in Washington, D.C., October 7th-11th at the Washington Marriott Wardman Park. For those of you who have not been before, the Annual Meeting is an excellent mix of education, information, networking, and social outings. This year's speaker list is impressive and includes Madeleine Albright, Colin Powell, and Rob O'Neill, the Navy Seal who killed Osama Bin Laden. Make plans to attend now as the hotel typically sells out early.



I would be remiss in not encouraging you to join DRI if you are not already a member. For those of you who are young lawyers (defined as in practice five years or less), you can join DRI free for the first year and receive a certificate for free attendance at a DRI seminar. For those of you who are members of SCDTAA and not a member of DRI, you can also join free for one year. I would encourage all of you who fit into either of these categories to take advantage of this opportunity. Contact me for the forms.

Of course, if you have any questions about DRI memberships, seminars, or otherwise, please feel free to contact me at 803-724-1850 or gculbreath@gwblawfirm.com.

I look forward to seeing you at a DRI event soon.

Stacking in South Carolina - A Law Adrift

by William H. Daniel, IV and William H. Daniel, V ¹

Prior to 1978, there was no underinsured (UIM) coverage in South Carolina. In 1978, South Carolina Code Section 38-77-160 was passed, and it has since been held to control *stacking* of uninsured (UM) and UIM coverage in this state. It is a confusing and, at best, vague statute. It never mentions the word stacking, although it has been held to authorize it. It is clear that the statute was enacted to create UIM coverage in this state and to mandate its offering, as well as to mandate the offering of UM coverage up to the liability limits an insured carries on his policy. Whether the statute was intended to legislate stacking is unclear.

Stacking was in existence prior to Section 38-77-160, but there is no indication that the statute was passed to set parameters for stacking. No state that the writers are aware of has a statute similar to Section 38-77-160. North Carolina does not have such a statute and its stacking rules are very different from South Carolina's. In North Carolina, stacking is of policies, and if there are multiple vehicles on the policy then the insured can get only one coverage from that policy. Also, North Carolina is a reduction state, which means the UIM limits of an insured are reduced by the amount of liability coverage that the at-fault driver possesses. South Carolina is an excess state, which means the UIM limits of an insured begin to pay unabated once the damages exceed the liability limits of the at-fault driver. This is significant because, when the statute was passed, the South Carolina Department of Insurance was under the impression that South Carolina was to be a reduction state. The courts were quick to disagree, thus demonstrating the ambiguities of the statute. It appeared that, after almost thirty years of litigation, the interpretation of the statute was finally settled. However, with the Supreme Court's decisions in *Nationwide v. Erwood*² and *Burgess v. Nationwide*³, all clarity was lost.

Prior to the Supreme Court's opinions in *Erwood* and *Burgess*, the law was as follows:

Liability: A policy can validly prohibit the stacking of liability coverage.⁴

Medical Payments Coverage: A policy can validly prohibit the stacking of such coverage as it is voluntary coverage.⁵

UM and UI: To be able to stack, a plaintiff/insured must be a Class I insured as to a vehicle involved in

the accident. He need not own the vehicle.⁶ A Class I insured may stack from uninvolved vehicles up to the amount of coverage he has on the vehicle involved in the accident, even if that is more than minimum limits.⁷

Stacking Definition: From the time the statute took effect through 1990, stacking was only defined in three cases, all involving State Farm. In two of them, *Jackson v. State Farm*⁸ and *Giles v. Whitaker*,⁹ stacking was defined as the recovery from more than one policy. In the other and earliest of the cases, *Busby v. State Farm*,¹⁰ stacking was defined as the adding of insurance benefits provided by separate insurance coverages, whether by different or the same insurance companies or policies of insurance.

Although stacking was never expressly defined in the opinions, courts also weighed in as follows:

*Gambrell v. Travelers*¹¹ called it stacking when the court allowed the collection of UIM coverage from two vehicles on just one policy.

*Garris v. Cincinnati*¹² called it stacking when the court referred to the collection of UIM coverage from multiple vehicles on the same policy.

*Nationwide v. Howard*¹³ called it stacking when the court allowed the collection of UM from six vehicles insured with Nationwide. Three of the vehicles were on one policy and the other three vehicles were on separate policies.

Thus, it appears that, through 1990, stacking included the recovery of coverage from multiple vehicles whether they be on the same policy, separate policies or multiple policies where some of the policies may insure more than one vehicle.

During the period 1991 through 2002, twelve cases addressed stacking—five cases decided by the South Carolina Supreme Court, and seven cases decided by the South Carolina Court of Appeals. Of these cases, three involved multiple policies with only one vehicle on the policy. Two cases involved multiple policies



Daniel, IV



Daniel, V

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with some of the policies having only one vehicle on them and others having multiple vehicles on them. The remaining seven cases involved only one policy that contained multiple vehicles. All of these cases stated that they were deciding stacking issues. Of the seven cases with only one policy with multiple vehicles on the policy, the Supreme Court decided four of them.

Of these twelve opinions, only four (three of which were decided by the Court of Appeals) provided a definition of stacking. Three of these four cases involved a single policy with multiple vehicles on the policy. In *Continental Ins. Co. v. Shives*, the court said, “[s]tacking is the insured’s recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies.”¹⁴ In *Mangum v. Maryland Casualty*, the court said, “[s]tacking permits the insured’s recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies.”¹⁵ In *Kay v. State Farm*, the only case to involve multiple policies with only one vehicle on the policy, the court said, “South Carolina courts have interpreted this section [38-77-160] to allow Class I insureds to stack UIM coverage from multiple automobile insurance policies.”¹⁶ The only case in which the Supreme Court provided a definition of stacking was *Ruppe v. Auto-Owners*,¹⁷ where the court stated, “[s]tacking does not depend upon the number of policies issued but rather the number of additional coverages for which the insured has contracted.” *Ruppe* involved one policy with two vehicles on it. State Farm, however, only puts one vehicle on a policy, and *Giles v. Whitaker* was a State Farm case, using the definition for stacking from *Jackson v. State Farm*.

Given that all twelve cases said they were deciding stacking issues, and the fact that the only definition put forward by the Supreme Court was that stacking is not dependent on the number of policies but rather on the number of coverages contracted for, it appears that, at that point, stacking was the recovery of damages from multiple coverages, whether they be on one policy or multiple policies.

At that time, there had been only three cases where the insured owned the vehicle in the accident and there was no UIM coverage on the vehicle.¹⁸ The first case was *McAlister v. State Farm*.¹⁹ There, State Farm had \$25,000 UIM coverage on a vehicle at home. State Farm paid \$15,000 pursuant to a provision in its policy which reduced the limit in this given situation. The exclusion was held invalid and the court pointed out that State Farm had failed to preserve the issue of whether it owed only the amount on the vehicle in the accident, which was zero. In *Ohio Casualty v. Hill*,²⁰ *Continental v. Shives*,²¹ and *State Farm v. Gunning*,²² the carriers all paid one limit of coverage before filing a declaratory judgment action to contest whether anything was owed from other vehicles. Thus, the issue was

open as to whether a carrier could claim it owed zero for each uninvolved vehicle if there was no UM or UIM on the vehicle that was involved in the accident. This type case was soon to arise.

THE LANDSCAPE IS CHANGED AND THE LAW IS SET ADRIFT

In 2007, the Supreme Court decided *Burgess v. Nationwide*.²³ There, Mr. Burgess was riding his motorcycle, which had no UIM coverage, when he was hit by an at-fault motorist. Burgess had a policy at home with Nationwide which insured three vehicles with \$25,000 UIM on each. The Nationwide policy at issue provided under UM and UIM that if the policyholder or resident-relative should sustain injury in an accident where a vehicle owned by the insured or another resident-relative was involved, then the Nationwide policy would be primary if the involved vehicle was on the declarations page, but be excess if the involved vehicle was not on the declarations page. If the involved vehicle was not on the declarations page, then the policy would pay up to the amount of coverage the involved vehicle carried. In that case, it was zero.

The court said that UIM coverage is personal to the insured and is not dependent upon the use of the insured vehicle. The court then continued on to state that Section 38-77-160 did not apply, as it was not a stacking case. The court, in a footnote, defined stacking to mean the recovery of damages from more than one policy. The court pointed out that the insured was only attempting to collect from one policy, and therefore it was not a stacking case. The court then said that Nationwide’s provision did not violate public policy because the insured could have purchased the UIM on his motorcycle if he had wanted to protect himself. The court stated that by holding the way it did, people would be encouraged to purchase UIM insurance on all of their vehicles.

On the same day, the Supreme Court decided *Nationwide v. Erwood*.²⁴ In that case, the insured was a passenger on her resident husband’s motorcycle when he caused an accident. There was no insurance on the motorcycle. The insured had a policy with Nationwide that insured one vehicle with \$15,000 UM coverage. Nationwide maintained that this was a stacking case and, pursuant to Section 38-77-160 and the provision in the policy, the insured was limited in how much she could collect from the at-home vehicle. According to the policy and the statute, that was as much as there was on the vehicle involved in the accident, which was zero. The court said that *Erwood* was not a stacking case, as the insured was only seeking to recover from her policy; thus, Section 38-77-160 did not apply. The court instead said that Section 38-77-150 applied, pointing out that it requires all policies to carry UM coverage in the minimum limits, and distinguishing that as mandatory versus UIM which is voluntary. The court said that, given the mandatory nature of UM, public

policy required that basic UM coverage be afforded to the insured even when she was a passenger on her spouse's uninsured motorcycle. In a footnote, the court said that it would be troubled if it was the insured who was seeking UM coverage from the at-home vehicle, indicating that the decision might be different if it was the owner of the motorcycle who was seeking to recover.

In *Nakatsu v. Encompass Indemnity Co.*,²⁵ Nakatsu was driving her auto when she was hit by an at-fault driver. She collected the liability coverage from the at-fault driver and the \$25,000 UIM from her own auto policy. Nakatsu then turned to Encompass who had issued an auto policy to Nakatsu's resident sister and brother-in-law, the Buckners, covering three vehicles with \$50,000 UIM on each. Nakatsu argued she was entitled to stack the UIM from those three vehicles. Encompass claimed that, because the Supreme Court in *Burgess* had said that UIM was completely voluntary, their provision in the policy, which excluded a resident relative from coverage if they were occupying a vehicle they owned but was not insured under the Encompass policy, was valid. The Court of Appeals stated that stacking is the recovery of damages from more than one policy and, as such, the present case was a stacking case. The court then held that Section 38-77-160 controlled and allowed a Class I insured to stack coverage from uninvolved vehicles up to the amount of coverage she had on the vehicle involved in the accident. The court held that any policy provisions inconsistent with this section were invalid. Thus, the court held that Encompass's provision was invalid.

More recently, in *Nationwide v. Rhoden*,²⁶ Rhoden and her daughter, Emerlynn Dickey, were passengers in a car owned and driven by Rhoden's other daughter, Ashley Arrieta, when they were hit by an at-fault motorist. All three persons lived together in Rhoden's home. Arrieta had no UIM on her vehicle, but Rhoden had a policy with Nationwide covering two vehicles with minimum UIM limits (\$15,000/\$30,000) on each vehicle. Nationwide claimed that its policy limited Rhoden and Dickey's recovery to the amount of UIM on the vehicle involved in the accident, and that *Burgess* had held that this provision was valid. The court stated that insurers have the right to impose whatever conditions they desire as long as they are not in contravention of a statutory inhibition or public policy. The court then said that the public policy of South Carolina is that UIM, like UM, is personal and portable to the insured and may not be limited to use of the insured vehicle; that is, the coverage follows the insured and not the vehicle. The court then stated that Rhoden and Dickey purchased UIM to protect them in situations when they could not protect themselves. The court stated that Rhoden and Dickey had no more control over the coverage purchased by Ashley Arrieta than they would over

anyone else with whom they may ride. The court stated that the same public policy considerations in *Burgess* were not present in this case, as it did not involve the owner of the involved vehicle seeking coverage, in which situation the owner could have protected himself. Thus, the court held that Nationwide's provision was invalid. The court went on to state that Section 38-77-160 did not apply, since stacking is the recovery of damages from more than one policy, and Rhoden and Dickey were only seeking recovery from one policy. The court held that the language in the statute, ". . . he has on the vehicle involved in the accident" means that the insured actually owns the vehicle involved in the accident. The court stated that the language in *Concrete Services v. U.S. Fidelity*²⁷ that the plaintiff must be a Class I insured as to the vehicle and not actually own it, is purely dicta and was put forth because of other public policy considerations involved in stacking, which the present case did not involve.²⁸

On December 11, 2013, the Supreme Court issued its opinion in *Carter v. Standard Fire Ins. Co.*²⁹ In that case, Carter was a passenger in his Dodge Charger driven by a friend, Collins. An accident took place in which Collins was at fault. Carter's Charger was insured with Allstate, and Collins had a personal policy with Allstate. Allstate paid the liability from Carter's policy and the liability from Collins' policy in exchange for a covenant not to execute. Allstate then paid the \$250,000 UIM coverage from Carter's policy. Carter then turned to his resident parents' policy with Standard Fire which insured three vehicles with \$250,000 UIM on each vehicle. Standard Fire denied coverage on the basis of a provision in the policy which stated that they did not provide UIM coverage for any person while occupying a vehicle owned by the policyholder, his wife, or any family member which is not insured under the policy. The court said that section 38-77-160 controls stacking. The statute clearly says that once an insured is protected by UIM in excess of the basic limits, then the insurer shall provide UIM coverage up to the amount on the vehicle involved in the accident. The court pointed out that, although stacking may be prohibited by contract as long as it is consistent with statutory insurance requirements, here Standard Fire's policy provision conflicted with the statute and was thus invalid. Standard Fire then argued that *Burgess* marked a turning point when it held that public policy is not offended by a policy provision which limits the portability of at-home UIM coverage when the insured owns the vehicle involved in the accident, but does not insure it under the at-home policy. The court pointed out that the case before them was different from *Burgess*, in that in *Carter* the insured chose to buy the insurance on the vehicle involved in the accident, and in *Burgess* he did

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not. Thus, the public policy concerns involved in *Burgess* were not present. Furthermore, the court pointed out that *Burgess* was not a stacking case and, therefore, Section 38-77-160 did not apply. Where stacking is the recovery of damages from more than one policy, and the case before them was clearly a stacking case, Section 38-77-160 controlled.

As of January 2014, it appears that the law of stacking in South Carolina was as follows:

Liability: A policy can validly prohibit the stacking of liability coverage.³⁰

Medical Payments Coverage: A policy can validly prohibit the stacking of such coverage as it is voluntary coverage.³¹

UM and UIM Coverage: S.C. Code Ann. § 38-77-160 controls stacking. To be able to stack, the insured must be a Class I insured who has a vehicle involved in the accident. If he does, then he may stack from policies on uninvolved vehicles up to the amount of coverage he has on the vehicle involved in the accident.³²

If the insured owns the vehicle involved in the accident and he does not have any UIM on this vehicle, then he may not collect anything from the policies on uninvolved vehicles at home.³³ It appears that should the court be faced with this issue in a UM situation, then the answer would probably be the same as the holding in *Burgess*.³⁴

Under UM and UIM, if the insured does not own the vehicle involved in the accident but it is owned by a resident spouse or resident relative and it does not have any UM or UIM on it, as the case may be, then the insured may go home and collect at least one minimum limits coverage.³⁵

The language in the statute saying “have a vehicle involved” now means that the insured must actually own the vehicle.³⁶

Definition of Stacking: It is now clear that stacking means, an insured’s recovery of damages under more than one policy in succession until all of his damages are satisfied or until the total limits of all policies have been exhausted.³⁷

UNANSWERED QUESTIONS

Since 2007, the law on stacking has greatly developed. However, there remain several unanswered questions. Before these questions are presented, it is helpful to quote the pertinent language from Section 38-77-160.

“...If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured’s or named insured’s vehicles is involved in the accident, coverage is avail-

able only to the extent of the coverage on any one of the vehicles with the excess or underinsured coverage.”

1. Since the language “. . . he has on the vehicle involved in the accident . . .” means that the plaintiff/insured must actually own the vehicle involved in the accident, does it mean that if the plaintiff/insured does not own the vehicle, but it is owned by a resident family member, he may not stack as this would not be a stacking case?

2. If the vehicle involved in the accident is owned by a resident family member of the plaintiff/insured and it has no UM or UIM, as the case may be, is the plaintiff insured limited to one minimum limit from an at-home policy, or may he collect a limit larger than that if such a policy has that much coverage?

3. If stacking is the recovery of damages from more than one policy, may a carrier prohibit the stacking of vehicles on a policy with multiple vehicles on it?

4. If a plaintiff/insured is in his vehicle which is involved in the accident, but all at-home vehicles are on the same policy as this vehicle, is stacking prohibited since he is only attempting to collect from one policy?

5. Can a plaintiff/insured who is in a resident relative’s vehicle which has minimum limits UM or UIM, as the case may be, refuse to accept any coverage from this policy and instead go to his own policy at home with large UM or UIM limits and claim he can get that as he does not want to stack, and thus Section 38-77-160 should not apply?

6. If the answer to number 5 is no, how is the public policy of encouraging policyholders to purchase UIM in the same amounts on all of their vehicles served when this plaintiff insured can only collect \$25,000 from his vehicle at home which has \$100,000 UIM limits because his resident family member only purchased \$25,000 UIM coverage on the vehicle involved in the accident; but the public policy is not served by limiting the plaintiff/insured to zero if the involved vehicle had no UIM on it?

With *Erwood*, *Burgess* and the cases that followed, the landscape of stacking has changed. It will be interesting to see how courts address these questions as they are presented.

Footnotes

1 William H. Daniel, IV is Of Counsel with Turner Padgett Graham and Laney, where he practices in the firm's Columbia office in the areas of personal injury, insurance coverage, and commercial litigation. William H. Daniel, V, is a recent graduate of Charleston School of Law, and will soon begin as an associate of Downey Cleveland, LLC in Atlanta, Georgia.

2 373 S.C. 88, 644 S.E. 2d 62 (2007).

Blurred Lines: Are the “Arising Out Of” and “Course of Employment” Prongs Still Distinct Requirements for Work-Related Falls

by T. Cory Ezzell and Amity S. Edmonds ¹

Two recent Supreme Court decisions have left employers in South Carolina wondering whether the two-pronged test for an injury to be found compensable under the South Carolina Workers' Compensation Act has been eroded, at least with regard to work-related fall injuries. Specifically, Section 42-1-160 expressly states that an injury under the Act is defined as an “injury by accident arising out of *and* in the course of employment.”² However, as suggested by Justice Pleicones, the decisions in *Nicholson v. S.C. Dept. of Social Services*³ and *Barnes v. Charter 1 Realty*⁴ have seemingly ignored the conjunctive “and” in the statute, and “erroneously equate[d] these two requirements”⁵ of arising out of and in the course of employment. As pointed out by Justice Pleicones’ dissent in *Barnes*, “[t]hese two requirements are not synonymous, and the claimant must prove both” to establish a compensable work-related accident.⁶

It is well settled that the “arising out of” component refers to the origin and cause of the injury, while the “course of employment” requirement refers to the time, place, and circumstances of the injury.⁷ While these are independent requirements both of which must be satisfied for an injury to be compensable, the focus of this article is solely on the “arising out of” prong.

1. Recent Supreme Court Decisions on Work-Related Falls

In *Nicholson*, a DSS employee fell when her foot caught on the carpet of a level hallway at work while on her way to a meeting. At the hearing before the Single Commissioner, she testified that she fell due to her foot getting stuck on the carpet from friction.⁸ Compensation was initially denied by the Single Commissioner after determining she had failed to establish a causal connection between her fall and the employment, as “there was nothing specific to the floor at DSS which contributed to [her] fall and . . . [she] could have fallen anywhere.”⁹ A split panel of the Full Commission reversed, finding her fall was neither unexplained nor idiopathic, but rather the result of the friction on the carpeted area where she was required to work.¹⁰ Thereafter, the Court of Appeals reversed the Full Commission, agreeing that the fall was not idiopathic or unexplained, but holding that because the carpet was not a hazard or

special condition peculiar to the claimant’s employment which contributed to or caused the fall, the injury did not arise out of her employment as a matter of law.¹¹

In *Barnes*, the claimant testified she stumbled and fell while hurrying to her supervisor’s office to check the supervisor’s emails.¹² She was unable to pinpoint a specific cause of the fall, other than stumbling while on her way to the supervisor’s office. The Single Commissioner denied the claim on the basis that there was no explanation for the fall and it was not caused by a particular hazard or deficiency with the carpet; therefore, holding the fall was idiopathic and not compensable.¹³ The Appellate Panel of the Commission and the Court of Appeals affirmed the decision.

The Supreme Court ultimately found both falls were compensable and had arisen out of the claimants’ employments. The basis for their findings is explained in more detail in the following subsections.

A. *Barnes v. Charter 1 Realty* Supreme Court Rationale

In *Barnes*, the Supreme Court held the claimant’s fall was not idiopathic in nature as a matter of law, and endeavored to clarify the scope of the idiopathic exception to compensability.¹⁴ The Court outlined that an “idiopathic fall is one that is ‘brought on by a purely personal condition unrelated to the employment, such as heart attack or seizure,’” and that idiopathic injuries are generally not compensable unless the employment contributed to the severity of the injury.¹⁵

In distinguishing the facts at issue in *Barnes* from those in *Crosby v. Wal-Mart Store, Inc.*,¹⁶ widely accepted as one of the chief cases addressing idiopathic falls/injuries, the Court noted that in *Crosby* there was testimony that indicated the claimant’s leg “gave out” to support the conclusion that the fall was idiopathic and the result of an internal failure or breakdown of the knee.¹⁷ Alternatively, the lower



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Edmonds

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courts' opinions in *Barnes* simply concluded the claimant's fall was idiopathic in nature, without any specific finding that the fall was caused by an internal breakdown personal to the employee, which the Supreme Court concluded was an error of law.¹⁸ The Court goes on to state that a finding "that a fall is idiopathic is not warranted simply because the claimant is unable to point to a specific cause of her fall."¹⁹ Simply put, the Court distinguished between an unexplained fall and one that occurs due to an internal breakdown personal to the employee.

After establishing the idiopathic defense was improper without a finding that the claimant's fall was caused by an internal breakdown, the Court went on to analyze whether *Barnes*' accident arose out of her employment. Without an abundance of discussion or citing to any evidence presented by the claimant as to the conditions or circumstances associated with her employment that caused or contributed to her fall, the Court held that because she was performing her job when she fell, her injuries arose out of her employment.²⁰

B. *Nicholson v. S.C. Department of Social Services* Supreme Court Rationale

In *Nicholson*, the claimant's fall was never characterized as idiopathic by the lower courts, so the focus of the Supreme Court opinion was solely whether an injury arises out of employment when the claimant falls while carrying out a task for her employer where there is no evidence that a specific danger or hazard of the work caused the fall.²¹ The Court found that the Court of Appeal's reliance on *Bagwell v. Burwell, Inc.*²² to support its opinion that the claimant's fall was not compensable, because it was not due to a hazard or special condition peculiar to her employment, was improper under the facts. Specifically, the Court found that the *Bagwell* Court looked to whether there was a work-related hazard only after concluding the claimant's injury was caused by an idiopathic condition personal to the claimant. The Court rejected the notion that the hazard must have caused the fall under the *Bagwell* analysis, but rather only applies when determining whether a hazard resulted in an increased effect from an otherwise non-compensable injury (e.g. when a claimant's knee gives way causing him to fall, which would otherwise be non-compensable, but he hits a piece of machinery as he is falling, thus increasing the risk of injury and resulting in a finding of compensability).

Ultimately, the Court opined that the Court of Appeals erred in requiring a claimant to prove the existence of a hazard or danger of employment that caused their injury, stating that by doing so they "erroneously injected fault into the workers' compensation law."²³ Accordingly, the Court held that because the circumstances of the claimant's employment required her to walk down the hallway to perform her job duties and, in the course of those duties, she sustained an injury, she had satisfied her burden of establishing a causal connection between

her employment and her injuries.²⁴ However, the Court did not acknowledge nor discuss that the claimant has the burden of establishing that an injury arises out of the employment, which has been defined by our courts as an injury that can "fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would not have been equally exposed apart from the employment."²⁵

Importantly, in his concurrence in *Nicholson* and his dissent in *Barnes*, Justice Pleicones noted the majority misapplied the "arising out of" requirement by equating it to the "in the course of" requirement under the facts of these cases.²⁶ Noting that South Carolina is in the minority of jurisdictions that deny compensation for unexplained falls, a premise that was seemingly ignored by the majority opinions, Justice Pleicones opined that the claimant must present specific evidence as to what caused the fall to prove a compensable injury.²⁷ While he felt the claimant in *Nicholson* had met her burden, presumably through her testimony that the fall was caused by friction on the employer's carpet,²⁸ he opined the claimant in *Barnes* had presented no evidence that her fall arose out of her employment by establishing her fall on a level surface was the result of a special condition or circumstance.²⁹ Notably, he cited the *Bagwell* decision for the proposition that the claimant has this burden.

2. What Remains of the "Arising Out Of" Requirement

Our courts have repeatedly quoted the Supreme Court decision in *Douglas v. Spartan Mills, Startex Div.*³⁰ when discussing the "arising out of" prong, which stands for the proposition that "an injury arises out of employment if it is proximately caused by the employment."³¹ Importantly, the often quoted test from *Douglas* goes on to state that the arising out of requirement excludes an injury "which comes from a hazard to which the workmen would have been equally exposed apart from employment . . . [and that] the causative danger must be peculiar to the work and not common to the neighborhood."³²

Interestingly, despite specifically noting the *Douglas* decision in the *Nicholson* opinion, it would seem the Supreme Court blurred the test previously set forth without actually overruling their prior opinion. Specifically, in *Nicholson*, the Court found that the *Douglas* test "simply establishes that an injury is not compensable absent some causal connection to the workplace" and that the claimant's burden of establishing a causal connection is satisfied by showing merely that "but for the claimant being at work, the injury would not have occurred."³³ Likewise, in *Barnes*, the court held that the claimant's injuries arose out of her employment as a matter of law because she "clearly established that she was performing her job when she sustained an accidental injury."³⁴

In other words, without outright overruling *Douglas's* test that the purported causative danger must be "peculiar to the work and not common to the neighborhood," it would seem these recent opinions have more or less replaced the arising out of requirement with the course of employment requirement, at least from a practical standpoint. It would seem that following these opinions, claimants need only establish that they were at work performing regular job duties when an accidental fall and resulting injury occurred, regardless of whether there was anything specific or peculiar about the work environment itself that presented an increased risk.

It remains to be seen whether the Supreme Court's recent analysis of fall injuries will carry over to other factual scenarios, despite the host of South Carolina cases confirming that the causative danger must be peculiar to the claimant's work place.³⁵ What is clear is that when dealing with a work-related fall, the employer must investigate what caused the fall as well as any potential internal or idiopathic causes. As a practical matter, the impetus will be on the employer to focus investigative efforts on determining whether other employees/witnesses were aware of a potential internal breakdown or whether prior medical evidence establishes an idiopathic cause personal to the claimant. Examples of internal conditions that should be considered are degenerative conditions, syncope or seizures, heart conditions, or side effects from medication the claimant was taking at the time. Additionally, in defending unexplained fall cases, it will be important that a specific finding of an internal breakdown is established at a compensability hearing rather than a mere finding that the fall was unexplained in order for the finding of an idiopathic fall to withstand appellate review.

With the foregoing said, it is important to keep in mind that both *Nicholson* and *Barnes* involved factual scenarios where a claimant was walking and tripped while on their way to perform a work duty. Thus, other unexplained injuries without any causative danger peculiar to employment would arguably still fall outside traditional notions of an injury by accident arising out of employment, as outlined by other binding precedent such as *Miller v. Springs Cotton Mills*.³⁶

In *Miller*, the claimant was denied compensation after twisting her knee while getting up from a table.³⁷ While there was no medical evidence indicating any specific internal breakdown to explain the knee injury, the Supreme Court upheld the denial of compensation finding the claimant had failed to establish that she suffered an injury by accident, stating she "simply [had] some internal failure or breakdown in the knee which might have happened at any time."³⁸ Notably, in supporting their denial of compensation the Court indicated that sustaining "an award of compensation in the instant case would necessitate opening the floodgates and holding that

every internal failure suffered by an employee in the course of his employment becomes an accident just because it happens."³⁹

Miller remains good law in South Carolina and was not undermined by the Supreme Court's opinions in *Nicholson* or *Barnes*. Accordingly, employers should continue to deny injuries that cannot fairly be traced to the employment as a contributing proximate cause. In particular, *Miller* supports the position that an injury does not arise out of employment where there is no accident. When a claimant is performing normal activities and alleges a resulting injury, a presumption or assumption that it was due to an internal breakdown and was therefore idiopathic appears to remain supported by the Act and controlling cases like *Miller*. A few examples of scenarios where denial remains proper are an alleged knee injury while walking normally on flat ground with no causative factor (i.e., a claimant experiencing a pop in their knee while simply walking), an alleged back injury while standing up from a seated position, or bending over to pick up a pen or work document off the ground. None of these examples involve any particular hazard or causative factor associated with employment and the circumstances certainly suggest an internal breakdown was the cause since no clear accident, such as a fall, took place. As such, unless the claimant can point to a specific causative danger or factor stemming from employment, employers should deny such cases as not arising out of employment as required under Section 42-1-160.

Accordingly, while it would seem the lines have been somewhat blurred between the two distinct requirements of "arising out of" and "course of employment" to establish a compensable injury under the Act, going forward the holdings in *Nicholson* and *Barnes* should be distinguished from scenarios in which there is no evidence of a distinct causative danger arising out of the employment. To satisfy the statutory burden, it appears that claimants must still identify a specific causative factor or danger associated with their employment, such as friction from carpet like in *Nicholson*, to establish a compensable injury. Merely being at work and performing work duties is sufficient to satisfy the "course of employment" requirement, but that alone should remain insufficient to satisfy the "arising out of" prong under the Act. While the fault of either the employer or employee certainly has no role in our workers' compensation laws, causation remains a vital legal hurdle for compensability under Section 42-1-160 and should not be ignored going forward. Thus, employers and carriers must continue to look for a specific causative factor tying the alleged accident to the claimant's employment before accepting a claim as compensable.

Footnotes

1 T. Cory Ezzell is a shareholder and Amity S. Edmonds is an associate in Gallivan, White & Boyd, P.A.'s Greenville office. Both practice in the firm's Workplace Practices Group, focusing primarily on workers' compensation defense and litigation.

- 2 S.C. Code Ann. § 42-1-160 (emphasis added).
- 3 411 S.C. 387, 769 S.E.2d 1 (2015).
- 4 411 S.C. 391, 768 S.E.2d 651 (2015).
- 5 *Id.* at 399-400, 768 S.E.2d at 655; *Nicholson*, 411 S.C. at 390-91, 768 S.E.2d at 6.
- 6 *Id.*; *See also Osteen v. Greenville Cnty. Sch. Dist.*, 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998).
- 7 *Barnes*, 411 S.C. at 398 (citing *Osteen*, 333 S.C. at 50, 508 S.E.2d at 24); *Owings v. Anderson Cnty. Sheriff's Dept'*, 315 S.C. 297, 433 S.E.2d 869 (1993).
- 8 *Nicholson v. S.C. Dept. of Social Servs.*, 405 S.C. 537, 541, 748 S.E.2d 256, 258 (Ct. App. 2013)(reversed on appeal).
- 9 *Nicholson*, 411 S.C. at 383, 786 S.E.2d at 2.
- 10 *Id.* at 384, 786 S.E.2d at 2.
- 11 *Id.*
- 12 *Barnes*, 411 S.C. at 394, 768 S.E.2d at 652.
- 13 *Id.*
- 14 *Id.* at 395, 768 S.E.2d at 653.
- 15 *Id.* at 395-96, 768 S.E.2d at 652 (quoting 2 Modern Workers Compensation § 110:8).
- 16 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998).
- 17 *Barnes*, 411 S.C. at 396, 768 S.E.2d at 653.
- 18 *Id.* at 397, 768 S.E.2d at 694.
- 19 *Id.*
- 20 *Id.* at 398-99, 768 S.E.2d at 654-55.

21 *Nicholson*, 411 S.C. at 384, 769 S.E.2d at 2.

22 227 S.C. 444, 88 S.E.2d 611 (1955) (holding that "the manner in which [the claimant] fell and all the surrounding circumstances . . . indicate that his fall was due to some internal failure or weakness," and was therefore not compensable where there was no specific medical evidence confirming the reason for the fall but there was also no evidence that the fall was caused by any hazards of his employment).

- 23 *Nicholson*, 411 S.C. at 389, 769 S.E.2d at 5.
- 24 *Id.* at 390, 769 S.E.2d at 5.
- 25 *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 140 S.E.2d 173 (1965).
- 26 *Barnes*, 411 S.C. at 399-400, 68 S.E. at 655 (Pleicones, J., dissenting); *Nicholson*, 411 S.C. at 390-91, 769 S.E.2d at 6 (Pleicones, J., concurring).
- 27 *Id.*
- 28 *Nicholson*, 411 S.C. at 391, 769 S.E.2d at 6.
- 29 *Barnes*, 411 S.C. 400, 768 S.E. 2d at 655.
- 30 245 S.C. 265, 140 S.E.2d 173 (1965).
- 31 *Nicholson*, 411 S.C. at 385, 769 S.E.2d at 3.
- 32 *Douglas*, 245 S.C. at 269, 140 S.E.2d at 175.
- 33 *Nicholson*, 411 S.C. at 386, 769 S.E.2d at 3.
- 34 *Barnes*, 411 S.C. at 399, 768 S.E.2d at 655.
- 35 *See generally Douglas*, 245 S.C. at 269, 140 S.E.2d at 175; *Crosby*, 330 S.C. at 492, 499 S.E.2d at 255; *Ervin v. Richland Mem'l Hosp.*, 386 S.C. 245, 687 S.E.2d 337 (Ct. App. 2009).
- 36 330 S.C. 489, 499 S.E.2d 253 (1998).
- 37 *Id.* at 330, 82 S.E.2d at 459.
- 38 *Id.*
- 39 *Id.*

- 3 373 S.C. 37, 644 S.E.2d 40 (2007).
- 4 *Ruppe v. Auto-Owners*, 329 S.C. 402, 496 S.E. 2d 631 (1998).
- 5 *State Farm v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993).
- 6 *Concrete Services v. USF&G*, 331 S.C. 506, 498 S.E.2d 865 (1998).
- 7 *S.C. Farm Bureau v. Mooneyham*, 304 S.C. 442, 405 S.E.2d 396 (1991).
- 8 288 S.C. 335, 342 S.E.2d 603 (1986).
- 9 297 S.C. 267, 376 S.E.2d 278 (1989).
- 10 280 S.C. 330, 312 S.E.2d 716 (Ct. App. 1984).
- 11 280 S.C. 69, 310 S.E.2d 814 (1983).
- 12 280 S.C. 149, 311 S.E.2d 723 (1984).
- 13 288 S.C. 5, 339 S.E.2d 501 (1985).
- 14 328 S.C. 470, 473, 492 S.E.2d 808, 810 (Ct. App. 1997).
- 15 330 S.C. 573, 574, 500 S.E. 2d 125, 127 (citing *Giles*, 297 S.C. 267, 376 S.E.2d 278 (1989)).
- 16 349 S.C. 446, 449, 562 S.E.2d 676, 678 (Ct. App. 2002)(citing *Ruppe*, 329 S.C. 402, 496 S.E.2d 631 (1998)).
- 17 329 S.C. 402, 496 S.E.2d 631 (1998)(citing *Esler v. USAA*, 273 S.C. 259, 255 S.E.2d 676 (1979)).
- 18 In a fourth case, *Continental v. Shives*, 328 S.C. 470,

492 S.E.2d 808 (Ct. App. 1997). the insured was riding on his bicycle when he was hit by an at fault motorist.

- 19 301 S.C. 113, 390 S.E.2d 383 (Ct. App. 1990).
- 20 323 S.C. 208, 473 S.E.2d 843 (Ct. App. 1996).
- 21 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997).
- 22 340 S.C. 526, 532 S.E.2d 16 (Ct. App. 2000).
- 23 373 S.C. 37, 644 S.E.2d 40 (2007).
- 24 373 S.C. 88, 644 S.E.2d 62 (2007).
- 25 390 S.C. 172, 700 S.E.2d 283 (Ct. App. 2010).
- 26 398 S.C. 393, 728 S.E.2d 477 (2012).
- 27 331 S.C. 506, 498 S.E.2d 865 (1998).
- 28 *Rhoden*, 398 S.C. at 402, 728 S.E.2d at 482 n. 5 (2012).
- 29 406 S.C. 609, 753 S.E.2d 515 (2013).
- 30 *Ruppe*, 329 S.C. 402, 496 S.E.2d 631 (1998).
- 31 *Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993).
- 32 *Carter*, 406 S.C. 609, 753 S.E.2d 515 (2013).
- 33 *Burgess*, 373 S.C. 37, 644 S.E.2d 40 (2007).
- 34 *Erwood*, 373 S.C. 88, 644 S.E.2d 67 (2007).
- 35 *See Erwood*, 373 S.C. 88, 644 S.E.2d 67 (2007); *Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012).
- 36 *Rhoden*, 398 S.C. at 401, 728 S.E.2d at 481 (2012).
- 37 *Carter*, 406 S.C. 609, 753 S.E.2d 515 (2013).

National Challenges to the Worker's Compensation Exclusive Remedy Doctrine

by J. Russell Goudelock and Jason W. Lockhart
Contributing Authors: Robert A. McNemar and Michael Mattix

1. The History of the Exclusive Remedy Doctrine: The "Grand Bargain"

Following the growth of labor movements worldwide seeking greater protection for workers, Wisconsin became the first U.S. state to pass a comprehensive workers' compensation law in 1911. Nine other states passed similar laws or regulations that year followed by thirty-six others by the end of the decade.

The various state workers' compensation statutes were all modeled loosely after the original Prussian system, championed by Otto von Bismarck. The central tenet is that of true "no-fault" insurance. Workers were provided wage replacement and medical benefits for the "inevitable" industrial accidents and injuries in exchange for relinquishing the workers' common law right to pursue a civil remedy through the courts.

Thus, employers participating in the system enjoy the notable benefit of tort exemption for workers covered by the statute. Employees remain free to sue third parties who may be responsible for their employment related injuries, but any proceeds from such litigation may go (in whole or in part) to reimburse their employer or its insurance carrier.

2. Dual Coverage under Standard Workers' Compensation Policies

From virtually the outset of workers' compensation in the U.S., legislatures and the courts began to create exceptions to the exclusive remedy, allowing employees to maintain a cause of action directly against their employer in certain circumstances (more fully explored in Part III, *infra*). The insurance industry responded to this potential gap in coverage by expanding coverage in the traditional workers' compensation policy beyond providing benefits mandated by a particular state's workers' compensation law.

Modern policies have two parts: Part One (also referred to as "Coverage A") provides coverage for workers' compensation claims. Part Two (sometimes referred to as "Coverage B") provides "Employer Liability" coverage.

Part One covers the benefits that an employer is required to pay under state law. The benefits are generally unlimited in time and amount except to the extent benefits parameters are provided in state law. Part Two insures the employer for its obligation to pay civil damages due to bodily injury by accident or disease if the condition arises out of and in the course and scope of employment *and if* there is a theory of recovery that is recognized as an exception to the exclusive remedy.

3. Traditional Carve-outs vs. Growing Erosion of Exclusive Remedy Doctrine

A. Third Party Liability

Contribution Contractual Liability - Part Two provides coverage for actions filed by an employee against a third party who, in turn, files a third party claim for indemnification due to the existence of a "hold harmless and indemnification" clause in a contract between the employer and third party. These situations often occur in the construction industry whenever a subcontractor's employee is injured, files a workers' compensation claim against the subcontractor and then sues an upstream contractor for failure to maintain a safe place to work. The upstream contractor then tenders the action back to the subcontractor due to the underlying contract between the parties. More recent issues involve growing trends to use independent contractors to perform work not closely related to the company's core enterprise (e.g., security, housekeeping, photocopying/imaging, landscaping, etc.). Depending on the precise nature of the relationship and contract, the employer may have some exposure.

Contribution/Indemnity Issues - Some states expressly provide for "actions over" against the employer in cases where employees sue negligent third parties (often in the construction trade or



Goudelock



Lockhart

Continued on next page

manufacturing context). For example, an employee injured by a punch press sues the manufacturer alleging negligent design. The manufacturer might file a third-party action over against the employer alleging removal of safety devices. In certain cases, the employer may be entitled to an offset for the amount paid under workers' compensation.

B. Dual Capacity

Some jurisdictions allow tort recovery against an employer that acted in a dual capacity. For example, the exclusive remedy doctrine may not protect a manufacturer of a defective product if the employee is injured by the defective product at the workplace. Other situations involve employees of doctors or hospitals who are victims of medical malpractice while treating with their employer for a work-related injury. Still other situations arise from the role of the employer as the owner of land or property. However, as noted above, not every jurisdiction supports a tort recovery in a dual capacity context.

C. Intentional Injury

The rationale behind this exception asserts that the grand bargain was to shield the employer from ordinary negligence and the fact that an injury was caused intentionally by an employer takes it outside the course and scope of employment. Moreover, it is argued that public policy considerations do not permit an employer immunity from civil actions

where there is an intent to injure or harm an employee. This is not a universally held exception, although the trend appears to be toward expansion not just for clearly intentional acts, but also for injuries arising from willful or deliberate conduct, or conduct "substantially certain to result" in the employee's injury. These expansions tend to focus on the employer conduct (the actions taken or not taken) vs. any deliberate intent to injure a particular employee.

D. Intentional Torts and/or Non-Physical Claims

Employees have alleged an independent action based upon the contention that the resulting injury is not "physical" (bodily injury) but "mental" (in those states that do not recognize purely mental claims) or economic in nature. In general, claims for false imprisonment, deceit, defamation, malicious prosecution and retaliatory discharge are fact-dependent. Results are mixed with regard to claims for intentional and/or negligent infliction of emotional distress. Negligent hiring or retention claims have been less successful in avoiding the exclusive remedy. Causes of action for such claims may involve:

- Intentional/negligent infliction of emotional distress
- Defamation
- False arrest/false imprisonment
 - Deceit
 - Malicious prosecution
 - Negligent hiring or retention
 - Retaliatory discharge
 - Violation of civil rights
 - Loss of consortium

E. Claims Falling Outside Workers' Compensation Statutory Definitions, Statutes of Limitations or Statutes of Repose

In general, occupational disease claims are insured by Part One ("bodily injury by accident or disease"). However, exceptions to the exclusive remedy may be allowed in situations where the injury stems from a latent condition that is time-barred by the applicable workers' compensation statute of limitations or where the medical condition or occupational disease has been expressly excluded by the workers' compensation statutory scheme (e.g., repetitive trauma injuries in Missouri).

Recent decisions from Illinois and Pennsylvania have overturned decades of precedent and ruled in latent asbestos cases that the exclusivity provision of the workers' and ruled in latent asbestos cases that the exclusivity provision of the workers' compensation acts are inapplicable in cases after the occupational disease

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statute of limitations has run. In *Folta v. Ferro Eng'g*, 14 N.E.3d 717 (Ill. App. Ct. 1st Dist. 2014), the First Appellate District held that a former employee can file a general casualty claim (common law suit) against the former employer if the disease manifests after the workers' compensation act's 25 year statute of limitations would serve to bar any recovery under the workers' compensation act. The reasoning of the court is that if a claim is time barred by the workers' compensation statute, it is not subject to the exclusivity provisions contained therein. A similar result was found in *Tooev v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013). And at least one other jurisdiction (Montana) had previously held likewise in an occupational disease setting [*Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 717 P.2d 21 (Mont. 1986)].

Similar legal theories to avoid the workers' compensation exclusive remedy can be contemplated for other injuries falling outside the statutory workers' compensation definitions (e.g., idiopathic causation or injuries in states where workers' compensation benefits are denied because the accident was not the "prevailing factor" or "predominant factor").

F. Racketeer Influenced and Corrupt Organizations Act (RICO) Claims

Claimants sometimes argue that, in addition to the industrial physical injury, there is subsequent harm produced by and through the claims process. Using the federal RICO statute, claims are made that employers, carriers and physicians have conspired to deny or limit medical treatment or economic benefits. Defenses invoking the Supremacy Clause have been asserted and those cases have wound their way through the Federal courts. *But see Brown v. Cassens Transp. Co.*, 546 F.3d 347 (6th Cir. 2008); *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 14 P.3d 234 (Cal. 2001); *Encinas v. Pompa*, 939 P.2d 435 (Ariz. Ct. App. 1997). *See also, Gianzero v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 40416 (D. Colo. Mar. 26, 2012), (a class action against Wal-Mart, its carrier and claims management firm resulting in a class settlement); *Jackson v. Sedgwick Claims Mgmt. Servs.*, 731 F.3d 556 (6th Cir. Mich. 2013) (a case filed just a few months after *Brown v. Cassens Transp. Co.*, *infra*, ruled that plaintiffs did not state a cause of action for which relief may be granted).

G. Bad Faith Claims Handling

In some states, other cases have been pursued successfully that are similar to the allegations contained in the RICO litigation; however, no evidence of conspiracy need be proven. These claims have been particularly effective against self-insured employers based upon claims handling in a particular injured workers' claim or alleged as a pattern and practice. In some states, the exclusive remedy protection is extended not only to the employer, but the employer's workers' compensation

carrier [Wis. Stat. § 102.03 (2)].

H. Recent Appellate Cases Affecting the Exclusive Remedy Doctrine

In *Florida Workers' Advocates v. State of Florida*, Case No. 11-13661 CA 25 (Fla. 11th Cir. Ct. 2014) [a/k/a Padgett], the state circuit court ruled the "exclusiveness of liability" provision of the Florida workers' compensation law was unconstitutional under the United States and Florida Constitutions. In the ruling, the judge stated that statutory changes in Florida had eroded benefits for injured workers to the point that it was no longer a "grand bargain" for the injured workers in exchange for them giving up their constitutional rights to pursue civil litigation. On appeal, the Florida Third District Court of Appeal, on June 24, 2015, concluded that the threshold requirements for prosecution of such claims were not met on grounds of mootness and lack of standing. Because it concluded these issues dispositive, the court declined to review the trial court's analysis of the state and federal constitutional claims. *State v. Fla. Workers' Advocates*, 2015 Fla. App. LEXIS 9531 (Fla. Dist. Ct. App. 3d Dist. June 24, 2015).

The case raises some interesting and troubling issues in view of the fact that, over the course of the past two decades, many states, including South Carolina, have passed workers' compensation reform legislation that was intended to reduce employer costs. Many of these reforms reduced benefits for injured employees and sharpened definitions related to compensability.

In *Mo. Alliance for Retired Ams. v. DOL & Indus. Rels., Div. of Worker's Comp.*, 277 S.W.3d 670 (Mo. 2009), the Missouri Supreme Court declined to decide various constitutional challenges to the 2005 amendments to the Missouri Workers' Compensation Act (Mo. Rev. Stat., Ch. 287). However, the Court granted the Appellant labor organizations certain declaratory relief regarding the exclusive remedy provisions of the Act (Mo. Rev. Stat. § 287.120) concluding that workers' compensation exclusivity only applies to those cases meeting the statutory definitions of compensable injuries by accident.

Other recent appellate cases that demonstrate some of the issues and complexity surrounding the exclusive remedy doctrine are: *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. Ct. App. 2010); *Hansen v. Ritter*, 375 S.W.3d 201 (Mo. Ct. App. 2012); *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14 (Mo. Ct. App. 2011); *But see* 2013 subsequent Missouri legislative enactment; *Schroeder v. Peoplease Corp.*, 18 So. 3d 1165 (Fla. Dist. Ct. App. 1st Dist. 2009); *Rothwell v. Nine Mile Falls Sch. Dist.*, 206 P.3d 347 (Wash. Ct. App. 2009); *Watters v. Dep't of Soc. Servs.*, 15 So.3d 1128 (La.App. 4 Cir. 2009); *Jones v. Ruth*, 31 So. 3d 115 (Ala. Civ. App. 2009); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274

(Ky. Ct. App. 2009); *Brown v. S. Ingenuity, Inc.*, 4 So.3d 974 (La.App. 2 Cir. 2009); *Horn v. Bradco Internat.*, 232 Cal. App. 3d 653 (Cal. App. 4th Dist. 1991); *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (U.S. 1990).

4. Alternative Opt-Outs to Traditional Workers' Compensation and the South Carolina Employee Injury Benefit Plan Alternative

A. Third Party Liability

In the Lone Star State, an employer may reject workers' compensation coverage and become a "non-subscriber". However, there are some requirements the employer must meet:

- ERISA document for each employee detailing the Employee Benefit Welfare Plan
- Package of insurance covering medical expense, AD&D, Disability and money for Legal Defense and Settlement
- Safety Program that is well maintained and documented

There will always be challenges and exceptions to the exclusive remedy doctrine, but it behooves all of us in the defense bar and those who write coverage and adjust claims to be aware of these challenges.

Here are the most recent statistics to indicate the percentage of Texas employers who have taken advantage of the non-subscriber statute:

- 44% of all Texas Employers are Non-Subscribers
- 20% of all Employees are no longer covered under Workers' Comp
- 53% of all Texas Manufacturers are Non-Subscribers
- 49% of all Texas Retailers are Non-Subscribers
- 42% of all Texas Real Estate Sales and Management Companies are Non-Subscribers
- 38% of all Texas Transportation Companies are Non-Subscribers
- 37% of all Texas Construction Contractors are Non-Subscribers
- 30% of all Texas Healthcare Employers are Non-Subscribers
- 94% of all large Non-Subscriber Employers (200 Employees and up) offer a responsible alterna-

tive to workers' compensation

- 30% of the small Non-Subscribing Employers offer a responsible alternative to Workers' Compensation
- Less than 3% of all injury claims ever go to the Court House in Texas

Source: Texas A&M study on Non-Subscribers as commissioned by the Texas Department of Insurance in 2012

Recent litigation in Texas highlights ongoing court controversies arising out of opt-out legislation. The Supreme Court of Texas, in *Austin v. Kroger Tex., L.P.*, 2015 Tex. LEXIS 559 (Tex. 2015), limited damages for many employees hurt while working in hazardous situations. The case affects employees of companies that have opted out of the state's workers' compensation system. In *Austin*, the Court unanimously ruled that millions of workers at the approximately 144,000 noninsured Texas businesses are no longer able to seek compensation in such cases.

But the ruling — which is a huge loss for workers under the "premises liability" law — is a bit of a two-edged sword. In the opinion, the Court stated that employees should be able to recover damages under a separate "negligence" law if the employer failed to provide proper equipment, training or supervision that could have prevented the injury. Such negligence claims with potentially major damage awards have not been previously available to workers in Texas.

B. Oklahoma Option

Prior to 2013, Oklahoma perceived a crisis in its workers' compensation system. Here are the more recent statistics that Oklahoma relied upon:

- Ranked 5th highest in claims cost (NCCI 2011)
- Ranked 6th highest in premiums (2012 Oregon Rate Ranking Summary)
- Ranked 47th worst in 2012 workers' compensation claims costs (American Legislative Exchange)
- Received a "D" for the effectiveness of its workers' compensation system in 2012 (Work Loss Data Institute)

Source: Foregoing data taken from Property Casualty 360 article, April 30, 2014

In response, the Oklahoma legislature passed significant reforms to its existing workers' compensation law, but also passed SB 1062 in 2013, effective February 1, 2014. The new law allows employers to choose between using the reformed workers' compensation system and the alternative system for all on-the-job injuries (Oklahoma Employee Injury Benefit Act). The Option uses minimum workers' compensation benefit levels, employee accountability and a free market approach to medical management. It is not ERISA-based. In addition, the Option benefit plan document may broaden some benefits from the workers' compensation minimum benefit

standards. One final area where the law duplicates the workers' compensation approach is "exclusive remedy."

The efforts to create "opt-out" provisions in states such as Oklahoma have not come without litigation. In April 2015, the Oklahoma Supreme Court rejected assuming jurisdiction over a lawsuit alleging that the state's alternative workers' compensation system is unconstitutional. The state's high court ruled 7-2 to not take up *Pilkington v. State of Oklahoma*, ex rel. Doak, File No. PR-113662 (Apr. 27, 2015) [File No. PR-113662 (Apr. 27, 2015)]., according to the Oklahoma Supreme Court website. Pilkington was injured on the job, and her claim for benefits was denied by Dillard's Inc. according to their petition to the court.

Dillard's opted out of the system and provide their alternative benefit plans. The Plaintiffs, in *Pilkington*, argued that the Oklahoma law is unconstitutional because it includes no due process protections. The Supreme Court of Oklahoma, in a divided decision, opted not to assume original jurisdiction in a constitutional challenge to the law. In its one line order, a majority of the court summarily denied a joint petition filed by two workers, including Pilkington. The order does not, however, amount to a decision on the merits. It does mean, however, that the constitutional status of the controversial legislation is left in limbo while some employers scramble to cobble together benefit plans.

The *Pilkington* decision is nearly two years removed from a prior decision by the Oklahoma Supreme Court where the constitutionality of the opt-out provision was challenged, not too soon after being signed into law in Oklahoma. Soon after being signed into law, opponents challenged the law on multiple grounds, but the Supreme Court's majority opinion focused on the allegation that the new law could violate a constitutional prohibition against covering multiple subjects in a single bill — a practice commonly referred to as logrolling. The Oklahoma Supreme Court rejected that claim.

C. Tennessee Reform

Interestingly, Tennessee legislators recently considered an "opt-out" law and rejected it, largely on fears that reliance on ERISA plans would prevent state oversight and regulation of benefits for workers.

D. South Carolina Employee Injury Benefit Plan Alternative

South Carolina House Representatives Hiott, Sandifer and Gagnon have introduced a bill that would allow employers to create alternative benefit plans for injured workers rather than providing traditional workers' compensation insurance coverage for employees. The legislation, entitled the South Carolina Employee Injury Benefit Plan Alternative, states that minimum benefit requirements must be "interpreted and applied in a manner so that the benefit plan is comparable to" the South Carolina

workers' compensation law.

Republican Rep. David Hiott, who introduced the bill, said in a statement that "markets operate best and participants receive the most benefit possible when competition exists ... The (bill) will also require high benefits levels, which is a win for hard-working South Carolina workers." According to the bill, total disability benefits must be at least 75% of a worker's average weekly wage and no less than \$75 per week. Workers eligible for temporary partial disability benefits will receive at least 75% of the difference between their pre- and post-injury average weekly wages.

Clearly, litigation in Oklahoma and Texas indicates that the creation of an opt-out system does not result in the creation of a utopian system that resolves all the perceived ills, which both injured workers and employers may perceive to exist.

5. The Future of Exclusive Remedy

Interestingly, many of the attempts to strip away the exclusive remedy result from jurisdictions where legislatures have attempted to control workers' compensation costs through broad reforms (e.g., Florida, Missouri, etc.). Rising pro-business lobbies, particularly in the South, have been able to gain traction in implementing increasingly expansive workers' compensation reforms. When faced with dwindling workers' compensation benefits, enterprising lawyers will try to push the envelope. In some cases, the argument has been advanced successfully that workers' compensation reforms have been so restrictive as to violate constitutional rights. The result has been that the injured workers sought relief outside the workers' compensation statute by attacking the exclusive remedy.

There will always be challenges and exceptions to the exclusive remedy doctrine, but it behooves all of us in the defense bar and those who write coverage and adjust claims to be aware of these challenges. In some cases, policy language can be tweaked; in other cases, it may depend on educating the claims adjusting staff; in still others, it may require a concerted effort within state legislatures to ensure that it appropriately and carefully addresses expansion or contraction of coverage for certain types of injuries, diseases and claims.

There is no simple answer to such a complex problem, but awareness of the trends and what can be done to counteract them is a good first step.

Robert A. McNemar, J.D., ARM, Vice President, Swiss Re America; C. Michael Mattix, J.D., CPCU, Vice President, Federated Rural Electric Insurance Exchange; J. Russell Goudelock, Member, MGC Insurance Defense, McAngus Goudelock & Courie, LLC; and Jason W. Lockhart, Member, MGC Insurance Defense/McAngus Goudelock & Courie, LLC.

The *England* Reservation - It's Not a Hotel Booking in London

by Joseph W. Rohe ¹



I would venture to guess that few litigators have happened upon what may be referred to colloquially in the federal courts as “the *England* reservation.” By admission, I unwittingly stumbled across it while researching an entirely unrelated matter—clearly a testament to my legal research skills. As the title suggests, the reservation relates not to your next vacation abroad, but rather to a fairly obscure rule laid down by the United States Supreme Court in *England v. La. State Bd. of Med. Exam’rs*.² Therein Justice Brennan delivered the opinion of the Court, holding that under the abstention doctrine a litigant foregoes his right to return to the federal courts for determination of federal issues when the litigant, freely and without reservation, submits the case to state courts for adjudication. To readily make sense of that holding, one must explore the case’s procedural background and the doctrine of abstention under *R.R. Comm’n of Tex. v. Pullman Co.*³

1. *England*’s Procedural Background

England involved claims brought in the Eastern District of Louisiana by certain chiropractic school graduates against the Louisiana State Board of Medical Examiners seeking an injunction and declaration that the Louisiana Medical Practice Act (the “MPA”) violated the Fourteenth Amendment to the United States Constitution.⁴ The district court invoked, *sua sponte*, the doctrine of abstention on the ground that “[t]he state court might effectively end this controversy by a determination that chiropractors are not governed by the statute,” and stayed further proceedings until the state court could address the state law issues.⁵ Thereafter, the claimants filed suit in the Louisiana state courts alleging the MPA, if applicable to chiropractors, violated the Fourteenth Amendment. The state court action terminated when the Louisiana Supreme Court declined to review an intermediate appellate decision both that the MPA applied to chiropractors and, as so applied, did not violate the Fourteenth Amendment.⁶

Following termination of the state court action, the

claimants re-filed in federal district court; however, those claims were dismissed on the ground that the courts of Louisiana had already ruled on all issues raised, including the federal Constitutional issues.⁷ The case was immediately appealed to the United State Supreme Court pursuant to 28 U.S.C. § 1253.

2. Abstention Under The *Pullman* Doctrine

To fully comprehend *England*, it is necessary to consider the underlying *Pullman* doctrine—sometimes referred to simply as “*Pullman* abstention.” Generally speaking, “[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is [the court’s] duty to take such jurisdiction.”⁸ Moreover, “[t]he right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.”⁹ Notwithstanding, in *Pullman* the Court developed “a doctrine of abstention appropriate [in the] federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary.”¹⁰

Abstention under *Pullman* is discretionary, but three “special circumstances” must be present before a federal district court may even consider invoking the doctrine—those are: “(1) uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) state law issues amendable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of the adjudication of the constitutional claims; [and] (3) a federal court’s erroneous construction of state law would be disruptive of important state policies.”¹¹ However and as repeatedly recognized by the Court, “abstention ‘does not...involve the abdication of federal jurisdiction, but only the postponement of its exercise.’”¹²

3. “The Dilemma” Presented In *England*

In its order dismissing the re-filed federal case, the district court recognized what it perceived to be “the dilemma [created by *Gov’t & Civic Employees Org.*

Comm'n v. Windsor, 353 U.S. 364 (1957)] of a litigant who has invoked the jurisdiction of a federal court to assert a claimed constitutional right and finds himself remitted to the state tribunals.”¹³ Speaking to “the dilemma,” the per curiam opinion noted “[o]n the one hand, in view of [*Windsor*, a litigant] dare not restrict his state court case to local [state] law issues. On the other, if, as required by *Windsor*, he raises the federal questions there, well established principles will bar a relitigation of those issues in the United States District Court.”¹⁴

As an aside, the Court clarified its decision in *Windsor*, explaining that “[t]he case does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed ‘in light of’ those claims.”¹⁵ However, the Court also recognized that, “in the heat of litigation a party...may be led not merely to state his federal constitutional claim but to argue it” and that, in any event, “parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so,” thereby depriving the federal district court of jurisdiction.¹⁶

The right of a party plaintiff to fully litigate federal claims in federal court is an important one that “cannot be properly denied.”¹⁷ Thus, “in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination.”¹⁸ Furthermore, federal appellate review of a state court determination under 28 U.S.C. § 1253 “may not be substituted, against a party’s wishes, for his right to litigate his federal claims fully in the federal courts.”¹⁹ Accordingly, “a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim.”²⁰ This right, however, may be waived.

4. Waiver and The England Reservation

As the Court made clear in *Button*, a party may waive its right to litigate federal claims in the federal district court.²¹ Though application of this rule may seem strict and unmitigating, there exists a logical justification—holding otherwise would permit a litigant to unreservedly and fully litigate its federal claims in the state courts and, following an adverse decision, ignore the same and relitigate the matter in the federal courts. Permitting such a second bite “would not only countenance an unnecessary increase in the length and cost of the litigation,” but would likewise give rise to “a potential source of friction between the state and federal judiciaries.”²² When viewed in this light, the rule may be seen as a logical extension of the doctrine of preclusion. Moreover, the Court “fashioned the rule recognizing such an election because [it] saw no inconsistency with the abstention doctrine in allowing a litigant to

decide, once the federal court has abstained and compelled him to proceed in the state courts in any event, to abandon his original choice of a federal forum and submit his entire case to the state courts, relying on the opportunity to come [to the United State Supreme Court] directly if the state decision on his federal claims should go against him.”²³

Notwithstanding and seemingly recognizing that a dilemma may still exist—even in light of the Court’s clarification of both the *Windsor* and *Button* decisions—the Court noted that “[t]he line drawn should be bright and clear, so that litigants shunted from federal to state courts by application of the abstention doctrine will not be exposed...to procedural traps operating to deprive them of their right to a District Court determination of their federal claims.”²⁴ As such, the Court “explicitly h[e]ld that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in [the Supreme Court]—he has elected to forgo his right to return to the District Court.”²⁵

To avoid such a waiver, a party should “mak[e] on the state record the reservation to the disposition of the entire case by the state courts.”²⁶ “That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.”²⁷ The right to make the reservation extends to any party to the litigation—including a defendant who has elected to litigate in the federal court by virtue of removal jurisdiction. “[W]hile a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant....The latter may protect his right by either declining to oppose the plaintiff’s federal claim in the state court or opposing it with the appropriate reservation.”²⁸

The rule has been approvingly applied in the Fourth Circuit. In *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal, Va.*,²⁹ the Fourth Circuit held that “in cases of Pullman-type abstention...litigants are not necessarily permitted to return to federal court, despite the stay order, if in state court they in fact litigated their federal claims and did not instead make an England reservation of their right to have a federal court disposition of the federal issues.” However, “[w]hen the reservation has been made...[the litigant’s] right to return [to the federal district court] will in all events be preserved.”³⁰

SCDTAA Amicus Update

by David C. Marshall

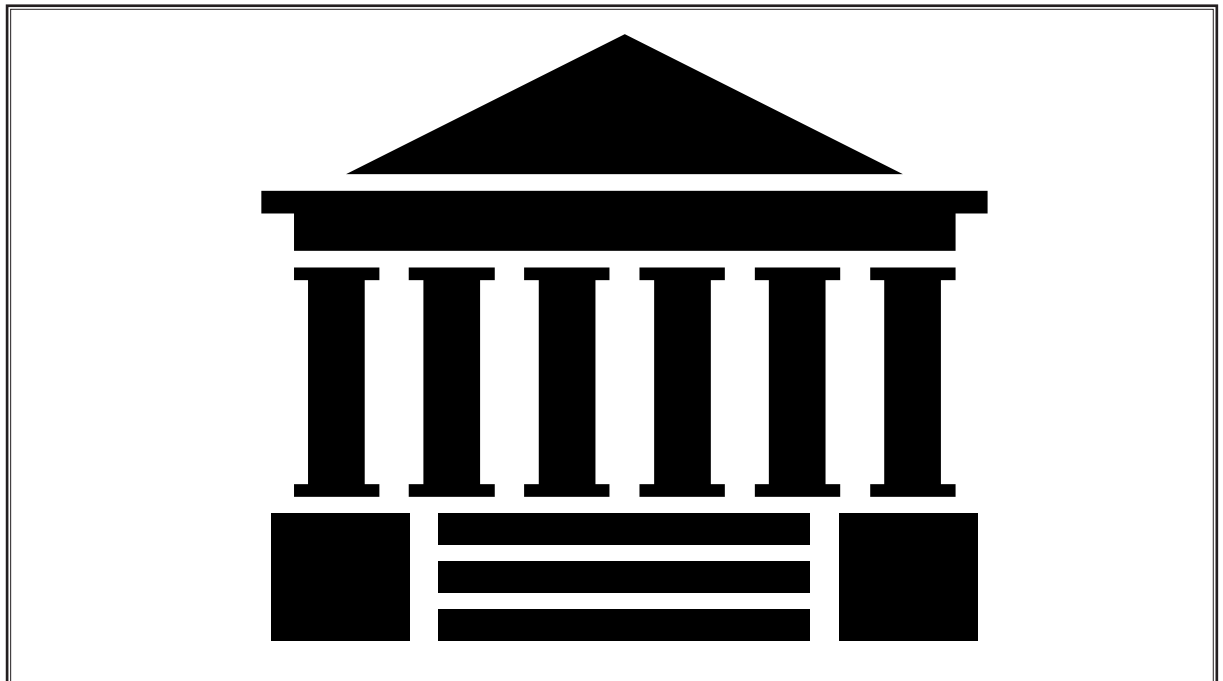


In March of this year, the South Carolina Defense Trial Attorneys Association filed an amicus curiae brief with the Supreme Court of South Carolina in a matter involving a certified question from United States District Judge J. Michelle Childs. The certified question was whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged legal malpractice arose. In its brief, the SCDTAA took the position

that permitting such assignments would cause immeasurable damage to attorney-client relationships, to the tort system, to the court system, and to the public's sense of justice. Permitting such assignments would relegate the legal malpractice action to the marketplace, which would encourage unjustified suits, increase legal malpractice litigation and insurance premiums, and force attorneys to defend themselves against strangers. Accordingly, the SCDTAA asked the court to prohibit such assignments.

On July 15, 2015, the Supreme Court of South Carolina answered the certified question "no" and

expressly prohibited the assignment of legal malpractice claims between adversaries in litigation. *Skipper v. ACE Property & Casualty Ins. Co.*, Opinion No. 27547 (S.C. Sup. Ct. July 15, 2015). The court held such assignments are void as against public policy. In reaching its decision, the court relied heavily on the multitude of cases from other jurisdictions that have considered, and prohibited, such assignments. This outcome affords the best protection to defense attorneys practicing law in South Carolina, ensuring they will not become the targets of their clients who may attempt to collude with their adversaries in the resolution of cases. More importantly, it preserves the sanctity of the attorney-client relationship and the civil justice system in general, ensuring that attorneys' duties of loyalty and confidentiality to clients will remain uncompromised by the threat of assignment of legal malpractice claims. The SCDTAA officers and amicus curiae committee are pleased that the Supreme Court agreed with our position and prohibited the assignment of legal malpractice claims between adversaries in litigation.



Coroner's Inquest - Alive and Well

by J. Bennett Crites, III, Laura J. Evans, and Mary J. Ramsay¹

In South Carolina, coroners are given the statutory authority to hold inquests into casual or violent deaths when the dead body is found lying within their county.² This authority is frequently exercised in instances when deaths involve high levels of public concern and media attention. Although some refer to a coroner's inquest as a rarely used tool, in recent years, South Carolina coroners have held inquests into deaths resulting from officer-involved shootings,³ inmate suicides,⁴ a dog mauling,⁵ child neglect by a babysitter,⁶ a plane crash,⁷ and a newborn death at a birthing center.⁸

An inquest is an official judicial inquiry before a coroner and coroner's jury for the purpose of determining the manner of death.⁹ The proceedings must be publically held.¹⁰ An inquest is primarily criminal in nature;¹¹ however, it is not a trial on the merits but merely a preliminary investigation to ascertain the cause of death, whether by natural causes or in an unlawful, criminal manner.¹² Having heard the evidence, a coroner's jury must rule whether the manner of death was undetermined, natural, homicide, suicide, or accidental.¹³

The coroner is given broad authority and discretion during an inquest. The statute permits the coroner to issue warrants, subpoena records, summon witnesses, and examine before the jury any person present, whether summoned or not, concerning the death.¹⁴ Not only does the coroner have the authority to question any person regarding the death, the manner of conducting the hearing is within the sole discretion of the coroner holding the inquest.¹⁵ The statute gives the coroner full control of the questioning of witnesses, and therefore the coroner can question the witnesses directly, or permit questioning of the witnesses by an attorney or the local solicitor.¹⁶ A coroner is even empowered to hold witnesses and jurors who fail to appear in contempt and commit them to the county jail for up to twenty-four hours.¹⁷ The coroner has statutory authority to examine all witnesses and accused persons, charge the jury with instructions for deliberation, and hold uncooperative witnesses in contempt.¹⁸ Thus, the coroner essentially has the power to act as both the prosecutor and judge in a coroner's inquest, which means many of the evidentiary "gatekeeping" functions our Judiciary employ during a jury trial are absent from an inquest.

Because an inquest is investigatory in nature, the accused has no constitutionally afforded right to counsel and is not permitted to cross-examine the witnesses.¹⁹ In *State v. Griffin*, the South Carolina Supreme Court found that "[t]he only object which a suspected person could have in appearing by counsel would be to prevent a full investigation in so far as it might tend to incriminate him, and thus defeat the purpose of the inquest."²⁰ If the accused chooses to retain an attorney, the attorney has no rights beyond that of a public citizen²¹ and cannot question any witnesses or object to any questions asked of witnesses. The attorney can only advise the accused to assert the Fifth Amendment right against self-incrimination.²²

A coroner's jury is comprised of six jurors.²³ All citizens that are subject to jury duty in circuit court are also subject to serve as jurors for their county at a coroner's inquest.²⁴ While the statute provides the manner in which jurors are to be summoned,²⁵ it does not establish requirements for juror qualification or a procedure for evaluating potential jurors to remove certain backgrounds, prejudices, or biases that are commonly addressed in the traditional voir dire process. Additionally, the accused has no opportunity or input in the jury selection process during a coroner's inquest. The accused has no right to question, evaluate, or strike potential jurors. While not explicitly stated in the statute, the coroner's jury is required to reach a unanimous verdict as to the manner of the death.²⁶

The effect of the verdict of an inquest is merely advisory and has no binding effect.²⁷ If the finding of the coroner's jury is the willful killing by the hands or means of another, a coroner is authorized to issue a warrant for the arrest of the accused.²⁸ However, the



Crites, III



Evans



Ramsay

Continued on next page

solicitor's office is under no obligation to criminally prosecute the accused based on the decision of the coroner's inquest.²⁹

Because the coroner's verdict is merely advisory, binds no one as a judgment, and has no probative effect as evidence, the law creates a rebuttable presumption that the coroner acted in good faith and on sufficient cause, and therefore a coroner's verdict is not subject to be reviewed, set aside, or quashed by a court.³⁰

The coroner must file the original inquisition and evidence with the Clerk of Court of General Sessions for the county in which the coroner presides within ten days after the finding.³¹ Every county coroner must keep a book with a copy of all inquests and evidence taken before the jury, and that book is public property that must be turned over to the successor to the coroner's office.³²

Except for the ability to advise a witness to assert the Fifth Amendment right against self-incrimination, participation by counsel for a witness subject to a coroner's inquest is all but non-existent. As a result, preparing your client is paramount as testimony provided at an inquest is a statement under oath that can be used as evidence in a subsequent civil or criminal proceeding. Additionally, because of the one-sided nature of the inquest, and the many unknown details of the case-in-chief, establishing a collegial relationship with the coroner before the proceeding should help to ensure a free flow of information about witnesses, anticipated testimony, and evidence to be introduced.

Footnotes

1 J. Bennett Crites, III is of counsel, Laura J. Evans is a partner, and Mary B. Ramsay is an associate in the Charleston office of Smith Moore Leatherwood, LLP. Bennett and Mary are members of the firm's litigation group advising businesses and individuals on complex legal issues. Laura is a member of the firm's health care practice group and handles a wide variety of corporate matters. She also continues to litigate non-health cases for long-time clients.

2 S.C. Code Ann. § 17-7-20 (2014); S.C. Code Ann. § 17-7-70 (every coroner, ..., may take inquest of casual or violent deaths when the dead body is lying within his county. Provided, however, if a person is injured in one county but removed to another county for medical purposes, the coroner of the county where the injury occurred shall have jurisdiction.).

3 Allen Wallace, Inquest Jury Clears Columbia Police Officers in Ajani Mitchell Shooting, *ColaDaily.com*, September 18, 2013, <http://coladaily.com/2013/09/18/inquest-jury-clears-columbia-police-officers> (In 2013, a coroner's inquest jury found that Columbia police officers acted in self-defense when they fatally shot Ajani Mitchell, a 21-year-old African American man.); Noelle Phillips, Coroner's Inquest Will Decide if CPD Shooting Was Justified, *The State*, September 17, 2013, <http://www.thestate.com/news/local/article14442530.html> (In 2004, an inquest jury found a Richland County sheriff's deputy was acting in self-defense when he shot and killed 19-year-old Chad Jones, who was driving away in a patrol car while handcuffed.)

4 *Id.* (In 2005, an inquest jury found the health care providers at Alvin S. Glenn Detention Center were responsible for the suicide of a mentally ill inmate.)

5 Ray Rivera & Lisa Weismann, Jury in Coroner's Inquest Rules Toddler's Mauling As Accident, *WCSC*, <http://www.live5news.com/story/19237827/coroner-schedules-inquest-into-fatal-mauling-of-2-year-old> (In 2012, a six-panel jury in a coroner's inquest ruled the death of a 2-year-old boy, who died after being bitten by two dogs outside a Mt. Pleasant home, as an accidental death and no criminal fault attached to the parents or supervisors.).

6 Prentiss Findlay, Baby Sitter Charged in Toddler's Death After Coroner's Inquest, *The Post and Courier*, October 7, 2012, <http://www.postandcourier.com/article/20121007/PC16/121009412> (In 2012, A coroner's inquest jury ruled that babysitter caused the toddler's death as a result of extreme indifference.).

7 Prentiss Findlay, Crash Cause Unknown, Jury Says, *The Post and Courier*, December 6, 2008, <http://www.postandcourier.com/article/20081206/PC1602/312069934> (In 2008, a six-member inquest jury settled on "undetermined" as the cause of death for two men killed when their plane crash landed in Charleston Harbor.).

8 Teddy Kulmala, Jury: Death of Baby at Fort Mill Birthing Center Was Homicide, *The State*, June 4, 2015, <http://www.thestate.com/news/state/article23156496.html> (The death of a newborn baby at a Fort Mill birthing center in January was a homicide, a York County jury ruled Thursday in a coroner's inquest.).

9 S.C. Code Ann. § 17-5-5(7).

10 1970 S.C. Op. Atty Gen., 1970 WL 12239 (Aug. 27, 1970) (citing *State v. Griffin*, 98 S.C. 105, 82 S.E. 254 (1914)).

11 *Acker v. Anderson Co.*, 77 S.C. 478, 58 S.E. 337 (1906).

12 *State v. Grantham*, 224 S.C. 41 at 45, 77 S.E.(2d) 291; 1969 Op. Atty. Gen. WL 15216, at *1 (S.C.A.G. Feb. 24, 1969.)

13 S.C. Code Ann. § 17-7-150.

14 S.C. Code Ann. § 17-7-170.

15 1966 S.C. Op. Atty Gen. 362 (1966) 1966 WL 8654 (citing 1951-52 Opinions, Attorney General, 47.)

16 1970 Op. Atty. Gen. 1970 WL 16800 (S.C.A.G. Apr. 20, 1970); 1960 Op. Atty. Gen. 1960 WL 11981, at *1 (S.C.A.G. Dec. 22, 1960.)

17 S.C. Code Ann. § 17-7-190.

18 S.C. Code Ann. § 17-7-150, -170, -190.

19 *State v. Griffin*, 98 S.C. 105, 82 S.E. 254 (1914); see also: 1966 Op. Atty. Gen. 337; 18 Am. Jur.(2d) § 10 at 524 20 *Id.*

21 *Id.*

22 1969 Op. Atty. Gen. Re: Conduct of Coroner's Inquest 1969 WL 15216, at *1 (S.C.A.G. Feb. 24, 1969).

23 S.C. Code Ann. § 17-7-140.

24 S.C. Code Ann. § 17-7-90.

25 S.C. Code Ann. §17-7-100.

26 1972 Op. S.C. Atty Gen. No. 3323 at 147, 1972 WL 20462.

27 1964 WL 11620, at *1 (S.C.A.G. Sept. 9, 1964)

28 S.C. Code Ann. § 17-7-151, Code of Laws of South Carolina (1962); 1972 S.C. Op. Atty Gen. 147 (1972), 1972 WL 20462.

29 1964 WL 11620, at *1 (S.C.A.G. Sept. 9, 1964)

30 1961 WL 11664, at *1 (S.C.A.G. Oct. 28, 1961); see also 13 Am. Jur., Coroners, Sec. 12; *Small v. State*, 101 Ga., 570, 28 SE 981.

31 S.C. Code Ann § 17-7-310.

32 S.C. Code Ann. § 17-7-330.

Verdict Reports

VERDICT
REPORTS

Type of Action: Medical Malpractice

Injuries alleged: \$384,022.45 in medical specials; \$795,678.19 in economic loss; pain and suffering; forced retirement; debility and loss of enjoyment of life; scarring and disfigurement; loss of consortium.

Name of Case: Hudgins v. AnMed Health

Court: (include county) Anderson County Court of Common Pleas

Case #: 10-CP-04-3180

Name of judge: Judge Scott Sprouse

Amount: \$0

Date of verdict: May 12, 2015

Demand: (required if defense verdict) "Never below seven figures"- concrete number never demanded

Highest offer: "Never close to seven figures"- concrete offer never made

Most helpful experts: (name, title and city) Lisa Houghton, RN (Blythewood, SC); Alan Wittgrove (La Jolla, California)

Attorney(s) for defendant (and city): Trey Suggs (Greenville, SC) and Steve Snyder (Greenville, SC)

Description of the case, the evidence presented, the arguments made and/or other useful information: This was a gastric bypass case. The patient suffered a gastric leak at the GJ anastomosis and subsequent sepsis. He required an open repair of the leak and subsequently developed a large incisional hernia which he refused to have repaired. There were allegations of negligence against the surgeon (an employee of AnMed) and the nurses regarding failure to recognize signs and symptoms of a gastric leak. The Plaintiffs alleged that the leak occurred shortly after the initially surgery and that we failed to recognize it for 6 days. We defended the case on the theory of medical judgment. We also argued that the leak did not occur until the day it was repaired.

The Plaintiffs asked the jury for \$2M. The case went to the jury on day 6. They deliberated a very short time before returning a verdict for the defense.

Type of Action: Medical Malpractice

Name of Case: Genesisie Fulton, individually, and as Next Friend of Bryson Fulton, a minor v. L. William Goldstein, M.D., individually and d/b/a L. William Goldstein OB-GYN

Court: (include county): Florence County Court of Common Pleas

Case number: 2013-CP-21-00587

Name of Judge: The Honorable Michael G. Nettles

Amount: Defense Verdict

Date of Verdict: May 8, 2015

Attorneys for defendant: Molly H. Craig, Ellore A. Ganes and Brian Kern of Hood Law Firm, LLC, Charleston, SC

Description of the case: Plaintiff alleged the Defendant physician was negligent during the Plaintiff's labor and delivery which caused the baby to sustain severe and permanent injury to his brachial plexus nerves. During the delivery, the child's anterior shoulder did not deliver signifying a "shoulder dystocia." According to the Plaintiff, the physician applied excessive traction in an attempt to deliver the baby resulting in permanent nerve damage involving C5, C6, C7 and C8.

The defense proved that shoulder dystocia is a medical emergency which was properly managed by the Defendant physician. In fact, within four minutes of recognizing the shoulder dystocia, the physician was able to successfully deliver the baby. The jury returned a defense verdict finding that the physician did not deviate from the standard of care.

Continued on next page

Type of Action: Medical Malpractice

Name of Case: Parise v. Earl B. McFadden, Mary M. McFadden, and William "Bill" Graham
 Court: Richland County Court of Common Pleas
 Case Number: 2013-CP-40-6277
 Name of Judge: The Honorable Donald B. Hoeker
 Amount: Defense Verdict
 Date of Verdict: April 3, 2015

Attorneys for defendants: Mark S. Barrow and Joseph O. Thickens of Sweeny, Wingate & Barrow, P.A. of Columbia for Defendants Earl and Mary McFadden, and J. Eugene Adams of The Ward Law Firm, P.A. of Spartanburg for Defendant Bill Graham.

Sweeny, Wingate & Barrow, P.A. attorneys Mark Barrow and Joe Thickens recently obtained a defense verdict after jury deliberations at the close of a 3-day trial in Richland County, South Carolina. Barrow and Thickens represented two defendants who permitted a zip line to be installed on their property at the request of a neighbor, who was also a co-defendant in the case. The neighbor purchased the zip line and hired a handyman to install it.

The zip line was used for over four years with other injuries to children in the defendants' neighborhood before the plaintiff fell from it and shattered her elbow. The plaintiff alleged both products liability and premises liability causes of action, contending in part that the defendants chose not to install a seat sold with the zip line. Because the zip line's handle was designed to rotate when gripped by a rider, the plaintiff maintained that it was unsafe for use without a seat or other secondary safety device. A significant portion of the defense focused on explaining the engineering purposes for the design of a rotating handle to the jury, as well as potential hazards posed by the alternate design proposed by the plaintiff's expert.

During closing, the plaintiff's attorney requested nearly \$500,000. After considering the testimony of ten witnesses, including experts for both parties, the jury returned a verdict in favor of the defendants.



Footnotes

- 1 Joseph W. Rohe is an attorney practicing in the Litigation and Transportation Industry Groups at Smith Moore Leatherwood, LLP in Greenville and Charleston, SC. Joseph practices in state and federal courts in Georgia and South Carolina, as well as the United States Court of International Trade.
- 2 375 U.S. 411 (1964).
- 3 312 U.S. 496 (1941).
- 4 *England*, 375 U.S. at 412.
- 5 *Id.*
- 6 *Id.*
- 7 See *England v. La. State Bd. of Med. Exam'rs*, 194 F.Supp. 521, 522 (E.D. La. 1961), rev'd 375 U.S. 411 (1964).
- 8 *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 24 (1909).
- 9 *Id.*
- 10 *Pullman*, 312 U.S. at 501 [citations omitted].
- 11 *Chez Sez III Corp. v. Twp. of Union*, 945 F.2d 628, 631 (3d Cir. 1991).
- 12 *England*, 375 U.S. at 416 (citing *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).
- 13 *England*, 194 F.Supp. at 522.
- 14 *Id.*; see also *NAACP v. Button*, 371 U.S. 415 (1963) (holding that a party elects to forego his right to return to

- the District Court by a decision "to seek a complete and final adjudication of his rights in the state courts.").
- 15 *England*, 375 U.S. at 420.
- 16 *Id.*
- 17 See *Willcox*, 212 U.S. at 40.
- 18 *England*, 375 U.S. at 416.
- 19 *Id.* at 417.
- 20 *Button*, 371 U.S. at 427.
- 21 See *id.* (holding the claimant manifested its election "to seek a complete and final adjudication of [its] rights in the state courts" and thus not return to the federal district court "by seeking...a binding adjudication of all its claims" from the state courts).
- 22 *Id.* at 419.
- 23 *England*, 375 U.S. at 418.
- 24 *Id.*
- 25 *Id.* at 419.
- 26 *Id.* at 421.
- 27 *Id.*
- 28 *Id.* at 423.
- 29 135 F.3d 274, 282 (4th Cir. 1998).
- 30 *England*, 375 U.S. at 421-22, 84 S.Ct. at 468.

Case Notes

Summaries prepared by

Katherine A. Stanton, Peden “Brown” McLeod, Jr., Thomas B. Boger, and Taylor H. Stair

CASE
NOTES

LeAndra Lewis, Petitioner, v. L.B. Dynasty, d/b/a Boom Boom Room Studio 54 and S.C. Uninsured Employers' Fund, Defendants, Of Whom S.C. Uninsured Employers' Fund is, Op. No. 27509 (S.C. Sup. Ct. filed March 18, 2015)

This is an appeal from The South Carolina Workers' Compensation Commission involving an exotic dancer at Studio 54 Boom Boom Room (the Club), who was struck by an errant bullet while working. The issue on appeal was whether the exotic dancer was an employee of the Club and therefore eligible for workers' compensation. The single commission found that the exotic dancer was an independent contractor and denied compensation. The Court of Appeals affirmed.

The exotic dancer traveled throughout North and South Carolina and performed five to seven days a week, and performed at the Club on three separate occasions. While at the club, the exotic dancer performed V.I.P. dances, table dances, and dances on stage. She was required to perform V.I.P. dances when requested, and paid a portion of the price to the club. She was also required to follow specific guidelines and was subject to fines or discharge for failing to comply. Once the exotic dancer was at the Club, she was required to follow the schedule set by the Club or faced being fined. If she failed to pay fines, or if there were repeated violations, she could be terminated.

While working at the Club a fight occurred and the exotic dancer was struck by a bullet in the abdomen resulting in severe injuries. The exotic dancer filed a claim for workers' compensation. At the hearing, the South Carolina Uninsured Employer's Fund appeared and argued that Lewis was an independent contractor, not an employee.

The Supreme Court noted that the crux of the matter was the purported employer's right to control the claimant, which they analyzed by looking at four factors: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; and (4) right to fire. Each factor was to be considered with equal force, and the existence of one was not dispositive.

The Supreme Court found that the Club exercised control over the exotic dancer because they could decline her entry into the Club if her appearance was undesirable, controlled the degree of nudity, and required her to perform V.I.P. dances when

requested. Based on this, the Court found that the factor weighed in favor of an employee relationship.

The Supreme Court found that the Club provided most of the equipment. The dancer only brought her costume with her. The Club provided the performance space – including the area for V.I.P. dances, stage with a pole, tables, and sound system. Based on this, the Court found that the factor weighed in favor of an employee relationship.

With regard to method of payment, the Court found that although the Club exerted some control over payments due to the V.I.P. requirements and a payout, the payment method – tips – did not suggest an employee relationship, but rather a contractor relationship.

As to the final factor regarding the right to fire, the Court found that the Club had the ultimate right to fire the exotic dancer without the risk of repercussions. The Club could fire her for reasons including failing to comply with the rules, leaving before the shift was over, declining to perform a V.I.P. dance, and failure to pay fines. The Court determined that this factor weighed in favor of an employee relationship.

The Court concluded that on balance, the factors indicated an employee relationship, and reversed the Court of Appeals' opinion.

Gregory A. Collins (Deceased), Employee, Claimant, Respondent, v. Seko Charlotte and Nationwide Mutual Ins. Co., Petitioners, v. West Expedited & Delivery Service, Inc., Defendant, v. Seko Worldwide and Federal Ins. Co., Defendants, v. Uninsured Employers Fund, Op. No. 27519 (S.C. Sup. Ct. filed April 29, 2015)

This is an appeal from the South Carolina Workers' Compensation Commission wherein a driver for a delivery service company was killed while returning to South Carolina after making a delivery in Wisconsin. The driver worked for a delivery service that contracted with another cargo delivery business to drive a shipment of goods from South Carolina to two locations in Wisconsin. After delivery of all the goods in Wisconsin, the driver began his return trip to South Carolina with no cargo on board. The issue on appeal was whether the driver's status changed from a statutory employee after making the delivery in Wisconsin.

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The Supreme Court noted that depending on the nature of the work performed by a subcontractor, an employer of a subcontractor may be considered a statutory employee of the owner or upstream employer. To determine if the work being performed by a subcontractor is part of the owner's business, consideration must be given to whether: (1) the activity of the subcontractor is an important part of the owner's trade or business; (2) the activity performed by the subcontractor is a necessary, essential, and integral part of the owner's business; or (3) the identical activity performed by the subcontractor has been performed by employees of the owner.

The Court noted that the issue is fact driven, and that the facts in this case qualify claimant as a statutory employee. The Court stated that the driver was engaged in an "express hot delivery" from South Carolina to Wisconsin, and that this type of delivery meant an immediate and direct trip to Wisconsin without the likelihood of cargo on the return trip to South Carolina. In fact, no cargo was being hauled while returning to South Carolina. As a result, the Court determined that the nature of the work required immediate travel to Wisconsin and an expected return trip to South Carolina. The Court found that it was reasonable to conclude that the driver's work ended after the driver returned to South Carolina.

The Court affirmed the Court of Appeals reversal of the Commissioner's decision and reinstated the single commissioner's order.

W. H. Bundy, Jr., Respondent, v. Bobby Brent Shirley, Op. No. 27520 (filed May 6, 2015)

This is an appeal from a declaratory judgment action where Bundy, the property owner, sought a determination on whether Shirley established a prescriptive easement over a road through Bundy's property. The Court of Appeals reversed a special referee who found Shirley was entitled to an easement because a predecessor-in-title used the disputed road for a period of twenty years, and permissive use does not defeat an easement by prescription.

Bundy's predecessor-in-title, Bowater Timber 1, LLC, owned the Bundy property from 1985 to 2003. During this time, South Carolina Department of Natural Resources had a legal interest in the property and was enrolled in the Wildlife Management Area Program. SCDNR erected a cable across the road while the property was not used in the program, and gave Shirley and his father a key.

Shirley's property was purchased by his parents in May of 1985, and transferred the property to Shirley in February 2005. Shirley's property was landlocked by surrounding owners, but was accessed via a dirt road that was an extension of Saxon Road running through Sumter County and Kershaw County. This

dirt road ran through Bundy's property.

Bundy purchased the property in March 2003, and gave Shirley permission to erect a gate of the disputed road to limit public access. The gate was located at the same location as the cable installed by SCDNR. Soon after the gate was installed, Bundy hired a timber company to plant pines on the property. During the work, Shirley became upset when a logging truck blocked the disputed road to Shirley's property. Shirley called Bundy and threatened him with violence. Bundy responded by instructing Shirley not to use the disputed road any more.

During the trial, Shirley relied on the Bennett family (predecessor-in-title) ownership between December 1947 and April 1969 as support for an easement. The Bennett family used Saxon Road and the disputed road as the sole access to the property. The special referee found that Shirley established an easement based on the Bennett family use, and further concluded that as a matter of law, Shirley had proven his parents used the disputed road continuously for 20 years.

The Supreme Court, citing a 1917 decision, noted that there is a heightened standard of proof when establishing an easement because it is "in derogation of the rights of the owners" and does not rise without "clear, unequivocal proof of such facts." The Court ruled that the burden of proof of all elements is by clear and convincing evidence and ruled the special referee erred in applying a preponderance of the evidence standard.

With regard to the issue of permissive use, the Supreme Court noted that "the law is well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right." The Court noted that when the Bundy property was controlled by SCDNR, Shirley was given permissive use because he was given a key to the cable. Furthermore, the Court noted that when Bundy purchased the property, Bundy gave Shirley permission to erect a gate at the same location of the cable, thus, Shirley "implicitly acknowledged Bundy's right to the property" which defeated any claim of right by Shirley.

Regarding Shirley's alternative argument that prescriptive easement was established by the Bennett family use of the disputed road, the Court found that for an easement to remain viable to subsequent owners there must be "continual use." The Court touched on the issue of tacking noting that a claimant may not tack: (1) to adverse use of strangers; (2) to a predecessor in title when predecessor's adverse use terminated before claimant acquired the land; (3) when intervening parties used the land with permission; and (4) when it is unclear if the predecessor's use was adverse.

The Court questioned whether Shirley presented clear and convincing evidence related to the Bennett family's use of the disputed road, but noted that even

assuming the Bennett family acquired a prescriptive easement, there was no evidence of the intervening predecessors-in-title actually using the disputed road, and therefore, failed to prove “continual use.” The Court held that the Court of Appeals correctly found that Shirley could not tack the Bennett family’s use to establish Shirley’s prescriptive easement.

Rickerson v. Karl, 412 S.C. 215, 770 S.E.2d 767 (Ct. App. 2015).

Plaintiff initiated a medical malpractice claim against his physician and nurse practitioner. Plaintiff filed a Notice of Intent (“NOI”) pursuant to S.C. Code §15-79-125, but failed to state that the case was subject to mandatory mediation. Plaintiff also failed to include a line for the clerk of court to write in the name of the mediator. Defendants filed a motion to dismiss because a mediation conference had not been held within the 120-day statutory time frame. The trial court subsequently granted the defendants’ motion to dismiss pursuant to Rule 37(b), SCRCF.

While the Court of Appeals confirmed that plaintiff failed to properly complete his NOI and failed to initiate the scheduling of mandatory mediation during the 120-day time frame, the Court of Appeals determined that there was no indication that his failure to comply with the statutory requirements of S.C. Code §15-79-125 was the product of bad faith, misconduct, willful disobedience, or a callous disregard for the rights of other litigants. The Court of Appeals acknowledged that under certain circumstances dismissal may be appropriate for failure to comply within the 120 day deadline, but did not find that dismissal with prejudice was warranted in the case at bar. The purpose of the mandatory mediation requirement of S.C. Code § 15-79-125 is to foster the settlement of potentially meritorious claims and to discourage the filing of frivolous claims; therefore, a technical noncompliance with this statute, without bad faith, should not result in the dismissal of the case. Accordingly, the Court of Appeals reversed the decision and remanded to the trial court.

Ferguson v. N.H. Ins. Co., 412 S.C. 203, 771 S.E.2d 851 (Ct. App. 2015).

eMove operates an internet marketplace where individuals or businesses renting moving trucks can search for and hire local moving companies to assist with loading and/or unloading rental trucks. Unterkoefler executed a contract with eMove to provide moving help for eMove’s customers. The claimant was working part time for Unterkoefler when he was injured while moving a washer/dryer unit. The claimant subsequently filed a Form 50, seeking workers’ compensation benefits from the accident.

The Workers’ Compensation Commission found that the claimant failed to prove eMove was his statutory employer and failed to prove he was an

employee of Unterkoefler. The panel determined eMove was not a statutory employer because eMove’s business was to match U-Haul renters with moving help, and actual moving was not a part of eMove’s trade, business, or occupation. The panel determined Unterkoefler was not an employer because; (1) Unterkoefler did not exercise control over the work performed by the claimant; (2) Unterkoefler did not furnish equipment to the claimant; (3) Unterkoefler was paid by the job and split his earnings with the number of helpers on each job; and (4) Unterkoefler could choose to use someone other than the claimant for a job. Finally, the panel found that Unterkoefler was not an uninsured employer under the Workers Compensation Act because he did not regularly employ four or more employees. The Court of Appeals affirmed the Appellate Panel’s decision.

Clemmons v. Lowe’s Home Ctrs., Inc.-Harbison, 772 S.E.2d 517 (Ct. App. 2015)

The claimant was a cashier for Lowe’s Home Centers when he was injured after he slipped on wet straw. The claimant filed a Form 50, alleging he sustained an injury to his head, back, and legs. Lowe’s admitted the claimant sustained an injury to his low back and right knee, but denied he sustained an injury to his head or left lower extremity, and further denied the extent of the claimant’s injuries. The parties entered into a consent order whereby Lowe’s agreed to accept the back, neck, and right knee as compensable injuries, and agreed to pay claimant temporary total disability benefits. Approximately two years after the injury, Lowe’s filed a Form 21 requesting a hearing to determine compensation due for permanent total disability or permanent partial disability. The claimant argued that the hearing on the Form 21 request violated due process because he had a right to request compensation at a time of his choosing.

The Appellate Panel determined that the claimant was afforded due process because he had the right to call witnesses, to cross-examine adverse witnesses, and to present admissible evidence. In addition, the Workers’ Compensation Commission was authorized to act on the request for a hearing under S.C. Code § 42-17-20 because fourteen days had passed since the claimant’s injury and because the parties failed to reach an agreement as to an award for permanent disability.

The Appellate Panel determined that the claimant was not entitled to permanent total disability under S.C. Code § 42-9-30(21) because his loss of use of the back was 48%. The Appellate Panel included residual myelopathy in its permanent partial disability award to the back, rather than making an award for myelopathy as a separate neurological injury, and determined that the claimant was not entitled to a

Continued on next page

separate award for his low back injury. The plain and ordinary meaning of the word “back” includes the low back, and S.C. Code § 42-9-30 does not recognize the “low back” as a separate schedule member.

The Court of Appeals affirmed all decisions made by the Appellate Panel.

Mason v. Mason, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015)

Appellant, a minority shareholder in a closed corporation (hereinafter “Son”), brought this stockholder oppression suit against the company, its other shareholders (his father, mother, and sister), and the company accountant alleging breach of contract, breach of fiduciary duty, wrongful termination, and civil conspiracy. The Respondents filed counter claims for breach of fiduciary duty and conversion. The case was tried by a special referee who found for Respondents on all of the Appellant’s claims and for the Respondents on their conversion counterclaim.

The South Carolina Court of Appeals affirmed the holding primarily based on the fact that most of the actions that led to the suit were actions taken by the Son. The Son participated in a fraudulent inventory scheme in which he faked inventory purchases and then paid himself for it. He also used company money to pay for his attorney in this action, although the attorney was representing the Son in his individual capacity and not in his capacity as a shareholder of the corporation. He also failed to pay back the company for personal expenses even after he requested that all of the other stockholders do the same. As the Son benefited primarily from these activities, some illegal, the appellate court found he was not an oppressed shareholder and upheld the special referee’s rulings regarding judicial dissolution, breach of fiduciary duty, and civil conspiracy (Son also failed to plead special damages in his civil conspiracy claim). Based on the same reasoning above, the Court of Appeals also affirmed the findings for Respondents on their conversion claims.

As to the breach of contract claim, the Son argued that based on a retirement agreement and gift letter he had with his mother and father, he was owed twenty percent more stock in the corporation. The special referee’s holding was upheld that the agreement was “illegal and unenforceable” as against public policy. Further, even if it was legal, Son was in breach of the contract. The Court of Appeals also upheld that the Son was not wrongfully terminated as all of the evidence and testimony showed that the Son voluntarily resigned his position with the Company.

Fay v. Grand Strand Regional Medical Center, LLC, 412 S.C. 185, 771 S.E.2d 639 (Ct. App. 2015)

This medical malpractice action involved the death of a patient who presented to the emergency room with a kidney stone and later died due to clin-

ical sepsis or septic shock (an overwhelming blood-borne infection within the body). At the close of evidence, the trial court directed verdict for the urologist, who the court found had no doctor-patient relationship with the decedent. The jury returned a \$3 million verdict against the hospital and the emergency room physician. After denying the post-judgment motions, the trial court entered the judgment against the Defendants as joint and several. The Plaintiff appealed the directed verdict as to the urologist, and the emergency room doctor appealed the denial of his motion for JNOV, the exclusion of evidence of an extramarital affair, and for refusing to enroll the judgment against him based on percent of liability and instead using joint and several.

The Court of Appeals upheld the directed verdict as to the urologist, since the urologist never examined the decedent or her records; did not consult on her release from the emergency room; and never communicated with the decedent. The emergency room doctor phoned the urologist while the decedent was in the hospital to confirm that the urologist could evaluate the patient the following week; however, that was not enough to establish a doctor-patient relationship, which is a prerequisite to a medical malpractice claim.

The Court of Appeals also upheld the trial court’s holdings as it related to the emergency room doctor. Expert witness testimony, including the testimony of the emergency room doctor himself, confirmed that the combination of a fever and a kidney stone presents as a urological emergency. The decedent’s temperature was taken at 8:06am but was not taken again, even after it was confirmed she had a kidney stone. Patient was discharged at 12PM and had a fever by 1pm. The parties also disputed whether the discharge instructions regarding the seriousness of a fever were ambiguous and/or conveyed the urgency. The failure to take the deceased’s temperature again combined with the dispute regarding the discharge instructions were enough to create a question of fact for the jury.

As to the extramarital affair, it occurred three years prior to the decedent’s death, decedent was aware of it, and it did not go towards liability. Therefore the Court of Appeals upheld the decision to not allow the testimony under Rule 403. Also, because the actions which led to the suit occurred in 2002, prior to tort reform, joint and several liability applied absent an agreement of the parties.

Hanold v. Watson's Orchard Prop. Owners Ass'n, Inc., 412 S.C. 387, 772 S.E.2d 528 (Ct. App. 2015)

In a case involving development of property in Greenville County, appellants attempted to amend restrictive covenants to remove a residential development requirement on five lots within a six acre tract of land they owned. A related twenty-two acre tract of land serving as a buffer zone to a subdivision

was subject to the same restrictive covenants, which were imposed by a former owner of the tract when the land was conveyed to the subdivision's property owners association. In order to amend the restrictive covenants, a majority vote of the then-owners of all "developed" lots for both parcels was required. The appellants sought to obtain a majority vote and possessed twenty-nine of fifty-four possible votes. Five of the votes were based on the lots within the six acre tract. The respondents, subdivision homeowners, filed a declaratory judgment action asserting that the amendments to the restrictive covenants were not validly adopted. The circuit court agreed and held that the six acre tract "had not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive covenants," and concluded that the plain and unambiguous language of the restrictive covenants required the lots to be developed prior to being eligible to vote. As such, the court ruled that the amendments to the restrictive covenants were both void and of no force and effect.

The Court of Appeals affirmed the circuit court, finding the plain and ordinary language of the restrictive covenants required the lots at issue to be developed prior to entitling the owner to a vote to amend the restrictive covenants. The Court of Appeals relied on cases from other jurisdictions that had addressed the term "developed" in the context of land disputes, and found that "develop" connotes the conversion into an area suitable for use and sale. Based on the plain and ordinary meaning of the term "developed," the Court of Appeals held that the term requires affirmative acts on the part of the owner to transfer the property from raw land to a more improved state. Because the lots were not developed, the Court of appeals held appellants' votes were invalid and the amended restrictive covenants were not enforceable.

Johnson v. Sam English Grading, Inc., 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015)

This negligence action arose from the death of a passenger (wife) in a motorcycle crash in which the driver (husband) attempted to avoid a collision with a large piece of equipment owned by Sam English Grading, Inc. (the Company), that was being driven on a private driveway towards an intersection. After braking and skidding, the motorcycle came to rest within five to ten feet of the Company's equipment. Johnson, the deceased wife's representative, filed suit against the Company for negligent acts including the failure to warn with signs or other devices of the danger the Company created. After the jury found for the estate, the Company filed an appeal, contending that the trial court erred in admitting certain evidence, giving a coerced version of an Allen charge to the jury, and denying its motions for directed verdict or JNOV.

On appeal, the Company argued that the trial court wrongfully admitted a contract between the Company and a third party into evidence, and allow-

ing multiple witnesses to testify about prior incidents that occurred at the same intersection with the Company. The Company asserted that the trial court erred in giving a version of an Allen charge that was coercive. During jury deliberations, the trial court gave the jury an Allen charge and provided a note stating that they could stay as long as necessary and had the option of coming back to continue deliberating, allegedly encouraging them to find a verdict as opposed to coming back with a hung jury. Subsequent to the note sent by the judge, the jury found the Company was negligent and 65% at fault for the \$2.9 million in actual damages to the estate. The Company further asserted that a statement made by Johnson at trial that the employees of the Company were not at fault mandated the trial court to direct a verdict for the Company.

The Court of Appeals affirmed all of the trial court's rulings, finding that: (1) the admission of the Company's prior contract was not error by the trial court but was within the court's discretion; (2) the trial court did not err in allowing multiple witnesses to testify about previous incidents at the same intersection with the Company, as this was within the court's discretion; and (3) the Allen charge provided by the judge to the jury was not coercive. Additionally, the Court of Appeals held that the trial court's failure to grant the Company's motion for directed verdict or JNOV had been abandoned by the Company, and the issue as to Johnson's statement was not preserved for appeal.

Bluffton Towne Ctr., LLC v. Gilleland-Prince, 2015 WL 3503949 (Ct. App. June 3, 2015)

In this landlord and tenant dispute, Bluffton Towne Center (BTC) brought an action against Beth Ann Prince (Tenant) for breach of a lease agreement after Tenant vacated the lease and defaulted on rent payments. The master-in-equity found for BTC, awarding \$35,784 in rent and late fees for Tenant's breach. Tenant appealed, asserting that the master-in-equity erred in (1) finding the lease was terminated by abandonment; (2) finding Tenant was liable for future rents under the lease; (3) considering extrinsic evidence after finding the lease unambiguous; (4) not allowing Tenant to cross-examine the managing member of BTC about specific language in the subject lease and language in two subsequent leases BTC entered into with different parties; and (5) failing to recognize the lease was ambiguous.

The Court of Appeals disagreed with Tenant's argument that the landlord's 10-day notice to pay or quit the premises was the equivalent of a termination by eviction. Rather, the Court of Appeals found that Tenant admitted to abandoning the premises in written communications with BTC, and voluntarily surrendered possession of the premises by turning over the keys and vacating the premises prior to receiving the notice to pay or quit the premises.

The Tenant argued that the master-in-equity erred in holding that BTC was entitled to recover future rents, based on the master's determination that the holding in *Simon v. Kirkpatrick*, 141 S.C. 251, 139 S.E. 614 (1927) — that a lessor's termination of the lease absolves a lessee from future obligations unless the lease provides the lessee is not relieved of such obligations — “does not state the modern law of damages for the breach of a lease in South Carolina today.” Instead, the master-in-equity found *U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403 (1956), stated the modern rule for damages a landlord may recover for a tenant's breach of the lease. Under this “modern” rule, the master found Tenant was liable for future rents.

The Court of Appeals held that the master-in-equity erred in concluding that *Simon* is no longer valid law, but properly concluded that BTC was entitled to recover future rent as damages under the theories of both *Simon* and *U.S. Rubber*.

The Tenant further argued that the master-in-equity erred in construing the “damages” term in the subject lease to entitle BTC to recover future rents. The Court of Appeals affirmed the master's finding that the parties clearly and unambiguously intended for BTC to reserve all rights against Tenant for rent due during the full term of the lease. While the term “damages” was not defined in the lease, the four corners of the lease provided that the lease not only reserved BTC's right to recover damages upon termi-

nation, but also provided a specific damages formula in the default provision. The default provision made clear that upon termination of the lease, Tenant was not relieved of future obligations for damages resulting from breaching the lease.

The Court of Appeals agreed with Tenant that the master-in-equity erroneously considered extrinsic evidence regarding the parties' intent after finding the subject lease was unambiguous. Subsequent to discussion regarding the clear intent of the default provision, the master-in-equity noted that correspondence between the parties provided further evidence that BTC and Tenant construed the lease as an obligation for Tenant to pay future rents. The Court of Appeals reviewed the order as a whole, and found any error in considering extrinsic evidence was harmless because it was reasonable to infer the master was simply stating alternative grounds for his interpretation of the contract.

The Court of Appeals held that the Tenant's position that the master-in-equity abused his discretion by not allowing Tenant to cross-examine the managing member of BTC was abandoned and not preserved for appellate review, as Tenant failed to cite any legal authority in support of her conclusory argument. The Court of Appeals additionally dismissed Tenant's argument that the lease terms were ambiguous, finding that the master-in-equity correctly decided that Tenant would be liable to BTC for rents due upon default and breach of the lease.



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

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