THE DEFENSE LINE
S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

IN THIS ISSUE:

- Judicial Profile of The Honorable Roger L. Couch
- Keys to Well Drafted Arbitration Clauses for the Homebuilder's Tool Kit
- New Guidance on "Users" and "Sophisticated Users" in Product Liability
- The Affordable Care Act and its Impact on Future Damages Calculations
- Things to Consider Before Your Next Rule 30(b)(6) Deposition
- Exempt the Un-Exempted - The DOL's New Overtime Rule

THE SUMMER MEETING IN ASHEVILLE

FALL 2016
VOLUME 44
ISSUE 2
WWW.SCDTAA.COM

Summer Meeting
Omni Grove Park Inn
Asheville, NC
July 14-16

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

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

PRESIDENT'S MESSAGE 3

AN ORGANIZATION LOOKS AT 50 4

YLD FALL 2016 UPATE 4

EDITORS' NOTE 5

SCDTAA DOCKET
Firm Announcements & Members in the News 6

SUMMER MEETING RECAP 17

THE 26TH ANNUAL TRIAL ACADEMY RECAP 18

FIRST EVER BOOT CAMP ON MOTIONS PRACTICE 19

FALL 2016 LEGISLATIVE UPDATE 20

JUDICIAL PROFILE:
THE HONORABLE ROGER L. COUCH 21

DRI UPDATE 22

KEYS TO WELL DRAFTED ARBITRATION CLAUSES
FOR THE HOMEBUILDER'S TOOL KIT 23

THE AFFORDABLE CARE ACT AND ITS IMPACT ON
FUTURE DAMAGES CALCULATIONS 27

NEW GUIDANCE ON "USERS" AND
"SOPHISTICATED USERS" IN PRODUCT LIABILITY 31

EXEMPT THE UN-EXEMPTED -
THE DOL'S NEW OVERTIME RULES 35

THINGS TO CONSIDER BEFORE YOUR NEXT
RULE 30(B)(6) DEPOSITION 39

VERDICT REPORTS 46

CASE NOTES 48

President's Message

by William S. Brown

"The bad news is time flies. The good news is you're the pilot." I read this quote from an unknown author recently. It sums up well my term as President of the South Carolina Defense Trial Attorneys' Association. As I write this letter, with my tenure as President winding to a close, the time has flown by this year. Nevertheless, I have treasured the privilege and opportunity to lead the SCDTAA. I have been very blessed to have an outstanding group of officers and board members to serve alongside me this year. The officers are all bright, talented, and dedicated individuals who have worked diligently to make this year a success. I cannot thank David, Anthony, Jamie, and Ron enough for their support and advice throughout the year. The SCDTAA is definitely in good hands, and the future is bright.

A great strength of the SCDTAA is the wealth of bright and talented members who are eager to participate and offer their leadership and wisdom to the SCDTAA. In return, the SCDTAA offers many opportunities for our members to participate, speak, write, and lead efforts that benefit and advance the defense bar in South Carolina. I have learned a great deal through my involvement through the SCDTAA, leading up to and including my time as President. As I came along in my career, many past leaders of the SCDTAA gave me guidance and opportunity. I have tried to follow that example and given a helping hand to others within the SCDTAA. It has been very fulfilling to help and watch other lawyers become engaged, active, and to lead in various roles within the SCDTAA.

Looking back at the time that has gone by, it was time well spent. The year has been full of wonderful events and accomplishments, including the Annual Trial Academy, Judicial and Legislative receptions, the Summer Meeting, the Motions Practice Boot Camp, and another successful PAC Golf Tournament. I have also had the honor to represent the SCDTAA at DRI functions and at the Annual Meetings of our sister organizations in Georgia and North Carolina.

Looking forward to the remaining time in my Presidency, I am excited about the culmination of the year at the SCDTAA's 49th Annual Meeting, November 10 through 13. The Ritz Carlton at Reynolds Plantation on beautiful Lake Oconee in Georgia will provide an enjoyable and scenic venue for this meeting providing great value for continuing education, networking, and good times with your fellow defense attorneys and members of the judiciary. I hope that all of the SCDTAA members will be able to attend and participate in the Annual Meeting or some SCDTAA function in the near future. There are great opportunities to be had as an active participant in the SCDTAA. Take charge of your time and get involved in the SCDTAA.

A special thank you to our Summer Meeting Sponsors:

GOLD SPONSOR

Applied Building Sciences Inc.

SILVER SPONSORS

A. William Roberts, Jr. & Associates
Dixon Hughes Goodman
ESI
Exponent
Robson Forensic
South Carolina Bar
SEA
Stasmayer Inc.
Warren

LAW FIRM SPONSORS

Haynsworth Sinkler Boyd, PA
MGC
Lueder, Larkin & Hunter
Wilkes Law Firm, PA

An Organization Looks at 50

by Anthony W. Livoti

On November 14, 1968, six visionary defense attorneys in South Carolina formally organized what is now known as the South Carolina Defense Trial Attorneys' Association. After that first meeting, the Association grew to seventy-five lawyers by the end of 1968. Since that time, the Association has grown from that initial gathering of six lawyers to a vibrant organization of nearly 1000 defense attorneys that is viewed as the model of state and local defense organizations nationwide.

The SCDTAA will celebrate its Fiftieth Anniversary in 2018, and the 2017 Annual Meeting will be the Fiftieth Annual Meeting of the Association. Over the next year or so, your Association will take this opportunity to reflect on fifty years of service to the defense bar in South Carolina. The SCDTAA has been at the forefront of innovative and educational programming to strengthen the defense practice in South Carolina. The Trial Academy has trained defense attorneys for over twenty-five years and has given exceptional instruction and hands-on trial experience to young attorneys. The Joint Meeting (now known as the Summer Meeting) was started to foster and grow the relationship between the defense bar and claims managers in the state. Today, it allows our Association to continue to educate our members and give those who practice in the workers' compensation field a chance to interact with the commissioners. The Annual Meeting culminates the Association year, and has provided exceptional education to both the judiciary and the defense bar. Along the way, there have been many other innovations: Trial Superstars, various "bootcamps," Women in the Law events, *The DefenseLine*, and others.

To commemorate our Fiftieth Annual Meeting, we will be returning to The Cloister at Sea Island, November 9-12, 2017, which hosted many past annual meetings. As we look to celebrate fifty years as an organization in 2017 and 2018, we invite you to get involved in our organization's events. Turning fifty is a significant milestone, especially for an organization such as ours. We hope you will take this opportunity to be involved with as many Association events as you can and share with us how this organization has impacted you.

YLD Fall 2016 Update

by Claude T. Prevost III

The SCDTAA Young Lawyers Division has enjoyed an active and productive Spring and Summer. In May 2016, many SCDTAA young lawyers from across the state participated in and volunteered for the SCDTAA Trial Academy. Young lawyers volunteered as witnesses or jurors in the mock trials of the Trial Academy. Those generous volunteers made the Trial Academy possible.

At the Summer Meeting in Asheville, the Young Lawyers Division organized a silent auction to benefit the National Foundation for Judicial Excellence, the South Carolina Bar Foundation, and Kids Chance of South Carolina. Through the volunteer work of and donations from young lawyers and other members of SCDTAA, we raised $10,500 for these worthy charities. Special recognition should go to: Jessica Waller (YLD Midlands Representative); Mike Leech (YLD Lowcountry Representative); Batten Farrar (YLD Upstate Representative); Derrick Newberry (YLD Vice President); Alan Jones (YLD Pee Dee Representative); and, Alex Joiner for their exceptional efforts in obtaining items for the silent auction. Aimee Hiers and her staff also deserve a special thanks for helping run the auction.

On Thursday, September 22, 2016, the SCDTAA held the Motions Practice Boot Camp. It served as an excellent opportunity for young lawyers to sharpen their advocacy skills while earning CLE credit.

Any young lawyer participation in SCDTAA committees or events is welcomed and appreciated. If you would like to get involved, please contact me or any of the committee chairs.

Editors' Note

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

Our Summer Meeting in Asheville was a great success!

In this issue, we bring our readers articles on topics with broad appeal as well as more specialized topics to support the diverse practices of our membership. To get these articles, we reached out to our Substantive Law Committee Chairs to identify submissions for this issue. The response was impressive. Numerous Committee Chairs responded quickly, and their membership produced quality articles on relevant topics. Our members also provided us with ideas about which recent cases would be worthy of attention and produced concise summaries of those decisions in order to keep our readers apprised of important developments in the law.

This issue of *The DefenseLine* also recounts some of the great events of 2016 that illustrate the many ways that the SCDTAA continues to fulfill its mission of keeping the civil defense bar connected, developing and improving our skill set, and keeping us abreast of the latest developments. From the Motions Boot Camp, to the Trial Academy, to the Summer Meeting in Asheville, these and other events help us continue to achieve our goals. And, our members and staff continue to improve on and refine these events year after year. For example, this year's Summer Meeting moved to downtown Asheville, where our members were within walking distance to numerous restaurants and other activities. And, the Blue Jeans, Barbecue, and Bluegrass event at a picturesque farm surrounded by scenic Asheville misty mountains was one of a kind. We hope those in attendance enjoyed the event as much as we did.

These events would not be as successful as they are without our judiciary taking the time to participate in many of these activities. Whether they are serving as judges for the Trial Academy or sharing their views on motions practice at the Summer Meeting, their participation is invaluable. We thank them. With these opportunities in mind, we hope all of our readers will join us at our 49th Annual Meeting in November. In the meantime, we hope you enjoy this issue of *The DefenseLine*!

Jones

Irvin III

Gibbon

MEMBER NEWS

SCDTAA Docket

Stephen Harrison Williams Joins Wilkes Law Firm, P.A.

Wilkes Law Firm, P.A. is pleased to announce that attorney Stephen Harrison Williams has joined the firm in its Charleston office. Harrison will be representing the firm's clients in a variety of civil litigation matters, including professional liability defense, contract claims, construction litigation, product defect litigation, personal injury defense, and intellectual property litigation.

Harrison graduated from Clemson University in 2011 with a B.A. in History and a minor in Legal Studies. While in college, he was a member of the William T. Howell pre-law society and served as vice president and philanthropy chair of the Sigma Alpha Epsilon fraternity. Harrison graduated cum laude from the University of South Carolina School of Law in 2015. During law school, he was the Associate Editor in Chief of the South Carolina Law Review, his student note was published in the law review's annual Survey of South Carolina Law, and he received the CALI Award of Excellence in Contracts and Electronic Discovery. Harrison also was a member of the Order of the Wig and Robe and Phi Delta Phi legal fraternity, and served as a student attorney in the law school's consumer bankruptcy clinic, which provides legal aid to those who cannot afford it.

Following law school, Harrison served as a Judicial Law Clerk to South Carolina Circuit Court Judge J. Mark Hayes, II. Harrison currently resides in West Ashley with his wife, Lauren. He is a member of the South Carolina Bar Association, the South Carolina Defense Trial Attorneys Association, the Defense Research Institute, and the Charleston County Bar Association.

Turner Padget Shareholder Earns National Recognition as a Top Employment Attorney

Turner Padget Graham & Laney P.A. is pleased to announce that, for the fifth consecutive year, Reginald "Reggie" Belcher has been included among Human Resource Executive's list of forty "up and comers" on the annual ranking of the nation's "most powerful employment attorneys." Belcher, a shareholder in the firm's Workplace Law Group, is the only South Carolina attorney to be honored. The 2016 list, which Human Resource Executive publishes in conjunction with Lawdragon, is available at www.hreonline.com.

Belcher defends businesses in a variety of employment matters before state and federal courts and governmental agencies. He writes employee handbooks, affirmative action plans, employment contracts, severance agreements, and non-compete and restrictive covenants. Additionally, Belcher counsels and trains supervisors and managers on compliance issues involving wage and hour laws, workplace harassment, union avoidance and union elections.

This list is the product of an extensive selection process handled jointly by Human Resource Executive, which goes out to more than 75,000 top-ranking human resource executives, and Lawdragon, the Los-Angeles-based networking site used by more than 300,000 leading lawyers and judges throughout the United States. Lawyers who earn glowing marks from clients, peers, colleagues and judges are awarded the distinction of inclusion on the list.

Turner Padget's nationally recognized Workplace Law Group provides counsel to businesses across the state. From risk management and workers' compensation, to labor and employment counseling and litigation, the firm's attorneys provide South Carolina employers with a complete range of services to manage their most valuable assets, their workforce.

Speed, Seta, Martin, Trivett, & Stubley, LLC, Attorney M. Stephen Stubley Included in Best Lawyers in America

Speed, Seta, Martin, Trivett & Stubley, LLC is pleased to announce that South Carolina Managing Partner M. Stephen Stubley has been selected for inclusion in Best Lawyers in America 2017 for the third year in a row.

Mr. Stubley was selected for inclusion in Best Lawyers in the area of Workers' Compensation Law – Employers. He practices in the areas of workers' compensation, workers' compensation appeals, subrogation, and civil defense litigation.

"We are delighted to have Stephen as our SC Managing Partner and could not be more proud of him for his inclusion in Best Lawyers in America 2017. We are pleased that all of his hard work and dedication has been recognized for the third year in a row," stated Wallace Speed, Partner at Speed, Seta, Martin, Trivett & Stubley, LLC.

Seven Richardson Plowden Attorneys Selected to 2016 South Carolina Super Lawyers

Richardson Plowden & Robinson, P.A., is pleased to announce that six attorneys from its Columbia office, George C. Beighley, Emily R. Gifford, Eugene H. Matthews, William C. McDow, Steven J. Pugh, and Franklin J. Smith, Jr. have been selected to the 2016 South Carolina Super Lawyers listing.

This is the fifth year Beighley has been recognized as a South Carolina Super Lawyer. He was recog-

nized for his work in Personal Injury Defense: Medical Malpractice. Beighley has been practicing law for more than thirty-nine years and earned his Juris Doctor from the University of South Carolina School of Law.

This is the third year that Gifford has been selected as a South Carolina Super Lawyer. She was previously listed as a South Carolina Rising Star in 2012 and 2013. She was selected for her work in Construction Law, which she has practiced for more than nine years. She earned her Juris Doctor from the USC School of Law.

Matthews has been honored as a South Carolina Super Lawyer for the last eight consecutive years. He was recognized for his work in Employment and Labor Law. Matthews has practiced law for nineteen years and earned his Juris Doctor from the University of Virginia School of Law.

This is the fourth year McDow was selected as a South Carolina Super Lawyer. He was honored for his work in Personal Injury Defense: Medical Malpractice. McDow earned his Juris Doctor from the USC School of Law. He has practiced for twenty-five years.

This is the first year Pugh was selected as a South Carolina Super Lawyer. He was selected for his work in Civil Litigation Defense. Pugh earned his Juris Doctor from the USC School of Law. He has practiced law for twenty-six years.

Smith has been recognized as a South Carolina Super Lawyer for the last nine consecutive years. He was honored for his work in Construction Litigation. Smith has practiced law for more than thirty years and earned his Juris Doctor from the USC School of Law.

Six Richardson Plowden Attorneys Named to 2016 South Carolina "Rising Stars"

Richardson Plowden & Robinson, P.A., is pleased to announce that six of its attorneys were selected to the 2016 South Carolina Super Lawyers: "Rising Stars" listing. Four attorneys from Columbia were selected: Jared H. Garraux, Michelle P. Kelley, Caleb M. Riser, and Joseph E. Thoensen; and two attorneys from Charleston were selected: Drew H. Butler and Samia H. Nettles.

This is the fifth consecutive year that Butler was recognized as a Rising Star. Butler was recognized for his work in General Litigation. He earned his Juris Doctor from Pennsylvania State University Dickinson School of Law in 2002.

It is the third year that Garraux has been recognized as a Rising Star. He was selected for his work in Construction Law. Garraux earned his Juris Doctor from the University of South Carolina ("USC") School of Law in 2007.

Kelley was selected as a Rising Star for the fifth consecutive year for her work in General Litigation. She earned her Juris Doctor from the USC School of Law in 2007.

This is the first year that Riser has been honored as a Rising Star. He was recognized for his work in Construction Law. He earned his Juris Doctor from Regent University School of Law in 2009.

It is the fourth consecutive year that Nettles has been selected as a Rising Star. She was chosen for her work in Construction Law. She earned her Juris Doctor from Charleston School of Law in 2007.

Thoensen was selected as a Rising Star for the fourth consecutive year for his work in General Litigation. He earned his Juris Doctor from the USC School of Law in 2004.

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

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

- Pete Roe – Bank and Finance Law (Top Attorney Vote)
- Bill Coates – Criminal Law
- Clark Price – Healthcare Law (Top Attorney Vote)
- Randy Moody – Labor and Employment
- Trey Suggs – Health Care Law and Business Litigation
- Ella Barbery – Tax and Estate

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

Fred Suggs Named Recipient of 2016 Alan R. Willis Society of Service Award

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., one of the largest labor and employment law firms representing management, is pleased to announce that Fred Suggs, a shareholder in the firm's Greenville office, has been named recipient of the 2016 Alan R. Willis Society of Service Award. Suggs is the exclusive winner of this award, which is the highest honor presented by the Upstate Employers Network (UEN).

Established in 1995, the Alan R. Willis Society of Service Award pays tribute to those whose actions help community members understand the meaning of "service above self." This award, chosen by past Willis Award recipients, acknowledges Suggs for placing the highest priority on community support and service.

Continued on next page

The UEN was formed to provide central, easily accessed resources for its members including seminars, classes, custom training, research, publications, and consulting. Suggs, who served on the UEN's board of directors for many years, helped develop the first Human Resources Law Update for the upstate of South Carolina. Over more than twenty years, this seminar has expanded into an annual event, which now draws hundreds of South Carolina's human resource professionals.

Suggs has practiced law for more than forty years and is a certified specialist in labor and employment law by the South Carolina Supreme Court. He represents employers in a full range of labor and employment matters, including matters alleging discrimination based on race, color, sex, national origin, and age, and claims arising under restrictive covenants, the Fair Labor Standards Act, the Family and Medical Leave Act, and common law torts and contracts. He has also advised many companies facing union elections on the rights and responsibilities of management during card signing activity and after petitions for elections have been filed. Suggs' practice expands across a number of industries, including apparel, automotive, banking, chemicals, communications, construction, education, finance, food service, grocery, manufacturing, pharmaceuticals, retail, sales, technology, textiles, and transportation.

Suggs has been lauded for his accomplishments throughout his career. He was named the 2016 Labor Law - Management Lawyer of the Year by Best Lawyers and since 2005, he has earned a Band 1 ranking, the highest possible, in Chambers USA. Suggs has been recognized as a South Carolina "Super Lawyer", is a Fellow in the College of Labor and Employment Lawyers, and holds an AV Preeminent rating from Martindale-Hubbell.

Suggs is also very active in the Greenville community. He has served the South Carolina Bar in many positions, including president, as well as chairman of the Labor and Employment Section, Professional Responsibility Committee, and House of Delegates. Suggs has also chaired the Board of the Metropolitan YMCA, served as the General Counsel of the Greenville Chamber of Commerce, and has been Counsel to the Staff Parish Relations Committee at Buncombe Street United Methodist Church.

Best Lawyers in America Names Twenty Ogletree Deakins Attorneys to 2017 List; Four Attorneys Recognized as a "Lawyer of the Year"

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., one of the largest labor and employment law firms representing management, is pleased to announce that twenty attorneys from the firm's South Carolina office have been listed in Best Lawyers in America 2017. The attorneys on the 2017 list were selected based on an exhaustive peer-review survey that examines the professional abilities, current practice, and experience of each lawyer.

The South Carolina-based Ogletree Deakins attorneys listed in Best Lawyers in America 2017 include:

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

In addition, Gray Geddie has been recognized as the Best Lawyers 2017 Greenville Labor Law -

Management "Lawyer of the Year," Allison Phinney has been recognized as the 2017 Greenville Employment Law - Management "Lawyer of the Year," and Thomas Christina has been recognized as the Greenville Litigation - ERISA "Lawyer of the Year." Leigh Nason has been recognized as the Best Lawyers 2017 Employment Law - Management "Lawyer of the Year" in Columbia. The publication awards this honor to a single lawyer in each practice area and designated metropolitan area.

In total, 195 Ogletree Deakins attorneys were listed in Best Lawyers in America 2017. Of these attorneys, 151 were named in the Employment Law - Management category; 102 were named in the Labor Law - Management category; and 115 were named in the Litigation - Labor and Employment category. Ogletree Deakins attorneys were also recognized in the Immigration Law, Qui Tam Law, Employee Benefits (ERISA) Law, and Litigation - ERISA categories, among others.

Canada Honors Nelson Mullins' David Wilkins

Canada has honored David H. Wilkins, former United States Ambassador to Canada and a partner in Nelson Mullins Riley & Scarborough LLP's Greenville office, with a Governor General's Medallion for his service in promoting and enhancing the Canada-U.S. relationship. The award was presented by Governor General David Johnston, Canada's head of state, during his first working tour of the South.

Mr. Wilkins, who served as ambassador from 2005-2009, was cited for his role in dealing with "several politically charged and divisive issues" such as Canada's role in Afghanistan, NAFTA, and the softwood lumber dispute.

Mr. Wilkins chairs Nelson Mullins' Public Policy and International Law practice group with a special focus on U.S.-Canada interests. He also worked on issues such as energy, national security, the environment, trade, and travel.

Legal Publication Chambers USA 2016 Recognizes Nelson Mullins South Carolina Attorneys' Practices

Legal directory publisher Chambers and Partners has recognized Nelson Mullins Riley & Scarborough LLP in its national category for its products liability and mass torts litigation. The publishers also single out four South Carolina attorneys for their nationwide practices:

- Columbia partner David E. Dukes, notable practitioner in product liability and mass tort
- Columbia partner Steven A. McKelvey Jr., notable practitioner in transportation: road (carriage/commercial)
- Charleston partner Robert H. Brunson, recognized practitioner in product liability and mass tort
- Columbia partner James T. Irvin III, recognized practitioner in product liability and mass tort

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

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

Individuals recognized for their South Carolina practices are:

- Thomas A. Brumgardt, Corporate/M&A (Up and Coming)
- Karen Aldridge Crawford, Environment
- Gus M. Dixon, Corporate/M&A
- David E. Dukes, Product Liability and Mass Torts, Litigation: General Commercial
- William H. Foster III, Labor & Employment
- Daniel J. Fritze, Corporate/M&A
- Neil E. Grayson, Corporate/M&A, Corporate/M&A: Banking & Finance
- Sue Erwin Harper, Labor & Employment
- Bernard F. Hawkins Jr., Environment
- P. Mason Hogue, Corporate/M&A
- John M. Jennings, Corporate/M&A, Corporate/M&A: Banking & Finance
- John T. Moore, Corporate M&A: Banking&Finance
- Samuel W. Outten, Litigation: General Commercial
- G. Mark Phillips, Litigation: General Commercial
- A. Marvin Quattlebaum, Jr., Litigation: General Commercial
- Bo Russell, Corporate/M&A
- Shawn R. Willis, Real Estate (recognized practitioner)

According to the organization, rankings are based on interviews with law firms and clients and are released in Chambers USA 2016. The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by the client, according to the publisher.

Thirty S.C. Nelson Mullins Attorneys Selected for 2016 'Super Lawyers,' 'Rising Stars'

Thirty Nelson Mullins Riley & Scarborough LLP attorneys based in South Carolina have been selected by their peers to the 2016 list of South Carolina "Super Lawyers" and "Rising Stars" in 14 practice areas. Additionally, Columbia partner George Cauthen was among ten attorneys in the state to receive the most votes.

Continued on next page

Member News cont.

Charleston

- Michael T. Cole – Class Action
- G. Mark Phillips – Personal Injury Defense: Products
- Eli A. Poliakoff – Healthcare (Rising Star)

Columbia

- Stuart M. Andrews Jr. – Healthcare
- Mattison Bogan – Appellate (Rising Star)
- Mitchell Brown – Appellate
- George B. Cauthen – Bankruptcy: Business
- Karen Aldridge Crawford – Environmental
- David E. Dukes – Class Action
- 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
- James F. Rogers – Personal Injury Defense: Medical Malpractice
- Carmen Harper Thomas – Banking (Rising Star)

Greenville

- William H. Foster – Employment & Labor
- Timothy E. Madden – Family Law
- Samuel W. Outten – Business Litigation
- Marvin Quattlebaum, Jr. – Business Litigation
- Dowse Bradwell Rustin, IV – Banking (Rising Star)
- Giles M. Schanen – Civil Litigation Defense (Rising Star)
- Reid T. Sherard – Family Law
- Ashley B. Summer – Intellectual Property (Rising Star)

Myrtle Beach

- Jim McCrackin – Estate Planning and Probate

Nelson Mullins' Bo Russell Named to S.C. Education Lottery Commission

Bo Russell, a partner in Nelson Mullins Riley & Scarborough LLP's Greenville office, has been appointed by South Carolina Speaker of the House James H. "Jay" Lucas to the South Carolina Education Lottery Commission. The commission oversees activities of the S. C. Education Lottery.

Mr. Russell is a corporate attorney who advises corporate clients, venture and growth stage companies, private equity funds, financial institutions, and real estate development companies with respect to corporate matters. He works with companies at various stages of development and has represented clients in merger and acquisition transactions and other corporate transactions, private placements, and debt financings. He also advises clients on legal and business matters including entity formation, capitalization issues, capital-raising considerations, equity compensation alternatives, customer and vendor contracts, and license and supply agreements.

Two Roe Cassidy Attorneys Selected for Inclusion in Best Lawyers 2017

Roe Cassidy Coates and Price, P.A., is pleased to announce that two of its attorneys have been selected by their peers for inclusion in Best Lawyers in America 2017. Following are the Roe Cassidy attorneys selected for inclusion, as well as the practice areas in which their work is recognized.

- Randy Moody – Litigation: Labor & Employment; Employment Law: Management; Employment Law: Individuals.
- Clark Price – Medical Malpractice: Defendants.

2016 MGC Long Run Raises Over $31,000 for USO South Carolina

The MGC Long Run raised $31,446.90 for USO South Carolina. The USO South Carolina is a nonprofit organization that strengthens America's military service members by connecting them to family, home, and country throughout their service to the nation. The donation is a result of the 2016 MGC Long Run 15k, 15k Relay, 5k and Kids' Fun Run that took place on Feb. 6.

This year's race had over 850 runners and walkers and over 125 volunteers. The Long Run was presented by McAngus Goudelock & Courie, a Columbia-headquartered firm. The Not-So-Long Run 5k was presented by Midlands Orthopaedics, P.A.

"MGC is proud to bring the Long Run to Columbia each year, bringing together over 1,000 runners, walkers and volunteers to support our soldiers," said Rusty Goudelock, one of MGC's founding members. "Our service men and women protect us each and every day, and we are honored to have raised over $31,000 for the USO South Carolina."

"Thanks to MGC and their outstanding support, the USO South Carolina can continue to grow and provide programs and services to service members and their families throughout our state," said Joanie Thresher, Director of USO South Carolina. "Thank you, MGC and all involved in the 2016 Long Run, for your kindness and generosity. Without community partners and friends like you, the USO South Carolina couldn't do what we do!"

The 2017 race will take place on Sat., Feb. 4, and will feature a 15k, 15k relay, 5k and Kids' Fun Run. More information can be found at www.mgclongrun.com.

16 MGC Attorneys Included in Best Lawyers in America 2017; Doc Morgan Named Best Lawyers 2017 Personal Injury Litigation –Defense "Lawyer of the Year" in Greenville

McAngus Goudelock & Courie, a regional insurance defense firm, is pleased to announce the inclusion of sixteen attorneys in Best Lawyers in America 2017. Attorney Doc Morgan was also named Best Lawyers 2017 Personal Injury Litigation – Defense "Lawyer of the Year" in Greenville, SC.

Listed lawyers include:

Columbia

- A. Mundi George – Workers' Compensation Law: Employers
- J. Russell Goudelock II – Workers' Compensation Law: Employers
- Jason W. Lockhart – Workers' Compensation Law: Employers
- Scott B. Garrett – Workers' Compensation Law: Employers
- Sterling G. Davies – Commercial Litigation; Insurance Law; Litigation: Insurance; Product Liability Litigation: Defendants
- Thomas E. Lydon: Commercial Litigation; Litigation – Banking & Finance
- W. Hugh McAngus: Workers' Compensation Law – Employers

Greenville

- Erroll Anne Y. Hodges – Workers' Compensation Law: Employers
- G.D. "Doc" Morgan, Jr. – Commercial Litigation; Insurance Law; Litigation: Insurance; Personal Injury Litigation: Defendants; Product Liability Litigation: Defendants
- Mark Allison – Workers' Compensation Law: Employers
- O. Shayne Williams – Workers' Compensation Law: Employers
- Vernon F. Dunbar – Workers' Compensation Law: Employers
- William E. Shaughnessy – Workers' Compensation Law: Employers

Mount Pleasant

- Amy Y. Jenkins – Employment Law: Individuals; Employment Law: Management: Litigation: ERISA; Litigation: Labor & Employment
- Carl Edwards – Personal Injury Litigation Defendants
- Mark Davis – Workers' Compensation Law: Employers

McKay Firm Partner Appointed to Two South Carolina Bar Committees

McKay, Cauthen, Settana, & Stubley, P.A. is excited to recognize Kelli Sullivan for being appointed to both the Unauthorized Practice of Law Committee and the Lawyers Helping Lawyers Committee of the South Carolina Bar.

Kelli recently completed her two year term as the Chair of the South Carolina Bar Association's Ethics Advisory Committee after serving on that committee for over ten years. The Unauthorized Practice of Law Committee monitors unauthorized law activity in and assists authorities in taking appropriate action. The Lawyers helping Lawyers Committee assists lawyers and judges addicted to alcohol or drugs and those suffering from depression.

Kelli Sullivan practices in the areas of medical malpractice defense and civil litigation at The McKay Firm and is a certified mediator. Prior to joining the McKay Firm, Kelli was the Regional Assistant General Counsel for Nationwide Insurance and attended the University of South Carolina (B.A.) and the University of South Carolina School of Law(J.D.). Kelli is a long-standing member of the SC Bar Ethics Advisory Committee and is a member of the SC Bar Free Disputes Board among her many achievements. She was named to the Midlands Legal Elite in the area of insurance in 2013.

Julius W. "Jay" McKay, II stated, "We couldn't be more proud of Kelli for being appointed to these important committees. Her outstanding service the past 10 years on the Ethics Advisory Committee is a testament to her dedication to the South Carolina Bar and her passion for practicing law."

Two McKay Firm Partners Named to 2016 South Carolina Super Lawyers

The law firm of McKay, Cauthen, Settana & Stubley, P.A. is pleased to announce that two of the firm's partners, Julius W. "Jay" McKay, II, and Daniel R. Settana Jr., have been selected for recognition in the 2016 edition of South Carolina Super Lawyers magazine.

Mr. McKay was selected for inclusion in the South Carolina Super Lawyers list for the eighth year in a row in the area of Medical Malpractice Defense. He also practices in health care law, products liability, commercial litigation, government defense, appellate law and professional licensure disputes. His grandfather, Douglas McKay, Sr., started The McKay Firm in 1908.

Mr. Settana was selected for inclusion in the South Carolina Super Lawyers list in the area of Transportation Law. He also practices in insurance defense, and government defense.

Best Lawyers in America Selects McKay and Settana of The McKay Firm

The McKay Firm is pleased to announce that two of the firm's Partners, Julius W. "Jay" McKay, II, and Daniel R. Settana Jr., have been selected for inclusion in the Best Lawyers in America 2017.

Mr. McKay was selected for inclusion in Best Lawyers in the area of medical malpractice law – defendants and litigation - insurance. He practices in health care law, products liability, commercial litigation, government defense, appellate law and profes-

Continued on next page

sional licensure disputes. His grandfather, Douglas McKay, Sr., started The McKay Firm in 1908.

Mr. Settana was selected for inclusion Best Lawyers in the area of litigation – insurance. He also practices in insurance defense, transportation law and government defense.

Julius W. "Jay" McKay, II, Selected for Who's Who Directory of Top Attorneys in North America

The McKay Firm is pleased to announce that Julius W. "Jay" McKay, II has been selected for inclusion in the 2016 Who's Who Directory of Top Attorneys in North America.

McKay leads the McKay Firm's health care litigation team and has been practicing in the areas of medical malpractice, healthcare law, products liability, commercial litigation, government defense, insurance defense, appellate law, and professional licensure disputes for thirty-four years. His grandfather, Douglas McKay, Sr., started the firm in 1908.

After receiving his B.A. from the University of South Carolina, McKay went on to receive his J.D. from the University of South Carolina as well. He is a member of the South Carolina Bar Association, American Bar Association, Richland County Bar Association, Litigation Counsel of America, South Carolina Chamber of Commerce, South Carolina Defense Trial Attorneys' Association, American Arbitration Association, Carolinas Association of General Contractors, and American Business & Insurance Attorneys. He has also been listed in South Carolina Super Lawyers from 2009-2016, Best Lawyers in America from 2015-2016, and holds an AV Preeminent Rating from Martindale Hubble.

Three McKay Firm Attorneys Selected for Midlands Legal Elite

The McKay Firm is pleased to announce that two of its attorneys have been selected for the 2016 "Midlands Legal Elite". McKay Firm Partner Kelli Sullivan was selected for both Healthcare and Insurance Law.

- Daniel R. Settana – Civil Litigation Defense
- Kelli Sullivan – Healthcare Law & Insurance Law

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

The Midlands Legal Elite awards will be presented at a reception in the coming Fall.

Brandon Jones Named Partner at The McKay Firm

The McKay Firm is pleased to announce that Brandon Jones has been named as a Partner in the law firm.

A Clemson University and University of South Carolina School of Law graduate, Brandon's law practice focuses primarily on civil defense litigation, including trucking and commercial transportation, automobile law, governmental law, construction defect litigation, and general insurance defense. He serves as a Vice Chair of the Government Law Committee of the ABA's TIPS Section, volunteers for the Special Olympics, and is a member of the Defense Research Institute's Trucking Law Steering Committee and Vice-Chair of the Trucking Law Committee for Young Lawyers, the Richland County Bar Association, and the Columbia Clemson Club, among other organizations. He also is a 2015 graduate of Leadership Columbia. Selected for his leadership potential and commitment to the community, Brandon helped to implement and market the Shared Streets project in Columbia.

Dan Settana, Partner at The McKay Firm said, "Brandon has gone above and beyond as an attorney in his several years at The McKay Firm. His experience and his dedication to client service make him a true asset to the firm."

Brandon also serves as Chair of the Trucking Law Committee for the South Carolina Defense Trial Attorneys Association, and is the South Carolina Chapter Secretary of the Claims & Litigation Management Alliance's Trucking Committee. He is a South Carolina native and resides in Columbia with his wife, Parke

Haynsworth Sinkler Boyd Practices and Attorneys Recognized in 2016 Chambers USA Rankings

Haynsworth Sinkler Boyd, P.A. received a distinction in the 2016 edition of Chambers USA, published by Chambers and Partners. The legal directory annually ranks American law firms and lawyers by state and practice area.

Chambers USA ranked Haynsworth Sinkler Boyd's Corporate/Mergers & Acquisition: Banking and Finance practice area in the top tier. The Firm's Corporate/Mergers & Acquisitions, Litigation: General Commercial, and Real Estate practice areas were also recognized for their strengths and abilities.

In addition, the 2016 edition of Chambers USA recognized Haynsworth Sinkler Boyd attorney David Swanson in the Real Estate practice area.

Six Haynsworth Sinkler Boyd Attorneys Named "Lawyer of the Year" by Best Lawyers

Best Lawyers, a legal peer-review guide, has selected six Haynsworth Sinkler Boyd attorneys as "Lawyer of the Year" for 2017. Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant.

The following have been named Best Lawyers 2017 "Lawyer of the Year":

<u>Columbia</u>

- Robert Y. (Bob) Knowlton has been named the Best Lawyers 2017 Columbia, SC Litigation – Intellectual Property "Lawyer of the Year."

Greenville

- W. David Conner has been named the Best Lawyers 2017 Greenville, SC Mass Tort Litigation / Class Actions - Defendants "Lawyer of the Year."
- W. Francis (Frankie) Marion, Jr. has been named the Best Lawyers 2017 Greenville, SC Bet-the-Company Litigation "Lawyer of the Year."
- Moffatt G. (Mott) McDonald has been named the Best Lawyers 2017 Greenville, SC Litigation – Environmental "Lawyer of the Year."
- Sarah M. (Sally) Purnell has been named the Best Lawyers 2017 Greenville, SC Medical Malpractice Law - Defendants "Lawyer of the Year."
- Matthew P. (Matt) Utecht has been named the Best Lawyers 2017 Greenville, SC Health Care Law "Lawyer of the Year."

Haynsworth Sinkler Boyd Attorneys Named to "Legal Elite" List

Haynsworth Sinkler Boyd is proud to announce that Columbia-based attorney John Bruton has been named to Columbia Business Monthly's 2016 "Legal Elite of the Midlands". Columbia Business Monthly's Legal Elite is the only award program in the region that gives every active attorney the opportunity to participate. Attorneys are nominated and selected by their peers. Mr. Bruton was recognized in the practice area of business litigation law.

Haynsworth Sinkler Boyd Attorney Named to "Legal Elite" List

Haynsworth Sinkler Boyd is proud to announce that Greenville-based attorney Ben Alexander has been named to Greenville Business Magazine's 2016 "Legal Elite of the Upstate". Greenville Business Magazine's Legal Elite is the only award program in the region that gives every active attorney the opportunity to participate. Attorneys are nominated and selected by their peers. Mr. Alexander was recognized in the practice area of health care law.

Womble Carlyle's Josh Howard Joins S.C. Judicial Merit Selection Commission

Womble Carlyle attorney Josh Howard has been appointed to the South Carolina Judicial Merit Selection Commission.

The Judicial Merit Selection Commission was created in 1997 by state constitutional provision and state statutes to investigate and determine the qualifications and fitness of judicial candidates for all positions on the Supreme Court, Court of Appeals, Circuit Court, Family Court, and Administrative Law Court. The Commission also screens candidates for appointment to Master-in-Equity positions, as well as retired judges for continued service through subsequent appointment by the Chief Justice of the Supreme Court.

Howard was appointed to the Commission by Speaker of the House James H. "Jay" Lucas. Howard is a veteran business, financial services and regulatory attorney with a focus in litigation and regulatory disputes, internal and government investigations. He is frequently called upon to advise and craft solutions to complex business and regulatory issues. He practices in Womble Carlyle's Greenville office.

Sixteen Gallivan, White & Boyd Attorneys Recognized By Super Lawyers

Gallivan, White & Boyd, P.A. is pleased to announce that sixteen of the firm's attorneys were selected for inclusion in South Carolina Super Lawyers 2016. Gallivan, White and Boyd attorneys appearing in the 2016 edition of South Carolina Super Lawyers include:

Greenville

- W. Howard Boyd, Jr. – Business Litigation
- H. Mills Gallivan – Alternative Dispute Resolution
- Phillip E. Reeves – Insurance Coverage'
- T. David Rheney – Personal Injury Defense: General
- Thomas E. Vanderbloemen – Intellectual Property
- Daniel B. White – Personal Injury Defense: Products

Columbia

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

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

Greenville

- Robert Corney – Personal Injury Defense: General
- Zach L. Weaver – Business Litigation

Columbia

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

Charleston

- Mikell H. Wyman – Workers' Compensation Defense

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 that the firm has been selected for inclusion in the 2016 edition of Chambers USA,

Continued on next page

Leading Lawyers for Business as a Leading Law Firm in Commercial Litigation. Additionally, firm attorneys Daniel B. White, Gray T. Culbreath, and John T. Lay, Jr. were chosen as leading business attorneys in the field of Commercial Litigation. White, Culbreath, and Lay have years of experience in the handling of complex high-stakes corporate and commercial litigation matters.

John T. Lay, Jr. Elected President of the International Association of Defense Counsel

Gallivan, White & Boyd, P.A. is pleased to announce that shareholder John T. Lay, Jr. has been elected president of the International Association of Defense Counsel ("IADC"). The IADC is the preeminent invitation-only legal organization for attorneys who represent corporate and insurance interests throughout the world. Lay will serve as president from July 2016 through July 2017, when he will transition to Chair of the Board of Directors.

Lay's selection places three Gallivan, White and Boyd attorneys simultaneously at the head of the three leading national legal civil defense professional organizations, an unprecedented achievement for a single firm. GWB attorney Mills Gallivan will assume the presidency of the Federation of Defense & Corporate Counsel ("FDCC") later in July, while GWB attorney John Cuttino will become president of DRI – The Voice of the Defense Bar, this fall.

Lay focuses his law practice on business litigation, professional malpractice, insurance bad faith and coverage, financial services litigation, product liability, and environmental law. Lay is a member of the Board of Directors of the IADC, the Defense Research Institute, and Lawyers for Civil Justice, and a Delegate of The American Civil Trial Bar Roundtable. Lay has been thoroughly recognized in the legal profession by organizations such as Chambers USA, Best Lawyers in America in six practice areas, South Carolina Super Lawyers, and Benchmark Litigation.

Columbia Attorney Lindsay Joyner Receives Katharine Heath Manning Perry Award

Gallivan, White & Boyd, P.A. attorney Lindsay Joyner has long been a dedicated servant to the community in Columbia, South Carolina. As a result of this dedication, Joyner has been awarded the Katharine Heath Manning Perry Award from the Junior League of Columbia ("JLC"). This award recognizes a member of JLC who has excelled in community voluntarism and activism, through her JLC placements and through extensions of her JLC work and training.

Joyner joined JLC in 2010 and is currently serving as League Attorney and Risk Manager. She has also been very active in other community organizations, such as the Columbia Museum of Art, South Carolina Bar Young Lawyers Division, and Downtown Church.

Joyner's legal practice places an emphasis on banking, business and commercial litigation, and professional negligence. A significant portion of Joyner's legal practice is devoted to banking, including advising bankers on policy and customer issues as well as litigating matters from an offensive and defensive perspective. Joyner also represents corporate and individual clients in complex business and commercial litigation matters.

Established in 1924, the Junior League of Columbia, Inc. is an organization of women committed to promoting voluntarism, developing the potential of women, and improving communities through the effective action and leadership of trained volunteers. Its purpose is exclusively educational and charitable.

H. Mills Gallivan Elected President of the Federation of Defense & Corporate Counsel

Gallivan, White & Boyd, P.A. is pleased to announce that shareholder H. Mills Gallivan has been named President of the Federation of Defense & Corporate Counsel ("FDCC"), with his term as President ending in July of 2017. The FDCC is composed of recognized leaders in the legal community. The FDCC is dedicated to promoting knowledge, justice and fellowship. FDCC members are dedicated to the pursuit of a balanced civil justice system as they represent those in need of a defense in civil litigation.

Gallivan's selection places three Gallivan, White and Boyd attorneys simultaneously at the head of the three leading national legal civil defense professional organizations, an unprecedented achievement for a single firm. GWB attorney John T. Lay, Jr. recently assumed the presidency of the International Association of Defense Counsel, while GWB attorney John Cuttino will become president of DRI – The Voice of the Defense Bar, this fall.

Gallivan has spent over forty years serving clients as a civil defense litigator in the areas of workplace practices, personal injury, and commercial matters. He now focuses his practice on mediation, alternative dispute resolution, and serving as a Special Referee. Gallivan has a long history as a leader in the community and the legal profession. His long list of service includes other organizations such as National Foundation for Judicial Excellence, South Carolina Defense Trial Attorneys' Association, Lawyers for Civil Justice, and DRI – The Voice of the Defense Bar.

Fourteen Gallivan, White & Boyd Attorneys Recognized as "Legal Elite" by Regional Business Magazines

Gallivan, White & Boyd, P.A. is pleased to announce that fourteen of the firm's attorneys have been selected as "Legal Elite" for 2016 by Greenville Business Magazine ("GBM") and Columbia Business Monthly ("CBM"). These regional business publications asked attorneys in the Upstate to nominate other attorneys who, in their opinion, were leading

lawyers in twenty particular practice areas. Respondents could nominate lawyers in their firms, but for each in-firm lawyer there had to be an out-of-firm lawyer nominated. The complete list of "Legal Elite" from GWB include:

Columbia

- Amy Hill – Business Litigation
- Laura Jordan – Business Litigation
- Shelley Montague – Construction Law
- Curtis Ott – Personal Injury Defense

Greenville

- Howard Boyd, – Civil Litigation
- Rob Corney – Personal Injury
- Amity Edmonds – Workers' Compensation
- Cory Ezzell – Workers' Compensation
- Nick Farr – Insurance
- Batten Farrar – Construction Law
- Mills Gallivan – Workers' Compensation
- Duffie Powers – Bankruptcy Law
- Thomas Vanderbloemen – Intellectual Property
- Zach Weaver – Business Litigation

Ben Gooding Elected to Board of Big Brothers Big Sisters of Greater Columbia

Sowell Gray attorney Ben Gooding has been elected to the board of Big Brothers Big Sisters of Greater Columbia.

"To be part of an organization that changes the lives of children facing adversity is an honor," said Gooding. "These children will be our future leaders and I can't think of a better way to serve my community."

Ben focuses his practice at Sowell Gray on business litigation, appellate advocacy, and professional negligence. His undergraduate studies in business and finance from the University of Georgia provide Ben with the necessary background to understand the functions, operations, and complexities of the businesses he represents.

Elmore Goldsmith Attorneys Recognized as South Carolina "Super Lawyers"

Greenville, SC (April 22, 2016) – Three attorneys from Elmore Goldsmith have been named by South Carolina Super Lawyers Magazine for 2016. 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.

Elmore Goldsmith attorneys recognized as Super Lawyers are:

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

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

- Bryan P. Kelley – Construction Litigation

The selection process for the Rising Stars list is the same as the Super Lawyers selection process, with one exception: to be eligible for inclusion in Rising Stars, a candidate must be either forty years old or younger or in practice for ten years or less.

Super Lawyers is an independent lawyer rating service that selects attorneys using a rigorous, multi-level rating process. Through peer nominations, evaluations, and third-party research, outstanding attorneys are selected based on their professional accomplishments.

Two Elmore Goldsmith Attorneys Named to Greenville Business Magazine's Legal Elite of the Upstate 2016

The law firm of Elmore Goldsmith is pleased to announce that two of the firm's attorneys have been named to Greenville Business Magazine's "Legal Elite of the Upstate" for 2016.

Attorneys receiving the distinction are:

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

In its annual survey, the magazine sent emails to Greenville-area lawyers and asked them who, in their opinion, were the best lawyers in twenty practice areas.

Elmore Goldsmith Attorneys Recognized in Best Lawyers in America 2017

The law firm of Elmore Goldsmith is pleased to announce that two of the firm's attorneys have been selected by their peers for inclusion in Best Lawyers in America 2017.

The following Elmore Goldsmith attorneys are included in Best Lawyers in America 2017:

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

Gray T. Culbreath & John T. Lay, Jr. Chosen as "Litigation Stars" by Benchmark Litigation

Gallivan, White & Boyd, P.A. Columbia attorneys Gray T. Culbreath and John T. Lay, Jr. have been chosen as "2017 Litigation Stars" by Benchmark Litigation. Benchmark Litigation has been conducting research on litigators, firms, and cases since 2008. "Litigation Stars" are selected after a six-month research period where Benchmark Litigation researchers examine recent casework handled by attorneys, interview clients, and ask individual litigators to offer their professional opinions on peers.

With over 25 years of legal experience, Gray T. Culbreath concentrates his practice on products liability, business and commercial litigation, transportation, class actions, and professional negligence practice areas. He is a member of the American Board of Trial Advocates, the Federation of Defense and Corporate Counsel, and Lawyers for Civil Justice.

John T. Lay, Jr. focuses his practice on business

litigation, professional malpractice, insurance bad faith and coverage, financial services litigation, product liability, and environmental law. Lay is currently President of the International Association of Defense Counsel ("IADC") and a member of the Board of Directors of the IADC, the Defense Research Institute, and Lawyers for Civil Justice, as well as a Delegate of the American Civil Trial Bar Roundtable.

ABA Section of Litigation's Environmental & Energy Litigation Committee Appoints Nelson Mullins' Karen Aldridge Crawford as Co-Chair

The American Bar Association's Section of Litigation has announced the merger of its Environmental Litigation and its Energy Litigation Committees and has appointed Karen Aldridge Crawford, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, as a co-chair of the newly formed Environmental & Energy Litigation Committee, one of the section's largest.

Ms. Crawford worked as an engineer in the chemical industry before joining Nelson Mullins in 1988 and was tasked with building the firm's environmental practice. She is a member of the South Carolina, Pennsylvania, and District of Columbia bar associations and practices in the areas of environmental, safety and health, transportation, and energy law and litigation; toxic torts and mass torts; disaster relief; and product liability. In 1997, the Institute of Professional Environmental Practice recognized Ms. Crawford as a Qualified Environmental Professional, a distinction awarded after fifteen years of experience and examination on a specific technical environmental project. In 2012, she was Best Lawyers' Environmental Litigation Lawyer of the Year for Columbia, and in 2008 she was in the first class to be inducted into the American College of Environmental Lawyers.

Laura Paton Of Carlock Copeland Now Certified To Mediate Cases In The Civil Courts Of South Carolina

Carlock, Copeland & Stair, LLP announces that Laura Paton recently completed the South Carolina Bar's Circuit Court Mediation Certification Training and Advanced Negotiation Workshop. Laura is now certified to mediate cases in the civil courts of South Carolina.

Laura Paton is Of Counsel in the Charleston office of Carlock, Copeland & Stair, LLP. She practices in the firm's Construction Litigation, General Liability Practice, and Insurance Coverage and Bad Faith Litigation Groups, and holds an AV Preeminent Peer Review rating by Martindale-Hubbell. Laura's practice focuses primarily on Construction and Design Defect Litigation, representing contractors and design professionals involved in a variety of disputes. Further, Laura represents design professionals involved in the development of various types of construction projects, where she enjoys assisting architects and engineers in negotiating and drafting contracts. She also provides corporate and individual clients with legal services in the areas of insurance defense, personal injury defense, and premises liability defense. She has successfully developed and executed resolution plans representing corporate entities and individuals in dozens of pre-litigation disputes and litigated cases.

Frank Elmore Inducted into Carolinas Associated General Contractors Hall of Fame

Founding shareholder Frank Elmore of Elmore Goldsmith, P.A. was one of five inaugural Class of 2016 Hall of Fame inductees at the Carolinas Associated General Contractors ("CAGC") Annual Divisions Conference and Construction Industry Summit held on Hilton Head Island.

To be considered for this award, the nominee must be a past or present CAGC member, be at least fifty years old, and have at least fifteen years of active involvement in the CAGC and the construction industry. Considerations for "active involvement" include: time and energy, ideas and processes, sponsorship and support of CAGC events and programs, attendance at CAGC events, service on board and committees and other leadership roles, advocacy for NC/SC PACs, advocacy and support for the CAGC Foundation, and civic and community investments. Elmore was the first attorney associate member of Carolinas AGC more than thirty years ago.

Elmore said "to be associated with Carolinas AGC is an honor. To be recognized in this manner with the icons of the construction industry in the Carolinas is overwhelming."

Summer Meeting Recap
Asheville, NC

by Michael D. Freeman

If you missed the SCDTAA's 49th Summer meeting in Asheville, NC, then you missed a rocking good time and you ought to be ashamed of yourself. Bucking tradition, the membership convened this year at the Renaissance Hotel to experience all that downtown Asheville had to offer. The Renaissance offered stunning views of the city skyline and surrounding mountains, as well as a central location for downtown exploration and adventure. As attendees trickled in, they made their way inevitably to the lobby bar to reconnect with friends and colleagues in preparation for the welcome reception.

Friday morning, we were welcomed by an enthusiastic William Brown. Stuart Mauney kicked off the CLE offerings with a timely presentation on depression, suicide and substance abuse in the legal profession. Following that, substantive law breakouts were offered. The Business Law and ADR sections, led by Biff Sowell and Tyson Nettles, combined to give us a panel update of recent developments in ADR law in conjunction with business litigation, terrifying all that were in attendance with the Five Star order and the prospect of court-imposed sanctions against clients and their counsel for failing to comply with South Carolina's ADR rules.

We reconvened as a group to be further terrified by the specter of malpractice in Marc Tucker's excellent presentation on cybersecurity and data management. Judging by the many people frantically jabbing at their iphones in the hallway following the discussion, I imagine scores of support staff and associates were getting emails to hastily update their firm's internal policies regarding data security. Closing out our CLE offerings for the day, we were honored to host Justice John Few of our South Carolina Supreme Court and hear about his humorous and expert insight on the future of the courts and justice system, which left everyone in good spirits for the Women in Law reception which immediately followed on the adjacent patio area. Attendees of all genders were welcomed to attend and share in the camaraderie of the profession.

Afterward, we were left to our own devices (or vices as the case may be) for the afternoon. Some demonstrated their skill on the golf course, others chose zip lining, horseback riding, sightseeing, and brewery sampling. The evening saw us loading up multiple tour buses and taking a short ride through the mountains to Claxton Farm, where we enjoyed some very fine North Carolina barbecue and great music with a beautiful backdrop.

Saturday morning began with Breakfast with the Commissioners giving the Comp practicioners a chance to mix and mingle with others in their field. After the subsequent membership meeting, we jumped right into our Circuit Court Judicial Panel led by Judge Hood, Judge Gravely and Judge Jocelyn Newman, and received the benefit of their practice tips from behind the bench. Common themes of hearing preparedness and cordiality towards opposing counsel were among the many practical tips imparted. Chief Justice Pleicones then gave one of the highlight presentations of the weekend, treating us to his State of the Judiciary, which was as entertaining as it was informative. Workers' Comp, Employment Law and Torts/Insurance sections then had their Saturday breakout sessions led by the Workers' Comp Commissioners, Shelia Bias and Shane Massey respectively, all of which yielded valuable practical lessons. Among other things, Shane gave us an idea of upcoming discussions of tort reform in the legislature and how our practices may be affected.

The closing sessions of our weekend started with Laura Evans' touching presentation about her efforts to manage charitable donations for the victims of the Mother Emanuel AME tragedy in Charleston. She challenged the group before she began to try and sit through it without shedding a tear. I don't believe a single person lived up to that challenge, but we all left inspired by her story and the work she and her team have done in response to that tragedy, and the massive pro bono efforts she coordinated. Finally, fresh off the party conventions, we were privileged to have Bakari Sellers, Chip Felkel and Shane Massey provide a government roundtable discussion about this year's elections at the state and federal level. Starting on Friday with suicide, depression and substance abuse and ending on Saturday with politics, I think all attendees will agree that a good time was had by all.

On behalf of myself, and the rest of the Summer Meeting Committee, Amy Geddes, Walt Barefoot, Claude Prevost and our esteemed Chair Jack Riordan, I would like to thank all of our sponsors. I'd also like to give thanks to all the presenters who put the work and effort into making our meeting as informative as it was fun. A special thank you to Aimee Hiers and her crew for making things run much more smoothly than they by right ought to. And thank you to all of the attendees who made this and every meeting worth attending. Look forward to seeing you all next year back at the Grove Park Inn.

The 26th Annual Trial Academy Recap

by Johnston A. Cox

The 26th Annual Trial Academy for the South Carolina Defense Trial Attorneys' Association was held May 25-27, 2016, in Greenville. 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 lectures on various aspects of trial from some of the top trial lawyers in the state. The Trial Academy culminated in mock trials on May 27th 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 Buoniconti v. The Citadel, et al. Each of the trials were presided over by a sitting state or federal court judge who, along with experienced lawyers, acted as trial observers and provided 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 Trial Academy hosted twenty-four students and conducted six trials. The Trial Academy Committee led by Johnston Cox, Trey Suggs, Josh Howard, Beth McMillan and Claude Prevost put together a great program. Special thanks go out to the following judges for giving their time to preside over the trials: Judge Derham Cole, Judge Perry Gravely, Judge Letitia Verdin, Judge Robert Hood, Judge Lawton McIntosh, and Judge Jocelyn Newman. We also thank the numerous speakers and break-out leaders who participated and helped with the Trial Academy. Additional thanks go out to Legal Eagle for sponsoring the Trial Academy. 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 2016 Trial Academy was another success. The Trial Academy returns to Charleston in 2017 and I encourage you to sign up your young lawyers for next year's event.

SCDTAA Hosts First Ever Boot Camp on Motions Practice

by Jared H. Garraux, Giles M. Schanen, Jr., & William "Trey" W. Watkins, Jr.

On September 22, the SCDTAA held its first ever Boot Camp on Motions Practice at the Matthew J. Perry Courthouse in Columbia. The program was a resounding success, as over twenty young lawyers came together to receive insight from a distinguished slate of panelists and speakers, and to hone their skills during mock hearings conducted before members of the judiciary or SCDTAA board members.

The program kicked off with a panel of career law clerks who dispensed advice gleaned from their many years of experience in the federal courts. We appreciate the willingness of Christine Schanen, Jennifer Whitsett, and Nan Williams to share with the group from their unique perspective within the judicial system.

Next, the participants heard from two prominent members of the plaintiff bar, Ronnie Crosby and Robert Goings, concerning their view on motions practice from the other side of the "V." It was very generous of them to donate their time to assist our organization, even if they did not share all of their trade secrets with us!

After a short break, the attendees were treated to a spirited mock argument of a motion in limine by Marvin Quattlebaum, former President of the South Carolina Bar, and Dick Willis. These highly skilled lawyers demonstrated the essential components of an effective oral argument, and provided an excellent example for the participants to follow when conducting their own mock arguments later in the day. We are very appreciative of Mr. Quattlebaum and Mr. Willis for this well-planned presentation, and for our own President-Elect, David Anderson, for judging this mock hearing.

Finally, the participants heard from a judicial panel consisting of Judge Joseph F. Anderson, Jr., Judge Shiva V. Hodges, and Judge Jocelyn Newman. This talented group of judges offered many pearls of wisdom concerning effective motion practice, the difference between motion practice in federal and state court, and the importance of treating all members of the courthouse staff—not just the judge—with respect. Undoubtedly, the young lawyers who attended the Boot Camp will benefit from these judges' sage advice.

After lunch, the participants argued mock dispositive motions and discovery motions in the courtrooms at the Matthew J. Perry Courthouse. We thank Judge Hodges, David Anderson, and Jared Garraux for judging these mock hearings, and the courthouse staff for their exceptional hospitality. The participants were well-prepared, which ensured the hearings ran smoothly, and the trial observers and the judges provided excellent critique and feedback.

Special thanks to our sponsor, A. William Roberts, Jr. and Associates, and to our Executive Director, Aimee Hiers, for her tireless work in coordinating the program. We hope to see more members at next year's Boot Camp!

Garraux

Schanen, Jr.

Watkins, Jr.

LEGISLATIVE REPORT

Fall 2016 Legislative Update

by Jeffrey N. Thordahl, SCDTAA Lobbyist

General Assembly

It seems like the primaries for the South Carolina General Assembly were long ago but they were just held this June and they will have a significant impact on the 2017 Legislative Session. January 2017 begins the first year of a new, two year Session. Numerous members of the General Assembly faced primary opposition and four incumbent House members were defeated, including Representatives Doug Brannon (Landrum), Donna Hicks (Boiling Springs), Wendy Nanney (Greenville), and Ralph Shealy Kennedy (Leesville).

In the Senate, several longtime incumbents lost their primary elections as well. These include the surprising losses by Senator Larry Martin (Pickens) and Senator Wes Hayes (Rock Hill). In addition, three other incumbent Senators lost their primary election: Senators Mike Fair, Lee Bright, and Creighton Coleman. Other notable Senate races saw Senator Hugh Leatherman and Senator Luke Rankin win their primaries despite considerable support for their opponents from Governor Nikki Haley.

The loss of these Senators in a chamber, where leadership is driven by seniority and majority party, has a dramatic impact on who will be the chairman of the various standing committees. Most notable for the SCDTAA is that Senator Luke Rankin will be the new Chairman of the Senate Judiciary Committee. The Senate Judiciary Committee will have several new members on the committee as well. When the Senate convenes in January, the Senators will select the committees on which they would like to serve. As this process is also driven by seniority, most, if not all of the new Senators will be on Senate Judiciary committee. This will include the following eight new Senators (the Senator who held the seat previously is reflected in parentheses):

- Rex Rice (Larry Martin)
- Scott Talley (Lee Bright) - Attorney
- William Timmons (Mike Fair) - Attorney
- Wes Climber (Wes Hayes)
- Representative Steve Goldfinch (Ray Cleary) - Attorney
- Mike Fanning (Creighton Coleman)
- Representative Mia McLeod or Susan Brill (Joel Lourie)
- Sandy Senn (Paul Thurmond) - Attorney

In all of these changes, I would be remiss if I did not point out SCDTAA Board Member, Senator Shane Massey, won his primary. In addition, he was elected by his peers to be the Senate Majority Leader. Also, due to the turnover in the Senate, he is also in line to become a committee Chairman next year.

Judiciary

As always, there are several Judicial Seats up for election by the General Assembly next year, including the seat formerly held by Supreme Court Justice Don Beatty. This vacancy was created when he was elected to be the Chief Justice of the Supreme Court. Currently, seven individuals have filed for the open seat. Also, with the election of Justice John Few to the Supreme Court, there is a vacancy on the Court of Appeals. Four individuals have filed for that seat. There are several other upcoming judicial elections with multiple candidates and they can found at this link - http://www.scstatehouse.gov/JudicialMeritPage/Media%20Release%20Announcing%20Fall%202016%20Judicial%20Candidates%208.1.16.pdf. The Public Hearings for the Judicial Merit Selection Commission have been scheduled to begin Monday, November 14, 2016, regarding the qualifications of the candidates for judicial positions.

The Honorable Roger L. Couch
South Carolina Circuit Court Judge

Judge Roger L. Couch was born in Spartanburg County on February 1, 1950. He is the son of the late Kenneth O. Couch and Catherine Ramsey Couch Edwards.

Judge Couch attended public schools and graduated from Paul M. Dorman High School in 1968. He graduated from the University of South Carolina in 1972 with a Bachelor of Arts Degree in Political Science. He earned his Juris Doctor Degree from the University of South Carolina School of Law in 1975. He was admitted to the South Carolina Bar on November 11, 1975.

Judge Couch was engaged in the private practice of law in Spartanburg County for twenty-one years prior to his taking the office of Master-in-Equity for Spartanburg County on July 1, 1997. He served on the Spartanburg County District #6 School Board for twenty years and is a member of the Downtown Spartanburg Rotary Club.

Judge Couch is married to the former Joy E. Ayers, and has two children, William R. Couch and Robert A. Couch. He has one stepson, James D. Jennings.

What factors led you to a career in the law?

I have wanted to be a lawyer for as long as I can remember. I told my parents about my wishes before I attended school. I was always impressed with the role of lawyers in creating our government and forming our society and wanted to be a part of that profession.

What has been the biggest influence in your legal career?

Probably the biggest influence on my legal career has been my law partner for twenty-one years, Toney J. Lister. He and I grew up together in the practice, and he has always been there for advice and support. Since taking the bench, I have had the support of my fellow judges and, in particular, former Chief Justice Littlejohn, who was always available to me during my early years for a consult.

What advice do you have for lawyers preparing to try a case in your Courtroom?

Be prepared and be aware that the judge should be instructed on your case just as much, or more, than the jury. Be sure to give the judge in your case copies of all exhibits that you refer to and ensure that the judge is able to view all demonstrative aids used in the trial. I always feel better about the case that I have been able to follow throughout the trial and understand from having been instructed about the case as it was presented.

What do you enjoy doing in your spare time?

Golf, DIY projects, and the beach.

What is your favorite movie?

Butch Cassidy and the Sundance Kid; Saving Private Ryan; or any Indiana Jones movie.

What was the last book you read?

The Testament by John Grisham.

If you could visit yourself on the first day of your legal career, what advice would you give?

Work hard, strive to do what's right, and problems will take care of themselves.

DRI
UPDATE

DRI Update

by Gray T. Culbreath

As I prepared to write my last DRI update as the South Carolina Sate Rep, I took a moment to reflect not only on the past three years but also and more importantly the past sixteen years as a Board member and Officer for SCDTAA. Obviously, those of you who are members and regularly attend SCDTAA meetings have benefited educationally and professionally from those events. Likewise, the benefits that DRI provides to members of the South Carolina Defense Trial Attorneys' Association are numerous. If you have read this column before, as I hope you have, you know that we are always looking for new members and continued involvement in DRI by South Carolina defense lawyers.

Recently, there have been some changes to the DRI membership program as it relates to the state and local defense organizations like the SCDTAA. Now, new first time SCDTAA members, who also join DRI as a full dues paying member, will receive a certificate to attend a free DRI seminar - a $795.00 value (excluding the annual meeting) to be used within 18 months. The certificate is non-transferrable. With the Bar exam results fast approaching, now is the time to be signing up new associates for both SCDTAA and also DRI. What better way to get them involved in the defense practice than joining both of these great organizations?

The DRI Annual Meeting took place in Boston October 19th thru 23rd at the Sheraton Boston Hotel and Hynes Convention Center and it was a spectacular event. In addition to the excellent CLE, there were numerous networking activities, including a Thursday night event at Fenway Park. Most importantly our own John Cuttino took over as President of DRI at the meeting.

Finally, I would be remiss in not encouraging all of you to download the fabulous new book available through DRI, The Associates Handbook, authored by my good friend, Frank Ramos. The book is free and it is available for download via the DRI website. The handbook is a comprehensive, accessible guide for young attorneys who typically arrive at their law firm filled with academic knowledge but not the mechanics and practical aspects of the practice of law. It provides advice on how young lawyers can make the most of their careers by showing them how to be better communicators, marketers and trial lawyers. It's a "how to" - how to write better, how to get more involved, how to be a rainmaker and how to prepare every case as if it is going to trial. It provides practical advice to help young lawyers avoid the pitfalls and obstacles of daily practice and excel at their firms. I encourage each of you to get your young lawyers a copy of this book.

DRI
The Voice of the Defense Bar

Congratulations to SCDTAA member John Cuttino

The new President of DRI

ARTICLE

Hammers, Nails, and Arbitration Clauses: Three Recent Cases Underscore the Importance of Well-Drafted Arbitration Clauses in the Homebuilder's Tool Kit[1]

by Stephanie G. Brown [2] and William "Trey" W. Watkins, Jr.[3]

Arbitration is an economical tool in dispute resolution. Its use has become rampant in almost every section of commerce. From cell phone contracts to banking agreements, most everyone has agreed to arbitration, many times agreeing to arbitration by just scrolling through the terms and conditions without stopping for a beat to actually consider the terms of the agreement. Arbitration is touted as providing a binding decision without the expense of litigation, offering a means of minimizing hostility, and shortening the time period for resolution.

After a trio of decisions from the South Carolina appellate courts, we might have felt a bit dizzy from all the back and forth. Where do these cases leave arbitration clauses in residential construction? This article reviews the decisions handed down over the summer relating to arbitration clauses. First, from the South Carolina Supreme Court's decisions in *Smith v. D.R. Horton*[4] and *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*,[5] and then briefly, the Court of Appeal's decision in *One Belle Hall POA v. Trammell Crow, et al*.[6] from earlier in the summer.

All three decisions involved arbitration clauses in contracts for residential home construction and sale. Within weeks, the court went from striking down one builder's arbitration clause to upholding and compelling arbitration under another builder's contract. This article summarizes the decisions and attempts to provide takeaways that readers can use in practice for drafting and assisting clients.

Smith v. D.R. Horton [7]

When the decision in *Smith v. D.R. Horton* was released, it seemed to be a swift blow to arbitration clauses in residential home sales contracts, and according to an attorney for the plaintiffs, the furtherance of the "Seller Beware" approach in the courts.[8]

The Smiths purchased a home from D.R. Horton and entered into the company's standard sales contract. Section 14 of the contract was titled "Warranties and Dispute Resolution." Within that section, Subsection 14(g) provided that the parties "desire[d] to arbitrate all disputes between themselves" to the "maximum extent allowed by law" and expressly provided that all claims arising out of D.R. Horton's construction of the home and the performance under the warranty were to be arbitrated.[9] Another section limited the extent of liability of D.R. Horton.[10]

Following the sale, the Smiths encountered a number of issues, and after years of D.R. Horton attempting to correct the defects without full resolution, the owners brought suit against D.R. Horton and others asserting negligence, breach of contract, breach of warranties, and unfair trade practices. The builder moved to compel arbitration. The buyers claimed the arbitration clause was unconscionable, and therefore, was unenforceable. The circuit court agreed with the buyers and found the arbitration clause was unconscionable. The builders then appealed, and the South Carolina Supreme Court agreed to hear the appeal.[11]

Brown

Watkins, Jr.

D.R. Horton argued that the Court of Appeals failed to follow the *Prima Paint* doctrine.[12] In *Prima Paint*, the Supreme Court held that to defeat arbitration, the challenging party must allege that the arbitration clause itself is unenforceable based on contractual defenses. Challenges to other sections of the contract would be resolved through arbitration proceedings.[13] When looking at D.R. Horton's purchase contract, the South Carolina Supreme Court found all of Section 14 to constitute the arbitration clause. Reasoning that because the subparagraphs in the Section contained "numerous cross-references to one another" the subparagraphs were "intertwine[d]" such "as to constitute a single provision."[14]

After quickly sweeping the severability argument away, the opinion went on to evaluate whether the arbitration clause, now all of Section 14, was unconscionable. Unconscionability is an "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."[15] While acknowledging that

Continued on next page

adhesion contracts are not per se unconscionable, the Court cited to *Kennedy v. Columbia Lumber & Mfg. Co.*,[16] where it recognized that South Carolina courts have shifted from *caveat emptor* ("let the buyer beware") to *caveat venditor* ("let the seller beware"). Since there was no indication the Smiths had any stronger bargaining position than an average buyer, nor indication they were represented by independent counsel, the Court found that the Smiths lacked a meaningful choice to negotiate the arbitration clause in their purchase contract.[17] On the second prong of the unconscionability analysis, the Court pointed to the subparagraphs of Section 14 that disclaim implied warranty claims and prohibit monetary damages as terms being so one-sided and oppressive that no reasonable person would agree.[18] The majority found the arbitration clause unconscionable, and therefore, unenforceable.

The dissent, authored by Justice Kittredge and joined by then-Justice Pleicones, attacked the majority's finding that the entire, 1,800 word Section 14 comprised the arbitration clause.[19] The dissent argued that the majority circumvented well established state law holding that a severable contract is "one in its nature and purpose susceptible of division and apportionment, having two or more parts . . . not necessarily dependent upon each other . . . despite interdependence of material terms."[20] The dissent called attention to not only the fact that the Section had numerous individually labeled subparagraphs, but the Smiths separately initialed specific subparagraphs within the Section 14, including 14(g) titled "Mandatory Binding Arbitration.[21] As the dissent would find only subsection 14(g) to be the arbitration provision, since the Smiths raised no objection to that subparagraph, any disputes regarding the other potentially problematic portions of the contract had to be resolved through arbitration.

Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.[22]

Just one month later, a case with seemingly the same issues provided the Court another bite at the arbitration apple. In *Parsons*, the South Carolina Supreme Court seemed to revive the enforcement of arbitration clauses.

John Weiland Homes ("JWH") purchased land, which had previously been used as a textile industrial site, and subsequently developed residential homes. JWH removed visible evidence of the prior industrial use, also removing various underground pipes, valves, and tanks remaining from the prior use.[23] Five years after JWH's purchase of the land, the Parsons purchased a home from JWH and entered into the seller's standard purchase agreement. Within the contract, one paragraph stated that the purchaser had received and read a copy of the JHW Warranty, and consented to the terms therein, which included the terms of the arbitration clause within the Warranty. This paragraph of the purchase contract was initialed. The Parsons also received a "Homeowners Handbook" containing the warranty. Paragraph O of the Warranty's General Provisions contained the arbitration clause.[24]

A year following the purchase, the Parsons found PVC pipes and a metal lined concrete box that contained "black sludge," later determined to be a hazardous substance.[25] The Parsons brought suit alleging breach of the purchase contract and implied warranties, unfair trade practices, negligent misrepresentation, negligence and fraud. JWH moved to compel arbitration and dismiss the action, asserting that the Parsons' claims all arose out of the purchase agreement and to which the Parsons had agreed that such disputes would be decided by arbitration.[26]

The circuit court found that the arbitration clause was unenforceable. First, it reasoned, because the arbitration clause was located in the Warranty booklet, only claims related to the Warranty were to be arbitrated. Since the claims did not relate to a defect or deficiency in the design or construction of the house, the claims fell outside of the scope of the arbitration clause. Second, the circuit court found that the arbitration clause was unenforceable due to the "outrageous tort exception." The Court of Appeals affirmed the decision, finding the scope of the arbitration clause was limited to Warranty claims, but did not address the outrageous torts exception doctrine.[27]

Newly-named Chief Justice Pleicones, now joined by Justice Kittredge, writing for the majority, disagreed with the Court of Appeals. After noting multiple times that there is a presumption in favor of arbitrability under both federal and state law, the Court went on to analyze the arbitration clause at issue.[28] The arbitration clause states "[a]ny and all unresolved claims or disputes of any kind or nature between [JWH] and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with [JWH] (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration."[29] Also included in the arbitration clause was a waiver of rights and remedies, which, after again acknowledging that the parties agree for arbitration to be the "sole and exclusion remedy for the resolution of any and all disputes arising after the initial closing," states: "Wieland and Homebuyers hereby waive any and all other rights and remedies a law, in equity or otherwise which might otherwise have been available to them in connection with any such disputes."[30] The Court held that the "plain and unambiguous language" called for the claims at issue to be arbitrated, and subsequently, the Court of Appeals erred in agreeing with the circuit court's finding that arbitration was limited to claims arising only out of the warranty.

While the majority could have stopped its analysis there, it also addressed the "outrageous torts exception" doctrine challenge, striking down the doctrine to the extent it was used solely as a challenge to arbi-

tration enforcement. Calling attention to the United States Supreme Court decision in *AT&T Mobility, LLC v. Concepcion*, the Court found the outrageous torts exception had been used only as a defense against arbitration enforceability, and as such was not a viable defense.[31] The Court stated that the *Concepcion* decision held the Federal Arbitration Act permitted arbitration agreements to be invalidated by "generally applicable contract defenses," but did not permit defenses that were applied only to arbitration agreements or that "derived their meaning from the fact that an agreement to arbitrate is at issue."[32] The majority overruled cases that applied the exception, finding the outrageous tort defense had only been applied in arbitration challenges.[33]

A concurring opinion by Justice Hearn, joined by Justice Beatty, agreed with the majority that the homeowners' claims must be arbitrated pursuant to the enforceable arbitration clause.[34] Justice Hearn disagreed with the majority to the extent it overruled the outrageous tort doctrine.[35] Justice Hearn's opinion found that the doctrine "embodies a generally applicable contract principle."[36] The concurring opinion noted, however, that the doctrine would have applied in *Parsons*, as there was a "significant relationship" between the Parsons' claims and the sales contract and it was "entirely foreseeable that a seller would fail to disclose defects with the property."[37]

One Belle Hall Property Owners Ass'n, Inc. v. Trammell Crow Residential Co.[38]

Another arbitration clause challenge case from this summer involved a roofing supplier's warranty that was contained with its packaging. Tamko Building Products ("Tamko") supplied the roof shingles for the One Belle Hall condominium project in Mount Pleasant. The supplier provided a twenty-five year repair or replace limited warranty, which contained a clause providing for arbitration of claims which related to or arose out of the shingles or the limited warranty.[39] Within a year following installation of the shingles, Tamko was contacted by the developer to report a warranty claim stating the shingles were defective.[40] The company sent the developer a warranty kit for the developer to provide proof of purchase, samples of the defective product, and photographs. The developer of the project never followed through with the return and Tamko inactivated the warranty plan.[41] Two years later, the condominium property owners' association instituted a class action suit against the developer and others, including Tamko. Tamko moved to compel arbitration, but the circuit court found the arbitration clause was unconscionable and, therefore unenforceable, and denied Tamko's motion. The Court of Appeals reversed, holding that the circuit court erred in "concluding the adhesive nature of the Warranty contributed to the unconscionability of the arbitration clause."[42] The Court of Appeals further reasoned that the trial court erred in finding the arbitration clause was not severable from the warranty, pointing out that the proper focus indicated by the South Carolina Supreme Court is "whether it can sever unconscionable provisions that were *within* the arbitration clause."[43] The Court of Appeals found the arbitration clause was severable from the other sections within the warranty purporting to limit remedies and disclaim warranties. As the challenge by the POA related to the limitations and disclaimers, and not to the arbitration clause itself, the Court of Appeals reversed the circuit court.

Arbitration in South Carolina

As plainly stated in the above opinions, federal and state laws favor arbitration. The FAA provides that in any written contract "involving commerce" an arbitration provision shall be valid and enforceable.[44] As such, the FAA has a broad preemptive reach. As construction projects frequently involve out of state subcontractors and almost always out of state materials, construction contracts overwhelmingly are found to implicate the FAA. However, parties may agree to subject the arbitration agreement to a specific state law, so long as the state statute is designed to encourage arbitration.[45]

Severability of the arbitration clause from the contract within which it is located also seemed to be a popular topic for the courts when deciding these cases. South Carolina courts have held "[a]n arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole."[46] "[A] party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause."[47] Additionally, "in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause."[48] If the arbitration clause is valid, challenges to other contractual provisions in the contract are decided in arbitration. The important focus in the defense of the arbitration clause is isolating it from other problematic and often unenforceable terms that lie elsewhere in the contract.

Conclusion and Takeaways

The topic of arbitration clauses in residential construction contracts is clearly very active and should continue to find its way through the courts. Whether the outrageous tort exception will be revived is yet to be determined. The makeup of the South Carolina Supreme Court has changed again since the *Parsons* decision. As two Justices still find the exception to be applicable—though not exclusively as a defense to arbitration—it is possible and likely, we have not seen the end of this point of law.

Continued on next page

ARTICLE CONT.

Each of the above summarized cases contain separate and distinct facts that provide their own nuances for the court's analysis and lead to a specific outcome. Below are a few points that can be gathered from this busy summer of decisions and reminders that may be useful in defending these types of cases or in drafting an arbitration clause.

Independent Review by Counsel:

Offering buyers the opportunity to engage their own advisor for legal advice related to the contract can serve as a deterrent for challenges to the contract. Especially for larger corporate developer/home builders, giving the individual homebuyer(s) an opportunity to have outside legal counsel dispels the argument that bargaining power was unequal.[49] When defending challenges, look at whether the clause somehow inhibited the use of outside counsel, and if not there may be an argument that the buyer had the opportunity but decided against such.

Separation/Severability of Arbitration Clause:

As noted above, being able to sever the arbitration clause from any questionable provision can help keep the claims in arbitration. To the extent a court can sever offending provisions from the arbitration clause, it will, but the courts seem to keep score of the volume of problematic provisions.[50] However, South Carolina law favors severability if there are issues, and asserting this protection is important to any defense of a challenge to an arbitration clause.

Separate Acknowledgment of Arbitration Clause:

The fact that the buyers initialed the arbitration section at issue was noted in both cases. When dealing with a challenge to arbitration, look for this and be sure to highlight any additional notations or separate signatures made concerning the arbitration provision. At least for the current make-up of the Court, this additional step seems to signal that a particular section was reviewed and/or explained by or to the individual, and the section has been specifically accepted by such notation. When assisting clients in drafting these contracts, be sure to consider the sophistication of the client before going and adding in extra lines for the parties' initials throughout a contract. If the client is not going to be thorough and ensure the contract is executed properly and completely, then you are only creating additional opportunities for challenges down the road.

Arbitration continues to be an important tool in any builders' kit. With proper planning and drafting, this useful dispute resolution tool can continue to be utilized to its fullest extent.

Footnotes

1 This article is for general informational purposes only. It does not express the opinions of the firm or any of its attorneys or clients. This article is not intended to be used as a substitute for specific advice or opinions as each case and its circumstances are different.

2 Stephanie G. Brown is an Associate with Wall Templeton & Haldrup in Charleston. She practices in the areas of commercial litigation, construction, and insurance coverage and defense. She previously worked as in-house counsel and development manager at Bennett Hospitality.

3 William "Trey" W. Watkins, Jr., is a Shareholder with Wall Templeton & Haldrup in Charleston. He practices in the areas of insurance defense, construction disputes, serious personal injury, and complex litigation. He is a past president of the South Carolina Defense Trial Attorneys Association Young Lawyers Division and currently serves on the SCDTAA's Board of Directors.

4 2016 WL 3660720 (S.C. July 6, 2016).

5 2016 WL 4411112 (S.C. Aug. 17, 2016).

6 2016 WL 3079042 (S.C. Ct. App. June 1, 2016).

7 2016 WL 3660720 (S.C. July 6, 2016).

8 Jeff Jeffrey, *Commonly used arbitration clause in home contracts "unconscionable"*, S.C. Lawyers Weekly, August 8, 2016, at 6 (statement of Michael Timbes).

9 *Smith*, at *7.

10 *Id*. at *8.

11 *Id*. at *1-2.

12 *Id*. at *2.

13 Id. at *3 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)).

14 *Id*.

15 *Id*. (citing *Simpson v. MSA of Myrtle Beach, Inc*., 644 S.E.2d 663, 668, 373 S.C. 14, 24-25 (2007)).

16 384 S.E.2d 730, 299 S.C. 335 (1989).

17 *Smith*, at *4.

18 *Id*. South Carolina law holds builder sellers to warrant that the home is fit for the intended use as a dwelling, and that the home was constructed in a workmanlike manner and free from latent defects. *E.g. Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730 (1989). However, "the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability," where such disclaimer is conspicuous, known to the buyer, and specifically bargained for. *Kirkman v. Parex, Inc.*, 632 S.E.2d 854, 858, 369 S.C. 477, 486 (2006).

19 *Id*. at *6.

20 *Id*. at *9 (citing *Columbia Architectural Grp., Inc. v. Barker,* 266 S.E.2d 428, 429, 274 S.C. 639, 641 (1980)).

21 *Id*. at *10.

22 2016 WL 4411112 (S.C. Aug. 17, 2016).

23 *Id*. at *1.

24 *Id*.

25 *Id*. JWH also entered into a cleanup contract with DHEC, and completed and paid for the cleanup per that contract. JWH incurred remediation costs of approximately $500,000 in completing the cleanup under the contract with the state agency. *Id*. at fn. 2. As mentioned by Ian Freeman, the attorney representing JWH, in addition to differences between the builders' respective contracts, this may be a factual point of difference between *Smith* and *Parsons*, as, according to the supreme court's decision, D.R. Horton made many attempts to remedy the homeowners' concerns without success.

26 *Id*.

27 *Id*. at *2.

28 *Id*.

Continued on bottmo of page 30

ARTICLE

The Affordable Care Act and its Impact on Future Damage Calculations

by Kelli Sullivan [1]

It is a familiar scenario: you represent a Defendant whose alleged negligence caused plaintiff, a forty year old father of two, damages that will require medical treatment for the rest of his life, including physical therapy, surgeries, medication, and regular blood tests to monitor for potential side effects of his daily medication. Plaintiff's counsel hires a life care planner, who submits a life care plan to the jury showing several hundred thousand dollars of future care that will be required for the next 38.3 years.[2] You, Plaintiff's counsel, and the judge all know that only a small portion of the amounts in the life care plan are ever actually going to be paid, as long as the plaintiff has health insurance. The actual amount paid to the health care providers will be a fraction of the amounts listed on the life care plan. The problem? The jurors are not allowed to know. Other than nit picking at the various line items proffered by the life care planner, what can you do? How does the Affordable Care Act ("ACA") impact plaintiff's future damages calculations?

South Carolina, like many other states, follows the collateral source rule. The collateral source rule provides that "compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer."[3] A tortfeasor cannot "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is an insurance company, an employer, a family member, or other source".[4] Some states actually codify the collateral source rule, and others rely on common law precedent. When payments are made to the injured party or on behalf of the injured party, by a source other than the wrongdoer, the collateral source rule operates to bar the jury from taking into account the payments in their deliberations.[5] The collateral source rule is based on several underlying theories, including:

(1) Preventing the tortfeasor from benefiting from the plaintiff's diligence and foresight in purchasing insurance coverage;

(2) Encouraging individuals to purchase insurance; and,

(3) Affirming the principle of tort law that wrongdoers should pay for the consequences of their actions.

These underlying justifications for the imposition of the collateral source rule, however, should be reexamined in light of the passage and affirmation of the ACA.

The Affordable Care Act

In 2012, 48% of Americans received their health insurance by virtue of their employment. About 31% were insured through a variety of government programs, including Medicare, Medicaid, or the Veteran's Administration. About 5% of Americans purchased private health insurance policies, and the remaining 15% of Americans were uninsured.[6]

For those that were insured through their employers, coverage was predicated on their continued employment, or COBRA coverage for a limited period of time after the employment ended. For those who purchased private insurance, most states allowed insurers to deny coverage for preexisting conditions, and there was no ceiling on the amounts of the premiums that could be charged. Those who were involved in accidents or had long term medical conditions, ran the significant risk of being unable to procure insurance at an affordable rate.

In 2010, Congress enacted the "Patient Protection and Affordable Care Act," often referred to as Obamacare. The majority of the provisions of the Act were to be implemented in 2014. The Act requires all Americans to purchase health care coverage, or be subjected to a fine.[7] These health care plans are referred to as Qualified Health Plans ('QHP"). QHPs are plans of insurance that provided the benefits required by the ACA. Benefits required to be provided by QHPs include coverage for:

- Ambulatory patient services;
- Emergency services;
- Hospitalization;
- Maternity and newborn care;
- Mental health and substance use disorder services;

Continued on next page

- Rehabilitative services;
- Laboratory services;
- Preventative and wellness services and chronic disease management; and
- Pediatric services, including oral and vision care.

Nursing home, transportation services, and in-home care are not covered under the ACA. QHPs are also forbidden, by law, from refusing coverage to any individual due to their health history, disability status, or pre-existing conditions.[9] The ACA therefore guarantees certain levels of health care coverage to all individuals, regardless of their medical situation. Further, there is no provision in the ACA for the health insurance entity to subrogate an insured for amounts paid on their behalf for injuries caused by tortfeasors.[10]

Now that the future of the ACA is more certain, other states have begun to reassess their application of the collateral source rule.

Policies Underlying The Collateral Source Rule

One of the policy reasons for enacting the collateral source rule is that it prevents the tortfeasor from reaping a windfall or a benefit from the plaintiff's diligence or foresight in purchasing insurance, and encourages plaintiffs to secure insurance for themselves. The theory is based on the idea that a defendant who injures the plaintiff would be unjustly enriched because he would be paying less in damages than he would to an uninsured plaintiff. Up until 2014, it was reasonable to assume that an injured plaintiff may indeed be unable to procure or keep insurance for a reasonable cost after an accident or injury. After the implementation of the ACA, however, the Plaintiff is not exercising any foresight, or special diligence by being insured under a QHP. The individual mandate portion of the ACA requires all American citizens to have at least minimum levels of insurance coverage, or pay a fine.[11] In theory, the implementation of the ACA effectively eliminates the possibility that an injured plaintiff will be uninsured.

In the event that a plaintiff is uninsured when injured, though, there is nothing in the ACA that prevents that plaintiff from purchasing a policy of insurance, even with preexisting conditions. In fact, the plaintiff is legally bound to secure such coverage or face a fine. The ACA only allows insurance companies to set premiums only based on an applicant's age, geographic region, family composition, and tobacco use.[12] The ACA has set minimum standards for covered services and has also set maximum expenditures for those insured under QHPs.[13] In general, the out of pocket maximum annually for an individual is $6,850.00 per year, excluding premiums. The out of pocket maximum is $13,700 for families.[14] Therefore, a plaintiff should never have to pay more than $6,850.00 per year plus their legally required premiums for medical care.

It is a long standing legal theory that plaintiffs should strive to mitigate their damages. An injured party is required to do what an ordinary, prudent person would do under similar circumstances to mitigate his damages.[15] A party who has suffered injury or damage from the actionable conduct of another is under a duty to make all reasonable efforts to minimize the damages incurred and cannot recover damages that might have been avoided by the use of reasonable care and diligence.[16] While the law does not require unreasonable exertion or substantial expense for the mitigation to occur, one could argue that complying with the law is certainly not an unreasonable expectation to make of the plaintiff.[17] As referenced above, the coverage afforded under a QHP is comprehensive and covers many of the elements that are often found in life care plans for injured plaintiffs, including rehabilitative services, chronic disease management, hospitalization and emergency services. There is no reason that an injured plaintiff can give to justify a failure to procure health insurance under the ACA.

Another underlying policy for continued use of the collateral source rule is that wrongdoers should pay for the consequences of their wrongful conduct, including reasonable and necessary medical expenses.[18] However, the tortfeasor is responsible for putting the plaintiff back into the position they were in before the loss, not enriching the plaintiff beyond the amounts necessary to make them whole.[19] Most life care plans do not take the ACA into account, and by virtue of that fact, have medical expense charges that bear no relationship to the amounts that the plaintiff is likely to incur. By not allowing the defendant to inform the jury of the ACA and the annual out of pocket maximums, the court is perpetuating a fiction in allowing the jury to believe that the plaintiff will be responsible for all of the medical costs,

when the most that the plaintiff will be responsible for is the annual out of pocket maximum and the health insurance premiums.

Trends In Other States

Beginning with the passage of the ACA, defense counsel began trying to introduce testimony regarding the ACA and its impact on life care plans and future medical expense projections. Prior to the implementation of the ACA, courts labored under the assumption that an injured party would have limited or no access to health care or health insurance, and therefore, introduction of the "retail price" of medical service was the only way to insure the injured party would have access to medical care in the future.

The first real objection to the introduction of ACA testimony by plaintiffs was that the future of the ACA and the levels of coverage that it would provide was speculative. This position was supported by the various Constitutional challenges mounted against the ACA in the first years after its implementation. In one of the first cases to deal with this issue, a California Court ruled in 2013 that the defense could not assert coverage under the ACA as a defense to future medical expense projections because the coverage was too speculative.[20] However, since that time, the Constitutionality of the ACA has been upheld in two different Supreme Court decisions.

Now that the future of the ACA is more certain, other states have begun to reassess their application of the collateral source rule. In *Jones v. MetroHealth Med. Ctr.*, the trial court granted the Defendant's motion to reduce a future medical expense judgment based on the fact that the Plaintiff would have coverage for those medical costs under the ACA, and the ruling was upheld by the Court of Appeals.[21] In *Jones*, Stephanie Stewart, the mother and guardian of Alijah Jones, brought suit against MetroHealth Medical Center and her doctor alleging violations in the standard of care that resulted in her son being born at twenty-five weeks gestation, by Caesarean section. According to the various medical witnesses, the child suffered from cerebral palsy, visual impairments, and developmental delays. At trial, life care planners set the amount of Alijah's future medical costs and economic damages at $8 million. Ultimately, the jury found for the Plaintiff, with an award of $14.5 million. In post-trial motions, Defendants made several arguments for the reduction of damages, including the argument that the future medical costs should be subject to offset since the medical costs would be covered by the coverage offered by the ACA. The trial court found that Alijah would qualify for Medicare at age twenty, which was eight years from the time of trial, and that in the interim eight year period, the family would pay $8,000 per year in premiums, and would be subject to an annual $6,500 out of pocket maximum for medical expenses, for a total loss of $116,000.00. The future medical costs were reduced to take into account both the coverage of costs by the ACA and by Medicare. The Ohio Supreme Court, on July 7, 2016, upheld the trial court's ruling.

Courts in Illinois, Michigan, California, Georgia, Hawaii and Arizona have also allowed evidence on the issue of what portions of a life care plan are covered by the ACA. In Michigan, a state court found that "health insurance under the ACA is reasonably likely to continue unto the future and that its discussion before the jury is not precluded by MCLA 600.6303(1) [Michigan's statutory collateral source rule] and what medical care therapies would be provided by ACA can be discussed/argued at trial."[22] Even California, commonly believed to be a liberal venue, has ruled in favor of the defense on the ACA's impact of future damages awards. In *Contreras Madrigal v. Hollywood Presbyterian Medical Ctr.*, the Plaintiff filed suit against the hospital alleging that the hospital's negligence resulted in significant birth injuries to Contreras Madrigal, including brain damage, incontinence, and microcephaly.[23] The court ruled that Defendant's expert witness, Linda Olzack, was allowed to testify as to the impact of the ACA on the Plaintiff's future damages calculations. The jury ultimately returned a defense verdict. Similarly, Linda Olzack was also allowed to testify at trial regarding the ACA and insurance plans in another California case, *Ihly v. Regents of the University of California*.[24] One California Court has gone so far as to rule that the retail hospital bills are "insincere, in the sense that they would yield truly enormous profits if those prices were actually paid."[25]

The case reports suggest three ways that defense counsel can attack the plaintiff's case under the ACA. The first, is to file the appropriate motions in *limine* in advance of trial to secure the court's ruling on the admissibility of evidence of the ACA's impact on the life care plan calculations. If the court rules in favor of the admissibility of evidence, defense counsel cannot only hire their own life care planner to take into account the coverage afforded by the ACA, but can attack the credibility of the plaintiff's life care planner and/or economist who has failed to take into account both the coverage available and the out of pocket maximums that limit the amounts the plaintiff will have to pay. Finally, the defense can attempt, as the defense in the Ohio cases did, to ask for a post-trial hearing on the issue under a set off theory. In South Carolina, the best course of action is likely the motion in *limine*. At least one motion in *limine* is currently pending in a South Carolina trial court on this issue.

Conclusion

The impact of the ACA on damage awards and life care plans in personal injury cases has only begun to be felt. However, given the fact that the

Continued on next page

ARTICLE CONT. FROM PAGE 29

Constitutionality of the ACA has been upheld twice, it is likely to exist, at least in some form, for several years into the future. In addition, since most cases going to trial in 2017 and later involve injuries that occurred after the implementation of the mandatory coverage provisions of ACA, defense attorneys would be well-served to file the appropriate motions in *limine* to obtain rulings on the admissibility of the impact of the ACA on the plaintiff's past and future medical care needs.

Footnotes

1 Kelli Sullivan is a Partner with The McKay Firm in Columbia, practicing in the areas of medical malpractice defense, insurance defense, and general civil litigation. Kelli is also a Member of the SC Bar's Resolution of Fee Disputes Board and the Lawyers Helping Lawyers Committee. Kelli wishes to thank Lee Weatherly, Esq. of Carlock, Copeland and Stair for his generous assistance in the preparation of this article.

2 South Carolina Code Annotated § 19-1-150.

3 *Citizens and S. Natl. Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 317 (1995).

4 *Pustaver v. Gooden* 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002).

5 *Mount v. Sea Pines Co*., 337 S.C.355, 523 S.E.2d 646 (Ct. App. 1999).

6 Matheson, Victor and Karraker, Jon, "Settlements and Awards for Medical Damages Under the Affordable Care Act"; www.dri.org, September 2015.

7 26 U.S.C. § 5000A.

8 42 U.S.C. §18022(b).

9 42 U.S.C. § 300 gg-(3) (a) and (4) (a).

10 Matheson, Victor and Karraker, Jon, "Settlements and Awards for Medical Damages under the Affordable Care Act"; www.dri.org, September 2015.

11 26 U.S.C. § 5000(A).

12 42 U.S.C.A. § 300gg.

13 42 U.S.C. § 18022(c).

14 26 U.S.C. § 5000 (a)(d)-(e).

15 *DuBose v. Bultman*, 215 S.C. 468, 471, 56 S.E.2d 95, 96 (1949).

16 *Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955).

17 *Genovese v. Bergeron*, 327 S.C 567, 572, 490 S.E.2d 608, 611 (Ct. App.1997).

18 *Haselden v. Davis*, 353 S.C. 481, 579 S.E.2d 293 (2003).

19 *Austin v. Specialty Transp. Servs*., 358 SC 298, 594 S.E.2d 867 (Ct. App. 2004).

20 *Leung v. Verdugo Hills Hosp*., No. B204908, 2013 WL 221654 at *10 (Ca. Ct. App. January 22, 2013).

21 *Jones v. MetroHealth Med. Ctr*. 2016 Ohio 4858 (Ct. App. 2016).

22 *Donaldson v. Advantage Health Physicians*, File No 11-09181-NH (Kent County Circuit Court Mich. 2015).

23 *Contreras-Madrigal v. Hollywood Presbyterian*, No. BC466779 (Cal. Sup. Ct. 2013).

24 *Ihly v. Regents of the University of California,* No. B259042 (Cal. Sup. Ct. 2014).

25 *Howell v. Hamilton Meats and Provisions, Inc*. 52 Cal. 4th, 541, 561 (2011).

ARTICLE CONT. FROM PAGE 26

29 *Id*. at *3.

30 *Id.*

31 *Id*. at *4.

32 *Id*.

33 *Id*. at *5 (citing to *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015)).

34 *Id*. at *6.

35 *Id*. at *6-7.

36 *Id*. at *6.

37 *Id*. at *7. 2016 WL 3079042 (S.C. Ct. App. June 1, 2016).

38 *Id*. at *1.

39 *Id*.

40 *Id*.

41 *Id*. at *4

42 *Id*. at *5 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 674, 373 S.C. 14, 34 (2007)).

44 9 U.S.C. §2. "Involving commerce" is to be broadly construed to extend to the reaches of the Commerce Clause's "affecting commerce" powers. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115 S.Ct. 834, 839, 513 U.S. 265, 273 (1995). As such, the test for whether a contract involves interstate commerce includes whether the transaction falls into any the three categories of the Commerce Clause: a) use of the channels of interstate commerce; b) regulation of persons, things, or instrumentalities in interstate commerce; and c) regulation of things have a substantial relation to interstate commerce.

45 *Volt Info. Sci., Inc. v. Bd. Of Tr. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989).

46 *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395 (1967)).

47 *S. Carolina Public Serv. Auth. V. Great W. Coal (Kentucky), Inc.,* 312 S.C. 559, 562–63, 437 S.E.2d 22, 24, (1993).

48 *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C.14, 35 n.9, 644 S.E.2d 663, 674 n.9 (2007).

49 E.g. *Lackey v. Green Tree Financial Corp*., 330 S.C. 388, 398, 498 S.E.2d 898, 903-04 (1998) (arbitration clause was not unconscionable for failure to ascertain Plaintiff's preference as to legal counsel).

50 *Simpson*, 373 S.C.14, 35 n.9, 644 S.E.2d 663, 674 n.9 (2007)(Court stated while policy is to favor arbitration and severability where possible, severing was not appropriate due to clause at issue having three offending provisions, rather than just one as in other cases).

ARTICLE

"Users" and "Sophisticated Users": Definitions and Defenses (An Analysis of Lawing v. Univar)

by Andrew M. Connor[1]

As is the case in any area of law, the definitions of statutory terms directly determine whether and to what extent the law of products liability applies to a given set of facts. If critical terms are left undefined by statute, it then falls on the courts to interpret the meaning of the terms and define the limits of the law's application. As with all common law, the interpretations and definitions set forth by the courts may evolve over time to meet the needs of an ever changing society. Such changes in interpretation, however, can have drastic effects on how and to what extent the law is applied. Indeed, seemingly small adjustments in the interpretation or definitions of statutory terms can work to expand or exclude redress under the law for whole classes of people or factual scenarios. By the same token, the evolution of the common law can have sweeping effects on the defenses available to manufacturers defending against products liability claims. The dynamic nature of the common law and its evolving definitions and defenses is what leads many to consider the practice of law just that – a practice.

In keeping with this dynamic common law tradition, the South Carolina Supreme Court, in its recent decision in *Lawing v. Univar, USA, Inc.*,[2] added two additional links in the evolutionary common law chain with its interpretation of the definition of "user" and the rejection of the "sophisticated user" defense in products liability cases in South Carolina. As to the first link, the Court appears to have expanded the definition of the statutory term "user" as used in S.C. Code § 15-73-10 to include those who utilize a product's labeling even if they do not handle or perform work on the product itself.[3] The Court, however, did not characterize its interpretation as an expansion of the definition of "user"[4] and was careful to preserve the exclusion of casual bystanders from recovery under the strict products liability statute.[5] As to the second, the Court declined to adopt the "sophisticated user" defense holding it inapplicable to the facts of the case.[6] The Court's position is surprising in light of the fact that many members of the bar – including Justices Kittredge and Pleicones in their respective dissents[7] – considered the sophisticated user defense to have been adopted twenty years earlier by the South Carolina Court of Appeals in *Bragg v. Hi-Ranger, Inc.*[8]

At first glance, then, the Court's decision in *Lawing* leaves unanswered questions about the duties owed by product manufacturers and to whom such duties are owed. This analysis of the *Lawing* decision attempts to explicate the basis for the Court's decision and offer guidance to practitioners in the area of products liability.

The Facts[9]

The *Lawing* case primarily concerned the labeling and packaging of a chemical called sodium bromate and its implication in a fire that occurred in a manufacturing plant in Seneca, South Carolina, in June 2004. Sodium bromate is classified as an oxidizer which means that, when heated, it is highly flammable both by itself and in combination with other materials. At the time of the fire, Scott Lawing worked for Engelhard Corporation ("Engelhard") – the owner of the manufacturing facility – as a maintenance mechanic. Engelhard utilized large amounts of sodium bromate as part of its manufacturing process as well as to refine precious metals from recycled materials.

Engelhard purchased the sodium bromate from Univar, USA, Inc. ("Univar") who, in turn, sourced the chemical through a supply chain consisting of Trinity Manufacturing, Inc. ("Trinity"), Matrix Outsourcing, LLC ("Matrix"), and a Chinese manufacturer. Neither Univar, Trinity, nor Matrix inspected or handled the sodium bromate, however, because the chemical was shipped from the Chinese manufacturer to the Port of Charleston, and from there, freight delivered directly to Engelhard.

Engelhard received, inspected, and accepted the shipment of sodium bromate on February 16, 2004. The sodium bromate came packaged in woven plastic bags weighing twenty-five kilograms apiece. Each bag displayed the universally recognized yellow oxidizer warning symbol on one side and black text on the other side noting the contents of the bag as "sodium bromate" and displaying other information regarding the material safety data sheet (MSDS) for the chemical. The bags were stacked on wooden

Continued on next page

pallets, thirty-six bags per pallet, and stacked two pallets high. Each pallet was shrink-wrapped in plastic so that the bags would remain on the pallet.

Trial testimony cited by the Court indicates that the yellow oxidizer warning symbol on the individual bags could not be seen through the shrink-wrap and that there were no warnings on the outer surface of the shrink-wrapped pallets. Expert testimony cited by the Court indicates that the labeling of the bags of sodium bromate did not satisfy federal Occupational Health and Safety Administration ("OSHA") HazCom requirements because the oxidizer symbol was not prominently displayed.

As of June 1, 2004, four of the delivered pallets of sodium bromate were being stored in the refinery hall in preparation for use in production. At that time, however, the plant was scheduled for a shutdown week in order to allow for the performance of routine plant maintenance. On that date, Lawing, along with two other employees, were tasked with using an oxyacetylene cutting torch to cut out and replace certain pipes in the ceiling of the refinery hall nearby the stored pallets of sodium bromate.

Company policy dictated that prior to starting their assigned task, a hazardous work permit had to be issued which required Lawing's supervisor to complete a thorough inspection of the work area for combustible or flammable substances and removal of those substances. Testimony cited by the Court indicates that both Lawing and his supervisor noticed the pallets of sodium bromate within the work area but, because no oxidizer warning symbol was visible, they did not remove the pallets from the work area. Both Lawing and his supervisor indicated that had such oxidizer warning symbols been visible, they would have had the pallets removed.

Thereafter, the maintenance crew began their work using the cutting torch. After about two hours of work, a piece of hot slag fell and landed on or near one of the pallets of sodium bromate. There was a flash and then a ball of fire erupted and engulfed Lawing and the other two employees. The fire caused the men to suffer severe burns and injuries which rendered them completely disabled and in need of substantial future medical care.

The Litigation

Lawing and the other two employees[10] sued Univar, Trinity, and Matrix (collectively, the Defendants), alleging causes of action for strict liability, negligence, and breach of the implied warranty of merchantability. Lawing also asserted a breach of express warranty against Univar and Lawing's wife alleged a cause of action for loss of consortium.

The trial court granted the Defendants' motion for summary judgment as to the Lawings' strict liability claims on the grounds that Lawing was not a "user" of sodium bromate as required by S.C. Code § 15-73-10. As to the Lawings' negligence claims, the trial court charged the jury on the sophisticated user defense over Plaintiffs' objection. The jury only found for the Lawings on their breach of express warranty claim against Univar and returned defense verdicts on all the other claims, thereby absolving Trinity and Matrix of liability.

The parties appealed. Univar, however, settled with all parties leaving only the Lawings and Trinity and Matrix pursuing the appeal. The Court of Appeals affirmed the trial court's charge of the sophisticated user defense, but reversed the grant of summary judgment on the strict liability claims. The Court of Appeals found that the trial court too narrowly construed the definition of "user" as it applied to Lawing and remanded for a new trial on that claim.

The Lawings, as well as Trinity and Matrix, petitioned for review by the Supreme Court and the Court granted certiorari. The Supreme Court affirmed the opinion of the Court of Appeals that the trial court's interpretation of "user" was too narrow. The Court, however, found that the Court of Appeals had set forth too broad of a definition of "user" and, as a result, formulated its own definition of "user" under the statute. As for the jury charge on the sophisticated user defense, the Court declined to formally adopt the defense and instead held that, under the facts of the case, the defense did not even apply. These issues are analyzed, in turn, below.

The Definition of "User"

The basis for strict products liability in South Carolina is derived from S.C. Code § 15-73-10, which states in pertinent part that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm caused to the ultimate user or consumer . . .."[11] The statute, then, limits recovery under a theory of strict products liability to the "user or consumer" of the defective product. The Code, however, does not define the terms "user" or "consumer."

While the Code itself is silent on the issue, the comments to § 402A of the Restatement (Second) of Torts were expressly incorporated into the Code by the legislature as an expression of their legislative intent.[12] In *Lawing*, the Court drew special attention and bolded emphasis to portions of comment l to § 402A in order to define "user":

> [The user or consumer] may be a member of the family of the final purchaser, **or his employee**….
>
> …
>
> **"User" includes** those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or **airplanes, as well as those who are utilizing it for the purpose of doing work upon it**, as in the case of an employee of the ultimate buyer….[13]

The Court also quoted portions of comment o to § 402A, which recognizes the limitation of "recovery to users and consumers, as those terms are defined in Comment l[,]" and excludes recovery for "casual bystanders[.]"[14]

Lawing was certainly an employee of the purchaser of the sodium bromate – so far, so good. However, as the defendants argued, Lawing, at least at first blush, would not appear to have been a "user" of the sodium bromate because he did not "utiliz[e] it for the purpose of doing work upon it[.]"[15] Indeed, this is the position that Justice Pleicones takes in his dissent.[16] In fact, the Court recognizes in its recitation of the applicable facts that Lawing did not use, work on, or handle the sodium bromate product in any way.

Implicit at this point in the Court's opinion, however, is the fact that Lawing's strict liability claims were based solely on the alleged defective labeling of the sodium bromate and, thus, not on defective manufacturing or design. As the Court recognized, "a product's labeling is considered part of the product's package."[17] Indeed, comment h to § 402A, cited by the Court, states that "[n]o reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole."[18] Thus, the Court's implicit conclusion is that utilizing the label of a product is equivalent to utilizing the product itself for purposes of determining who qualifies as a "user" under S.C. Code § 15-73-10.

The "crucial" fact for the Court's determination of whether Lawing qualified as a "user" of the sodium bromate, therefore, was Lawing's failure to request removal of the sodium bromate because he did not see the warning label.[19] The Court found that Lawing's actions constituted "utilizing" the labeling – or lack thereof – of the sodium bromate. By extension, then, his actions constituted "utilizing" the "integrated whole" of the sodium bromate product and its packaging. In this way, the Court held that Lawing qualified as a "user" of the sodium bromate as defined by comment l.

In reaching this conclusion, however, the Court may have exceeded the bounds of comment l. Comment l states that the term "user" includes "those who are utilizing [the product] for the purpose of doing work upon it[.]"[20] In this case, that would likely mean the user would utilize the labeling for the purpose of doing work upon the product. The Court, however, stated that "Lawing used the information on the sodium bromate's packaging to complete work *in close proximity* to the pallets of sodium bromate, and to assess the need to avoid or move the nearby sodium bromate, regardless of the fact that he did not actually handle the sodium bromate."[21] Obviously, doing work "upon" the product and doing work "in close proximity" to the product are two very different things with the universe of users under the latter formulation being much more inclusive. A broad reading of the Court's ruling, therefore, would indicate that the Court has extended the definition of "user" under comment l.

A narrow, and likely more accurate, reading of the Court's ruling, however, would interpret Lawing's "assess[ment of] the need to avoid or move the nearby sodium bromate" as constituting "doing work upon" the sodium bromate within the context of comment l. Under this view, the mental exercise of assessing the danger of the sodium bromate and deciding whether or not to move the sodium bromate would constitute "doing work upon" the product. Indeed, the work attendant with utilizing a product label is the mostly cerebral act of reading comprehension and resulting decision-making analysis. Thus, under this narrow reading of the Court's holding, the definition of "user" is not expanded, but merely interpreted to accommodate the real differences in how users and consumers interact with a product's labeling as in a defective labeling case versus the product itself as in a defective design or manufacturing case.

The "Sophisticated User" Defense

Generally, suppliers and manufacturers of dangerous products are under a duty to warn the ultimate user or consumer of the dangers associated with the use of the product.[22] A problem arises, however, when the product is sold by the manufacturer to an intermediate purchaser prior to the ultimate user or consumer interacting with the product. Indeed, that is the situation presented by the *Lawing* case where the defendants sold the sodium bromate to Engelhard – the intermediate purchaser – but it was Engelhard's employee, Lawing, who was the ultimate user. In this type of situation, a product manufacturer or supplier cannot be certain that the warnings supplied with the product will reach the ultimate user because the product first passes through the control of the third party intermediate purchaser. Thus, in the context of negligence claims, manufacturers and suppliers may not be able to discharge their duty to warn the ultimate user or consumer through the exercise of reasonable care. The sophisticated user doctrine is aimed at addressing this problem.

The sophisticated user doctrine finds its genesis in comment n to § 388 of the Restatement (Second) of Torts.[23] As the Court in *Lawing* notes, the doctrine "is typically applied as a defense to relieve the supplier of liability for failure to warn where it is difficult or even impossible for the supplier to meet its duty to warn the end user of the dangers associated with the use of the product, and the supplier therefore relies on the intermediary or employer to warn the end user."[24] The opinion of much of the products liability bar has been that the sophisticated user

Continued on next page

doctrine has been a part of South Carolina jurisprudence since 1995 with the Court of Appeals opinion in *Bragg v. Hi-Ranger, Inc.*[25] This position is supported by the dissenting opinions of Justices Kittredge and Pleicones, which both argue that the sophisticated user defense was clearly recognized by the opinion in *Bragg*.[26] The majority opinion from the *Lawing* Court stands in stark contrast, noting that "prior to the court of appeals' opinion in this case, neither this Court, nor the court of appeals, had explicitly adopted the defense."[27]

While rational minds can certainly argue over the holding of the *Bragg* opinion, the Court's refusal to formally adopt the sophisticated user doctrine in *Lawing* or apply it to the facts of the case[28] is much more relevant for product liability practitioners looking forward.

The *Lawing* Court agreed with the Defendants that Engelhard "was very familiar with sodium bromate and understood its dangerous nature."[29] In fact, the Court went so far as to label Engelhard a "sophisticated user."[30] The Court, however, was careful to draw a "critical distinction" between any duties Engelhard may have borne towards Lawing based on its sophisticated knowledge and those duties borne by the Defendants to adequately label the sodium bromate. Thus, because the Defendants failed to adequately label the sodium bromate, the Court found Engelhard's knowledge concerning sodium bromate to be "insignificant."[31]

What the Court does not make explicit in its analysis is that under comment n to § 388, application of the sophisticated user doctrine is predicated on the manufacturer or supplier of a product giving to the intermediate purchaser, otherwise known as the sophisticated user, "all the information necessary to its safe use[.]"[32] The Defendants argued that the MSDS given to Engelhard contained all the information necessary to the safe use of sodium bromate. The Court explicitly labeled such arguments a mere "distraction"[33] in light of the fact that the yellow oxidizer labels, required to be displayed by OSHA HazCom regulations,[34] were not visible. What the Court did not discuss, however, is that comment n deals directly with this particular issue:

> There are many statutes which require that articles which are highly dangerous if used in ignorance of their character, such as poisons, explosives, and inflammables, shall be put out in such form as to bear on their face notice of their dangerous character, either by the additional coloring matter, the form or color of the containers, or by labels. Such statutes are customarily construed as making one who supplies such articles not so marked liable, even though he has disclosed their actual character to the person to whom he directly gives them for the use of others, and even though the statute contains no express provisions on the subject.[36]

Thus, because the required warning labels were obscured by the shrink-wrap used on the pallets of sodium bromate, the application of the sophisticated user doctrine to the factual scenario presented by *Lawing* was precluded.

Looking Forward

Whether the Court's future interpretations of the definition of "user" follow a broad or narrow approach as outlined above is yet to be seen. One can easily foresee a factual scenario in which a bystander, injured by a particular product, would claim that proper product labeling would have dissuaded them from conducting whatever activity led to their injuries in close proximity to the product at issue. The Court's reiteration of the exclusion of casual bystanders from strict product liability recovery, however, would likely curtail such a broad reading of the *Lawing* opinion. As a result, it may be beneficial for defense practitioners in this area of law to be cognizant of the potential plaintiff's argument and to be prepared to advocate for a more narrow interpretation of *Lawing*.

Additionally, while the Court declined to formally adopt the sophisticated user doctrine in *Lawing*, the Court did not foreclose its application in future cases. That said, any future application of the defense may be narrower than advocated by the defendants in *Lawing*. The *Lawing* defendants asserted the sophisticated user doctrine as a defense to liability in negligence based on the sophisticated knowledge of the intermediate purchaser. Post-*Lawing*, however, defendants should consider any duty to the intermediate purchaser to appropriately label their products before being able to reap the protection afforded by the sophisticated user doctrine.

Finally, the most practical – challenging – lesson to be learned from the *Lawing* opinion is that any required warnings, symbols, or other labeling may need to be clearly visible on the outside of the product packaging and on the outside of any packaging incident to shipping. This may be difficult to achieve in this world of sophisticated shipping logistics.

Footnotes

1 Andrew M. Connor practices with Nelson Mullins Riley & Scarborough LLP in the areas of products liability, premises liability, and commercial litigation.

2 *Lawing v. Univar, USA, Inc*., 415 S.C. 209, 781 S.E.2d 548 (2015).

3 *Id*. at 224.

4 *Id*. at 223 (noting that plaintiff's actions fell under existing comment l to Section 402A of the Restatement (Second) of Torts).

5 *Id*. at 223-24 (preserving exclusion of casual bystanders under comment o to Section 402A).

6 *Id*. at 226.

Continued on bottom of page 38

ARTICLE

Exempt the Un-Exempted - The DOL's New Overtime Rule

by Sheila M. Bias[1]

Earlier this year, the United States Department of Labor ("DOL") released its revised regulations affecting certain kinds of employees who may be treated as exempt from the federal Fair Labor Standard Act's ("FLSA") overtime and minimum-wage requirements. These highly anticipated regulations were officially published in May of this year and are set to go into effect on December 1, 2016. The changes will significantly impact not only workers, but businesses too. Responses to the changes have been mixed; but, regardless of the diametrically opposed actions, the changes appear to be coming no matter what. This article will provide a brief overview of the FLSA, the changes that have been made, the reactions to those changes, and will provide information for businesses and employers as to how to respond.

What Does the FLSA Cover?

The FLSA is a wage-hour law that applies to most employers and employees in the United States. There are four main requirements: (1) paying employees a minimum hourly wage; (2) paying employees an overtime premium after they have worked more than forty (40) hours in a single workweek; (3) establishing limits and prohibitions on child labor; and, (4) creating record keeping requirements.

The FLSA has a variety of exemptions to its requirements. The applicability of these exemptions puts employees largely into two categories: exempt and nonexempt. Each exemption has specific requirements. Employers seeking to take advantage of these exemptions bear the burden of establishing that each of the requirements are met.

Generally, nonexempt employees must be paid the federal minimum wage. However, the FLSA generally provides for a "tip credit" towards the minimum wage for employees working in occupations in which they customarily and regularly receive more than thirty dollars a month in tips.

Additionally, nonexempt employees are required to be paid overtime compensation for hours worked over forty in a given workweek. The overtime premium rate is 1.5 times the employee's regular rate of pay. A "workweek" is a fixed regularly-recurring period of seven, consecutive, twenty-four-hour periods. For purposes of calculating the "regular rate of pay," all remuneration for employment, including bonuses, commissions, and various incentive payments are included.

The FLSA further requires that employers keep accurate records of all time worked by nonexempt employees. The time records must include all time the employer knows, or has reason to know, the employer worked.

The FLSA exemptions allow some employees to be exempt from the minimum wage and overtime requirements of the FLSA in compensating employees. Contrary to popular belief, an employee is not exempt if he or she is merely paid a salary rather than an hourly rate. Instead, there are very specific criteria that must be met for the exemptions to apply.

The most commonly used exemptions are the so-called "white collar" exemptions. The "white collar" exemptions are applied to employees who are employed in Executive, Administrative, Professional, Computer and Outside-Sales capacities and certain Highly Compensated employees. The three general requirements for most of the exemptions are that the employees are paid on a "salary basis," the salary is at least a certain amount, and that the employee performs specific types of work.

To qualify for an exemption, a white collar employee generally must be salaried (i.e., meaning they are paid a predetermined and fixed salary), that meets or exceeds a predetermined salary level. This is most commonly referred to as the "salary basis" test. In 2004, the DOL updated the standard salary level to $455 per week. This represents an annualized salary of $23,660.

Under the duties test, the employee must perform executive, administrative, or professional duties as defined by the applicable regulations. For example, the Executive Exemption can be applied to employees whose primary duty is managing the enterprise or a customarily-recognized department or unit. In addition, the employee must customarily and regularly direct the work of two or more other employees. The employee must also have the authority to hire or fire, or make suggestions and recommendations about hiring, firing, advancement, promotion, or other status changes that are given particular weight.

Continued on next page

ARTICLE CONT.

The employee is also paid on a "salary basis," at a rate $455.

Under the Administrative Exemption, the employee's primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers. Importantly, and often forgotten, the employee's work must include the exercise of discretion and independent judgment as to matters of significance. Similar to the Executive Exemption, the employee must be paid on a "salary basis" at a rate of least $455 a week.

The Professional Exemption applies to an employee whose primary work duty requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized, intellectual instruction, or work requiring invention, imagination, originality, or talent recognized field of artistic or creative endeavor. The work must be predominantly intellectual and must include the consistent exercise of discretion and judgment. The professional exemption can also apply to teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge. Professional employees must also be paid on a "salary basis" at a rate of at least $455 a week.

The change with the largest impact for employers is increasing the minimum salary threshold for the "salary basis" test of the "white-collar" exemptions.

The Highly Compensated Employee Exemption is reserved for the employee whose primary duty includes performing office or non-manual work. The employee customarily and regularly performs at least one exempt duty or responsibility of an exempt executive, administrative, or professional employee. The employee's pay is at least the level of the salary basis weekly, but has a total annual compensation of at least $100,000 (including salary, commissions, and/or non-discretionary compensation).

So, What Was the Problem?

In 2014, President Obama signed a Presidential Memorandum directing the DOL to update and modernize the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards. From that Memorandum, the DOL issued a Proposed Overtime Rule. According to the DOL, the rules that establish which employees are exempt from overtime pay have not kept up with the cost of living. Therefore, to "restore the effectiveness of the salary level test," the DOL sought to provide new standard salary levels. As noted above, under the current parameters, certain professionals and managers are exempt from overtime pay if they make more than $23,660 a year. As the DOL pointed out, this figure is lower than the current poverty line for a family of four which is $24,008.

The DOL has stated that "[b]y updating the overtime rules, we're ensuring a fair day's pay for a fair day's work. This would mean more time with . . . family and more money in [the employee's] pocket and others just like [the employee] who are working hard and deserve to be rewarded for their work." The DOL has estimated that the regulations will broaden overtime pay regulations to cover 4.2 million more people who are currently exempt. When the rule was initially proposed, the DOL also estimated that there would be at least $239 million in annual employer compliance costs and average annualized transfers from employers to employees. Interestingly, the DOL has predicted that the increased thresholds will also result in reduced litigation costs because of an increased certainty regarding exemption status.

Notably, the changes the DOL initially proposed were a comprehensive overhaul to the "white collar" exemption provisions. However, the response to the proposed rule was overwhelming. The proposed changes were published on July 5, 2015. By the close of the comment period, on September 4, 2015, the DOL had received over 270,000 comments.

What Was Changed?

The change with the largest impact for employers is increasing the minimum salary threshold for the "salary basis" test of the "white-collar" exemptions. The threshold is increasing to $913 per week, an increase from $455 per week. This is an annualized increase from $23,660 salary per year to $47,476 per year. The DOL has stated that this figure is set in the 40th percentile of data representing what it calls "earnings of full-time salaried workers" in the lowest-wage census region—currently the South. This salary figure is set to be updated every three years,

beginning January 1, 2020. The DOL will release the changes 150 days in advance.

The DOL has also increased the salary threshold for "highly compensated" employees. The salary threshold for highly compensated employees has increased from $100,000 to $134,000. The DOL says this figure is set at the 90th percentile of data representing what the DOL calls "earnings of full-time salaried workers" nationally.

Employers are able to satisfy up to 10% of this new threshold through nondiscretionary bonuses and other incentive payments, provided that the payments are made quarterly. However, this bonus "catch-up" is not permitted as to salaries paid to employees treated as exempt "highly compensated."

Importantly, what has not changed are any of the exemptions' requirements as they relate to the kinds or amounts of work necessary to sustain exempt status, i.e. the "duties" test.

The Response to the Changes Have Been Largely Negative.

Essentially doubling the current salary threshold for exemption status has obviously caused strong feelings on both sides of the issue. Labor unions such as the AFL-CIO, the Teamsters, and the United Auto Workers have all provided comments in support of the new regulations. Richard Trumka, President of the AFL-CIO, issued a statement applauding the Obama Administration's efforts, noting that "millions of workers will receive a long overdue raise, healthier and more productive jobs, and more time to spend with our community and loved ones." However, not all impressions are this enthusiastic. Indeed, the new rule has prompted legislative and judicial opposition.

In March of 2016, House and Senate Republicans introduced legislation in an attempt to stall the new regulations. The bill, entitled the Protecting Workplace Advancement and Opportunity Act, seeks to: (1) nullify the proposed rule; (2) require the DOL to first conduct comprehensive economic analysis of the impact of mandatory overtime expansion to small businesses, nonprofit organizations, and public employers; (3) prohibit automatic increases in the salary threshold; and (4) require that any future changes to the duties test be subject to notice and comment. When the bill was introduced, Senate Health, Education, Labor and Pensions Chairman Lamar Alexander (R.-Tenn.) stated that, "there is no question that this rule also hurts those American workers it's intended to help, through reductions in their hours and diminished workplace flexibility." Senator Alexander also speculated that the rules impact could cause higher education institutions to take significant additional costs, which would be passed through to college students via tuition hikes. Since the bill was filed before the final rule was issued, it was premature, only addressing those aspects of the proposed regulations that employers were fearing the most. The bill is currently under consideration by the Senate Small Business and Entrepreneurship Committee. In the House, the Bill has been referred to the House Committee on Education and Workforce.

In addition, on September 21, 2016, the Regulatory Relief for Small Business, Schools and Nonprofits Act (H.R. 6094) was introduced. The bill seeks to change the new rule's effective date to June 1, 2017. The extension is to provide "workers, small businesses, nonprofits, colleges and universities more time to prepare for dramatic changes resulting from the department's final rule."

On September 20, 2016, Nevada, Texas, Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, Wisconsin, Kentucky, by and through the Governors of the states of Iowa, Maine, New Mexico, Mississippi, and the Attorney General of Michigan filed a lawsuit in the Eastern District of Texas, Sherman Division, seeking to block the new rule. The suit claims, inter alia, that by committing an ever-increasing amount of state funds to paying state employee salaries or overtime, the Federal Executive is unilaterally depleting state resources in violation of the Constitution.

The same day, the U.S. Chamber of Commerce, National Federation of Independent Business ("NFIB"), National Retail Federation, and other business groups filed a similar lawsuit to challenge the overtime rule. The suit essentially alleges that the new rule departs from the Congressional intent of the FLSA, that the new salary threshold did not properly consider regional and industry differences that were previously considered, and that the automatic update provision is not authorized by the FLSA because it fails to take input from affected parties and bypasses the traditional rulemaking procedures.

In addition, the NFIB has also filed a petition with the DOL to delay the start date of the regulations by six months. The NFIB is a small business advocacy organization representing about 325,000 independent U.S business owners. According to their petition, sixty-eight percent of U.S. businesses have fewer than ten employees and thirty-nine percent have receipts less than $250,000. The NFIB contends that millions of business are unprepared for the changes. In response to the petition, Wage and Hour Division Administrator David Weil said, "[t]he Dec. 1 implementation date is a sufficient amount of time (more than six months) for employers to adjust to the new salary level." He also noted that the 190 days provided by DOL was more than three times what is legally required.

So What Do We Do Now?

Whether the challenges to the new regulations will be successful has yet to be seen. However, at this

Continued on next page

ARTICLE CONT.

point, the regulations are still set to go into effect on December 1, 2016 and employers should still function as if the regulations will be enacted.

Because exemptions relate to individuals, not job descriptions, pay classifications, positions, job groups, conventional wisdom, or other theories along those lines, employers should ensure that there exists detailed, accurate, and current job information for each of their employees. In addition, employers should analyze whether the exemption requirements they have been relying upon will continue to be met once the new rule goes in to effect. Employers can also evaluate what aspects might be changed about one or more jobs so that employees could be treated as exempt in the future. Alternatively, employers can evaluate their employees' jobs to determine if alternative FLSA exemptions could apply.

Employers will also need to consider what additional training will be needed for those employees who were previously exempt, but will no longer be exempt under the recent changes. These employees will need guidance on how to handle the practical aspects of no longer being an exempt employee. For example, employees may now have to maintain time sheets where they previously did not need to keep up with their time worked. These employees may also have to become accustomed to "clocking in" on the time clock where they previously would not have been utilizing such a device. There will also need to be arrangements made for "after hours" work that the employee may have previously been able to do without tracking their time, such as answering emails in the evening or during the weekends.

Finally, employers should develop FLSA-compliant pay plans for employees who have been treated as exempt but are no longer exempt. Employers can consider alternative ways of compensating employees. For example, employers can consider whether to pay salary as straight-time compensation for forty hours, pay on a commission plus overtime basis, or a day-rate, job-rate, or piece-rate basis.

Final Thoughts

Employers should remember that violations of the FLSA regulations have significant consequences. Wronged employees can recover back wages, plus an equal amount of liquidated damages. In addition, employers could be subject to an extended statute of limitations for violations deemed to be willful and could be ordered to pay plaintiff's "reasonable" attorney's fees. If they have not already, employers must begin to analyze their workforce to ensure compliance with the new rule.

Footnotes

1 Sheila Bias is an associate in the Columbia office of Fisher Phillips. She practices in the area of employment and labor law, with a focus on workplace discrimination, employment policies and procedures, retaliation and wrongful termination, and non-competition and trade secret agreements. Ms. Bias is an SCDTAA board member and also serves as Secretary and board member of the South Carolina Women Lawyers' Association.

ARTICLE CONT. FROM PAGE 34

7 *Id*. at 229-30.

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

9 Summarized from the Supreme Court's opinion.

10 The other two employees settled leaving Lawing the only remaining plaintiff in the appeal.

11 S.C. Code § 15-73-10 (1).

12 S.C. Code § 15-73-30.

13 *Lawing*, supra, at 221-22 (emphasis in original).

14 *Id*. at 222 (quoting Restatement (Second) of Torts § 402A, comment o); *see also Bray v. Marathon Corp*., 356 S.C. 111, 588 S.E.2d 93 (2003) (cited by Court in *Lawing* for proposition that "a bystander analysis does not apply to a strict liability cause of action").

15 Restatement (Second) of Torts § 402A, comment l.

16 *Lawing*, supra, at 231-32.

17 *Id*. at 223 ("a product's labeling is considered part of the product's package".

18 Restatement (Second) of Torts § 402A, comment

19 *Lawing*, supra, at 223.

20 Restatement (Second) of Torts § 402A, comment l.

21 *Lawing*, supra, at 223 (emphasis added).

22 *Id*. at 225 (citing *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16,18 (1987)).

23 Unlike the comments to § 402A, the comments to § 388 have not been specifically adopted by the legislature as evidence of its intent.

24 *Lawing*, supra, at 225-26.

25 *See Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 550, 462 S.E.2d 321, 332 (Ct.App. 1995) (concluding that "the trial court properly charged the jury concerning the sophisticated user defense.").

26 *Lawing*, supra, at 229-32.

27 *Id*. at 226.

28 *Id*.

29 *Id*. at 227.

30 *Id*. at 228.

31 *Id*.

32 Restatement (Second) of Torts § 388, comment n.

33 *Lawing*, supra, at 228.

34 *Id*. at 214.

35 Restatement (Second) of Torts § 388, comment n.

ARTICLE

Not so Fast, My Friend: A Few Things to Consider Before Your Next Rule 30(b)(6) Deposition

by Jay T. Thompson [1]

Most of us who litigate cases are generally familiar with Rule 30(b)(6). If you have been around the block a time or two, you no doubt have prepared for, taken, and defended corporate depositions under this rule. However, there may be a few traps for the unwary lurking beneath the surface, including implications that may arise after the deposition concludes. Here are a few practical tips for your next one. [2]

Your Client's Rule 30(b)(6) Testimony May Be More Binding On the Company Than You Think

You are defending ABC trucking company in a personal injury suit after one of its drivers struck a passenger van, injuring all onboard. In the 30(b)(6) deposition, your client's safety director succumbed to the clever attorney's Reptile-style questioning. Your client's sworn testimony included quotable sound bites that a safe driver should do everything that can possibly be done to ensure the safety of other vehicles' occupants, that ABC company expects its drivers to protect other vehicles at all costs, and that your client's driver did not abide by the company's rules as he drove down the highway at sixty mph. Now that the testimony is on the record, what can you (and your opposing counsel) do with it?

No South Carolina appellate court has spoken on the extent to which a corporate party is bound by the testimony of its 30(b)(6) witness, and courts in other jurisdictions are divided on this issue. Both South Carolina and Federal Rule of Civil Procedure 32 state that an adverse party may use a 30(b)(6) deposition of a party "for any purpose," including impeachment. The majority of courts have held that a company is bound by its 30(b)(6) testimony the same way any natural person witness is bound by his or her individual deposition testimony. However, some courts have held that a company's 30(b)(6) testimony constitutes judicial admissions that the corporation cannot later contradict, resulting in a potential jury instruction that the admissions given in the 30(b)(6) deposition are conclusively established as a matter of law.

Under the majority rule, the company has the right to offer evidence at trial to attempt to explain or modify the 30(b)(6) testimony. One federal court explained that "a corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue." *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D. Ill. Oct. 15, 1991).

Of course, having the ability to contradict or explain the testimony at trial is still not ideal because no defendant wants its corporate representative to give sworn deposition testimony on behalf of the company that is antithetical to the defendant's litigation position. The bell has been rung; the toothpaste is out of the tube. Further, even under this more lenient reading of Rule 30(b)(6), the "sham affidavit" rule may still prevent a corporate party from using a subsequent affidavit to contradict its 30(b)(6) testimony for the purpose of defeating a summary judgment motion. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) ("[A] court may disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement.") (citing *Margo v. Weiss*, 213 F.3d 55, 63 (2nd Cir. 2000); *Rohrbough v. Wyeth Labs. Inc.*, 916 F.2d 970, 976 (4th Cir. 1990); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705 (3rd Cir. 1988)).

While the majority position is more lenient, counsel should be mindful of the alternative holding that some courts have reached. One federal court held that, "[b]y commissioning the designee as the voice of the corporation, the Rule obligates a corporate party to prepare its designee to be able to give binding answers on its behalf . . .. Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different

Continued on next page

ARTICLE CONT.

allegations that could have been made at the time of the 30(b)(6) deposition." *Rainey v. American Forest and Paper Ass'n., Inc.*, 26 F.Supp.2d 82, 94 (D.D.C. 1998). *See also, e.g., Ierardi v. Lorillard, Inc.*, No. CIV. A. 90-7049, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991) ("Under Rule 30(b)(6), defendant has an obligation to prepare its designee to be able to give binding answers on behalf of [the corporation]. If the designee testifies that [the corporation] does not know the answer to plaintiffs' questions, [the corporation] will not be allowed to change its answer by introducing evidence during trial.").

The takeaway is that you may be able to explain or supplement harmful 30(b)(6) testimony at trial, but it can almost always be used against the company at trial to some degree, and sometimes it can be devastating. Therefore, it is worth investing the time and resources for the company and its counsel to prepare the 30(b)(6) witness(es) thoroughly.

Drop "Person Most Knowledgeable" From Your Vocabulary

A recent client who was fond of acronyms informed us in a telephone conference at the outset of a product liability case in the USDC that the company had a "PMK" whom they preferred to send to PL inspections and who would most likely be the corporate witness later in the litigation. They used the same guy regardless of the COA or AIC, whether it be a PD, BI, or BOC claim, as well as in ADR proceedings. Sometimes they would get him to help with ROGs and RFPs, as he knew the FRCP pretty well and had helped them prevail on a number of MSJs and MTCs in several different states, most often in TX and KY. OMG.

It is great for a corporate client to have a PMK, or Person Most Knowledgeable, on various issues that may come up in a case. However, it is neither necessary nor sufficient for a company to use as its 30(b)(6) witness a "person most knowledgeable" who relies on his or her own personal knowledge. The purpose and intent of Rule 30(b)(6) is not to get the personal knowledge of one person on a particular issue, regardless of how much knowledge that person possesses. Some attorneys are prone to issue 30(b)(6) deposition notices calling for the party to produce the "most knowledgeable" witness on a given subject, but this is not (and never has been) in the rule. In fact, reliance on a "person most knowledgeable" does more than fail to comply with the Rule; it is fundamentally inconsistent with the purpose and dynamics of the Rule.

Rule 30(b)(6) requires the company to present one or more witnesses who can testify to the *company's* knowledge, not their own knowledge, which requires the company and counsel to take the necessary steps to be sure the witness is fully educated as to the company's position on the designated topics. In fact, the witness is not even required to have any personal knowledge of the issues for which he is designated to testify on behalf of the company. *See, e.g., PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir. 2004) (noting that a 30(b)(6) witness "was free to testify to matters outside his personal knowledge as long as they were within the corporate rubric").

The party conducting the deposition cannot object to a witness on the basis that he lacks personal knowledge. On the other side of the coin, the designating party cannot avoid presenting a witness on the basis that none of its employees have personal knowledge of the noticed 30(b)(6) topics.

While you may want to ask in your interrogatories for identification of the person most knowledgeable about certain topics and then depose that person individually, this is not appropriate under Rule 30(b)(6).

This is important for multiple reasons. On one hand, even the most knowledgeable person in the company often does not know or have all the company's knowledge, particularly if it is a complicated issue or one with a long history. In addition, there are often valid reasons for the company to choose someone other than the most knowledgeable person to testify on behalf of the company on certain subject matters. In *QBE Ins. Corp. v. Jorda Enterprises, Inc*., 277 F.R.D. 676, 688 (S.D. Fla. 2012), the court commented that a corporation might choose to designate a less-knowledgeable witness for any number of reasons, including that the more-knowledgeable witness "might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire process . . .."[3]

Questioning the Witness on Matters Outside the Scope of the Rule 30(b)(6) Notice

What should you do when your opposing counsel asks questions of your 30(b)(6) witness that go beyond the scope of the topics set forth in the 30(b)(6) deposition notice? The United States District Court for the District of South Carolina held in a 2013 opinion that a 30(b)(6) "'deponent's answers to questions outside the scope of the notice will not bind the organization, and the organization cannot be penalized if the deponent does not know the answer.'" *United States v. Albemarle Corp.*, No. CIV.A. 5:11-00991-JMC, 2013 WL 6834597, at *4 (D.S.C. Dec. 23, 2013) (Childs, J.) (quoting E*.E.O.C. v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012)).

If the 30(b)(6) witness is presented with questions outside the scope of the deposition notice, it is not proper for the witness to decline to answer the questions or for counsel to instruct the witness not to answer. It is not a valid objection that the witness did not have notice or an opportunity to prepare for

the questions. The witness should answer the questions truthfully and to the best of his ability. If the witness does not know the answer, then he should respond truthfully as to his lack of personal knowledge. As set forth in *Albemarle*, neither the witness nor the company should be penalized for the witness's inability to prepare for questions outside the scope of the notice, and the company should not be bound to the witness's testimony on such questions.

Although the *Albemarle* holding is the majority position and the most likely way a court would rule in a dispute over the scope of a 30(b)(6) deposition, counsel should be advised that a few courts have held that the topics set forth in the 30(b)(6) deposition notice define the outer limits of the deposition, such that the questioner would not be allowed to ask questions outside the scope of the notice. This was the holding of one older case from a Massachusetts federal court, which found that the questioner in a 30(b)(6) deposition "must confine the examination to the matters stated 'with reasonable particularity' . . . in the Notice of Deposition." *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727, 730 (D.Mass. 1985). The court, however, held that counsel for the deponent could not merely object and instruct the witness not to answer, but had to suspend the deposition and seek a protective order. Id. at 731.

Most cases have not taken the position set forth in *Paparelli* more than thirty years ago. S*ee, e.g., King v. Pratt & Whitney, a Division of United Technologies Corp.*, 161 ER.D. 475, 476 (S.D.Fla. 1995); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366 (N.D.Cal. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 ER.D. 67, 68 (D.D.C. 1999).

The majority rule is consistent with the purpose and intent of Rule 30(b)(6) in that it holds the company accountable only for matters on which the company had reasonable notice and an opportunity to prepare a witness to testify regarding the company's position. It is also consistent with the scope of discovery under Rule 26, and it avoids the inefficiency of having to convene a second deposition of the same witness in order to ask questions outside the scope of the 30(b)(6) notice. However, it creates a risk that individual testimony (outside the noticed 30(b)(6) topics), which should not be binding on the company, could be mistaken for 30(b)(6) testimony, which is binding on the company. The *Detoy* opinion form the Northern District of California acknowledged this risk, and the court took the additional step of recommending that counsel manage the risk by objecting on the record that the question falls outside the noticed 30(b)(6) topics, allowing the witness to answer the question, and requesting at trial a jury instruction clarifying that the answers are merely the answers of an individual fact witness rather than the corporation itself. *Detoy*, 196 F.R.D. at 367.

The Role of In-House Counsel and Privilege Issues

A corporate party presenting one or more witnesses for a 30(b)(6) deposition has a duty to prepare its witnesses to answer questions fully and unevasively about the designated subject matters. In an often-cited opinion on the subject, a federal district court in North Carolina stated:

> The Rule 30(b)(6) designee . . . presents the corporation's "position" on the topic. Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. The corporation must provide its interpretation of documents and events. The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer.

United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C.) (internal citations omitted), aff'd, 166 F.R.D. 367 (M.D.N.C. 1996).

A tension arises in preparing a Rule 30(b)(6) witness when some of the information known to the company is known only by the company's in-house counsel. While the attorney's mental impressions, opinions, and strategy are likely protected under the work product doctrine, the facts known by in-house counsel, even if discovered solely through the company's attorney's efforts, are not protected and are discoverable.

Herein lies the rub: while it should be generally agreed upon that facts conveyed to a 30(b)(6) witness through counsel may be discoverable and not protected by any privilege, in the 30(b)(6) context, counsel may have an affirmative duty go further and educate the witness with facts the attorney knows so that the witness will be fully equipped with the company's knowledge for the deposition. This will result in a delicate balance to be sure the witness is able to articulate facts without testifying about the mental impressions and strategy of legal counsel.

A Rule 30(b)(6) Deposition Witness May Not be Allowed to Testify at Trial

The requirements for admissibility of trial testimony are different from the requirements to give 30(b)(6) deposition testimony. *See, e.g., Roundtree v. Chase Bank USA, N.A.*, 13-239 MJP, 2014 WL 2480259 (W.D. Wash. June 3, 2014) ("FRCP 30(b)(6) is inapplicable to the issue of witness testimony at

Continued on next page

ARTICLE CONT.

trial."). No South Carolina appellate court has addressed the extent and manner in which a party may either introduce 30(b)(6) deposition testimony at trial or present live trial testimony of a witness designated to testify based on the company's "corporate knowledge" rather than the witness's own personal knowledge.

Both the South Carolina and Federal Rules of Evidence require that hearsay is inadmissible and that a witness may testify at trial only as to matters about which he has personal knowledge. Rules 602, 801 SCRE; Fed. R. Evid. 602, 801. These provisions conflict with Rule 30(b)(6), which specifically contemplates that the deposition witness will testify on behalf of the company as to matters about which he may or may not have personal knowledge. There is no provision in the Rules of Evidence that corresponds to Rule 30(b)(6), allowing a witness without personal knowledge of the subject matter to testify live as a corporate designee at trial, and courts are divided on whether this should be allowed.

Other jurisdictions are divided as to whether and to what extent a 30(b)(6) witness may testify at trial based on "corporate knowledge" rather than the witness's own personal knowledge. One of the leading cases allowing such testimony is *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006). In *Brazos*, the plaintiff called a defendant's 30(b)(6) witness to testify at trial. The defendant objected to that witness testifying at trial to matters outside his personal knowledge, even though he had testified on behalf of the company to those same matters in the 30(b)(6) deposition. The Fifth Circuit held that if a party makes its 30(b)(6) corporate designee available at trial, the adverse party may question that witness about matters "within corporate knowledge" to which he testified at the deposition even if he does not have personal knowledge of the subject matter. *Id*. at 434. However, the court also held that the witness could not go beyond the corporation's subjective beliefs in his trial testimony. The witness could not testify at trial as to whether the other defendant had made certain misrepresentations to the plaintiff, because such testimony would be inadmissible hearsay. *Id*. at 435. On the other hand, the designee witness could testify at trial as to what the other defendant had told the designee's fellow employees that it had represented to plaintiff, because that would meet the non-hearsay definition of an admission of a party opponent, even if the witness did not have personal knowledge of the discussions. *Id*.

The Fifth Circuit later addressed a different variation of the facts in *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 Fed. Appx 899, 907–08 (5th Cir. 2010), in which a corporate party attempted to call its own 30(b)(6) witness to testify at trial, including on subject matters about which the witness did not have personal knowledge. Under these facts, the Fifth Circuit that "a corporate representative may not testify to matters outside his own personal knowledge to the extent that information [is] hearsay not falling within one of the authorized exceptions." *Id*. at 908 (internal quotations omitted). The court held:

> Federal Rule of Evidence 602 limits the scope of a witness's testimony to matters that are within his or her personal knowledge. Union Pump argues that [its witness] was permitted to testify to matters that, although they were not within his own personal knowledge, were within the knowledge of the corporation because [the witness] was designated as Union Pump's corporate representative. We disagree. Federal Rule of Civil Procedure 30(b)(6) allows corporate representatives to testify to matters within the corporation's knowledge during deposition, and Rule 32(a)(3) permits an *adverse* party to use that deposition testimony during trial. *See Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir.2006). However, a corporate representative may not testify to matters outside his own personal knowledge "to the extent that information [is] hearsay not falling within one of the authorized exceptions." *Id*. at 435; *see also Deutsche Shell Tanker Gesellschaft mbH v. Placid Refining Co.*, 993 F.2d 466, 473 n. 29 (5th Cir.1993) (corporate representative is not permitted to repeat "rank hearsay").

Id. at 907-08.

When a party seeks to introduce 30(b)(6) deposition testimony at trial, as opposed to calling the 30(b)(6) witness to testify live at trial, the scope and extent to which such deposition testimony may be admitted depends on whether the deposition was taken of a party or non-party to the litigation. If the deponent was a party, Civil Procedure Rule 32(a) (Federal Rule 32(a)(3), S.C. Rule 32(a)(3)) allows the adverse party to use the deposition of either (1) the company's officer, director or managing agent or (2) the representative designated by the company pursuant to Rule 30(b)(6) for any purpose. The deposition testimony will likely not be hearsay, but will be deemed an admission of a party opponent under Evidence Rule 801(d). Therefore, if your adversary's 30(b)(6) deposition testimony is relevant and admissible, it may be used for any purpose at trial, without limitation.

However, for a 30(b)(6) deposition of a non-party, the deposition may be used at trial only if the witness is unavailable because the court finds:

> (A) that the witness is dead;
>
> (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears

> that the witness's absence was procured by the party offering the deposition;
>
> (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
>
> (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
>
> (E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the important of live testimony in open court — to permit the deposition to be used.

Fed. R. Civ. P. 32(a)(4). (Rule 32(a)(3), SCRCP, is substantially identical.) Otherwise, if the deposition taken was of a non-party, it generally may not be used at trial except to contradict or impeach testimony given by the deponent, or for another purpose as set out in the Federal Rules of Evidence (for example, to refresh a witness's recollection).

Where the Rule 30(b)(6) deposition is of a non-party, the testimony typically will not be admissible as a party admission, and it is very possible that any testimony of the non-party's designee not based on that witness's personal knowledge will be deemed hearsay. Therefore, when conducting a Rule 30(b)(6) deposition of a non-party, it is particularly important to have the witness identify the source of information outside his personal knowledge in order to evaluate whether to subpoena that source to ensure admissibility at trial.

An Illinois federal court provided a thorough analysis of admitting corporate knowledge of a non-party at trial in *Sara Lee Corp. v. Kraft Foods Inc.,* 276 F.R.D. 500 (N.D. Ill. 2011). The defendants moved *in limine* to exclude a non-party's 30(b)(6) witness's deposition testimony under Evidence Rules 602 and 801, arguing that the testimony was hearsay and the witness did not have personal knowledge of the subject matter. The court held that "courts have attempted to square Rule 30(b)(6) with the personal knowledge requirement by explaining that a Rule 30(b)(6) witness 'testifies "vicariously," for the corporation, as to its knowledge and perceptions.'" *Id*. (quoting *Brazos*, 469 F.3d at 434). However, the court continued:

> When it comes to using Rule 30(b)(6) depositions at trial, strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve. For example, a party might force a corporation to "take a position" on multiple issues through a Rule 30(b)(6) deposition, only to be left with the daunting task of identifying which individual employees and former employees will have to be called at trial to establish the same facts. . . .
>
> Given that some of [the witness's] testimony may be admitted based on the corporate knowledge of [the non-party], the next question is how far the concept of "corporate knowledge" can be stretched. Few courts have addressed this issue, but the purposes underlying Rule 30(b)(6) must be balanced against the real dangers of admitting testimony based on hearsay. For instance, the Court doubts that a Rule 30(b)(6) witness should be allowed to testify about the details of a car accident in lieu of the corporation's truck driver who actually witnessed the event. If he could, Rule 30(b)(6) would severely undercut the requirement, fundamental to our adversary system, that fact witnesses have personal knowledge of the matters upon which they testify.

Id. at 503 (citation omitted).

On the other hand, some courts have found that "a Rule 30(b)(6) witness may testify both in a deposition and at trial to matters as to which she lacks personal knowledge, notwithstanding the requirements of Federal Rule of Evidence 602." *Univ. Healthsystem Consortium v. UnitedHealth Grp., Inc*., 13 CV 6683, 2014 WL 4685753 (N.D. Ill. Sept. 19, 2014) (noting that there is "little principled distinction" between allowing a Rule 30(b)(6) witness to testify at trial without personal knowledge and allowing him to testify at deposition or via affidavit without personal knowledge).

To be sure your client is able to introduce the needed testimony at trial and exclude testimony that should not be admitted, counsel should be prepared to deal with the limitations placed upon admissibility by Civil Procedure Rule 32(a) and Evidence Rules 602 and 801 for both a party an a non-party, none of which apply to questioning of the witness during a 30(b)(6) deposition

Appendix

Quoted from *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 687–91 (S.D. Fla. 2012).

If the case law outlining the guiding principles of 30(b)(6) depositions could be summarized into a *de facto* Bible governing corporate depositions, then the litigation commandments and fundamental passages about pre-trial discovery would likely contain the following advice:

1. The rule's purpose is to streamline the discovery process. In particular, the rule serves a unique function in allowing a specialized form of deposition. *Great Am. Ins. Co. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 (D.Nev.2008)

2. The rule gives the corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf.

Continued on next page

ARTICLE CONT.

United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C.1996).

3. It is a discovery device designed to avoid the bandying by corporations where individual officers or employees disclaim knowledge of facts clearly known to the corporation. *Great Am.*, 251 F.R.D. at 539; *Taylor*, 166 F.R.D. at 361.

4. Therefore, one purpose is to curb any temptation by the corporation to shunt a discovering party from "pillar to post" by presenting deponents who each disclaim knowledge of facts known to someone in the corporation. *Great Am*., 251 F.R.D. at 539. Cf. *Ierardi v. Lorillard, Inc.*, No. 90–7049, 1991 WL 66799, *2 (E.D.Pa. Apr. 15, 1991), at *2 (without the rule, a corporation could "hide behind the alleged 'failed' memories of its employees").

5. Rule 30(b)(6) imposes burdens on both the discovering party and the designating party. The party seeking discovery must describe the matters with reasonable particularity and the responding corporation or entity must produce one or more witnesses who can testify about the corporation's knowledge of the noticed topics. *Great Am*., 251 F.R.D. at 539.

6. The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents. A Rule 30(b)(6) designee presents the corporation's position on the listed topics. The corporation appears vicariously through its designees. *Taylor*, 166 F.R.D. at 361.

7. A corporation has an affirmative duty to provide a witness who is able to provide binding answers on behalf of the corporation. E*cclesiastes 9:10–11–12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir.2007).

8. Thus, a Rule 30(b)(6) witness need not have personal knowledge of the designated subject matter. *Ecclesiastes*, 497 F.3d at 1147; *see generally Federal Civil Rules Handbook*, 2012 Ed., at p. 838 ("the individual will often testify to matters outside the individual's personal knowledge").

9. The designating party has a duty to designate more than one deponent if necessary to respond to questions on all relevant areas of inquiry listed in the notice or subpoena. *Ecclesiastes*, 497 F.3d at 1147; *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 127 (M.D.N.C.1989) (duty to substitute another witness as a designee once the initial designee's deficiencies become apparent during the deposition); *Alexander v. F.B.I.,* 186 F.R.D. 137, 142 (D.D.C.1998).

10. The rule does not expressly or implicitly require the corporation or entity to produce the "person most knowledgeable" for the corporate deposition. Nevertheless, many lawyers issue notices and subpoenas which purport to require the producing party to provide "the most knowledgeable" witness. Not only does the rule not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule. As noted, the witness/designee need not have **any** personal knowledge, so the "*most* knowledgeable" designation is illogical. *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir. 2004) (rejecting argument that trial court should not have credited the testimony of a witness who lacked personal knowledge because the witness was a 30(b)(6) witness and "was free to testify to matters outside his personal knowledge as long as they were within the corporate rubric"). Moreover, a corporation may have good grounds not to produce the "most knowledgeable" witness for a 30(b)(6) deposition. For example, that witness might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire process or the corporation might want to save the witness for trial. From a practical perspective, it might be difficult to determine which witness is the "most" knowledgeable on any given topic. And permitting a requesting party to insist on the production of the most knowledgeable witness could lead to time-wasting disputes over the comparative level of the witness' knowledge. For example, if the rule authorized a demand for the most knowledgeable witness, then the requesting party could presumably obtain sanctions if the witness produced had the *second* most amount of knowledge. This result is impractical, inefficient and problematic, but it would be required by a procedure authorizing a demand for the "most" knowledgeable witness. But the rule says no such thing.

11. Although the rule is not designed to be a memory contest, the corporation has a duty to make a good faith, conscientious effort to designate appropriate persons and to prepare them to testify fully and non-evasively about the subjects. *Great Am.*, 251 F.R.D. at 540.

12. The duty to prepare a Rule 30(b)(6) witness goes beyond matters personally known to the designee or to matters in which the designated witness was personally involved. *Wilson v. Lakner*, 228 F.R.D. 524 (D.Md.2005).

13. The duty extends to matters reasonably known to the responding party. F*owler v. State Farm Mut. Auto. Ins. Co.,* No. 07–00071 SPK–KSC, 2008 WL 4907865, at *4 (D.Haw.2008).

14. The mere fact that an organization no longer employs a person with knowledge on the specified topics does not relieve the organization of the duty to prepare and produce an appropriate designee. *Id.; Great Am*., 251 F.R.D. at 540; *Taylor*, 166 F.R.D. at 362; *cf. Ecclesiastes*, 497 F.3d at 1148 (in "one common scenario," the corporation designates individuals who lack personal knowledge "but who have been **educated about it**") (emphasis added).

15. Faced with such a scenario, a corporation with

no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge. *Great Am.*, 251 F.R.D. at 540; *Federal Civil Rules Handbook*, p. 838; *see generally Wilson*, 228 F.R.D. at 529 (preparation required from myriad sources, including "documents, present or past employees, or other sources").

16. In other words, a corporation is expected to *create* an appropriate witness or witnesses from information reasonably available to it if necessary. *Wilson*, 228 F.R.D. at 529.

17. As a corollary to the corporation's duty to designate and prepare a witness, it must perform a reasonable inquiry for information that is reasonably available to it. *Fowler*, 2008 WL 4907865 at *5; *Marker*, 125 F.R.D. at 127.

18. A corporate designee must provide responsive answers even if the information was transmitted through the corporation's lawyers. *Great Am.*, 251 F.R.D. at 542.

19. In responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that its documents state the company's position and that a corporate deposition is therefore unnecessary. *Great Am.*, 251 F.R.D. at 540.

20. Similarly, a corporation cannot point to interrogatory answers in lieu of producing a live, in-person corporate representative designee. *Marker*, 125 F.R.D. at 127.

21. Preparing a Rule 30(b)(6) designee may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business. *Great Am.*, 251 F.R.D. at 541; *see also Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 38 (D.Mass.2001) (review required even if "documents are voluminous and the review of those documents would be burdensome").

22. Not only must the designee testify about facts within the corporation's collective knowledge, including the results of an investigation initiated for the purpose of complying with the 30(b)(6) notice, but the designee must also testify about the corporation's position, beliefs and opinions. *Great Am.*, 251 F.R.D. at 539; *Taylor*, 166 F.R.D. at 362 (designee presents corporation's "position," its "subjective beliefs and opinions" and its "interpretation of documents and events").

23. The rule implicitly requires the corporation to review all matters known or reasonable available to it in preparation for a Rule 30(b)(6) deposition. *Wilson*, 228 F.R.D. at 529 ("good faith effort" to "find out the relevant facts" and to "collect information, review documents and interview employees with personal knowledge").

24. If a corporation genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations under the Rule cease. *Calzaturficio*, 201 F.R.D. at 39; *see also Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D.Neb. 1995).

25. If it becomes apparent during the deposition that the designee is unable to adequately respond to relevant questions on listed subjects, then the responding corporation has a duty to timely designate additional, supplemental witnesses as substitute deponents. *Alexander*, 186 F.R.D. at 142; *Marker*, 125 F.R.D. at 127.

26. The rule provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default. *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 269 (2d Cir.1999) (affirming order precluding witness five witnesses from testifying at trial); *see also Taylor*, 166 F.R.D. at 363 ("panoply of sanctions"); *Great Am.*, 251 F.R.D. at 543 ("variety of sanctions").[4]

27. The failure to properly designate a Rule 30(b)(6) witness can be deemed a nonappearance justifying the imposition of sanctions. (*Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 198 (5th Cir.1993)). *See also Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 305 (3d Cir.2000) (a 30(b)(6) witness who is unable to give useful information is "no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it").

28. When a corporation's designee legitimately lacks the ability to answer relevant questions on listed topics and the corporation cannot better prepare that witness or obtain an adequate substitute, then the "we-don't-know" response can be binding on the corporation and prohibit it from offering evidence at trial on those points. Phrased differently, the lack of knowledge answer is itself an answer which will bind the corporation at trial. *Fraser Yachts Fla., Inc. v. Milne*, No. 05–21168–CIV–JORDAN, 2007 WL 1113251, at *3 (S.D.Fla. Apr. 13, 2007); *Chick–fil–A v. ExxonMobil Corp.*, No. 08–61422–CIV, 2009 WL 3763032, at *13 (S.D.Fla. Nov. 10, 2009); *see also Ierardi*, 1991 WL 66799 at *3 (if party's 30(b)(6) witness, because of lack of knowledge or failing memory, provides a "don't know" answer, then "that is itself an answer" and the corporation "will be bound by that answer").

29. Similarly, a corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the questions "will not be allowed effectively to change its answer by introducing evidence at trial." *Ierardi v. Lorillard*, No. 90–7049, 1991 WL 158911 (Aug. 13, 1991) (E.D.Pa.

Continued on next page

1991, at *4)[5]

30. The conclusion that the corporation is bound at trial by a legitimate lack of knowledge response at the 30(b)(6) deposition is, for all practical purposes a variation on the rule and philosophy against trial by ambush. *Calzaturficio*, 201 F.R.D. at 38; *Wilson*, 228 F.R.D. at 531; *Taylor*, 166 F.R.D. at 363 (rule prevents "sandbagging" and prevents corporation from making a "half-hearted inquiry before the deposition but a thorough and vigorous one before the trial").

31. If the corporation pleads lack of memory after diligently conducting a good faith effort to obtain information reasonably available to it, then it still must present an opinion as to why the corporation believes the facts should be construed a certain way *if* it wishes to assert a position on that topic at trial. *Taylor*, 166 F.R.D. at 362.

32. There is nothing in the rule which prohibits a corporation from adopting the testimony or position of another witness in the case, though that would still require a corporate designee to formally provide testimony that the corporation's position is that of another witness. *Fraser Yachts*, 2007 WL 1113251, at *3.

33. The rule does not expressly require the designee to personally review all information available to the corporation. So long as the designee is prepared to provide binding answers under oath, then the corporation may prepare the designee in whatever way it deems appropriate—as long as someone acting for the corporation reviews the available documents and information. *Reichhold, Inc. v. U.S. Metals Ref. Co.*, No. 03–453(DRD), 2007 WL 1428559, at *9 (D.N.J. May 10, 2007) (the rule "does not require that the corporate designee personally conduct interviews," but, instead, requires him to testify to matters known or reasonably available to the corporation).

34. Rule 30(b)(6) means what it says. Corporations must act responsibly. They are not permitted to simply declare themselves to be mere document-gatherers. They must produce live witnesses who have been prepared to provide testimony to bind the entity and to explain the corporation's position. *Wilson*, 228 F.R.D. at 531; *Great Am.*, 251 F.R.D. at 542 (entitled to "corporation's position").

35. Despite the potentially difficult burdens which sometimes are generated by Rule 30(b)(6) depositions, the corporation is not without some protection, as it may timely seek a protective order or other relief. *C.F.T.C. v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 772 (9th Cir.1995).

36. Absolute perfection is not required of a 30(b)(6) witness. The mere fact that a designee could not answer every question on a certain topic does not necessarily mean that the corporation failed to comply with its obligation. *Costa v. County of Burlington*, 254 F.R.D. 187, 191 (D.N.J.2008); *Chick–fil–A*, 2009 WL 3763032, at *13 (explaining that the corporation need not produce witnesses who know every single fact-only those relevant and material to the incidents underlying the lawsuit).

37. A corporation cannot be faulted for not interviewing individuals who refuse to speak with it. *Costa*, 254 F.R.D. at 191.

38. There are certain cases, such as subrogation cases or those involving dated facts, where a corporation will not be able to locate an appropriate 30(b)(6) witness. In those types of scenarios, the parties "should anticipate the unavailability of certain information" and "should expect that the inescapable and unstoppable forces of time have erased items from ... memory which neither party can retrieve." *Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 178 (E.D.Pa.1996) (concluding that corporation did not act in bad faith when its designee did not remember events from almost thirty years earlier).

39. A corporation which expects its designee to be unprepared to testify on any relevant, listed topic at the corporate representative deposition should advise the requesting party of the designee's limitations before the deposition begins. *Calzaturficio*, 201 F.R.D. at 39.

Footnotes

1 Jay T. Thompson is a Partner with Nelson Mullins Riley & Scarborough in Columbia. He practices in the areas of business and commercial litigation, product liability, and premises liability.

2 Only two published opinions of South Carolina state courts have addressed Rule 30(b)(6) in the entire history of South Carolina jurisprudence. Both of them touched on the rule only briefly, and they are not relevant to the discussions herein. Fortunately, the South Carolina rule is substantially identical to Federal Rule 30(b)(6), and there is no shortage of federal case law interpreting the federal rule. The South Carolina Supreme Court has held that, "[s]ince our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure." *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330-31, 404 S.E.2d 200, 201 (1991). Therefore, it is appropriate to look to guidance of the federal courts in interpreting the application of Rule 30(b)(6).

3 The QBE Ins. Corp. opinion summarized the "guiding principles of 30(b)(6) depositions" in a 39-point list within the published opinion. This list is quoted in the Appendix to this Article.

4 Requiring the responsive party to produce another 30(b)(6) deposition witness who is prepared and educated is a frequently-invoked sanction which is not available now in this case because the discovery cutoff has expired (and no one has filed a motion to extend the now-expired discovery deadline, and the Undersigned would not in any event be able to unilaterally change the deadlines imposed by U.S. District Judge Alan S. Gold).

5 This Order cites two decisions from Ierardi: one from April 15, 1991 (1991 WL 66799) and one from August 13, 1991 (1991 WL 158911).

Verdict Reports

Type of Action: Medical Malpractice

Name of Case: Christy Byrd, as Next Friend of Julia Byrd, a minor v. McLeod Physician Associates, Inc., and Dr. John B. Browning, individually and d/b/a McLeod OB-Gyn Associates and McLeod Physician Associates II

Court: Florence County Court of Common Pleas

Case number: 2013-CP-21-00690

Name of Judge: The Honorable William H. Seals, Jr.

Amount: Defense Verdict

Date of Verdict: May 20, 2016

Attorneys for defendant: Molly H. Craig, Elloree A. Ganes and Ben Joyce of Hood Law Firm, LLC, Charleston, SC

Description of the case:

This case was initially tried in September 2015 and resulted in a mistrial during the direct examination of the Plaintiff's rebuttal witness.

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 and became stuck under the mother's pubic bone signifying a "shoulder dystocia." According to the Plaintiff, the physician applied excessive traction in an attempt to deliver the baby and this pulling force resulted in permanent nerve damage involving C5, C6 and C7.

The defense proved that shoulder dystocia is a medical emergency which was properly managed by the Defendant physician. The defense also presented testimony from obstetricians and a pediatric neurologist addressing alternative causes for a brachial plexus injury other than the use of excessive force by the delivering physician. The jury returned a defense verdict.

Type of Action: Medical Malpractice

Name of Case: Judie Gathers Jenkins, as Special Administrator of the Estate of George Benjamin Mullen, IV v. Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Healthcare, and Mark Vuletich, DO, MD

Court: Charleston County Court of Common Pleas

Case number: 2014-CP-10-01164

Name of Judge: The Honorable Roger M. Young, Sr.

Amount: Defense Verdict

Date of Verdict: September 9, 2016

Attorneys for defendant: Molly H. Craig, Brian E. Johnson and Jean Marie Jennings of Hood Law Firm, LLC, Charleston, SC

Description of the case:

Plaintiff alleged the Defendant physician was negligent by failing to diagnose a C5 fracture when he provided care and treatment to the Decedent in the emergency department. Shortly after discharge from the hospital, the Decedent showed signs of paralysis and ultimately was a quadriplegic until his death two years later.

The Decedent was involved in an altercation with law enforcement resulting in being tased with an electroshock device. After being tased, the Decedent allegedly suffered a compression fracture following a fall from a porch. The Defendant physician was not notified of the fall, however, the Plaintiff argued that the doctor should have ordered a CT of the neck since the doctor knew about the altercation and tasing. Plaintiff's experts opined that if the spinal cord injury was diagnosed timely, the Decedent's paralysis could have been prevented.

The defense proved that the Decedent did not have a diagnosable spinal cord injury at the time Defendant physician was providing care and treatment in the emergency department. The jury returned a defense verdict.

Case Notes

Prepared by Helen F. Hiser, Alan G. Jones and Charlie Kinney

The Gates at Williams-Brice Condominium Assoc'n, et al. v. DDC Construction, Inc., et al., Op. No. 5438, August 31, 2016.

At issue before the South Carolina Court of Appeals was whether the Homeowners at The Gates at Williams-Brice were entitled to proceed as a class in a jury trial against Developer for alleged faulty workmanship that occurred during the construction of 158 condominium units at the Gates in Columbia, South Carolina, in mid-2006. According to the Homeowners, the Gates' Property Owners Association (POA) was first notified of construction defects in the condominiums in November 2012 when a maintenance company, Watertight Systems, Inc., refused to bid on an exterior caulking/sealant job due to perceived construction issues. Approximately one month after this discovery, Homeowners filed their initial complaint on December 26, 2012, against DDC Construction, Inc. (DDC) and others, raising negligence, gross negligence, breach of warranty, and strict liability claims.

DDC, the only appellant that was a party to the initial complaint, filed its answer on March 7, 2013. In its answer, DDC "specifically denie[d] any class is proper" and "oppose[d] the certification of a class in this matter." Although DDC did not specifically oppose Homeowners' right to a jury trial, DDC "denie[d] that [Homeowners were] entitled to any of the relief sought in the WHEREFORE clause." DDC generally asserted that "[Homeowners'] claims against it may be barred by the defenses of laches, mistake, release, waiver, ratification, estoppel, unclean hands, statute of limitations and/or any other defense that may be available upon discovery of additional information during the pendency of this action." (emphasis added in opinion). Without specifically referencing the Master Deed, DDC "reserve[d] its right to amend this Answer to assert further allegations in support of any such defenses as required by the Rules of Civil Procedure."

The HOA then filed an amended complaint in May 2013, adding additional developer entities and parties. One week later, the HOA amended the Master Deed to remove a consequential damages clause, an arbitration clause, a waiver of class action clause, and a waiver of jury trial clause. In responsive pleadings, various defendants asserted defenses found in the Master Deed regarding the waiver of class action and waiver of jury trial. The Developer defendants moved for a nonjury trial and to strike the class action allegations.

The trial court denied the Developer defendants' motion for a nonjury trial and to strike the class action allegations of the named plaintiff. Applying a de novo standard of review, the Court of Appeals reversed, finding:

1) By raising the jury trial and class action issues in its Answer(s), the Developer defendants met the "first opportunity" requirement of Foggie v. CSX Transp., Inc. The Court held that, under the facts of this case, Rules 39(a) & 38(b), SCRCP, (which together allow for a party to move for a non-jury trial within 10 days of service of the last pleading) controlled, rather than Rule 12(f), SCRCP (requiring a party to submit a motion to strike before responding to a pleading). The Court explained that all that Foggie, required was that an issue be raised before the trial court and immediately appealed.

2) The Homeowners' removal of the jury trial and class action waivers by amending the Master Deed a full six months after they filed their first complaint and a week after filing their first amended complaint applied prospectively only. The Court went on to say it was "unaware of any authority in this state that would permit contracting parties, such as Developer and Homeowners, to unilaterally alter agreed upon provisions once litigation has commenced."

3) The Court held that the Homeowners knowingly and voluntarily waived their rights to a jury trial and to proceed as a class, even though the Property Owners' Association was controlled by the Developer defendants at its creation.

4) Finally, the Court held that the Developer defendants did not waive their right to a nonjury trial and to proceed without class certification simply because the Developer defendants elected to not arbitrate. Although the jury trial and class actions provisions were in the section of the Master Deed titled "Alternative Dispute Resolution," those provisions were in a subsection separate from the subsection addressing arbitration, which the Court held made them "completely separate and distinct" provisions that stood on their own.

As a result, the circuit court's decision was reversed and remanded.

Parsons v. John Wieland Homes, et al., Op. No. 27655, August 17, 2016.

In a highly split decision involving enforcement of an arbitration clause, the Supreme Court overruled South Carolina precedent applying the "outrageous tort exception" to preclude enforcement of an otherwise applicable arbitration clause. The Parsons bought a home in a development Wieland built on property that formerly housed a textile production facility. Although Wieland cleared the land and removed "all visible evidence of the industrial site," they missed some piping and a concrete box, which contained hazardous black sludge, which were buried on the Parsons' property. The sales contract included an arbitration clause in the warranty provisions in a Homeowner Handbook provided to the Parsons after the sale. The lower courts held that the arbitration clause: 1) only applied to warranty issues since it was included in the warranty; and, 2) enforcement of the arbitration provision was barred by the outrageous torts exceptions.

The majority opinion, written by Chief Justice Pleicones, overturned the lower courts, holding that the terms of the arbitration provision (which applied to "any and all unresolved claims or disputes of any kind or nature between [Wieland] and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland (if any, this warranty, the Home and/or property on which it is constructed, or otherwise"), were broad enough to extend beyond warranty/building defect issues. The majority also held that, with regard to arbitration clauses governed by the Federal Arbitration Act, two recent United States Supreme Court cases compelled state courts to place them "on equal footing with other contracts." Finding that the outrageous tort exception had only been applied to arbitration clauses in South Carolina, the majority held that that doctrine was no longer viable (because it did not put arbitration clauses on the same footing as other contract provisions) and overruled prior cases applying it. Justice Kittredge signed on to the majority opinion.

Justice Hearn concurred in the result, but argued the outrageous tort exception as applied in South Carolina was still good law; she did not believe it would apply under the facts of this case because, according to Hearn, it is "entirely foreseeable that a seller would fail to disclose defects with the property." Justice Beatty joined her concurrence.

Former Chief Justice Toal dissented and argued that, not only should the outrageous tort exception continue to be applied in South Carolina, but that the facts of this case justified its application. Justice Toal pointed out the Court's long history of protecting innocent residential homeowners and expressed concern that the majority was backing away from "our extensive precedent in the residential construction context."

Gary v. Askew, et al., Op. No. 5406, June 1, 2016

In this case, the South Carolina Court of Appeals considered whether a company (AMR), which had contracted with the South Carolina Department of Health and Human Services (SCDHHS) to act as a broker to provide non-emergency medical transport services to Medicaid members who need access to medical care or services, had a non-delegable duty to the users of that service. The plaintiff was a passenger in an ambulance that crashed, killing his wife and injuring him. He sued the ambulance company and also AMR.

The Circuit Court granted the plaintiff's motion for summary judgment against AMR based on the theory that AMR owed him a non-delegable duty under its contact with SCDHHS. According to the Circuit Court, AMR had an absolute duty to provide safe transportation. Further, "[g]iven the duties imposed under the Contract and the extensive control [AMR] had over its . . . service providers, [AMR] cannot walk away from its responsibilities under its . . . Contract where the duties are so important to the Medicaid members and simply transfer it to another." According to the court, SCDHHS's "Contract clearly indicates that public policy and its Contract impose a non-delegable duty on the . . . [p]rogram administrators to provide competent and safe non-emergency medical transport services to Medicaid members, pursuant to a significant number of control measures and protocols."

The Court of Appeals reversed, first clarifying that it is the liability, not the duty, that is not delegable in certain circumstances. The Court of Appeals then distinguished a non-delegable duty from the theory of "ostensible agency," applied where an ER hires independent contracting physicians (who reasonably appear to be hospital employees). Finding the contract at issue in this case obligated AMR to perform administrative oversight and record-keeping functions but not to guarantee safe transport, the Court of Appeals reversed the Circuit Court's grant of summary judgment. The Court of Appeals also found there was no public policy reason for imposing a non-delegable duty in this instance. The Court suggested AMR owed the plaintiff some duty, just not a non-delegable duty to ensure the ambulance company provided safe transport.

Easterling v. Burger King Corporation, et al., Op.No. 5405, May 18, 2016.

The South Carolina Court of Appeals affirmed a grant of summary judgment in this premises liability case. The plaintiff was in a Burger King drive-thru lane when the driver behind him began bumping his bumper and spinning his tires. At first, the plaintiff believed the collision was an accident. However, when the driver behind him rammed the back of his

Continued on next page

car again, the plaintiff exited his car. When the plaintiff got out to check his car for damage, the driver in the vehicle behind him approached him in a threatening manner. The two engaged in a scuffle at the instigation of the other driver, and during the fisticuffs the plaintiff fell backward onto an embankment with curbing that knocked him unconscious. When he regained consciousness, the driver was pinned on top of the plaintiff and proceeded to bite off the plaintiff's nose. The entire altercation lasted a few minutes. Burger King employees called the police as soon as they realized how serious the altercation/injuries were.

The court rejected the plaintiff's argument that Burger King should have had greater security measures in place, focusing on the history of incidents at that place of business (and rejecting an expert who culled crime statistics for a surrounding ? mile area), which included mostly vandalism and car accidents. The court utilized the balancing approach from Bass v. Gopal, Inc.to determine (1) if a crime was foreseeable, and (2) given the foreseeability of the crime, the economically feasible security measures that were required to prevent such harm. The court determined that no evidence was presented of a crime of a remotely similar nature to the one that occurred in this case. Further, the court found no evidence that Burger King's security measures were unreasonable given the unforeseeability of this incident.

The court also rejected the plaintiff's argument that, by having a steep embankment next to the drive-thru, Burger King had created a dangerous condition because he was not able to "escape" the aggressive driver behind him. The court said the condition was open and obvious, Burger King could not have anticipated such a brutal assault, and the plaintiff had a chance to escape when he exited his vehicle but did not do so.

Finally, the court also rejected plaintiff's argument that the circuit court's grant of summary judgment in a Form 4 order was insufficient to allow appellate review. The Court said it applied the same standard of review of summary judgment that the lower court applied. Further, the record was adequate for the court to conduct its own review.

State v. Anderson, 415 S.C. 441, 783 S.E.2d 51 (2016) (by Charlie Kinney)

In this Fourth Amendment case involving a Terry v. Ohio, 392 U.S. 1 (168) stop, the South Carolina Supreme Court held that "being in a high crime area does not provide police officers carte blanche to stop any person they meet on the street." Anderson, 415 S.C. at 448, 783 S.E.2d at 55. Reasonable suspicion requires more for the totality of the circumstances analysis required under Terry and its progeny. While Anderson is a criminal matter, the holding from this case is applicable to false arrest and false imprisonment cases, which are popping up more and more, especially with the current political and social climate regarding law enforcement.

The Greenville Police Department obtained a no-knock search warrant for a specific house in a known drug area on Dobbs Street. Through surveillance and a successful purchase of crack cocaine by an informant, officers learned that drug runners used a footpath near the house on Dobbs Street to sell drugs on the adjacent street, Sullivan Street. The warrant included only the home on Dobbs and its curtilage; not the footpath. Despite this limitation, Greenville SWAT was instructed to secure and detain any person found on the footpath.

During the execution of the search warrant, Anderson and a woman were seen on the footpath walking from Dobbs Street to Sullivan Street. When Anderson saw the officers, Anderson and the woman "veered off the path in a quick manner." Officers pursued Anderson, detained him, and performed a Terry stop, which discovered no weapons but did reveal a small plastic bag containing crack cocaine.

Anderson moved to suppress the drugs on two grounds. First, the drugs were not found as part of a Terry stop but pursuant to the search warrant. Second, even if it was a Terry stop, it was improper because there was no reasonable suspicion to stop Anderson or suspect that he was armed.

The trial court denied the motion and found reasonable suspicion for the officers to conduct a Terry stop and subsequent pat-down. Anderson was ultimately found guilty of possession with intent to distribute crack cocaine following a bench trial. Anderson appealed and the Court of Appeals affirmed. Anderson then petitioned for certiorari, which was granted.

The South Carolina Supreme Court reversed and held that a "person's proximity to criminal activity, without more, cannot establish reasonable suspicion to detain that individual. Taken to its logical conclusion, the erosion of an individual's Fourth Amendment right would necessarily accompany his or her misfortune of living in an area plagued by crime." The Court found that the State offered no more than Anderson's proximity to criminal activity and his allegedly evasive behavior to support the conclusion that the officers had reasonable suspicion to detain and search Anderson. The Court specifically noted that the footpath was not part of the search warrant. The Court further noted Anderson did not flee the area, and the officers did not recognize Anderson as a suspect involving the drug house on Dobbs Street.

When "reviewing reasonable suspicion determinations, a court must look to the totality of the circumstances 'to see whether the detaining officers has a particularized and objective basis for suspecting legal wrongdoing.'" Ultimately, being in a high crime area, and evasive conduct of the suspect, are to be taken into consideration in the totality of the circumstances analysis of the court; however, there are not dispositive in an of themselves.

2017

Spring

TRIAL ACADEMY

TBA

Charleston, SC

Summer

SUMMER MEETING

July 14 - 16

The Omni Grove Park Inn

Asheville, NC

Celebrating 50 years

ANNUAL MEETING

November 9 - 12

The Cloister

Sea Island, GA

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

ADDRESS SERVICE REQUESTED