THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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2015 Executive Officers

Curtis L. Ott, Immediate Past President;
William S. Brown, President-Elect;
Ronald K. Wray II, President;
David A. Anderson, Treasurer; and
Anthony W. Livoti, Secretary

SPRING 2015
VOLUME 43
ISSUE 1
WWW.SCDTAA.COM

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

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

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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THE DefenseLINE

President's Message

by Ronald K. Wray, II

"When hell freezes over." That was the response from my best friend when I boasted to him that my date for our senior prom was going to be the best looking girl at our high school. Well (spoiler alert), hell didn't freeze over and my prediction didn't hold true, but at least I learned a catchy phrase to use when someone tells you something that seems far-fetched or incredible.

Twenty-two years ago, when I attended my first SCDTAA annual meeting, that might have been an appropriate response had I suggested to one of my colleagues that one day I would have the honor and privilege to serve as president of the South Carolina Defense Trial Attorneys' Association. Many, including me, consider the SCDTAA to be the best state civil defense organization in the country. I am truly honored to be serving this year as your president. As I think back on that first meeting I attended twenty-two years ago, I can still remember my nervousness and apprehension as my wife Becky and I departed for the meeting. Other than members of my firm, and perhaps one or two attorneys who had attended law school with me, I knew very few folks who would be in attendance.

Fortunately, I found a group of lawyers who were warm and welcoming, and anxious to get me involved. It was not long after that first meeting that I began serving on a committee. From there, I assisted with planning our summer and annual meetings, served on virtually every committee SCDTAA has to offer, and spoke at numerous seminars and events (my apologies to those of you who have had to sit through one of those presentations).

For those of you who are veterans of the programs offered by the SCDTAA, I am confident that your experience has been similar to mine. For those of you who are new, I promise that my personal experience was not unique, and that your involvement in SCDTAA will be similarly rewarding. As you read this letter, your Board of Directors and other volunteers are already hard at work in putting together a fabulous program of events for this year. We kicked things off with our ever-popular legislative reception which took place at the Oyster Bar in Columbia on April 15, 2015. What better way to put aside the stress of "tax day" than to have a cold beverage with your colleagues and visit with members of our legislature and a few members of our judiciary. In May, we will have our annual Trial Academy in Greenville. This is an incredible opportunity for new or less-experienced lawyers to learn from the best of the best, and to sit first-chair in a mock trial before a state or federal judge. As usual, we will be looking for volunteers to serve in a number of capacities, including playing the role of witnesses and assisting with the educational sessions. If your schedule permits, or you just want to see some talented young lawyers in action, we can use your help at Trial Academy in May.

The summer will once again see us return to the beautiful Grove Park Inn in Asheville for our Summer Meeting. The dates for our trip to the cool mountain air are July 23 – July 25. As one of our hallmark events, featuring the members of the South Carolina Workers' Compensation Commission and our fabulous silent auction, we know you will not want to miss it.

Later in the year, we will descend upon sunny Florida for our Annual Meeting at Amelia Island. Our meeting will take place at the Amelia Island Ritz Carlton from November 5 to November 8. We are looking forward to once again hosting the members of our judiciary, and will have a special feature or two to make this meeting one that you will never forget.

Dispersed throughout the rest of the year will be many other opportunities for you to get involved. These will include CLE programs sponsored by our substantive law committees, judicial receptions, happy hour CLEs, as well as opportunities to become a published writer by submitting an article to the Defense Line. And that's not all!! Whatever your interest or desire, the SCDTAA has an opportunity for you.

Theodore Roosevelt once said that in any moment of decision the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing. I hope this year you will make the "right" decision and become involved in the SCDTAA. My door is always open, and my phone is always on, so if there is anything I can do to encourage you to get involved or to make your participation in SCDTAA more meaningful, please let me know.

Ronald K. Wray, II

SCDTAA Website Update

by Ryan A. Earhart

We are pleased to announce that the new SCDTAA website has been launched. While everyone will surely enjoy the modern updates and features, the new website marks an important digital transition for the Association. Previously the Association used a template provided by DRI which offered very limited features and functionality.

The Association elected last year to make a capital improvement to develop its own "digital" infrastructure to allow the website, for the first time, to interact with the Association's other IT systems. While we hope everyone enjoys the new features (like Google search), the real magic is what is going on "behind the curtain." The new site offers flexibility as the Association grows its digital footprint. Take a second and give the new website a visit.

We hope you like what you see.

Hemphill Award Call for Nominations

Eligibility:

The candidate must be a member of the South Carolina Bar and a member or former member of the SCDTAA. He or she may be in active practice, retired from practice, or a member of the judiciary.

Criteria:

The award should be based upon distinguished and meritorious service to the legal profession and/or the public. The candidate should be, or should have been, an active, contributing member of the Association. The candidate also should have been instrumental in developing, implementing, and carrying through the objectives of the SCDTAA.

Procedure:

Nominations should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community, and the reasons why the nominee is being put forward.

Nominations are due to Aimee Hiers at SCDTAA Headquarters by July 13, 2015.

SCDTAA
1 Windsor Cove,
Suite 305
Columbia, SC
29223

For more information contact Aimee at aimee@jee.com

Editor's Note

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

"In Character, in manner, in style, in all things, the supreme excellence is simplicity."

-Henry Wadsworth Longfellow

Longfellow's words are sage advice for civil defense attorneys. In our practices, we constantly are required to simplify complex issues for our target audience. Whether it is crafting a jury argument, examining a technical expert witness, or drafting a brief, a lawyer achieves excellence through communicating difficult subject matter in a clear and concise fashion.

The same principle of simplicity holds true for a legal publication such as *The DefenseLine*. Between magazines, email newsletters, and blogs, it seems we receive at least one legal publication every day. It is a challenge to keep these publications from cluttering our desks and inboxes; to actually read each of the publications is a noble, but unobtainable goal. In order for a publication to make our list of priority reading material, it must be truly excellent. And with *The DefenseLine* our model for achieving excellence is simple—to provide current and practical information that is directly relevant to the work of civil defense lawyers in South Carolina.

We are not satisfied with producing a publication that is merely read. It is our goal that each edition of *The DefenseLine* be used by the attorneys and judges who receive our publication. Whether it be the feature articles in the areas of employment law, construction law, consumer finance, and use of social media at trial; the case briefs of virtually every decision this year that affects South Carolina defense lawyers; the profile of a prominent member of our judiciary; or the updates concerning the activities of our organization and its members, we hope you will find this edition useful to your practice.

We offer our sincere thanks to the many contributors to this issue. An incredible amount of time was spent drafting the articles, case notes, and committee reports. All of that time was donated by busy professionals who are dedicated to the success of the SCDTAA. Our organization is successful because of such people, and we always are looking for more. If you are not already involved in the SCDTAA, we would encourage you to become involved. There are endless opportunities, including attending the Summer Meeting or Annual Meeting, joining a substantive law committee, or writing an article for *The DefenseLine* . The SCDTAA affords an invaluable opportunity for our members to network, learn from each other, and advance the interests of the civil defense bar in South Carolina. If you would like to become involved, or if you would like to share an idea to be included in *The DefenseLine* , please do not hesitate to contact one of us, any member of our Board of Directors, or our Executive Director, Aimee Hiers. As always…we love to hear from you!

Giles M Schanen

Graham P. Powell

Amy H. Geddes

Alan Jones

SUBMISSIONS WANTED!

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

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

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

MEMBER NEWS

SCDTAA Docket

Angela Strickland Appointed Co-Chair of ABA Section of Litigation Automotive Subcommittee

Bowman and Brooke is pleased to announce that Angela Strickland, a partner in the firm's Columbia, South Carolina office, has been appointed to a three year term as co-chair of the American Bar Association Section of Litigation Automotive Subcommittee.

Collins & Lacy Ranked Tier 1 in 2015 U.S. News – Best Lawyers "Best Law Firms" Rankings

Collins & Lacy, P.C. is pleased to announce the firm has been recognized in the "Best Law Firms" 2015 list by U.S. News & World Report and Best Lawyers.The firm earned top-tier rankings in the areas of workers' compensation law and arbitration. The firm was also recognized in the areas of banking and finance law, criminal defense - white collar, employment law – management, mediation, and litigation – banking & finance and labor & employment.

Collins & Lacy Attorney Elected to Home Builders Association of Greater Columbia Council

Collins & Lacy, P.C. is pleased to announce Andrew Cole has been named Vice Chairman of the Home Builders Association of Greater Columbia's Remodelers Council. The Council promotes ethical business practices and sets quality standards for the remodeling industry in the Midlands. The council has been awarded seven national Council Awards for Demonstrating Remodeler Excellence (CADRE) from the National Remodelers Council. Cole is a shareholder with the firm and a certified circuit court mediator.

Collins & Lacy Welcomes Meghan Hazelwood Hall

Collins & Lacy, P.C. is pleased to announce Meghan Hazelwood Hall has joined the firm's Columbia office as an associate practicing in retail and hospitality law.

Collins & Lacy Expands Workers' Compensation Practice with the Addition of Ashley R. Kirkham

Collins & Lacy, P.C. is pleased to announce Ashley Kirkham has joined the firm's Columbia office as an associate practicing in the area of workers' compensation.

Christian Stegmaier Named Chair of DRI's 2015 Retail & Hospitality Seminar

Collins & Lacy, P.C. is pleased to announce Christian Stegmaier has been named chair of the DRI's 2015 Retail & Hospitality seminar, which is to be held May 7 and 8, 2015 in Chicago. Stegmaier is a member of the Collins & Lacy Management Committee and chair of the firm's Retail & Hospitality Practice Group. The Retail & Hospitality Committee strives to foster greater communication and partnering between the "in-house" team of attorneys, risk managers and third party administrators that defend and manage civil litigation and claims, and their outside panel counsel.

Mike Ethridge Spoke at the 2015 CLM Annual Conference

Mike Ethridge, an attorney with Carlock, Copeland and Stair, LLP, was a featured speaker at the 2015 Claims and Litigation Management Alliance annual conference in Palm Desert, California, March 25-27. Mike spoke on the topic "Litigation Management - What Matters in Measuring Success?" .

Carlock, Copeland & Stair LLP Announces Promotions

Carlock, Copeland & Stair, LLP congratulates Douglas MacKelcan on being selected to join the Firm's partnership and Laura Paton on being promoted to of counsel. Mr. Mackelcan and Ms. Paton practice out of the firm's Charleston Office.

Lee Weatherly Nominated to Claims and Litigation Management Alliance

Carlock, Copeland & Stair, LLP is pleased to announce that Lee Weatherly has accepted a client nomination to join the Claims and Litigation Management Alliance (CLM). CLM is an alliance of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. CLM's goal is to promote and further the highest standards of litigation management in pursuit of client defense. Attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows, in-house claims professionals.

David Overstreet Named President of SC Chapter of the Claims and Litigation Management Alliance

Congratulations to Carlock, Copeland & Stair Attorney, David Overstreet, on his recent appointment as the new president of the South Carolina Chapter of the Claims and Litigation Management Alliance (CLM).

Elmore Goldsmith, PA Receives Tier One Ranking in U.S. News - Best Lawyers "Best Law Firms" 2015 Survey

Elmore Goldsmith, PA was recognized in three areas in the U.S. News & World Report and Best Lawyers 2015 "Best Law Firms" rankings. In the Greenville metropolitan area, the firm received tier one rankings for Construction Law and Litigation –

Construction and a tier two ranking for Commercial Litigation.

Gallivan, White & Boyd, P.A. Receives Top Rankings in U.S. News - Best Lawyers "Best Law Firms" 2015 Survey

Gallivan, White & Boyd, P.A. has been ranked in the 2015 "Best Law Firms" list by U.S. News & World Report and Best Lawyers regionally in 23 practice areas. Gallivan, White and Boyd has been ranked a tier 1 or tier 2 "Best Law Firm" in the following practice areas:

- **Columbia, South Carolina – Tier 1**: Commercial Litigation, Insurance Law, Mass Tort Litigation/Class Actions – Defendants, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, and Workers' Compensation Law – Employers
- **Greenville, South Carolina – Tier 1**: Commercial Litigation, Copyright Law, Insurance Law, Legal Malpractice Law – Defendants, Mass Tort Litigation/Class Actions – Defendants, Mediation, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, Workers' Compensation Law – Employers
- **Greenville, South Carolina – Tier 2**: Employee Benefits (ERISA) Law, Employment Law – Management, Litigation – Intellectual Property, Professional Malpractice Law – Defendants, Trademark Law

Gallivan, White & Boyd, P.A. Opens Charleston, South Carolina Office

Gallivan, White and Boyd, P.A. is pleased to announce the opening of its new office in Charleston, South Carolina. Mikell Wyman, partner, and Blakely Molitor, associate, have joined the firm and will practice out of the new Charleston office.

Attorney John E. Cuttino Elected First Vice President of DRI – The Voice of the Defense Bar

Gallivan, White & Boyd, P.A. is pleased to announce that attorney John E. Cuttino has become First Vice President of DRI–The Voice of the Defense Bar.

H. Mills Gallivan Receives 2014 Alumni Achievement Award from The McCallie School

Gallivan, White & Boyd, P.A. is pleased to announce that senior shareholder H. Mills Gallivan received the 2014 Alumni Achievement Award from the McCallie School. McCallie's Alumni Achievement Awards are presented annually to graduates who have shown outstanding accomplishments in a chosen career and distinguished themselves professionally. Alumni are eligible to be nominated after their 15th reunion and are selected in accordance with their reunion-year cycle. This award focuses solely on career accomplishment without consideration of service to McCallie or other service endeavors.

Lindsay Joyner Elected Secretary/Treasurer of the SC Bar's Young Lawyers Division

Gallivan, White & Boyd, P.A. is pleased to announce that firm attorney Lindsay Joyner has been elected Secretary/Treasurer of the South Carolina Bar's Young Lawyers Division. Joyner practices in Gallivan, White and Boyd's Columbia, South Carolina, office.

Gallivan, White & Boyd Attorneys Recognized As Legal Elite

Gallivan, White & Boyd, P.A. is pleased to announce that three of the firm's attorneys have been recognized as being among the 2014 Legal Elite of the Midlands by Columbia Business Monthly. Gallivan, White and Boyd's Legal Elite in the Midlands include: James Brogdon - Personal Injury, Johnston Cox – Civil Litigation, and Gray Culbreath – Civil Litigation

Thomas E. Vanderbloemen Elected Shareholder at Gallivan, White & Boyd, P.A.

Gallivan, White & Boyd, P.A. is pleased to announce the election of Tom Vanderbloemen as a shareholder. Vanderbloemen is a part of the firm's Business and Commercial Practice Group, and practices in the firm's Greenville office.

Partner Breon C. M. Walker Elected to the Board of Directors for the 701 Center for Contemporary Arts

Gallivan, White & Boyd, P.A. is pleased to announce Breon C. M. Walker has been elected to the Board of Directors for the 701 Center for Contemporary Art (701 CCA). 701 CCA is a visual art center that promotes understanding, appreciation, and enjoyment of contemporary art, the creative process, and the role of art and artists in the community. Walker is a member of the firm's Business and Commercial Practice Group and Insurance Practice Group in the firm's Columbia, South Carolina, office.

Ron Wray Elected President of the South Carolina Defense Trial Attorneys Association

Gallivan, White & Boyd, P.A. is pleased to announce that firm shareholder Ron Wray was elected President of the South Carolina Defense Trial Attorneys Association at the November 7, 2014 annual meeting of the Association. Wray takes the reins from outgoing president and fellow Gallivan, White and Boyd partner Curtis Ott.

Collins & Lacy Attorney Joel Collins Sworn In as National President of the American Board of Trial Advocates

Collins & Lacy, P.C. announces co-founder Joel Collins has been named President of the American Board of Trial Advocates (ABOTA). ABOTA is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion

Continued on next page

of the Seventh Amendment to the U.S. Constitution which guarantees the right to jury trials. ABOTA's primary goal is to educate the American public about the history and value of the right to trial by jury and is dedicated to elevating the standards of integrity, honor, and courtesy in the legal profession.

McKay, Cauthen, Settana, & Stubley, P.A. Recognized as Top Law Firm by U.S. News & World Report and Best Lawyers

McKay, Cauthen, Settana, & Stubley, P.A. is pleased to announce that the firm has again received national recognition as one of U.S News & World Report's "Best Law Firms" in 2015. The firm received a metropolitan tier-2 ranking in the area of Workers' Compensation Law - Employers. Two McKay Firm attorneys are listed in The Best Lawyers in America, Senior Partner Julius W. "Jay" McKay, II and Partner M. Stephen Stubley.

George D. Gallagher Joins McKay, Cauthen, Settana, & Stubley, P.A.

McKay, Cauthen, Settana, & Stubley, P.A. is pleased to announce the addition of George D. Gallagher as the newest attorney at the firm. Mr. Gallagher practices in the area of workers' compensation defense.

The McKay Firm Welcomes Charles Kinney

McKay, Cauthen, Settana, & Stubley, P.A. is pleased to announce the addition of Charles Kinney as the newest associate at the firm. Mr. Kinney practices in the areas of government defense, general insurance defense, trucking and transportation law, commercial and business litigation, civil litigation defense, and products liability defense.

Kelli Sullivan Named 2015 Leadership in Law Nominee

The law firm of McKay, Cauthen, Settana, & Stubley, P.A. is excited to recognize Kelli Sullivan as one of the 2015 Leadership in Law honorees. Sponsored by South Carolina Lawyers Weekly, this annual event recognizes legal professionals from across the Palmetto State who have achieved success in their law practice, made contributions to society and have had a positive impact on the legal industry. Mrs. Sullivan practices in the areas of medical malpractice defense, general insurance defense and civil litigation and is a certified mediator.

McAngus Goudelock & Courie Opens Nashville Office

McAngus Goudelock & Courie, a regional insurance defense firm, has opened an office in Nashville, Tenn. The Nashville office is the firm's 12th office in the Southeast. MGC welcomes four new attorneys to the firm's Nashville office: Paul Brewer, Joey Johnsen, Chuck Mangelsdorf and Stephen Morton.

McAngus Goudelock & Courie Included in 2015 "Best Law Firms" List

McAngus Goudelock & Courie, a regional insurance defense firm, is pleased to announce its inclusion in the U.S. News – Best Lawyers "Best Law Firms" list for 2015. The firm received six Metropolitan Tier 1 rankings in several metropolitan areas; the firm has also received 11 Metropolitan Tier 2 rankings in several metropolitan areas.

McAngus Goudelock & Courie received Metropolitan Tier 1 rankings in:

- **Charleston, SC**: Litigation – ERISA;
- **Columbia, SC**: Commercial Litigation, Litigation – Banking & Finance, and Workers' Compensation Law – Employers; and
- **Greenville, SC**: Insurance Law and Workers' Compensation Law – Employers

McAngus Goudelock & Courie received Metropolitan Tier 2 rankings in:

- **Charleston, SC**: Employment Law – Individuals, Employment Law – Management, Litigation – Labor & Employment, Workers' Compensation Law – Claimants, and Workers' Compensation Law – Employers;
- **Charlotte, NC**: Commercial Litigation and Workers' Compensation Law – Employers;
- **Columbia, SC**: Appellate Practice;
- **Greenville, SC**: Personal Injury Litigation – Defendants;
- **Memphis, TN**: Insurance Law; and
- **Raleigh, NC**: Workers' Compensation Law – Employers

Hugh McAngus Receives SCDTAA's Hemphill Award

McAngus Goudelock & Courie is pleased to announce that Hugh McAngus, founding member of MGC, is the recipient of the South Carolina Defense Trial Attorneys' Association's (SCDTAA) Hemphill Award. The Hemphill Award is given to a member or former member of the SCDTAA who has shown distinguished and meritorious conduct or service to the legal profession and/or the public. This person has been instrument in developing, implementing and carrying through the objectives of the SCDTAA. In the 46 year history of the SCDTAA, Mr. McAngus is the 16th recipient of the Hemphill Award.

Richland County Bar Honors Nelson Mullins' Carl Epps for Service on Behalf of School Districts

The Richland County Bar Association has honored Carl B. Epps III, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, with its John W. Williams Distinguished Service Award given for distinguished and meritorious service. Mr. Epps practices in the areas of business litigation, product liability, mass torts, and class actions.

Mr. Epps was honored for serving as co-lead counsel on behalf of the impoverished rural school districts in the landmark case, Abbeville County School District et al., v. The State of South Carolina et al. Mr. Epps has represented the districts for more

than 20 years, most of which were pro bono, in an effort to show that the State has failed to provide the students he represents with constitutionally required educational opportunities.

Nelson Mullins' Amanda Kitts Selected as Leadership Council on Legal Diversity Fellow

Amanda Kitts, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, has been selected to participate as a Fellow in the 2015 class of Leadership Council on Legal Diversity, which identifies, trains, and advances the next generation of leaders in the legal profession. Ms. Kitts practices in the areas of pharmaceutical and medical device litigation, product liability, and business litigation.

John Kuppens Elected DRI Second Vice President

DRI – The Voice of the Defense Bar has elected John Kuppens, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, as second vice president.

Ed Mullins Elected to Executive Committee of the American Inns of Court

Ed Mullins, of counsel to Nelson Mullins Riley & Scarborough LLP, has been elected to the Executive Committee of the American Inns of Court.

Nelson Mullins Announces S.C. Promotions

The partners of Nelson Mullins Riley & Scarborough LLP have elected the following South Carolina attorneys to the partnership: Heyward D. Bonyata, Gary L. Capps, Sally H. Caver, Lucile H. Cohen, Maurice Holloway, Steven McFarland, Brad Rustin, Kathleen King Smith, and Carmen Harper Thomas. Attorneys promoted to of counsel are Lindsey Altman, Michael J. Anzelmo, Kristen E. Horne, and Chad Lott.

Nelson Mullins Ranked Nationally and in Columbia by U.S. News & World Report and Best Lawyers

U.S. News and Best Lawyers have ranked Nelson Mullins Riley & Scarborough LLP law firm nationally in eight practice areas in their 2015 rankings.

The nationally ranked practices are: Health Care Law, Commercial Litigation, Corporate Law, Financial Services Regulation Law, Litigation - Intellectual Property, Mass Tort Litigation / Class Actions – Defendants, Patent Law, and Trademark Law

Additionally, the organizations ranked Nelson Mullins as a top-tier firm in Columbia in 23 practice areas: Administrative / Regulatory Law, Appellate Practice, Bankruptcy and Creditor/Debtor Rights / Insolvency and Reorganization Law, Commercial Litigation, Corporate Law, Environmental Law, Government Relations Practice, Health Care Law, Insurance Law, Litigation - Banking & Finance, Litigation – Bankruptcy, Litigation – Environmental, Litigation - Intellectual Property, Litigation – Labor & Employment, Litigation – Securities, Litigation - Trusts & Estates, Mass Tort Litigation / Class Actions – Defendants, Mergers & Acquisitions Law, Mortgage Banking Foreclosure Law, Personal Injury Litigation – Defendants, and Product Liability Litigation – Defendants, Tax Law, Trusts & Estates Law

Nelson Mullins Champions the Cause of School Districts in Successfully Challenging the Constitutionality of South Carolina's Public Education System

The South Carolina Supreme Court ruled that the State of South Carolina has failed to meet its obligation to provide its school children the opportunity to receive a "minimally adequate education," the constitutional standard in this state. The plaintiffs are a group of rural school districts, students, and taxpayers who brought the suit against the State of South Carolina and other governmental officials in Abbeville County School District et al., v. The State of South Carolina et al., which was originally filed in Lee County, SC. Students in the plaintiff school districts are predominantly living in poverty in the state's poorest and most isolated areas. Plaintiffs' lawsuit challenged the state's funding of South Carolina's public schools, as well as the adequacy of the education system overall.

Nelson Mullins partner Carl Epps has represented the districts since 1993. A non-jury trial lasted 102 days in 2003-2004, with over 70 witnesses testifying. The South Carolina Supreme Court heard oral arguments in June 2008, but issued no decision at that time.

In 2012, the South Carolina Supreme Court scheduled a re-argument of the 2008 appeal. On November 12, 2014, the Supreme Court issued its ruling, affirming the trial court's conclusion that the State had failed to meet its constitutional obligation to the students in the plaintiff school districts. Modifying the trial court's decision, the Supreme Court's decision found the entire public education system to be constitutionally lacking.

Although the Supreme Court rejected the Defendants' argument that the issues in this lawsuit were matters of legislative policy and prerogative, the Court declined to dictate a solution to the constitutional shortcomings. Instead, the Supreme Court instructed the parties to work together to create and "present a plan to address the constitutional violation announced today."

The Court has directed the parties to reappear within a reasonable time to present a plan to address the constitutional violation, with emphasis on what is needed statutorily and administratively to resolve the problems in these districts at both state and local levels.

Continued on next page

Member News cont.

Alana Odom Appointed to the Board of the Riverbanks Park Commission

Alana Odom Williams has been appointed to the board of the Riverbanks Park Commission. Ms. Williams is a partner in the Columbia office of Nelson Mullins Riley & Scarborough LLP where she practices in the areas of business litigation, complex consumer and financial services litigation, and insurance coverage and bad faith claims. The seven-member Riverbanks Park Commission is responsible to the citizens of the Midlands for the financial stability of the Riverbanks Zoo and Garden.

Ogletree Deakins Elects John Merrell as Shareholder

Ogletree, Deakins, Nash, Smoak & Stewart, P.C is pleased to announce that John Merrell has been elected to the position of shareholder. Merrell practices in the firm's Greenville office.

Richardson Plowden selected as a 2015 "Best Law Firm" by Best Lawyers and U.S. News and World Report

Richardson Plowden & Robinson, P.A. was ranked by Best Lawyers and U.S. News & World Report as a 2015 "Best Law Firm." The Firm received a Metropolitan First-Tier Ranking for Columbia, SC in the areas of Administrative and Regulatory Law, Commercial Litigation, Construction Law, Legal Malpractice Law – Defendants, Litigation – Construction Law, and Real Estate Law.

Richardson Plowden Names Nettles and Tesh as Shareholders

Richardson Plowden & Robinson, P.A. is pleased to announce that attorneys Samia H. Nettles and Adam S. Tesh have been named shareholders in the Firm. Nettles joined Richardson Plowden in the Charleston office in 2012. Tesh joined Richardson Plowden in the Columbia office in 2001.

Richardson Plowden Launches Newly Redesigned Website

Richardson Plowden & Robinson, P.A. is proud to announce the launch of its newly redesigned website, www.RichardsonPlowden.com. The newly redesigned site was developed graphically by Florence Design in Columbia and programmed by Stormfront Productions, which is based in Indiana.

Richardson Plowden Welcomes James M. Whalen to the Firm

Richardson Plowden & Robinson, P.A. is pleased to announce that James M. Whalen has joined the firm as an associate attorney in the Charleston office.

Smith Moore Leatherwood Attorneys Named to 2014 Super Lawyers Business Edition

Smith Moore Leatherwood is pleased to announce that 2 of the firm's attorneys were named to the 2014 Super Lawyers Business Edition, honoring key firms and attorneys in the U.S. who have received outstanding results for their corporate clients.

The Smith Moore Leatherwood attorneys honored in Super Lawyers Business Edition 2014 attorneys are: Michael Bowers – Business Litigation (Charleston, S.C.) and Steven Farrar – Business Litigation (Greenville, S.C.)

Smith Moore Leatherwood Recognized by U.S. News & World Report and Best Lawyers For Fifth Consecutive Year

U.S. News & World Report and Best Lawyers, for the fifth consecutive year, has included Smith Moore Leatherwood in the 2015 "Best Law Firms" rankings.

The firm earned Metropolitan Tier 1 rankings in its Atlanta, Charlotte, Greensboro, Greenville and Raleigh offices in a total of 47 practice areas. The firm also received 37 additional Metropolitan rankings.

The following practice areas were ranked Metropolitan Tier 1:

- **Atlanta, Ga.**: Insurance Law
- **Charlotte, N.C.**: Antitrust Law, Commercial Litigation, Litigation – Antitrust, Litigation – Securities, Mass Tort Litigation/Class Actions – Defendants, Trust & Estates Law
- **Greensboro, N.C.**: Antitrust Law, Appellate Practice, Banking and Finance Law, Commercial Litigation, Copyright Law, Corporate Law, Employment Law – Individuals, Employment Law – Management, Environmental Law, Health Care Law, Land Use & Zoning Law, Litigation – Antitrust, Litigation – Environmental, Litigation – Intellectual Property, Litigation – Labor & Employment, Litigation – Land Use & Zoning, Litigation – Patent, Personal Injury Litigation – Defendants, Real Estate Law, Securities Regulation, Tax Law, Trademark Law, and Workers' Compensation Law – Employers
- **Greenville, S.C.**: Commercial Litigation, Corporate Law, Employee Benefits (ERISA) Law, Legal Malpractice Law – Defendants, Litigation – Construction, Litigation – Real Estate, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, Professional Malpractice Law – Defendants, Real Estate Law, Tax Law, and Trusts & Estates Law
- **Raleigh, N.C.**: Employment Law – Management, Health Care Law, Labor Law – Management, Land Use & Zoning Law, and Litigation – Land Use & Zoning

Attorney Steve Fararr Elected to DRI Board of Directors

Smith Moore Leatherwood is pleased to announce that attorney Steve Farrar, who was recently elected as the president-elect of the Federation of Defense and Corporate Counsel (FDCC), has been appointed to the board of directors of the Defense Research Institute (DRI) organization.

Sweeny Wingate & Barrow, PA Names P. Jason Reynolds, as a Member

P. Jason Reynolds, a 2002 graduate of The Citadel and a 2007 graduate of the University of South Carolina School of Law, has been named a member at Sweeny Wingate & Barrow, PA.

Turner Padget Receives First-Tier Rankings in the 2015 Best Law Firms Publication

U.S. News & World Report and Best Lawyers have released the 2015 "Best Law Firms," and the firm earned Metropolitan Tier 1 rankings in all offices - Charleston, Columbia, Florence, Greenville and Myrtle Beach. Turner Padget is recognized in the following categories as among the top law firms in the respective metropolitan areas:

- **Charleston**: Professional Malpractice Law – Defendants;
- **Columbia**: Banking and Finance Law, Employee Benefits (ERISA) Law, Employment Law – Management, Litigation – Construction, Litigation - Labor & Employment, Litigation - Real Estate, Litigation - Trusts & Estates, Mediation, Product Liability Litigation – Defendants, andWorkers' Compensation Law – Employers;
- **Florence:** Tax Law;
- **Greenville**: Arbitration, Mediation; and
- **Myrtle Beach**: Commercial Litigation and Real Estate Law

Turner Padget's Mike Chase Speaks at South Carolina Workers' Compensation Educational Association Annual Education Conference

Turner Padget Graham & Laney P.A. is pleased to announce that Mike Chase spoke at the South Carolina Workers' Compensation Educational Association (SCWCEA) annual education conference in Hilton Head, S.C. Chase led a panel discussing workers' compensation on October 13, 2014. The issues discussed included employers' responsibility in a workers' compensation claim, miscommunications in the handling of a workers' compensation claim and updated workers' compensation laws. Also participating in the panel were Lucinda Fountain, Honda of S.C. Manufacturing, Inc. and Joanie Winters, Esq., Winters Law Firm.

Turner Padget Helps to Feed Florence County School-Children without Weekend Lunches

Help4Kids Florence and Turner Padget Graham & Laney P.A. are pleased to announce that they have partnered to fill the hunger gap for Florence County elementary school-aged children who depend on school meals as their primary source of nourishment. The 66 attorneys of Turner Padget spent part of their firmwide annual retreat at Help4Kids Florence's warehouse at 2420 Hoffmeyer Road packing 900 of the lunches. In addition, R. Wayne Byrd, chief executive officer of Turner Padget, presented Help4Kids Florence with $2,500, covering the cost of the 900 bags that the firm packed.

René Josey Elected to ABOTA and the Board of Directors of the South Carolina Bar Foundation

The firm of Turner Padget Graham & Laney, P.A. proudly announces that J. Rene Josey has been approved for membership by the National Board of Directors of the American Board of Trial Advocates ("ABOTA") as well as the Board of Directors of the South Carolina Bar Foundation. Mr. Josey is a shareholder in the Florence office and is a member of the Business Litigation team.

Kennaday Elected Chairman of Advisory Board of First Tee

Turner Padget is pleased to announce that Thomas M. Kennaday, of counsel in the firm's Columbia office, has been elected Chairman of the Advisory Board of the First Tee of Columbia. The First Tee of Columbia is an official Chapter of The First Tee, an initiative of the World Golf Foundation. Since 2004, The First Tee of Columbia has introduced the game of golf and its inherent values to thousands of young people. On golf courses and in elementary schools, The First Tee of Columbia helps shape the lives of young people from all walks of life by teaching them values like integrity, respect and perseverance through the game of golf.

2015 Benchmark Litigation Recognizes Firm and Turner Padget Litigators

Turner Padget is proud to announce that eight attorneys were selected for inclusion in the latest edition of Benchmark Litigation. The firm also was honored to be named to their list of "highly recommended" litigation firms in South Carolina.

Turner Padget's "Local Litigation Stars" and designated practices are as follows:

- R. Wayne Byrd – General Commercial; Securities
- J. Kenneth Carter, Jr. – Construction; Personal Injury; Product Liability
- Richard S. Dukes – Product Liability; Professional Liability
- Edward W. Laney, IV - Insurance
- Steven W. Ouzts – Construction; Product Liability
- Thomas C. Salane – Appellate; Insurance; Product Liability; Professional Liability
- W. Duvall Spruill – General Commercial
- John S. Wilkerson, III – General Commercial; Insurance; Labor & Employment; Product Liability

David Marshall Named Shareholder

Turner Padget Graham & Laney, P.A. has elected David C. Marshall as a shareholder in the firm's Columbia office.

Continued on bottom of next page

SCDTAA Events

25th Annual Trial Academy

by William "Trey" W. Watkins, Jr.

The 25th Annual Trial Academy for the South Carolina Defense Trial Attorneys' Association is scheduled for May 20-22, 2015 in Greenville, South Carolina. SCDTAA looks forward to welcoming its young lawyers for this three day program. The first two days of the seminar provide intense training and instruction to the participants about all aspects of trial preparation and the conduct of an actual trial. During the first two days, the participants will have access to the trial problem and they will spend time preparing their case for a jury trial that will occur on the third day of the seminar at the Greenville County Courthouse.

Six trials will take place, and we have invited members of the South Carolina Judiciary to serve as trial judges. All of the participants in the trial academy will be licensed members of the Bar. Therefore, although the scenario is fictitious, the setting will be almost like an actual civil trial.

In order to make the trial experience as authentic as possible for the participants, we are recruiting jurors to serve at the trial. The jurors can provide feedback to the participants and to the Academy regarding their view of the actual trials.

SCDTAA is in the process of recruiting jurors and witnesses to serve on Friday, May 22. All of those who participate will receive a civil trial Rule 403, SCRCP trial experience. Further, licensed members of the bar will receive CLE credit for their involvement and participation. Should you wish to participate as a juror or witness, please send an email to Sandra.Schultz@walltempleton.com.

We look forward to the fellowship with our members and the judiciary during the trial academy. A Young Lawyers reception is scheduled for Wednesday evening and a Trial Academy reception is scheduled for Thursday evening. Please join us for the reception with the judges on Thursday and stay over on Friday to participate as a witness or juror.

We look forward to seeing you in Greenville and hope you will sign up your Young Lawyers for this year's Trial Academy.

Member News cont. From page 11

Julie Moose Selected Leadership in Law

Turner Padget is pleased to announce that Julie J. Moose has been selected as a recipient of the 2015 Leadership in Law award by the South Carolina Lawyers Weekly. The award recognizes individuals whose leadership, both in the legal profession and in the community, has made a positive impact on our state. Ms. Moose is a shareholder in the Florence office where she represents businesses and individuals in the area of business law in both litigation and non-litigation contexts, as well as handling complex commercial litigation.

Kristen Nichols Elected to Board of SCWLA

Turner Padget Graham & Laney, P.A. is pleased to announce that Kristen N. Nichols has been elected to the Board of Directors of the South Carolina Women Lawyers Association.

Kristen Nichols Joins Turner Padget Charleston Office

Kristen N. Nichols has joined the law firm of Turner Padget Graham & Laney, P.A. and is based in the Charleston office. Ms. Nichols practices in the areas of Alternative Dispute Resolution, Real Estate and Lending Transactions, and Business and Commercial Litigation.

Greenville Attorney Receives National Craft Beer Award

Greenville attorney Brook Bristow has received a national craft beer industry award in Portland, Oregon. Bristow is the first South Carolinian to receive the F.X. Matt Defense of Small Brewing Industry Award, presented on April 15 at the Craft Brewers Conference & BrewExpo America® Conference. More than 11,000 industry representatives attended the presentation at Portland's Veterans Memorial Coliseum.

Bristow was honored for his pro bono legal work on the passage of the 2013 Pint Law and 2014 Stone Law in South Carolina. The Pint Law created a rapid economic benefit in South Carolina, with a $13.7 million initial impact from the opening of 12 new breweries and a projected additional economic impact of nearly $71 million, according to a South Carolina Brewers Guild economic impact survey released in late 2014.

Bristow credited "the many brewers, legislators, and craft beer enthusiasts that worked together to pass the groundbreaking legislation that has decidedly moved South Carolina into a new era of growth for the craft beer industry." Bristow practices law with Bradford Neal Martin & Associates, PA in Greenville. He blogs at beerofsc.com and can be followed on Twitter at @brookbristow.

Legislative/Judicial Reception

by Robert E. Tyson, Jr.

On April 15, the SCDTAA once again hosted a legislative reception at the Oyster Bar in Columbia. Guests included members and staff of the House and Senate Judiciary Committees and other legislative leadership. Many of the Leadership are attorneys, including the Speaker, Jay Lucas, and the Speaker Pro Tem, Tommy Pope. In addition, seventeen of the twenty-five members of the House Judiciary Committee are attorneys, while thirteen of the twenty-three members of the Senate Judiciary committee are attorneys.

The legislative reception provided a great opportunity for members of the General Assembly to hear directly from defense lawyers, plus enjoy great food and company. It is vitally important for the defense bar to have relationships with members of the General Assembly so that when issues arise that affect our membership we can engage quickly and educate them through established and trusting friendships. We already have strong relationships with the legislature, and this reception allowed us to strengthen those relationships with legislators who may have been a classmate, or are colleagues in the legal community or colleagues home in the business community.

Having a greater presence at the State House enhances our ability to advocate on the issues affecting the defense bar. For example, pending legislation involves rules of evidence, rules of civil procedure, jurisdiction of the state grand jury, election of judges, and amendments to strengthen the Freedom of Information Act. Clearly, changes to these and other laws can have a great impact on our practice. As a result, it is imperative for the defense bar to remain close to the General Assembly.

A sincere thanks goes out to the members of the General Assembly and the numerous Judges and staff who enjoyed some good food and visited with many members of the defense bar. We already are looking forward to next year.

SCDTAA
EVENTS

2015 Summer Meeting
Asheville, NC • July 23 - 25

by Mark A. Allison

While we are all enjoying spring and warmer weather, the Association is preparing for summer. The 2015 Summer Meeting will be held from July 23-25 at the Omni Grove Park Inn in Asheville, North Carolina. We invite you to join us for another exceptional program and time to enjoy friends and family.

This year's program will offer over seven hours of CLE credit. Our program includes a presentation from Mike Ethridge, a partner with Carlock, Copeland & Stair, that satisfies the mental health and substance abuse CLE credit. We will also hear from Liz Huntley of Lightfoot, Franklin & White in Birmingham, Alabama. The Honorable Bruce Hendricks will share wisdom from the federal bench. In addition, we will offer breakout sessions from our substantive law committees, and a panel of mediators to roundtable effective mediation strategies.

The Summer Meeting continues to provide an incredible program for our workers' compensation members. Last year, we were honored to have all seven Commissioners in attendance and participating in our four hour program devoted to workers' compensation practice. We anticipate another solid program that allows interaction with the commissioners, as well as our Breakfast with the Commissioners on Saturday.

Last year, our Young Lawyers' Division put on a record-breaking silent auction, offering more options and raising more money than any previous auction. We are excited to try and top last year's exciting auction as part of our Thursday evening cocktail reception. As always, we also look forward to outdoor activities, including a golf tournament, tennis, canopy tours, and our Friday night bluegrass and barbeque.

Please mark your calendars now. We hope to see you in July!

2015 Annual Meeting
Amelia Island • Nov. 5-6

by James B. Hood

Mark your calendars now for the Forty-Eighth Annual Meeting of the South Carolina Defense Trial Attorneys' Association! On November 5-8, we will return to the stunning Ritz Carlton at Amelia Island for a great opportunity to reconnect with friends, colleagues and our judiciary.

Your Annual Meeting Committee is hard at work to ensure this weekend is equal parts education and recreation. Amelia Island has something for everyone. In addition to its spectacular beachfront location, the Ritz Carlton at Amelia Island offers outstanding golf, tennis, and fishing options.

Our Annual Meeting also will feature cutting edge CLE programming. Our fast-paced format is intended to inform and entertain, and will allow us to bring you more content in shorter increments to ensure that you are up to date on the recent legal developments. We are excited to present two judicial panels this year. First, Molly Craig will moderate a discussion with a panel of trial judges that will address some of the most common and challenging issues encountered by trial lawyers. Our second judicial panel will be moderated by Mitch Brown, and will focus on key appellate issues. Social activities will begin on Thursday evening with the President's Reception, and on Friday night we will enjoy a cocktail reception before heading to the black tie optional Dinner and Dance. Before Saturday evening's Oyster Roast, you can enjoy golf, football, the beach and all Amelia Island has to offer. This will be a weekend you do not want to miss! Make your plans now to enjoy another exceptional Annual Meeting.

Young Lawyer Update

by William "Trey" W. Watkins, Jr.

Leadership

Claude Prevost of Collins & Lacy continues to serve as the President-Elect of the Young Lawyer Division, and Jay Thompson of Nelson Mullins as our Secretary. Both of these gentlemen will serve with me as officers in 2015. We are pleased to have as our area representatives Derrick Newberry of the Wilkes Law Firm for the lowcountry, Childs Thrasher of Gallivan White & Boyd as our midlands representative, Duffie Powers of Gallivan White & Boyd as our upstate representative, and Alan Jones of McAngus Goudelock & Courie as our Pee Dee representative.

Trial Academy

The Association focuses its efforts on the promotion of civil justice and continuing legal education. This year marks the 25th Annual Trial Academy. On Friday, May 22, several mock trials will take place before Circuit Court Judges at the Courthouse in Greenville. We are seeking jurors and witnesses to serve. This is a great opportunity to experience a live trial as a juror or witness and interact with Circuit Court Judges and other lawyers from around the state. Anyone is welcome and everyone is encouraged to participate as a juror.

SCDTAA is providing free lunch and CLE credits, and the Supreme Court has agreed to provide one Rule 403 Civil Jury Trial experience credit for those who serve as jurors. The trials typically last from 8:30 a.m. until 4:30 p.m. and will be completed in one day.

Please sign up as a juror or witness by sending your full name, email address, and firm or school name to Trey.Watkins@WallTempleton.com with a copy to Sandra.Schultz@WallTempleton.com. We hope you will take advantage of this opportunity and that you will join us as a juror.

Summer Meeting Auction Items

Our Summer Meeting will be held at the Grove Park Inn in Asheville, North Carolina, from July 23-25. As always, we will conduct an auction at our Summer Meeting. This year, in addition to many other items, we will offer three exciting trips. The trips include the white sand beaches of a Four Seasons Resort in Mexico, the Canadian rocky mountains of a Fairmont Banff Springs Ski and Spa Resort, and an insider's tour and tasting in Napa.

Four Seasons Resort
Punta Mita, Mexico

(Private Culinary Experience, Four Seasons Resort Punta Mita; Five-Night Luxury Stay with Airfare for Two)

This Trip Includes:

- Five-night stay in a garden-view Casita room at the Four Seasons Resort Punta Mita, Mexico
- Daily breakfast for two
- Private cooking class for two with your choice of chefs from the resort's restaurants Bahia or Ketsi
- Round-trip coach class airfare for two from within the 48 contiguous U.S. states to Puerto Vallarta, Mexico
- Winspire booking & concierge service

Four Seasons Resort Punta Mita is located in a 1,500-acre private peninsula on the northern tip of Bahía de Banderas – one of the world's largest natural bays. The shoreline is fringed by over nine miles of pristine white sand and rugged lava rock formations, and is located about an hour from Puerto Vallarta. This resort is rated #4 of the Top 35 Resorts in Mexico by Conde Nast Traveler and among the Top 500 in the World by Travel+Leisure Magazine.

Enjoy round-trip coach class airfare for two, a five-night stay in a garden-view Casita room including daily breakfast for two at this five-star resort which offers more privacy and better service than any other hotel on Mexico's Pacific Coast. Three pools, including an infinity-edge pool, together with two magnificent private beaches are attended by Four Seasons signature pool service with chilled towels,

Continued on next page

face misting, bottled water, fresh juices and fruit. The spa offers exercise classes and a mix of New Age and Mexican treatments. Besides a well-equipped gym, the resort provides a whirlpool, ten lighted tennis courts, snorkeling equipment and kayaks. One of two Jack Nicklaus signature golf courses boasts the world's only natural island hole.

Private Culinary Experience for Two - Meet one of Four Seasons Resort Punta Mita chefs on the beach and discover the many different varieties of seafood that grace Punta Mita's shores, just delivered by the local fishermen. Then proceed with the chef to one of the following private cooking class options:

Bahia "Catch of the Day" Cooking Class (Four hours) - This private class puts you alongside the chef learning different preparations for your choice of the "catch of the day", and then savoring the results with a leisurely lunch.

·Ketsi by Richard Sandoval Cooking Class (Four hours) - A private class and lunch for those who wish to learn the art of modern Mexican cuisine. Learn skills to prepare an authentic Mexican dinner and impress your friends back home.

This is a $14,645 value
and bidding will start at $5,950.

The Fairmont Banff Springs (Alberta)

This Trip Includes:

- Four-night stay in a standard Fairmont room at the Fairmont Banff Springs Resort in Alberta, Canada
- Daily breakfast for two
- Round-trip coach class airfare for two from within the 48 contiguous U.S. states to Calgary, Canada
- Winspire booking & concierge service

Enjoy round-trip coach class airfare for two to Calgary, Canada and a four-night stay in a standard Fairmont room at this prestigious member of Conde Nast's Gold List and one of the Top 500 Hotels in the World according to Travel+Leisure Magazine. Your stay includes daily breakfast for two in the dining room. This property is located 64 miles from Calgary.

Few hotels in the world can rival the majesty, hospitality and scenery of The Fairmont Banff Springs. Its unique blend of opulence and seclusion has been a symbol of Rocky Mountain magnificence for more than a century. Styled after a Scottish baronial castle, The Fairmont Banff Springs offers stunning vistas, championship golf courses, unparalleled skiing, classic cuisine and Willow Stream, a world class European-style spa. Experience timeless beauty and luxurious comfort in a pristine wilderness.

This is a $7,052 value
and bidding will start at $2,950.

Napa Wine Country VIP Insiders Tour

(Exclusive Winery Tours & Tastings, Private Chef Dinner with Wine Pairing, Guided Napa Tour, Caldwell Vineyard Guesthouse; Three-Night Stay with Airfare for Two)

This Experience Includes:

- Three-night stay at Caldwell Vineyard's Guest House
- Caldwell Vineyard Insider's tour and tasting for two
- Winemaker Dinner for two with Marbue Marke and Chef Gary Penir
- Neiman Cellars private tasting and lunch for two
- Private guided Napa tour and transportation with Paul Diaz, Wine Educator
- Round-trip coach class airfare for two from within the 48 contiguous U.S. states to San Francisco or Oakland, CA
- Winspire booking & concierge service

These up and coming wineries have been described as the next Harlan, Screaming Eagle, and Spottswoode of Napa Valley.

Caldwell Vineyard (Napa): Enjoy an insider's tour and tasting for two and a three-night stay in the Caldwell Vineyard Guest House. Your tasting will be with founder John Caldwell or his winemaker, Marbue Marke, in their 20,000 square foot cave where you will be immersed in his informative, intriguing stories. Hollywood has already taken note of John Caldwell's story; how he single-handedly became the first Californian to discover and import rootstocks and grapevine clones from France. They are now referred to as the "Caldwell Clones" and today, in a Bordeaux-style vineyard, clones are indus-

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Legislative Update

by Jeffrey N. Thordahl, SCDTAA Lobbyist

The 2015 Legislative session is well underway. The big headline topics continue to be road funding and ethics reform, with the newest headline being a proposed Bond Bill of almost $500 million. There has not been resolution of road funding or ethics reform to date, as compromise and majority consensus has been elusive. Road funding hearings have been frequent in both the House and Senate, but there are competing plans which will likely lead to extensive debate in each body.

Budget

The House of Representatives funded several requests by Chief Justice Jean Toal including;

- $1,537,000 for information technology to increase network security and networking;
- $450,000 in one-time money to purchase digital court recording. The digital recording devices would be used to capture the verbatim record of court proceedings;
- $3,000,000 in one-time money to complete the Disaster Recovery and Business Continuity (DR-BC) plan. The DR-BC plan started in the fall of 2014 with the initial funds allocated by the Legislature. At this time, SCJD is beginning with the study and planning phase, followed by the purchase of appropriate hardware and software necessary to build out the DR-BC plan. This information technology initiative will enable the courts to continue business in the event of a local disaster.

The following requests did not make the House of Representatives version from March 12:

- Two new Family Court Judges and staff ($645,500) and salary for a Circuit Court Judge ($136,905)--This request had strong support but did not make the final version of the budget once it became apparent that the Bond Bill did not have sufficient support;
- $9,200,000 for Calhoun building renovations--lost when the Bond Bill failed;
- $5,369,056 for judicial pay raises--This was initially adopted as one-time money. The House removed that money, but seems committed to finding a way to fund pay raises permanently, though possibly not this year.

The Senate must also approve or amend these provisions before the budget goes to Governor Haley for review.

Legislation

There are several bills of note to the legal community that are moving through the legislative process:

S. 177 (Rules of Evidence--Foreign Records) - This bill would adopt the Federal Rule (902) for self-authenticating records. It has passed both bodies and will be sent to the Governor for her signature.

S. 268 (Jurisdiction of State Grand Jury)--This bill would make the South Carolina grand jury process consistent with the federal grand jury process by limiting the presiding judge's oversight of the investigation. The bill is now on the Senate calendar but has received objection and is now in a holding pattern indefinitely.

S. 10 (FOIA bill related to autopsy reports)--This bill was adopted by the Senate and has been sent to the House Judiciary Committee. The amended version creates a new cause of death report with limited information that must be completed within 72 hours of the autopsy and made available to the public.

S. 16 (Elimination of concurrent jurisdiction under Longshore and Harbor Workers' Compensation Act and State Workers' Compensation Act) --This bill has been the subject of several hearings in both the House and Senate. Strong views have been expressed by proponents and opponents. Given the Senate Rules, if the bill makes it to the Senate calendar it is likely to be on hold unless a compromise can be reached. The House bill will be debated by the full House in mid-April.

H. 3202 (South Carolina Whistleblower and Public Employee Protection Act)--This bill makes several clarifications to the Act, including the amount of money an employee can receive due to savings generated by the employee's report, and the time-frame in which a cause of action must be brought. It passed the House unanimously, and will now be considered by the Senate Judiciary Committee.

Judicial Elections

Chief Justice Jean Toal will retire at the end of 2015. Justice Costa Pleicones is the only applicant to file for the Chief Justice Seat. His screening is scheduled for April 24, 2015. If elected, Justice Pleiconas will serve until the end of 2016.

Below is a link to a complete listing of the terms of all judges in the state and the current status of their term.

http://www.scstatehouse.gov/judicialmeritpage/TermsofJudges03042015.pdf

Young Lawyer Update cont.

try standard. Caldwell produces estate-grown hillside fruit for its signature wines, "Gold", "Silver" and "Rocket Science". The new varietals collection culminates Caldwell's work over the last 25 years.

Situated on the Caldwell's private 123-acre estate, the charming two-bedroom, one-bath guest cottage offers a truly serene experience with breathtaking views of the Napa Valley from its expansive wrap-around deck. The cottage features two bedrooms (one with a queen bed, one with a double bed) and a fully equipped kitchen.

Winemaker Dinner with Marbue Marke and Chef Gary Penir: Enjoy a wine tasting and dinner for two, created by Executive Chef, Gary Penir, along with Winemaker Marbue Marke, at the Caldwell Cottage. Chef Gary Penir has worked in kitchens in both Napa and Sonoma counties and has refined the skills and techniques required to deliver exceptional foods from all over the world. He recently launched Cuisine GP, designed to create excellent food and a unique culinary experience for his guests in Napa Valley.

Neiman Cellars (Napa): Enjoy an insider's tasting with owner/winemaker Drew Neiman and a gourmet seasonal lunch for two in the Neiman Room at the top-rated Inn on Randolph. After working under legendary winemaker John Kongsgaard at Newton, Luna, Kongsgaard and Arietta wineries, Drew established Neiman Cellars in 1997 with three tons of fruit purchased from the Caldwell Vineyard. Total production is 600 cases of minimal intervention, handcrafted, artisan, small batch wine. Wine critic Robert Parker has called Neiman "brilliant". He has been featured in FOOD & WINE, Wine Spectator, InStyle and has poured his wine at the James Beard House in NYC.

Private Guided Napa Tour & Transportation with Paul Diaz, Wine Educator: Spend the day with Paul and enjoy VIP treatment as he joins you at the Caldwell Cottage to start your journey through Napa. He will provide transportation and drive you to the Neiman Cellars tasting as well as to another winery that you will select with him based on your preferences. Paul, a fourth generation "Sonoman", takes a unique approach to immersing clientele into the culture of the valley with a passion that goes beyond what is in the bottle. A winemaker and a grape grower as well, Paul will educate in all phases of the wine business as few other guides in the valley can. Because this trip is an insiders tour, it is priceless and bidding will start at $3,800.

Please consider attending the Summer Meeting and bidding on your next vacation at the SCDTAA silent auction!

We are continuing to collect other action items, so please let me know what you or your contacts may be able to donate this year.

This year is shaping up well for the Young Lawyer Division and we look forward to seeing you at our events.

The SCDTAA Needs You!

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

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

The Honorable Roger M. Young, Sr.
South Carolina Circuit Court Judge

Judge Roger M. Young, Sr. was born in Michigan in 1960. Two years later, he and his parents moved to North Charleston, S.C., which at the time was unincorporated and was known simply as "The North Area." Judge Young graduated from Stall High School in 1977, and from Baptist College at Charleston (now Charleston Southern University) in 1980. Judge Young graduated from the University of South Carolina School of Law in 1983, and also received a Master of Judicial Studies degree from the University of Nevada, Reno in 2000.

Following law school, Judge Young began a solo practice. He served as a part-time Municipal Court Judge for the City of North Charleston from 1988 to 1990. Between 1990 and 1994, Judge Young served two terms in the South Carolina House of Representatives. From 1996 to 2003, Judge Young served as the Master-in-Equity for Charleston County. In 2003, he became a Circuit Judge, the position he holds today.

Judge Young is married to Tara Amick of Lexington, S.C. Although the two met in law school, they did not see each other for approximately 30 years. They reunited three years ago and were married six months later. They continue to reside in North Charleston.

What factors led you to a career in the law?

When I was 13 my dad got me a job cutting grass at the old Baptist College at Charleston for two summers in a row. I cut grass 8 hours a day all day in the hot summer sun. One of the older guys said that he was going to law school to become a lawyer. I wasn't sure what a lawyer did, but I knew it had to be better than cutting grass all day, so I decided I needed to become a lawyer, too.

What has been the biggest influence in your legal career?

I have a good friend who encouraged me at just the right moment in time to take some chances that have led me to do what I'm doing today.

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

Be on time and prepared. Figure out a realistic assessment of the value of your case. I'm not one of those judges who chastises lawyers for their appearance, but you should ask yourself if your appearance might distract a judge or a juror from the point you are trying to make. If so, then you are possibly hurting your client's case. You are an advocate – you are not the cause. Express your individuality some other way.

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

Practicing law is not a 9 to 5 job. Absolutely nothing beats preparation. Experience is wonderful, but it takes time to get it. Intelligence is a great gift if you possess it, but the best thing you can do to represent your client is to be prepared in whatever you are doing. If you want to be a trial lawyer, go watch good lawyers try cases. Learn how a courthouse works and who runs it (hint: It's not the judge). Get to know some older lawyers. They love to help young lawyers and are usually very generous with their time. Treat other people like you'd want to be treated. It pays off in the long run and makes you feel better in the short run.

What do you enjoy doing in your spare time?

I like to cook, eat, drink wine and mess around with my computers. I have a wonderful wife who is fun to be around and puts up with most of my idiosyncrasies. I'm in a bowling league one night a week. I like that it is in-doors with air-conditioning. I've yet to lose a ball.

What is your favorite television show?

All-time: West Wing. Current: Any of Anthony Bourdain's travel/food shows and Diners, Drive-ins, and Dives. I also love to watch British spy shows and murder mysteries on Netflix. Nobody does those better than the Brits. I also enjoy watching a show called "How It's Made" while I read the newspaper Sunday mornings. It fascinates me how things are made. I have zero aptitude for building things with my hands and greatly admire people who can.

What was the last book you read?

The last physical book I read in hand was "Downtown" by Ferrol Sams. Most of the books I "read" these days I actually listen to on the Audible app on my iPhone. The last book I listened to was "Killers of the King", by Charles Spencer. It is a terrific book about the regicide of Charles I and subsequent retribution by his son Charles II. The book discusses nasty, brutal business. You may learn more about being drawn and quartered than you'll ever need to know, but it's a tangential part of Charleston's and South Carolina's history.

DRI Update

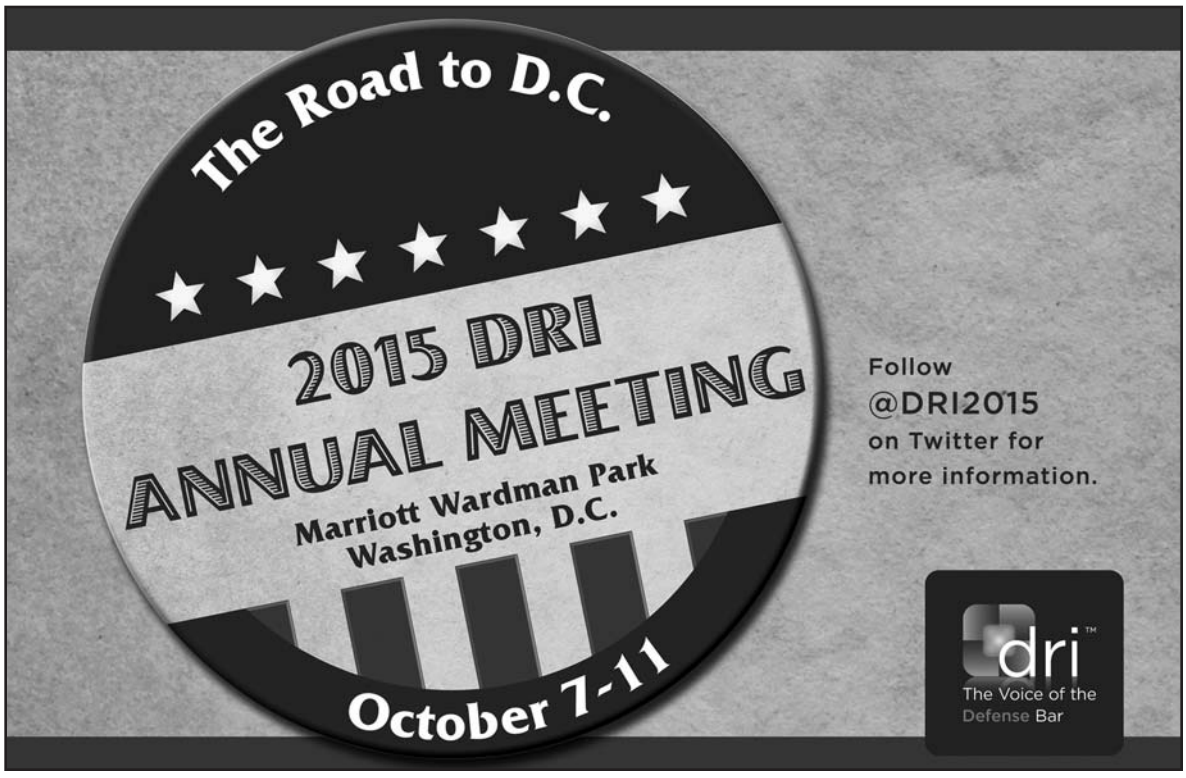
By Gray T. Culbreath

The first quarter of 2015 has been a busy year for South Carolina and DRI. As many of you know, SCDTAA member John Kuppens was elected Second Vice President of DRI at the DRI Annual Meeting in October of last year. This will give South Carolina back-to-back DRI presidents from our membership. He and John Cuttino helped conduct the DRI Leadership Meeting in Chicago in January, which I attended as DRI state representative. This meeting gave me an excellent opportunity to network with other state representatives and SLDO officers to learn ways that SCDTAA can improve its offerings to our membership. As usual, I came away from the meeting realizing that SCDTAA truly leads the way in terms of providing value to its members.

In 2015, DRI is offering a wide variety of CLE programs designed to educate members on content specific areas of substantive law. I would encourage each of you to go to www.DRI.org and look at the options available for CLE programing during the year. For you first time members of SCDTAA, you can join DRI for the first year for free. If you are a young lawyer, defined as less than five years in practice, you are entitled to not only the free membership but also a free seminar voucher which is a value of almost $800.00.

DRI's Annual Meeting this year will be held early from October 7-11 in Washington, D.C. at the Washington Marriott Wardman Park Hotel. I would encourage each of you to consider attending this meeting. It is packed not only with informative CLE and excellent opportunities to network, but also panel counsel meetings for a variety of insurers and corporations.

If you have any questions about DRI or how to get further involved, please do not hesitate to contact me at gculbreath@gwblawfirm.com or 803-724-1850./



ARTICLE

Performance Bond Applicability in Construction Litigation

by David C. Kimball & Drew H. Butler [1]

In conjunction with "latent defect" and "progressive injury" litigation in the construction industry over the past ten to twenty years, various risk allocation products have evolved to provide owners, design professionals and contractors a variety of options to protect their interests before, during and after the completion of a building project. Two of the most common methods of risk allocation that are present in nearly every construction project are commercial general liability ("CGL") insurance policies and performance bonds. When properly employed, these products complement each other, generally providing adequate security to all stakeholders in a project.

Unfortunately, common misconceptions about the function and purpose of both CGL insurance and performance bonds can result in gaps in coverage, thereby exposing a project stakeholder to unanticipated risk. Recent developments in case law governing the interpretation of CGL policies have exacerbated the confusion – or at least complicated the analysis – of what types of damage a CGL policy will cover in a particular instance. Thus, a proper appreciation of performance bonds in the context of construction-defect litigation is vital to all parties in negotiating and litigating construction claims.

1. The Crosshairs: Where CGL Coverage & Performance Bonds Intersect

Courts faced with the question of whether to allow CGL coverage resulting from defective work have sometimes justified their decisions against coverage on the basis that, to hold otherwise, would convert an ordinary CGL policy into a performance bond. For example, in *L-J, Inc. v. Bituminous Fire & Marine Ins. Co*,[2] the Court stated:

> If we were to hold otherwise [*i.e.*, in favor of coverage], the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents. A performance bond guarantees that the work will be performed according to the specifications of the contract by providing a surety to stand in the place of the contractor should the contractor be unable to perform as required under the contract. Consequently, our holding today ensures that ultimate liability falls to the one who performed the negligent work – the subcontractor – instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.[3]

Kimball

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The *L-J* court was correct in this analysis. CGL coverage and performance bonds are distinct in a number of ways and should not be confused. Although they are both regulated by the South Carolina Department of Insurance,[4] mere inclusion in the insurance code is insufficient to convert an obligation into "insurance."[5] Likewise, although insurance contracts and performance bonds are construed and interpreted by courts in a similar way, this alone does not confer upon performance bonds the status of "insurance." "Courts analogize insurance with surety for purposes of contract construction, not to expand common law duties in tort." [6]

Sound policy reasons exist for drawing sharp distinctions between performance bonds and CGL policies. These reasons were aptly explained by the Supreme Court of Kentucky, which noted:

> An insurance policy is a contract of indemnity whereby the insurer agrees to indemnify the insured for any loss resulting from a specific event. The insurer undertakes the obligation based on an evaluation of the market's wide risks and losses. An insurer expects losses, and they are actuarially predicted. The cost of such losses are

Continued on next page

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> spread through the market by means of a premium.
>
> In contrast, a surety bond is written based on an evaluation of a particular contractor and the capacity to perform a given contract. Compensation for the issuance of a surety bond is based on a fact-specific evaluation of the risks involved in each individual case. No losses are expected. Sureties maintain close relationships with the contractors they bond and require the contractor to sign an indemnity contract in favor of the surety company. As such a surety's relationship to its principal is more like that of a creditor/debtor than that of the traditional insurer/insured.[7]

Thus, courts have noted that the gap in coverage for a party's own subpar work under the ISO CGL Form can be filled by the use of a performance bond. Gaps in CGL policies related to the work of contractors and subcontractors are notoriously tricky to predict. Stakeholders in construction projects are well advised to insist upon performance bonds from all significant downstream suppliers of services and materials. Moreover, as discussed below, stakeholders should take care to review and understand the specific terms of particular performance bonds used on a project. If such precautions are ignored, a party seeking indemnity for claims arising from defective construction may be surprised by its inability to recover for the principal's failure of performance.

2. The Scope of Performance Bonds: Performance Defined

The question naturally arises regarding the scope of performance guaranteed by a performance bond. In addition to merely plugging the gaps for defective work that would otherwise fall outside the scope of CGL coverage, a performance bond typically protects the obligee (usually the owner) from *any* failure to perform by the principal (usually the general contractor or a subcontractor). [8]

Because performance bonds are nothing more than a form of contract, the terms of the performance bond govern the requisite scope of the surety's performance. Although often accompanied by confusing and mysterious terminology that pervades the realm of suretyship, a performance bond – like any other form of surety – is simply an agreement governed by its own terms. The South Carolina Supreme Court has described surety agreements and, specifically, performance bonds as follows:

> A surety is a tripartite agreement among the surety company, the principal who is primarily responsible for performing the contract, and the obligee for whose benefit the agreement is made. Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal. South Carolina law treats a surety agreement as a credit arrangement where the surety lends credit to the principal who otherwise has insufficient credit to obtain the contract with the obligee.[9]

Because the express terms of a performance bond dictate the coverage afforded by the performance bond, the language of any particular performance bond should be scrutinized at the outset of the project to ensure that it adequately encompasses all of the obligations of the principal. Sureties commonly argue that their obligations cease at project completion, which is a defensible position only if the performance bond so provides. An owner or general contractor would be wise to review all performance bonds to ensure that the surety's obligations are, in fact, coextensive with the principal's obligations, including post-construction obligations such as the duty to defend and indemnify the obligee. All bonds are not created equal, and unlike CGL policies, which are almost entirely standardized, performance bonds come in a variety of shapes and sizes. Performance bond forms are as varied as the number of projects for which they are issued, and parties negotiating and reviewing performance bonds should not simply assume that worn-out adages (*e.g.*, "the surety stands in the shoes of the principal") will ensure the surety's performance in the absence of a provision requiring such performance.

3. AIA Form A312 Performance Bonds

Because the scope of performance required of a surety under a performance bond cannot be divorced from the terms of the bond itself, the terms of any given performance bond will govern the contours of a dispute. A review of recent changes to the AIA performance bond form is instructive for identifying potential areas of concern for both negotiation and litigation purposes. Form A312, which includes standard forms for both performance and payment bonds, is the official AIA performance bond form. For 25 years – from 1984 through 2009 – Form A312 remained unchanged; however, a new version of Form A312 was published in 2010 and officially replaced the 1984 form on December 31, 2011.

A. Contractor Defaults

Under Section 3.1 of the most recent Form A312, the Owner is no longer required to "attempt[] to arrange a conference with the Contractor and Surety" before declaring the Contractor in default.[10] Instead, the Owner may simply notify the Contractor and Surety that it is "considering declaring a

Contractor Default."[11] In connection with this notice, the Owner may request a conference, but is not required to do so. Likewise, the Surety has the option of requesting a conference among the parties within five business days after receipt of the Owner's notice, and if it does so, the conference must be held within ten business days of the Surety's receipt of the Owner's notice. The most recent Form A312 has added a new Section 4, which expressly provides that none of the notice provisions set forth in Section 3.1 are conditions precedent to the Surety's performance, except to the extent that the Surety can demonstrate "actual prejudice" resulting from the Owner's failure.[12]

In addition to the scaled-down conference requirements of Section 3.1, Section 3.2 requires only that the Owner "declares a Contractor Default, terminates the Construction Contract and notifies the Surety[.]"[13] Section 3.3 remains largely the same, requiring that the Owner agree to pay the Contract Balance to the Surety or its replacement contractor. The changes to Sections 3.1, 3.2 and 4 greatly diminish the impediments presented to an Owner seeking the intervention of the Surety.

These changes have the practical effect of reducing the Owner's waiting period for declaring a Contractor Default from at least twenty business days (if not much more) to only five business days. Similarly, pursuant to the most recent provisions of Section 6, if the Surety fails to act in response to the Contractor's initial letter with "reasonable promptness," it shall be deemed in default seven days after receipt of an additional notice from the Owner.[14] This seven day waiting period is a substantial reduction from the previous version of the form, which required a fifteen-day period before the Surety could be deemed in default.

B. Clarifications of Surety Exposure

Revisions to former Section 6 *et seq*. of Form A312 and the addition of a new Section 8 help to clearly define the scope of the Surety's responsibilities, depending upon which remedy the Surety elects to provide the Owner in the event of Contractor Default. These more nuanced provisions of the revised Form A312 are designed to help prevent a situation in which the Surety assumes responsibility for completing a project, exhausts the penal sum of the bond before construction is completed and subsequently walks off the jobsite.

If the Surety elects to take over the work of the Contractor and perform in its place (either by self-performing or hiring a replacement contractor of its own choosing), then the Surety's obligations to the Owner are limited only by the obligations of the original Contractor under the Contract. If, on the other hand, the Surety elects to (1) arrange for the original Contractor to complete the Contract, subject to the Owner's consent, or (2) arrange for a substitute contractor to contract directly with the Owner, then the Surety's exposure is limited to the obligations of the Contractor under the original Contract or the penal sum of the bond – whichever is less. Finally, if the Surety waives its right to perform on behalf of the Contractor or simply determines that the Contractor is not in default, the Surety's exposure is capped at the amount of the penal sum of the bond.

The recent provisions of Form A312 counsel in favor of closely reviewing any performance bonds used on a given project to ensure that performance is properly secured.

Regardless of whether the AIA bond form, the ISO CGL Form, or the Acord Certificate of Liability Insurance is relied upon to protect a project stakeholder, the specific terms of any such instrument will govern the degree to which the stakeholder is actually secured. Common misconceptions concerning the quality and degree of protection these documents afford can often leave a party exposed to more liability than it expected. In negotiation and litigation over construction projects, it is critical to properly understand the terms of all underlying agreements in assessing exposure and allocating risk.

Footnotes

1 David C. Kimball is a Shareholder of Robinson Bradshaw & Hinson, P.A. in the firm's Rock Hill office, where he practices in the areas of commercial litigation, construction litigation, and product liability. Drew Hamilton Butler is a Shareholder of Richardson Plowden in the firm's Columbia and Charleston offices, where he focuses his practice on general litigation, including construction litigation, products liability, premises liability, and insurance defense.

2 366 S.C. 117, 621 S.E.2d 33 (2005).

3 *Id*. at 36-37.

4 *See* S.C. Code. Ann. § 38-1-20(54).

5 *See Wilson v. McLeod,* 274 S.C. 525, 265 S.E.2d 677 (1980) (evaluating bail bondsmen as insurers).

6 *Masterclean, Inc. v. Star Ins. Co*., 347 S.C. 405, 556 S.E.2d 371, 375 (2001).

7 *Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co.*, 983 S.W.2d 501, 504-05 (Ky. 1998).

8 *See, e.g.*, AIA Form A312, which provides, "The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference."

9 *Masterclean*, 556 S.E.2d at 373-74.

10 AIA Form A312-1984, § 3.1.

11 AIA Form A312-2010, § 3.1.

12 AIA Form A312-2010, § 4.

13 AIA Form A312-2010, § 3.2.

14 AIA Form A312-2010, § 6.

ARTICLE

The Consumer Financial Protection Bureau: The Fed's Latest Watchdog Has Been Busy

by Michael S. Cashman [1]

Responding to the 2008 financial crisis, Congress enacted, through the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") significant new regulations affecting this county's financial service systems. Since its inception in July 2011, the federal bureau created by the Dodd-Frank Act has become one of the most active oversight and enforcement agencies in the federal government. This article provides a summary of new regulatory structure created by the Dodd-Frank Act, the primary functions of the Bureau of Consumer Financial Protection ("CFPB") created by that act, and some of its major actions since its inception.

I. The CFPB

Title X of the Dodd-Frank Act, the Consumer Financial Protection Act of 2010 ("CFP Act") created the CFPB and substantially consolidated in that bureau the federal consumer protection powers that were previously held by seven federal agencies and at least seventeen different laws.[2] The CFPB was given broad rule making authority for an array of federal consumer financial protection laws, as well as most consumer compliance supervisory and enforcement powers over larger depositories. It even has the power to regulate certain nondepository financial institutions, which were previously largely unregulated at the federal level. The CFPB's authority to regulate extends to any "covered person," defined as any person or affiliate of a person "that engages in offering or providing a consumer financial product or service."[3]

The CFPB's stated purpose is to "implement and, where applicable, enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[4] While it exists within the Federal Reserve, the CFPB is an expressly independent unit.[5] The Federal Reserve is without authority to intervene in CFPB actions, including rulemaking, orders, and personnel.[6] It reports directly to Congress and no federal authority can require advance drafts of its communications.[7]

II. Rule Making

The first of the CFPB's broad powers is its rule making authority in administering federal consumer financial laws.[8] Like all government agencies when proposing and adopting rules, the CFPB must consider the potential costs and benefits to consumers and covered persons, which includes any potential reduction of consumer access to financial products or services. In its three years of existence, the CFPB has promulgated 65 new rules or amendments to existing rules.[9] A detailed analysis of all of the new rules is beyond the scope of this article. However, several rules that took effect in 2014, and particularly those addressing the mortgage lending industry, are worthy of a brief review.

- Mortgage Servicing Final Rules: Amendments to certain regulations went into effect addressing: (1) periodic billing statements; (2) interest rate adjustment notices; (3) prompt crediting of mortgage payments, and responses to requests for payoff amounts; (4) error-resolution and information requests; (5) force-placed insurance requirements; (6) general servicing policies and procedures to achieve certain objectives set forth in the rules; (7) early intervention with delinquent borrowers; (8) continuity of contact with delinquent borrowers; and (9) loss-mitigation procedures, including limitations on dual tracking.[10]
- Ability to Repay/Qualified Mortgage Standards: Requires financial institutions to make a reasonable good-faith determination that a consumer has a reasonably ability to repay certain loans.[11]
- Loan Originator Compensation Requirements: Prohibits compensation to a loan originator based on the terms of the loan transaction or a "proxy" for the terms of the transaction. Also requires individual loan officers, mortgage brokers, and creditors to be "qualified" and "registered" or "licensed" to the extent required under State and Federal law.[12]

- Integrated Loan Disclosures: This rule integrates home mortgage disclosures by combining and replacing certain forms developed pursuant to the Real Estate Settlement Procedures Act ("RESPA") and the Truth in Lending Act ("TILA").[13]
- High-Cost-Mortgage and Homeownership-Counseling Amendments: This amendment expands coverage under the Home Ownership and Equity Protection Act of 1994 (HOEPA) for "high-cost mortgages" and revises and expands the tests for coverage. It also places new restrictions on mortgages, including a pre-loan counseling requirement.[14]

III. CFPB Data Collection and Complaint Process

Second, the Dodd-Frank Act requires that the CFPB collect data to assist consumers of financial products or services.[15] Within its first year, the CFPB established a clearinghouse of consumer financial data and complaints and regularly issues reports.[16] The CFPB received over 240,000 complaints from consumers about financial products and services in the fiscal year ending in September 2014. The top three categories that accounted for almost three-quarters of all complaints were debt collection, mortgage and credit reporting.[17] The CFPB's complaint process is done entirely via a secure web portal.[18] After review and screening, the CFPB contacts the applicable company and offers them an opportunity to respond within fifteen days to both the consumer and the CFPB. The consumer then has the ability to dispute the company's response, which occurs less than 20% of the time.[19] Absent resolution, the CFPB may then refer the matter to its Division of Supervision, Enforcement, and Fair Lending.

IV. Enforcement

In addition to its rule making and data collection roles, the CFPB is authorized to conduct a wide range of enforcement actions, including conducting hearings and administrative proceedings and bringing civil litigation in federal courts.[20] Administrative proceedings are frequently brought as a result of consumer complaints and typically resolved by consent orders whereby the defendant admits the violations. The relief in these instances includes cease and desist provisions; future compliance monitoring and reporting requirements; and the assessment of civil penalties.

Upon notification of the Attorney General, the CFPB may also bring a civil action in federal district court for violations of consumer financial protection laws.[21] Since 2012, the CFPB has issued warnings, referred to as a Notice and Opportunity to Respond and Advise ("NORA"), prior to commencing litigation.[22] While not required, the NORA is modeled after the procedures followed by other federal agencies and gives the recipient an opportunity to gather information and respond in writing within fourteen days. In the past fiscal year, the CFPB initiated, either independently or with other federal agencies, forty-one civil actions.[23] Notable matters include:

- *United States v. SunTrust Mortgage, Inc.* (D.D.C. No. 1:14-cv-1028-RMC) – SunTrust agreed by consent order to pay $40 million to consumers who lost homes in foreclosure, and $10 million to the federal government.
- *In the Matter of: Flagstar Bank, F.S.B.* (File No. 2014-CFPB-0014) – In the first enforcement action under the 2013 RESPA Mortgage Serving Final Rule, Flagstar agreed to a consent order to pay $27.5 million to affected parties and $10 million in civil money penalties.
- *In the Matter of: U.S. Bank N.A. (*File No. 2014-CFPB-0013) – U.S. Bank agreed by consent order to refund an estimated $48 million to approximately 420,000 customers and to pay a $5 million civil money penalty for illegal practices related to "add-on" products.
- *In the Matter of: Synchrony Bank, f/k/a GE Capital Retail Bank* (File No. 2014-CFPB-0007) – Synchrony Bank agreed by consent order to provide an estimated $225 million in relief to consumers harmed by illegal and discriminatory credit card practices.
- I*n the Matter of: Bank of America, N.A. and FIA Card Services, N.A.* (File No. 2014-CFPB-0004) – Bank of America and FIA Card Service agreed by consent order to refund an estimated $727 million to approximately 2.9 million customers and to pay a $20 million civil money penalty for illegal practices related to credit card "add-on" products.
- *Consumer Financial Protection Bureau et al. v. Ocwen Financial Corp. and Ocwen Loan Servicing, LLC*, (D.D.C. No. 1:13-cv-02025-RMC) – Ocwen agreed by consent order to provide $2 billion in principal reduction to underwater borrowers and to refund over $125 million to nearly 185,000 borrowers who have already been foreclosed.

While not all cases have resulted in millions of dollars of payments and penalties, many are resolved with compliance and reporting agreements, which can be costly to implement and maintain.

V. Latest Developments

The CFPB has shown no signs of slowing down. Since it issued its fiscal year report to Congress on December 31, 2014, it has already issued six new reports and proposed two new rules.[24] Notable developments since the start of the new calendar year include:

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- Proposal To Facilitate Access To Credit In Rural And Underserved Areas: On January 29, 2015, the CFPB proposed changes to mortgage rules potentially affecting small creditors in rural and underserved areas.[25] More particularly, the proposals seeks to amend the "Ability-to-Repay" mortgage rules that took effect in January 2014 by loosening certain loan requirements for smaller lenders by enlarging the definition of a smaller lender (to less than 2,000 loans) and expanding the definition of "rural" areas.

- Reverse Mortgages: On February 9, 2015, the CFPB issued a report on complaints regarding reverse mortgages.[26] Reverse mortgages allow homeowners who are sixty-two or older to borrow against the accrued equity in their homes. Loan proceeds are typically provided as lump-sum payments, annuity-like monthly payments, or lines of credit. As noted in the report, while the reverse mortgage market presently accounts for approximately one percent of the traditional mortgage market, as the "baby-boomer" generation retires, some commentators speculate the reverse mortgage market will grow to become as popular as IRAs are today. The most prevalent complaints reported are the borrower confusion over requests to change loan terms. More than ten policy changes have been issued regarding reverse mortgages since the CFPB began taking complaints in December 2011. A recent financial assessment requirement for prospective borrowers continues that trend.[27] As the market grows, additional regulations and resulting litigation would not be unexpected.

VI. Conclusion

While still in its infancy, the CFPB has become a prolific regulator and active enforcer. It has shown no signs of slowing down. Its activities remain largely unknown to many litigators. With a wide berth of oversight, regulatory and enforcement authority, it is likely that the CFPB will eventually affect any entity that buys, sells, or services any type of consumer financial product. Even if your practice excludes regulatory or administrative law, understanding the authority and procedures of the CFPB will allow you to provide better and more informed representation.

Footnotes

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2 Among these agencies were the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, Federal Trade Commission, the Department of Housing and Urban Development, and the National Credit Union Association. 12 U.S.C. § 5581(b). Some of the laws previously enforced by these agencies that are now enforced by the CFPB include the Fair Debt Collection Practices Act ("FDCPA"), the Fair Credit Reporting Act ("FCRA"), the Equal Credit Opportunity Act ("ECOA"), the Truth-in-Lending Act ("TILA"), and the Real Estate Settlement Procedures Act of 1974 ("RESPA"). § 1002; 12 U.S.C. § 5481(12). While the CFPB has jurisdiction over an array of consumer financial products and services and serves as the primary federal consumer financial supervisor of many of the institutions that offer these products and services, these existing agencies continue to hold some consumer protection powers.

3 12 U.S.C. § 5481(6).

4 12 U.S.C. § 5511(a).

5 12 U.S.C. § 5491(a).

6 12 U.S.C. §5492(c)(2).

7 12 U.S.C. § 5492(c)(4).

8 12 U.S.C. § 5512(a).

9 http://www.consumerfinance.gov/regulations/

10 http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf

11 12 CFR 1024 & 1026, 78 Fed. Reg. 44686; http://www.consumerfinance.gov/regulations/ability-to-repay-and-qualified-mortgage-standards-under-the-truth-in-lending-act-regulation-z/ .

12 12 CFR 1026, 78 Fed. Reg. 11279; http://www.consumerfinance.gov/regulations/loan-originator-compensation-requirements-under-the-truth-in-lending-act-regulation-z/ .

13 http://www.consumerfinance.gov/regulations/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the-truth-in-lending-act-regulation-z/

14 12 CFR 1024; 12 CFR 1026, 78 Fed. Reg. 6855; http://www.consumerfinance.gov/regulations/high-cost-mortgage-and-homeownership-counseling-amendments-to-regulation-z-and-homeownership-counseling-amendments-to-regulation-x/

15 E.g. 12 U.S.C. § 5493(b)(2).

16 http://www.consumerfinance.gov/reports/

17 http://files.consumerfinance.gov/f/201412_cfpb_,report_section-1017e4-appropriations.pdf at p. 45.

18 http://www.consumerfinance.gov/complaint/

19 http://files.consumerfinance.gov/f/201412_cfpb_report_section-1017e4-appropriations.pdf at p. 75.

20 12. U.S.C.§§5563, 5564

21 12 U.S.C. § 5564

22 http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf

23 http://files.consumerfinance.gov/f/201412_cfpb_report_section-1017e4-appropriations.pdf at pp. 114-26.

24 http://www.consumerfinance.gov/reports/; http://www.consumerfinance.gov/regulations/#proposed.

25 http://files.consumerfinance.gov/f/201501_cfpb_amendments-relating-to-small-creditors-and-rural-or-underserved-areas.pdf

26 http://files.consumerfinance.gov/f/201502_cfpb_report_snapshot-reverse-mortgage-complaints-december-2011-2014.pdf

27 http://portal.hud.gov/hudportal/documents/huddoc?id=15-06ml.pdf

ARTICLE

An Important Social Event: Authenticating Social Media Evidence at Trial

By J. Christopher Clark [1]

Social Media is a goldmine for the defense lawyer seeking to impeach or simply rattle an opposing witness at trial. Because it has been integrated so quickly and ubiquitously into American life,[2] even the most inscrutable witness may have a picture or post on an ever-growing list of websites[3] that can bolster the defense.

But just as during the gold rushes of America's past, some eager social-media miners will find that the gold is easy to identify but difficult to extract. Specifically, some courts have been reluctant to admit social media data at trial under Federal Rules of Evidence 901 and its state counterparts. No South Carolina opinion specifically addresses this issue.

The social media skeptics rely on a fundamental difference between social media and traditional forms of twentieth century evidence, such as writings, photographs, or recordings: social media, by definition, is easy to create and "continuously modified by all users in a participatory or collaborative fashion."[4] For example, anyone can create a twitter account allegedly belonging to someone else, and the content of that fake account can be shared widely through legitimate sources. The North Carolina Department of Agriculture learned this lesson in February 2015, when it re-tweeted a post allegedly belonging to former state rep. Nathan Ramsey – the Ramsey post theorized that cold weather makes dairy cows produce ice cream.[5] Ramsey denied authorship, and official apologies soon followed.

This article will discuss the evidentiary challenges unique to social media data and suggest methods for introducing this important evidence at trial.

Social Media Skepticism On The Rise

Griffin v. State of Maryland[6] is a much-discussed example of judicial unease with social media. In *Griffin*, the trial court admitted a printed page from a MySpace account into evidence, which allegedly belonged to a murder defendant's girlfriend. The prosecution used the printout to explain why a key prosecution witness lied in an earlier proceeding: At that time, he felt threatened by the girlfriend's post "Free Boozy! Just remember snitches get stitches!! U know who U are!!"

The defense argued that the post was not properly authenticated as belonging to the girlfriend, but the trial court cited several pieces of evidence suggesting otherwise: The girlfriend's birthday was displayed on the Myspace account, along with a picture of her and the defendant and other posts identifying the defendant as "Boozy." On these facts, the post was admitted.

The Maryland Court of Appeals reversed. The Court noted "the relative ease with which anyone can create fictional personas or gain unauthorized access to another user's account."[7] Because of the threat of third-party manipulation, posts from social media sources "require[] a greater degree of authentication."[8] This higher standard might be satisfied through such expedients as "ask[ing] the purported creator if she indeed created the profile," hiring an expert to comb through the relevant computer hard drive, or asking the social media site itself to corroborate the identity of the poster.[9]

At first glance, the *Griffin* decision appears both highly impractical and somewhat alarmist. The Court's full-bodied skepticism about social media brings to mind the amusingly reactionary denouncement of electronic evidence as a whole by Federal Judge Samuel Kent in 1999:

> While some look at the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation...For those reasons, any evidence procured off the Internet is valuable for almost nothing. . ."[10]

However, the *Griffin* opinion is more than an isolated case of judicial techno-phobia. Courts in New York, Massachusetts, Connecticut, Mississippi and California[11] have also expressed concern about social media authenticity. These courts are deeply concerned about the casual way in which social media is created and exploited. To take Facebook as

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one example, anyone at least thirteen-years-old can create a Facebook account by using a valid e-mail address and entering the putative account-holder's name and birthday. Once created, the profile is subject to an alarming risk of being hacked; Facebook acknowledges that hackers attempt to break into Facebook accounts approximately 600,000 times every day.[12] The tools to hack an account are readily available: Password-guessing software can be quickly downloaded from the Internet, and the personal data most people use to create their passwords – birthdays, names of pets, nicknames – are already shared amongst hundreds of cyber "friends."

Even if an account is not hacked through technical means, personal information can be obtained through simple subterfuge. A popular method is "phishing," whereby an imposter website poses as a Facebook friend and asks the user to visit a webpage.

If the evidence in dispute is critical to your case, hire a computer expert.

The webpage appears nearly identical to the Facebook login screen, and many users simply type in their Facebook login data under the assumption that they accidentally logged out of their account. The imposter then gains complete control of the Facebook account and can impersonate the user at will.[13]

For these reasons, the authenticity of social media evidence is viewed as questionable per se by some commentators.[14] The question is unsettled in South Carolina, and caution is therefore warranted. "Until clear rules emerge, the practitioner needs to assume that a high standard for authentication applies - higher than for more traditional forms of evidence."[15]

Satisfying the Skeptics

Authentication of all evidence is governed by South Carolina Rule of Evidence 901. Rule 901(a) provides that authentication can be accomplished through any evidence that supports a finding that the evidence in question is what its proponent claims. This generic guidance is fleshed-out by Rule 901(b), which provides ten non-restrictive illustrations of evidence that might get the job done. The most commonly used method for social media is Rule 901(b)(4): Authentication through distinctive characteristics. Any identifying characteristic of the evidence, such as its appearance, contents, substance or internal patterns, can be used for authentication. Thus, defense counsel might have a witness testify that the plaintiff always ended his posts with M.C. Hammer's catchphrase "Hammertime!" If believed, this distinctive characteristic could allow a court to conclude that a plaintiff's Facebook post admitting fraud and ending with "Hammertime!" was authentic. More prosaic examples might include routine misspellings of common words, such as "agin" for "again," or disclosure of information known only to the user and her close friends, such as plans for a pending court filing. The more distinctive the characteristic, the more likely the evidence is to be authenticated. In *United States v. Vayner*,[16] the Second Circuit Court of Appeals recently rejected authentication of a social media page through easily-acquired information found on a defendant's profile, such as his name and Skype address. The Court compared this sort of information to data that might be found on a flyer in the street, and suggested that the identifying characteristics should be "sufficiently obscure" to support authentication. Other courts disagree, holding that easily-obtained information such as a recognizable screen name or mention of a shared dispute may be enough.[17] For the practitioner, the best approach is to gather evidence about all distinctive traits with a focus on those that establish a unique social media profile.

If the evidence in dispute is critical to your case, hire a computer expert. A forensic examination of the hard drive or device may yield testimony that establishes the origin and timing of social media posts. Even a social media app like Snapchat that is popular for its ephemeral content – posts allegedly disappear after 10 seconds or less - actually stores content on a device long after its deletion date.[18] Of course the key to this approach lies in proactive discovery, which should include a request for voluntary examination of the party's social media profile.[19]

A party's data service provider can also provide crucial information through business records establishing that a post originated with the party's personal computer or cell phone.[20] Corroborating evidence should be sought suggesting that only the purported sender would have had access to the device during the relevant timeframe.

A surer, but less common, way to authenticate social media can be found in Rule 901(b)(1): Testimony of a person with knowledge.[21] If you are lucky enough to find a witness who can say that she

observed a party create a disputed post or page, for example, your job will be relatively easy.

If all else fails, don't forget the conditional relevancy standard of Rule 104. Rule 104(b) provides that the court may admit proposed evidence on a preliminary basis, subject to the condition that the proponent introduces additional, foundational evidence later that could support a finding that the proposed evidence is what it appears to be. Thus at a pre-trial hearing, counsel may seek a ruling that a Facebook post can be admitted at trial subject to the condition that additional evidence is introduced connecting the post to a particular computer and user. If the court finds the subsequent foundational evidence insufficient, it may withdraw the entire matter from the jury's consideration.[22] However, if the subsequent evidence is enough for a reasonable juror to conclude that the proposed post is authentic, then the evidentiary issue is for the jury. This procedure shifts the ultimate determination of a fundamental fact question to the jury, which routinely handles many complex questions, such as the credibility of competing scientific and medical testimony.

Of course, social media skeptics may wince at the risk of juries considering falsely-attributed posts or messages at trial, but it is not clear that judges are more equipped to ferret-out social media fraud than jurors. Social media is a part of most jurors' everyday lives, and the hazards of life online are well known. News coverage of hacking scandals is frequent and highly followed, such as the torrent of reporting following the August 2014 release of private pictures belonging to female celebrities such as Kate Upton and Jennifer Lawrence. Juries tend to be younger and have more diverse life experiences than the average judge, and jurors may have personal knowledge of friends or family who have been hacked. In any event, they can be specifically educated about the facts of an alleged hack at trial. Rule 104(b) tacitly acknowledges these factors by relying on the experience of a community of jurors to trump that of a single fact-finder. As such, the rule can serve as a redoubt against the efforts of social media skeptics to keep this often powerful evidence from the jury.

Conclusion

As the role of social media evidence continues to grow, the objections of the social media skeptics will increase in volume and scale. By anticipating these challenges in advance, defense counsel can increase the odds of securing a predictable and fair result at trial.

Footnotes

1 Chris Clark practices in the Myrtle Beach office of McAngus Goudelock & Courie where he focuses on general litigation, construction and errors and omissions claims.

2 A 2014 Pew Research Center report indicates that 74% of Americans with online access use Facebook. http://pewinternet.org/fact-sheets/socia-networkig-fact-sheet.

3 The list of most popular social media sites and apps is ever-changing, but currently includes Snapchat, Instagram, Facebook, Pinterest, Tumbler, Twitter, Youtube, Blogger, Vine, Skype, Reddit, Google+, Linkedin, and the venerable Myspace.

4 Andreas M. Kaplan & Michael Haenlien, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 Bus. Horizons 59, 61 (2010).

5 http://newobserver.com/2015/02/20/4570151/fake-twitter-accounts-irk-nc-legislators.html.

6 19 A.3d 415 (Md. 2011).

7 *Id*. at 422.

8 *Id.* at 424.

9 *Id*. at 427-428.

10 *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp.2d 773 (S.D. Tex. 1999).

11 *People v. Lenihan*, 911 N.Y.S. 2d 588 (N.Y. Sup. Ct. 2010); *Commonwealth v. Williams*, 926 N.E.2d 1162 (Mass. 2010); *People v. Beckley*, 110 Cal. Rptr. 3d 362, 367 (Cal. Ct. App. 2010); *State v. Eleck*, 23 A.3d 818, 825 (Conn. App. Ct. 2011); *Smith v. State*, 136 So.3d 424 (Miss. 2014).

12 http://www.telegraph.co.uk/technology/facebook/8856417/Hackers-go-after-Facebook-sites-600000-times-every-day.html.

13 Neil J. Rubenking, "Don't Get Phished on Facebook (and how to recover if you do)," http://ww.pcmag.com/article2/0,2817,2419925,00.asp.

14 *See, e.g.*, Collin Miller and Charles White, "The Social Medium: Why the Authentication Bar Should be Raised for Social Media Evidence," 1 Temple Law Review Online 87 (2014) (discussing forgery concerns unique to social media).

15 Karen L. Stevenson, "Internet-Based Evidence: Is It What I Says It Is," http://americanbar.org/litigation/litigationnews/top_stories/070811-internet-based-evidence (quoting David Wolfsohn, then co-chair of ABA's Trial Evidence Committee).

16 769 F.3d 125 (2d. Cir. N.Y. 2014).

17 *See, e.g., Parker v. State*, 85 A.3d 683, 684 (Del. 2014).

18 http://www.forbes.com/sites/kashmirhill/2013/05/09/snapchats-dont-disappear; http://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were.

19 *See Romano v. Steelcase*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (compelling a personal injury plaintiff to give the defense access to her entire Facebook profile, including all deleted posts, from the time she opened her account to the present).

20 *People v. Chromik*, 946 N.E.2d 1039, (Ill. App. 2011) (concerning text messages).

21 Fed. R. Evid. 901 and Rule 901, SCRE contain identical language with the exception of subsection 901(b)(10) of the South Carolina rules, which refers to South Carolina statutes or Supreme Court rules instead of their Federal counterparts.

22 Advisory Committee Note, Rule 104(b), Federal Rules of Evidence (discussing language identical to the South Carolina Rule).

ARTICLE CONT.

Clarifying the Public Policy Exception to At-Will Employment

The South Carolina Supreme Court recently provided guidance to courts and employers regarding the scope of the public policy exception and its limitations.[1]

by Brian L. Quisenberry and Stephanie N. Ramia [2]

Quinsenberry

Ramia

An unclear exception to at-will employment

A cornerstone of employment law in South Carolina is the common law rule of "at-will" employment. The long embraced at-will employment rule provides that an employment relationship for an indefinite period "is generally terminable by either party at any time, for any reason or for no reason at all." [3] The South Carolina Supreme Court, however, recognizes exceptions to at-will employment, including when an employee's discharge constitutes "a violation of a clear mandate of public policy." [4] In *Ludwick v. This Minute of Carolina, Inc.*, the Court recognized for the first time a cause of action in tort against employers for discharges that violate public policy.

Since the Supreme Court first announced the public policy exception to at-will employment, employers and courts have struggled to determine what sorts of actions will be found to violate public policy. One court recently opined "the condition of this cause of action under South Carolina state court precedent is less that desirable. It is not the Court's first jaunt through it and there simply remains too much ambiguity. The language employed is typically inconsistent, and the courts have simultaneously circumscribed the cause of action while in the same breadth teased that more is available." [5]

Court rulings after *Ludwick* identify various terminations that violate public policy. The South Carolina Supreme Court, however, has consistently rejected a bright-line rule to define the limit of the cause of action, resulting in uncertainty for employers attempting to make lawful termination decisions. Courts determining public policy issues in the employment arena on a case-by-case basis have provided little guidance to employers hoping to avoid liability. Employers have therefore enthusiastically argued for a bright-line test after the Supreme Court hinted in *Lawson v. Department of Corrections* that the cause of action was limited to only two narrow circumstances.[6]

The Supreme Court offered at least some clarity on this ambiguous claim in its 2011 opinion B*arron v. Labor Finders of South Carolina*.[7] The *Barron* court rejected the employer's argument for a bright-line rule. The Supreme Court held the exception is not limited to the two exceptions enumerated in *Lawson v. Department of Corrections*—(1) where the employer requires an employee to violate the law; and (2) where the reason for the termination was itself a violation of criminal law.[8] Significantly, however, the *Barron* court clarified the court's role in deciding what actions violate public policy. The Court held "the determination of what constitutes a violation of public policy is a question of law for the courts to decide. . . [and is] not a function of the jury[.]" [9] The *Barron* Court's holding was an important win for employers hoping to avoid jury trials because most cases turn on the determination of whether the employer's action constituted a public policy violation.

But employee-side attorneys saw an opening. The *Barron* Court refused to state what terminations constitute a violation of public policy and rejected the employer's request for a bright-line rule.[10] The *Barron* holding thus provided an opportunity going forward for employees to argue that a myriad of employer actions allegedly violate public policy. Accordingly, employers and courts were left with little guidance on how to decide what termination actions violate public policy.

In the recent case of *Taghivand v. Rite Aid Corporation*, the Supreme Court provided additional guidance to courts and employers regarding the public policy exception.[11] This article analyzes how courts have applied this tort over the recent years, and how the Supreme Court's recent opinion in *Taghivand v. Rite Aid Corporation* will affect employment litigation going forward.

Courts struggle to determine what constitutes "public policy"

Both before and after *Barron*, courts have struggled to determine in any bright-line fashion what terminations violate public policy. Although *Barron*

left the public policy question open-ended, many courts since the ruling have remained reluctant to expand the public policy exception beyond where a civil or criminal law was violated. Moreover, most courts have refrained from expanding public policy beyond policy enumerated in enacted legislation.[12]

Generally, courts applying the public policy exception have done so in two circumstances, where either: (1) the employer requires the employee to violate the law[13]; or (2) the reason for the employee's termination itself is a violation of criminal law.[14] Although not limited to these circumstances,[15] the exception nonetheless requires factual allegations showing a violation of a clear mandate of public policy.[16] Thus, courts require plaintiffs to specifically plead the basis for the alleged public policy the employer violated.[17] Moreover, the complaint must set forth specific factual allegations that enable the court to determine if the employer violated the alleged public policy.[18] A plaintiff cannot avoid dismissal of his public policy claim by asserting that the claim presents a novel issue of this state's public policy with no supporting authority.[19]

Taghivand v. Rite Aid Corporation.

Illustrating that the public policy exception remains unclear, in *Taghivand v. Ride Aid Corporation*, the District of South Carolina certified a question to the South Carolina Supreme Court asking the court to "delineate the parameters of the public policy exception to the doctrine of at-will employment."[20] Specifically, the District Court asked the Court to "consider whether the public policy exception is broad enough to permit a cause of action in tort for employees who are terminated for reporting a suspected crime . . . ."[21]

Answering the question with "no", the South Carolina Supreme Court held the public policy exception to at-will employment is *not* broad enough to include employees who are terminated for reporting a suspected crime.[22] The *Taghivand* Court rejected the plaintiff's arguments that (1) "there are specific statutory and common law authorities which establish a clear mandate of public policy favoring the reporting of crimes," and (2) "that there is a general public policy favoring the reporting of crimes inherent in the functioning of the state's criminal justice system."[23] Specifically, the Court held that, while "society benefits from citizen participation in the criminal justice system," this interest in participation does not mandate an exception to the at-will employment doctrine.[24]

While *Taghivand* reaffirmed the rejection of a bright line rule, the Court held that the public policy exception is narrow. The Court emphasized South Carolina's strong policy favoring at-will employment.[25] The Court noted that the public policy exception is not limited to situations involving violations of civil or criminal law, but the Court stated "we have specifically recognized no others."[26] In fact, the Court stressed that it exercises serious restraint when "undertaking the amorphous inquiry of what constitutes public policy."[27]

The *Taghivand* Court concluded, "the public policy of this state finds expression in our longstanding adherence to at-will employment; any exception to this doctrine, which is itself firmly rooted in the public policy of this state, should emanate from the General Assembly, and from this Court only when the legislature has not spoken."[28] Further, "[a]bsent a more clear and articulable definition of policy from the General Assembly," the Court is reluctant to broaden the public policy exception to the at-will employment doctrine.[29]

What does Taghivand mean for Employers?

Taghivand likely strengthens employers' opportunities for ending claims at the motion to dismiss or summary judgment stages. The Supreme Court held that the public policy exception is much narrower than employee-side attorneys argued after *Barron*. Importantly, the Court referenced a need for the General Assembly to recognize definitive public policy before the Court would further expand the public policy exception.[30] Further, the *Taghivand* court emphasized that courts must balance plaintiffs' alleged public policy violations with South Carolina's clear public policy of at-will employment. Accordingly, courts will likely be more reluctant to broaden the public policy exception after *Taghivand*.

Despite the Supreme Court's strong language and guidance in *Taghivand*, employers will continue to face uncertainty associated with undefined exceptions to at-will employment. While *Taghivand* arguably narrows the basis for which a plaintiff's wrongful discharge in violation of public policy claim can survive, employers must still act cautiously when making employment decisions as the Court left the door open for expansion of the public policy exception going forward. Employers must continue to rely on the case-by-case determinations made in prior litigation and interpretation of statutes to evaluate their exposure to potential liability when making termination decisions.

Footnotes

1 This article is an update of the spring 2012 Defense Line article "*What Violates Public Policy? A Question of Law Decided Case By Case*" written by Brian Quisenberry and Eric Schweitzer. See, Defense Line, Volume 40, Issue 1, pp. 39-42.

2 Brian L. Quisenberry is a partner and Stephanie Ramia is an associate with the firm Young Clement Rivers, LLP in Charleston. Brian is the President of the S.C. Chapter of the F.B.A. and is the Chair of the SCDTAA's Substantive Law Committee for Employment Law. Both Brian and Stephanie practice in the firm's Employment and Labor Law Practice Group. Brian and Stephanie represent employers in state and federal courts, as well as

Continued on next page

before administrative agencies such as the NLRB, the EEOC, and the S.C.H.A.C.

3 *Presscott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 516 S.E.2d 923 (1999).

4 *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985).

5 *Scarbourough v. Lifepoint, Inc.*, 2011 WL 6819082, * 7 (D.S.C. 2011).

6 *Lawson v. S. Carolina Dep't of Corr.*, 340 S.C. 346, 532 S.E. 2d 259 (2000).

7 *Barron v. Labor Finders of SC,* 393 S.C. 609, 713 S.E.2d 634 (2011).

8 *Lawson*, 340 S.C. at 350, 532 S.E.2d at 261 (citing *Ludwick*, *supra* and *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 422 S.E.2d 91 (1992).

9 *Barron*, 393 S.C. at 616–17, 713 S.E.2d at 638.

10 *Id*. at 614–16, 713 S.E.2d at 637.

11 *Taghivand v. Rite Aid Corp*., Op. No. 27485 (S.C. Jan. 28, 2015).

12 *See Washington v. Purdue Farms, Inc.*, 2009 WL 386926 at *12 (noting, "[s]everal types of public policies have been deemed appropriate to sustain this cause of action including: requiring an employee to violate the criminal law, where the reason for the employee's termination was itself a violation of criminal law, obeying a subpoena, refusing to contribute money to a political action fund, and invoking rights under Payment of Wages Act."); *Jones v. Hydro Conduit Corp.*, No. CA 3:10-776-MBS-PJG, 2012 WL 1096141, at *8 (D.S.C. Mar. 30, 2012) (*indicating* that the South Carolina Illegal Immigration Reform Act could represent a clear mandate of the state's public policy after its enactment); *Jones v. Gilstrap*, 288 S.C. 525, 529, 343 S.E.2d 646, 648 (Ct. App. 1986) (*indicating* that a public policy would likely be established by Section 8–17–110, providing grievance procedure for county and municipal employees); see also *Culler v. Blue Ridge Elec. Co-op., Inc*., 309 S.C. 243, 246, 422 S.E.2d 91, 92-93 (1992) (finding that because Chapter 17 of Title 16 of the South Carolina Code defines "Crimes Against Public Policy," "*Ludwick*'s prohibition of retaliatory discharge in violation of clear mandate of public policy of this State extends . . . to legislatively defined "Crimes Against Public Policy."). In each of these enumerated declarations of "public policy," however, the purported public policy is *one based on statutory law*: (1) requiring an employee to violate the criminal law and/or obey a subpoena—S.C. Code Ann. § 41-29-210 (penal statute); (2) the termination itself was a violation of criminal law and/or requiring an employee to contribute money to a political action fund—S.C. Code Ann. § 16-17-560 (1985) (making it a crime to fire any person because of his or her political beliefs); (3) invoking rights under the SC Payment of Wages Act—S.C. Code Ann. § 41-10-10, *et seq*.; (4) situations invoking the SC Illegal Immigration Reform Act—§ 41-8-10, *et seq*; and (5) employment issues related to county or municipal employee grievance procedure—S.C. Code Ann. § 8–17–110. *See also, Merck v. Advanced Drainage Sys., Inc*., 921 F.2d 549, 554 (4th Cir. 1990) (holding the "public policy" exception to the at-will doctrine "is to be very narrowly applied.").

13 *Ludwick, supra*.

14 *Culler, supra* (employee was terminated after he refused to contribute to political action fund, and his termination violated S.C. Code Ann. § 16–17–560).

15 *Barron*, 393 S.C. at 614, 713 S.E.2d at 637.

16 *Morrow v. Brookview Healthcare Ctr.*, 7:13-CV-0378-JMC-JDA, 2013 WL 3553415 at *5 n.2 (D.S.C. July 11, 2013) (noting that, although not for the reasons identified by the defendant, the allegations regarding the plaintiff's termination in violation of public policy claim appear inadequate based on the plaintiff's failure to identify what public policy the defendant violated by terminating her); *Jones v. Wal-Mart/Sam's Club*, 2010 WL 5824267 (D.S.C. Oct. 22, 2010) *report and recommendation adopted as modified*, 8:10-CV-00988-JMC, 2011 WL 601371 (D.S.C. Feb. 11, 2011) (dismissing the plaintiff's public policy claim, finding "the [p]laintiff's Complaint does not speak to any public policy, much less the kinds of policy considerations that South Carolina has expressly recognized, whatever their number.").

17 *See Riley v. S. Care, Inc*., No. 3:13-CV-00357-CMC, 2013 WL 1809788, at *6 (D.S.C. Apr. 29, 2013) (finding the plaintiff's claim for wrongful termination in violation of public policy failed as a matter of law because the plaintiff did not direct the court to any source of a clear mandate of public policy); *Washington, supra*, 2009 WL 386926 at *12 (dismissing the plaintiff's retaliatory discharge in violation of public policy claim, noting the plaintiff did not cite any case law to support her proposition of a public policy of South Carolina); *See McNeil v. S. Carolina Dep't of Corr*., 404 S.C. 186, 193, 743 S.E.2d 843, 847 (Ct. App. 2013) (requiring a terminated employee to allege more than just a general statement that her discharge violated public policy for purposes of the public policy exception to the at-will employment doctrine); *Morrow, supra*, 2013 WL 3553415 at *5 n.2; Jones, supra, 2010 WL 5824267 report and recommendation adopted as modified, 2011 WL 601371.

18 *See McNeil*, 404 S.C. at 193, 743 S.E.2d at 847.

19 *Id*. (dismissing the plaintiff's public policy claim, and rejecting an interpretation of the public policy exception to at-will employment that would provide that "any employee could circumvent the employment at-will doctrine by merely asserting a termination was retaliatory in violation of a clear mandate of public policy and contend it was a novel issue. . . . [As such an interpretation,] would be contrary to the public policy exception recognized by [South Carolina] courts.")

20 *Taghivand, supra*. The specific question certified was: "Under the public policy exception to the at-will employment doctrine [ ], does an at-will employee have a cause of action in tort for wrongful termination where (1) the employee, a store manager, reasonably suspects that criminal activity, specifically, shoplifting, has occurred on the employer's premises, (2) the employee, acting in good faith, reports the suspected criminal activity to law enforcement, and (3) the employee is terminated in retaliation for reporting the suspected criminal activity to law enforcement?" *Id.*

21 *Id*.

22 *Id*.

23 *Id*.

24 *Id*.

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Taghivand, supra*. The Court, however, left the door open for the Court to recognize public policy when "the legislature has not spoken." Id. Justice Pleicones' concurring opinion also noted his "belief that this Court has the authority to create a public policy exception to the common law at-will employment doctrine, even in the absence of legislative action." Id. (Pleicones, J., concurring) (citations omitted).

Verdict Reports

Type of Action: Medical Malpractice

Name of Case: Janice H. Smith and Ricky Smith v. Rebecca Baird, M.D., and Charleston OB-Gyn, LLC

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

Case number: 2012-CP-10-04064

Name of Judge: The Honorable R. Ferrell Cothran, Jr.

Amount: Directed Verdict

Date of Verdict: January 15, 2015

Attorneys for defendant: Molly H. Craig, Brian E. Johnson and Caroline R. Niland of Hood Law Firm, LLC, Charleston, SC

Description of the case: Plaintiffs alleged the Defendant was negligent in failing to order diagnostic studies of the Plaintiff's breast following an abnormal palpable breast finding. The Plaintiff presented to her gynecologist complaining of a lump found during a breast self-examination. The doctor performed a breast examination, found there was no discrete mass and did not order follow-up diagnostic testing to rule out malignancy. When the Plaintiff returned for her annual physical eleven months later, a mass in the Plaintiff's breast was detected requiring mastectomy, chemotherapy and radiation for Stage III breast cancer.

At the close of Plaintiff's case, the defense moved for a directed verdict on the basis that the Plaintiff failed to present sufficient evidence to prove the Defendant's negligence was the proximate cause of the Plaintiff's injuries and damages. The judge granted the Defendants' Motion for Directed Verdict.

Type of Action:

Name of Case: John W. Machin v. The Andersons, formerly known as "Golden Eagle Products," and Carus Corporation

Court: United States District Court for the District of South Carolina—Columbia

Case Number: 3:12-cv-02675-JFA

Name of Judge: The Honorable Joseph F. Anderson, Jr.

Amount: Dismissal with Prejudice, Defense Verdict

Date of Verdict: February 9, 2015

Attorneys for defendants: Mark S. Barrow and Ryan C. Holt of Sweeny, Wingate & Barrow, P.A. of Columbia for Defendant The Andersons and J. Arthur Davison and Sonja Tate of Fulcher Hagler LLP of Augusta for Defendant Carus Corporation.

Plaintiff was employed by the Town of Lexington as a utility operator. Defendant Carus is an international chemical company which manufactures chemicals, including sewer deodorizers. The Andersons, formerly Golden Eagle Products, is a toller that blends final products per the specifications of other companies, like Carus. Carus provided a central ingredient along with instructions on where the final product should be sent. The Andersons retained a third-party trucking company it had used for nearly 30 years without incident.

The trucker, who had made the delivery before without incident and who ran his carrier's safety training, delivered the product to a Town of Lexington lift station where the product was used to deodorize sewer lines. The product was stored in a series of plastic containers connected by PVC pipe which had been constructed by utility workers without the approval of an engineer. After offloading the deodorizer, the truck driver used air pressure to clear his hose of remaining chemical, unaware that the Plaintiff had closed off the system. The pressurization caused a valve to rupture and Plaintiff was sprayed with the chemical.

Plaintiff claimed severe respiratory dysfunction and black-boarded $1.3 million in future medical bills and $1 million in lost wages. A vocational rehabilitation expert determined that he was 100% vocationally disabled. In closing, Plaintiff's counsel requested nearly $5 million. After hearing the testimony of 35 witnesses, the jury indicated that it had reached a verdict as to The Andersons, but not as to Carus. The Plaintiff voluntarily dismissed The Andersons and the jury returned to deliberate as to Carus. The jury then returned a defense verdict for Carus.

Continued on next page

Type of Action:

Name of Case: Pamela Stuck, as Personal Representative of the Estate of Helen M. Spalding v. James B. Tribble, Individually and as Agent, Servant or Employee of Surgical Associates of South Carolina, P.A., Dr. Heyward H. Fouche, Individually and as Agent, Servant, or Employee of Critical Health Systems of South Carolina, P.A. d/b/a American Anesthesiology; Palmetto Health Alliance, d/b/a Palmetto Heath Baptist, Surgical Associates of South Carolina, P.A. and Critical Health Systems of South Carolina, P.A., d/b/a American Anesthesiology

Court: Richland County Court of Common Pleas

Case Number: 2010-CP-40-4529

Name of Judge: The Honorable D. Craig Brown

Amount: Defense Verdicts

Date of Verdict: March 10, 2015

Attorneys for defendants: Bill Sweeny and Benson Driggers of Sweeny, Wingate & Barrow, P.A. (Columbia) for Dr. Fouche; Steve Snyder of Davis, Snyder & Williford, P.A. (Greenville) for Dr. Tribble; and Bill McDow and Shelton Haile of Richardson, Plowden & Robinson (Columbia)

The case involved a sudden death due to cardiac arrhythmia following a ventral hernia procedure. The anesthesiologist, surgeon, their respective practices, and hospital were all sued. The Plaintiff alleged that the defendants were negligent in failing to order a cardiac workup prior to surgery, failing to cancel the morning of surgery due to various signs and symptoms, administering excessive fluids post surgery and discharging the patient without proper clearance and without requiring her to void. After hearing the testimony of 16 witnesses including 8 medical physicians, the jury returned a defense verdict for all defendants after less than an hour of deliberations.

Case Notes

Summaries prepared by David C. Dill

North Am. Rescue Prod., Inc. v. P.J. Richardson, Op. No. 27475 (S.C. Sup. Ct. filed Jan. 7, 2015)

Plaintiff commenced a declaratory judgment action against defendant to determine whether defendant had the option to purchase 7.5% of plaintiff's stock despite the existence of a termination agreement, which purported to end the parties' relationship. The termination agreement twice referenced a future stock option agreement, which was never created or executed. Defendant counterclaimed for breach of contract and promissory estoppel. At trial, plaintiff moved for directed verdict on defendant's breach of contract and promissory estoppel claims. The trial court denied plaintiff's motions and held the terms of the contract were ambiguous. The jury returned a verdict in favor of defendant, and found he was entitled to purchase 7.5% of plaintiff's stock for $2,936,300.00.

On appeal, plaintiff argued the trial court and Court of Appeals erred in denying plaintiff's motion for directed verdict as to defendant's claims for breach of contract and promissory estoppel. At issue was whether the termination agreement was ambiguous because it mentioned a future agreement between the parties. The Supreme Court held the termination agreement was unambiguous and clearly terminated the obligations between the parties. The Supreme Court further held the mere mention of a future agreement that was never executed did not create an ambiguity in an otherwise unambiguous contract, and contractual provisions to agree in the future have no legal effect. Additionally, the Supreme Court held promissory estoppel did not apply in this case because the termination agreement clearly severed any promises that could have arisen prior to the termination agreement. Finally, the Supreme Court found there was no evidence to support a promissory estoppel claim arising after the termination agreement was executed, noting the plaintiff's subsequent assurances to defendant failed to rise to the level of an unambiguous promise, and there was no evidence of detrimental reliance by defendant. The Supreme Court reversed and remanded to trial court for entry of judgment in favor of plaintiff.

Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. The S.C. Med. Malpractice Liab. Joint Underwriting Ass'n and Michael P. Taillon, Op. No. 27484 (S.C. Sup. Ct. filed January 21, 2015)

Two doctors working as independent contractors in a hospital emergency room misdiagnosed a patient as having acid reflux when he had actually suffered a heart attack. The patient and his wife subsequently sued one of the doctors and the hospital. The hospital ultimately settled, and then filed an equitable indemnification action against the other doctor and his medical malpractice insurer. The trial court granted summary judgment in favor of the doctor and his insurer, finding that the medical malpractice statute of repose barred the hospital's indemnity action. By a 3-2 margin, the Supreme Court affirmed.

To prevail on the equitable indemnification claim, the hospital was required to prove that the doctor was liable for medical malpractice. Medical malpractice claims are subject to a six year statute of repose. The General Assembly has excluded certain categories of claims from the statute of repose. There is no exception, however, for equitable indemnification claims. The Supreme Court found that it was the General Assembly's exclusive decision whether to expand the exceptions to the statute to include an exception for equitable indemnification claims, and the General Assembly did not do so. Accordingly, the Supreme Court affirmed the decision that the medical malpractice statute of repose barred the hospital's indemnity claim.

Carolina First Bank v. BADD, L.L.C, William McKown, and Charles A. Christenson, Op. No. 274868 (S.C. Sup. Ct. filed January 28, 2015)

BADD, L.L.C. ("LLC") executed two promissory notes in order to finance the purchase of three warehouse units. One of LLC's members executed a personal guaranty on the notes. Subsequently, LLC defaulted and the plaintiff's bank brought a foreclosure action. The guarantor filed two permissive counterclaims based upon allegations of a conspiracy between the bank and a third party and sought a jury trial on those counterclaims.

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The Supreme Court first held that the guarantor was not entitled to a jury trial by virtue of being a party to the foreclosure action because he was a party solely to allow the bank to collect a deficiency should one be adjudged. Mere inclusion of a guarantor does not alter the equitable character of a foreclosure action. The Supreme Court further held that the guarantor had waived his right to a jury trial on the permissive counterclaims by raising them in the equity action.

Crossman Communities of N.C., Inc. and Beazer Homes Inv. Corp. v. Harleysville Mut. Ins. Co. and Cincinnati Ins. Co., Op. No. 5292 (S.C. Ct. App. filed Jan 28, 2015)

This insurance dispute involved two companies engaged in the construction of condominium projects and their commercial general liability (CGL) umbrella insurer. The umbrella and underlying policies provided coverage for property damage, but not defective construction. The companies appealed the trial court's finding that the underlying policies were not exhausted and that the insurer was not bound by an earlier judgment in the case. The Court of Appeals affirmed.

The companies had submitted evidence as to the amount they paid for the remediation of property damage in other states. They did not, however, specify the portions of those payments that related to property damage as defined under the relevant insurance policies as opposed to those made for defective construction. Accordingly, the trial court found that the companies did not prove that the underlying policy limits had been exhausted. The Court of Appeals found that it was not error for the trial court to reject the companies' bare assertion that all of the claims paid arose from property damage. Furthermore, the Court of Appeals found that the umbrella coverage was not triggered because of the parties' own stipulations, which there was no evidence that the interest of justice required abrogating. Damages were stipulated to be $7.2 million, while the underlying insurers had already paid $8.6 million. Therefore, excess coverage could not be triggered.

The companies also argued that the trial court applied the wrong allocation method due to the doctrine of law of the case. In earlier proceedings, the trial court applied the joint and several allocation method and the insurer did not appeal that order. Even though the insurer had not appealed the previous order, the Court of Appeals found that the law of the case doctrine did not apply because the previous order did not decide whether the underlying policies had been exhausted, and the parties had stipulated that if time of the risk was later determined to be the proper allocation method, they reserved all rights to argue related issues.

Cynthia L. McNaughton v. Charleston Charter Sch. for Math and Science, Inc., Op. No. 27490 (S.C. Sup. Ct. filed Jan. 28, 2015)

Plaintiff was a participant in the South Carolina Department of Education's Program of Alternative Certification for Educators ("PACE"), which enables individuals with bachelor's degrees who have not completed a traditional teacher preparation program to become certified South Carolina public school teachers. Defendant, a charter school, hired plaintiff to teach art during the 2010-2011 school year. In the middle of the school year, defendant abruptly terminated plaintiff's employment so that it could hire an additional math teacher. As a result, plaintiff was unable to find another teaching job and could not remain in the PACE program. At trial, plaintiff prevailed on claims for breach of contract and was awarded actual and special damages and attorney's fees. Defendant appealed, arguing that the trial court erred by denying its motions for a directed verdict and JNOV as to the breach of contract claim, allowing special damages, and awarding attorney's fees. The South Carolina Supreme Court affirmed the decision.

There was sufficient evidence to support the court's rulings on the directed verdict and JNOV motions because, while the teacher's job was contingent on "funding and enrollment," the evidence demonstrated that there was funding available to pay her salary at the time of termination. Special damages were permissible as the teacher was entitled to recover the loss she actually suffered as a result of the breach of the employment agreement. Furthermore, plaintiff's special damages were proper because they were not based on an extension of her employment agreement with the school beyond one year, but rather based on her status as a teacher in the PACE program. Had the school not terminated the teacher's employment, she most likely would have completed the PACE program and become a certified teacher. Thus, the damages she suffered were a result of the special circumstance of losing her position in the PACE program after the school terminated her employment.

Attorney's fees were also properly awarded under § 15-77-300 of the South Carolina Code. A charter school, by statute, is considered a state actor. There was no abuse of discretion by the trial court in determining there was no reasonable basis in law for the school to defend against Plaintiff's breach of contract claim. Good faith and solicitation of legal counsel do not show special circumstances to make an award of attorney's fees unjust.

Frewil, LLC v. Price and Smith, Op. No. 5293 (S.C. Ct. App. filed February 4, 2015)

Plaintiff Frewil, LLC, the owner of a rental property in Charleston, filed suit for breach of contract or, in the alternative, unjust enrichment or quasi contract/quantum merit, based on the alleged breach of a lease by defendants Price and Smith, plaintiff's former tenants. Defendants counterclaimed for negligent misrepresentation, breach of contract accompanied by a fraudulent act, and violation of the South Carolina Landlord Tenant Act due to the lack of a washer, dryer or dishwasher as allegedly represented by plaintiff verbally before execution of the lease. The trial court granted summary judgment to plaintiff and denied defendants' counterclaims, and defendants appealed.

On appeal, defendants argued that the lease was ambiguous, permitting introduction of parol evidence, and that the parol evidence revealed genuine issues of material fact which precluded summary judgment. The Court of Appeals determined that the lease was ambiguous regarding the presence of a washer, dryer or dishwasher because it contained references to those appliances in provisions regarding maintenance and the return of the security deposit. Therefore, parol evidence was admissible to show that plaintiff had verbally represented to defendants that the apartment contained the appliances, and the trial court erred in granting summary judgment to plaintiff. Defendants also argued that the trial court erred in dismissing their counterclaims. The Court of Appeals determined that parol evidence could be used to show reliance for a claim of fraud, and since the allegations made by defendants regarding plaintiff's representations were admissible as parol evidence, a question of fact existed for a jury regarding the reasonableness of their reliance on plaintiff's representations. The Court of Appeals, therefore, reversed the circuit court.

Independence Nat'l Bank v. Buncombe Prof'l Park, LLC, and David DeCarlis, Op. No. 27499 (S.C. Sup. Ct filed Feb. 25, 2015)

This case involved a dispute between a bank and a borrower/guarantor. The Supreme Court reversed a decision from the Court of Appeals that concluded the bank did not have a first priority mortgage. The Court of Appeals reached its conclusion on the basis that the closing attorney, the dual agent for the bank and the borrower, identified a prior existing mortgage in favor of the guarantor in his title search prior to closing, but failed to have the guarantor execute a subordination agreement at closing. The closing attorney and the guarantor also failed to disclose the prior mortgage to the bank. Despite the bank's lack of actual knowledge of the prior mortgage, the Court of Appeals held that the bank was charged with actual knowledge through its agent, the closing attorney. As a result, the Court of Appeals held that the prior lien in favor of the guarantor had priority over the bank's mortgage. The Supreme Court reversed, holding that the bank was entitled to a first priority mortgage lien because knowledge through an agent is constructive, not actual, knowledge. Therefore, the bank was entitled to have its mortgage equitably subrogated to the guarantor's prior recorded mortgage.

State of S.C. ex rel. Alan Wilson v. Orth-McNeil-Janssen Pharm., Inc., Op. No. 27502 (S.C. Sup. Ct. filed Feb. 25, 2015)

In January 2007, the State and the manufacturers of Risperdal, an antipsychotic drug, entered a tolling agreement concerning the statute of limitations. In April 2007, the State filed two claims stemming from alleged violations of the South Carolina Unfair Trade Practices Act. The first claim arose from the content of written material furnished by the manufacturer since 1994 with each Risperdal prescription ("labeling claim"). The second claim was based upon alleged false information contained in a November 2003 letter sent by the manufacturer to South Carolina prescribing physicians. After a jury trial, the trial judge ordered the manufacturer to pay civil penalties in excess of $327 million. The Supreme Court affirmed liability on both claims, but significantly reduced the amount of the penalties to $136 million.

The Supreme Court first found that penalties as to the labeling claim were limited to three years from the date of the tolling agreement. The Supreme Court further found that the penalties for the labeling claim, $300 per sample box distributed to prescribers during the relevant period, were excessive and reduced the penalty per box to $100 due to a lack of actual harm from the manufacturer's conduct. The Court also reduced a portion of the penalty attributable to the November 2003 letter as excessive under the circumstances.

As to the original $327 million penalty, the Supreme Court found it to be constitutionally sound. While the fine was large, when viewed in the context of the legislative intent of the South Carolina Unfair Trade Practices Act, to deter unfair and deceptive behavior in the conduct of trade or commerce, it did not violate the Due Process Clause.

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S.C. Pub. Interest Found. and Edward D. Sloan v. S.C. Dep't of Transportation and John V. Walsh, Op. No. 5299 (S.C. Ct App. filed March 4, 2015)

Plaintiffs filed a declaratory judgment action against the South Carolina Department of Transportation ("SCDOT") and its Deputy Secretary of Transportation for Engineering. Plaintiffs sought a declaration that SCDOT violated the South Carolina Constitution by inspecting three privately owned bridges located in a gated subdivision in the City of Aiken. The trial court granted summary judgment in favor of defendants, finding, in part, that plaintiffs lacked standing and the issue was moot. The Court of Appeals affirmed.

Standing may be acquired (1) by statute, (2) through the rubric of "constitutional standing," or (3) under the "public importance" exception. The plaintiffs argued they had standing under the public importance exception and as taxpayers. The key to public importance analysis is whether a resolution is needed for future guidance. The Court of Appeals found that because SCDOT conducted its own audit and concluded that its own actions were improper, there was no "future guidance" the Court could provide in this matter and therefore plaintiffs could not fall within the public importance exception. Similarly, the Court of Appeals found that plaintiffs lacked taxpayer standing to bring suit. Plaintiffs had no special interest and their only standing was as general taxpayers. Accordingly, to have taxpayer standing they must demonstrate some overriding public purpose or concern. The Court of Appeals found there was no public interest involved in preventing the unlawful expenditure of inspecting private bridges when SCDOT had already determined that its own policy prohibited the action. Accordingly, the Court of Appeals affirmed the trial court's findings regarding standing.

The Court of Appeals also affirmed the trial court's finding that plaintiffs' suit did not fall within one of the three mootness exceptions because SCDOT had already independently determined that its policy did not permit the inspection of private bridges. Accordingly, the matter was not capable of repetition yet evading review, of great public importance and manifest urgency, or one that would affect future events or have collateral consequences.

Behrooz Taghivand v. Rite Aid Corp., Eckerd Corp. d/b/a/ Rite Aid, and Steve Smith, Op. No. 27845 (S.C. Sup. Ct. Filed January 28, 2015)

Plaintiff filed this action in federal court against defendants alleging that he was wrongfully terminated in retaliation for reporting a suspected shoplifting at a store where he worked as manager. Plaintiff argued that the public policy inherent in certain statutory and common law authorities favored the reporting of crimes and supported his wrongful termination action. Defendants moved to dismiss the case, but the district court, finding that no clear issue was raised by defendants' motion, instead certified the question. Ultimately, the certified question posed was whether public policy supports a wrongful termination action by an employee who is fired for reporting criminal activity that he reasonably believes occurred on the employer's premises. The Supreme Court found that the public policy exception to at-will employment does not create such a cause of action.

The Supreme Court first noted that South Carolina's longstanding public policy in favor of at-will employment is indeed limited by other public policy considerations. Specifically, South Carolina's public policy exception to at-will employment supports a wrongful termination cause of action by employees who are required by their employers to break the law or are terminated illegally. The Court acknowledged that the public policy exception is not limited only to these circumstances, but declined to extend the exception to the present case.

Plaintiff pointed to a statue prohibiting the intimidation of court officials, jurors or witnesses, and the Victim and Witness Service Act, in support of his argument that public policy favors the reporting of crimes and validates his wrongful termination action. The Court disagreed. Though the Court recognized that the State's interests celebrate citizen participation in the criminal justice system, it did not find that these interests mandate an exception to at-will employment. Instead, the Court deferred to the State's "longstanding adherence to at-will employment" and declined to extend the public policy exception absent a clearer and more articulate policy definition from the legislature.

2015

Spring

TRIAL ACADEMY

May 20 - 22

Greenville, SC

Summer

SUMMER MEETING

July 23 - 25

The Grove Park Inn

Asheville, NC

Fall

ANNUAL MEETING

November 5 - 8

Ritz Carlton

Amelia Island, FL

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