THE DEFENSE LINE

S.C. DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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NEW OFFICERS FOR 2017

l to r: William S. Brown (Immediate Past President), Anthony W. Livoti (President-Elect), David A. Anderson (President), A. Johnston Cox (Secretary) and James B. Hood (Treasurer)

SPRING 2017

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ISSUE 1

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

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

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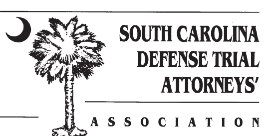

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President's Message

by David A. Anderson

It is with much excitement, a humble heart and great anticipation that I accept the significant responsibility to serve as President of the SCDTAA for the 2017 year. I wish to thank all of the Past Presidents and our membership for this awesome honor.

2017 is a historic year for our Organization, State and Country. This year we will mark our 50th Annual Meeting where we will return to the Cloister at Sea Island, GA on November 9-12, please mark your calendars for what will be a remarkable event. I must also remind you of our Summer Meeting, July 14 -16, where we will return one last time for the foreseeable future to the beautiful Omni Grove Park Inn in Asheville, NC. This has always been an event which is much enjoyed by families. Finally, for those who wish to have their motion skills enhanced, please be on the lookout for a Motion Practice Seminar which will be presented in Greenville, SC. We have tentatively set September 22, 2017 for that seminar and more information will be forthcoming.

I care deeply about the SCDTAA, an organization in which I have been involved with for over twenty years. I am very proud of our mission statement which is to promote justice, professionalism and integrity in the civil justice system by bringing together attorneys dedicated to the defense of civil actions. I am also proud of how our Organization for nearly 50 years have led the way nationally as being one of the premier state defense organizations in the country.

The most important asset of any organization is its people and there are many who should be thanked for our past and recent successes. I would like to take this opportunity to commend our Executive Director, Ms. Aimee Hiers, and those on her staff who work tirelessly to insure a smooth operating organization. I also wish to thank William Brown, our Immediate Past President and Anthony Livoti, our President Elect for their respective efforts and continuing service to the SCDTAA.

This year leading up to our 50th Annual Meeting promises to be an exciting one. Your Association is working hard to benefit you and your firms. We have an Association sponsored ethics hour CLE on Engagement/Disengagement Letters ready to present to your firms, all that it will cost to provide this presentation and get your credit is the $75.00 CLE filing fee. You can coordinate for this presentation by contacting Aimee Hiers at aimee@jee.com. Your substantive law committee and summer and annual meeting committees are working hard to provide cutting edge CLEs, dynamic speakers as well as an opportunity to network and recharge. I encourage you to attend our meetings and get involved with us. If you are interested in ways to further the Association goals, call me and I will be glad to provide you with an opportunity for growth and fulfillment. Our excellent *The DefenseLine* Editors are always on the lookout for articles to publish. Be a part of our endeavors to promote justice, professionalism and integrity in defense of civil actions and let's have fun and a sense of pride in doing so.

David A. Anderson

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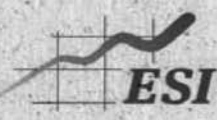

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Editors' Note

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

Greetings and welcome to another issue of *The DefenseLine*! The past several months have provided quite a bit of activity, both in the judicial and legislative realms as well as for SCDTAA. With this issue, we aim to provide you with practical tools to use in your practice, important updates to the law in South Carolina, and opportunities to participate further in our organization.

In this issue, thanks to the contributions of many authors, editors, and staff, we have put together articles and updates that we believe will serve all of us well. This includes a profile of Judge William Seals, a comprehensive update on recent Workers' Compensation decisions from South Carolina's appellate courts, and a look at the most recent legislation that could impact the defense bar.

As many may know, 2017 marks the 50th SCDTAA Annual Meeting, which will be held November 9 – 12 at the stunning Cloister at Sea Island, Georgia. We would like to welcome you to attend and begin the 50th anniversary celebration of SCDTAA. But even before that, enjoy another great opportunity to join us at The Omni Grove Park Inn in Asheville, North Carolina on July 14 – 16 for SCDTAA's Summer Meeting. These meetings are a wonderful chance to reunite with colleagues, attend educational courses for CLE credits, and develop friendships with others.

As always, we thank our contributors for their hard work in providing excellent content for us. Most of all, we thank our readership and all of the people who make this organization so special. If you haven't joined yet, please feel free to reach out so we can tell you more about what the SCDTAA can do for your practice!

Jones

Irvin III

Gibbon

Join DRI and your first seminar is free!
(First time members only)

This is an $875.00 value
(excludes the DRI Annual Meeting)

If interested in joing DRI,
please contact Jay Courie
803.227.2223 or jcourie@mgclaw.com

SCDTAA Docket

Richardson Plowden names Riser and Thoensen as shareholders

Richardson Plowden & Robinson, P.A. is pleased to announce that attorneys Caleb M. Riser and Joseph E. Thoensen have been named shareholders in the Firm. Riser joined Richardson Plowden in 2009. Thoensen joined Richardson Plowden in 2007. Both attorneys are part of the Firm's Columbia office. Riser focuses his practice in construction litigation, procurement, general litigation, insurance defense, and government liability defense. Thoensen focuses his practice in civil litigation, insurance defense, products liability, toxic tort defense-asbestos, premises liability defense, and retail and hospitality defense.

Carlock Copeland & Stair Names Jeff Crudup Partner

Jeff Crudup is a partner in the Charleston office and focuses his practice on complex civil cases involving medical malpractice, automobile and motor carrier accidents and commercial litigation. Prior to joining Carlock Copeland, Jeff practiced in a large law firm based in Massachusetts and Rhode Island. He has an array of litigation experience involving medical malpractice, construction litigation, employment litigation, general business and commercial litigation, and real estate disputes. Jeff also has experience providing general business advice to clients. As a litigator with transactional business experience, he works to limit the costs of litigation to his clients while working for the best possible outcomes for them. Since coming to Charleston, Jeff has become an active member of the South Carolina bar, but remains a member of the Rhode Island, Massachusetts and New York Bars.

R. Wilder Harte Joins Richardson Plowden's Columbia Office

Richardson Plowden & Robinson, P.A. is pleased to announce that R. Wilder Harte has joined the Firm as associate attorney in the Columbia office. Harte will focus his practice in General Litigation.

Harte earned his Juris Doctor from the University of South Carolina School of Law in 2013, where he was the recipient of the Robert T. Bockman Award and member of the First Place Mock Trial Team Competition. He earned his Bachelor of Arts degree in Political Science from Wake Forest University in 2010.

S.C. Appleseed Honors Nelson Mullins' Stuart Andrews with Clementa Pinckney Award

The S.C. Appleseed Legal Justice Center has honored Stuart M. Andrews Jr., a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, with its 2016 Rev. Sen. Clementa C. Pinckney Award for Justice. The award recognizes a champion for justice whose life's work has been dedicated to improving the lives of fellow South Carolinians, according to the organization.

S.C. Appleseed recognized Mr. Andrews for his "vision, compassion, and leadership in serving the legal needs of the low income community." He has served as chair of S.C. Appleseed's board and was a founding member of South Carolina Legal Services. He also has served on the governing board of a number of other advocacy and service organizations, often as chair. Along with his community and civic work, he has undertaken individual cases, pushed for laws and policies resulting in widespread benefit, and worked directly with nonprofits that provide direct legal aid to the state's poorest citizens, the organization noted.

The award is named for longtime S.C. Appleseed supporter S.C. Sen. Clementa C. Pinckney, who was killed in the mass shooting in June 2015 in Charleston, S.C. at Mother Emanuel A.M.E. Church, where he served as senior pastor.

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

The attorneys and staff at Gallivan White & Boyd, P.A. would like to congratulate Columbia shareholder John E. Cuttino for his election as President of DRI–The Voice of the Defense Bar (DRI). DRI is the leading organization for lawyers and in-house counsel who defend businesses and individuals in civil litigation. DRI is committed to improving the civil justice system; enhancing the skills, knowledge, and professionalism of its members; and anticipating and addressing issues relevant to defense attorneys and the civil justice system.

Cuttino has a long history of service with DRI as well as a number of other prominent legal organizations. He is a member of the International Association of Defense Counsel (IADC), National Foundation for Judicial Excellence (NFJE), and the South Carolina Defense Trial Attorneys' Association. Cuttino's legal practice includes the litigation of class actions, construction and design defects, toxic and mass torts, insurance coverage, tort and personal injury, products liability, and professional negligence. He is regularly retained by insurers, self-

insureds, risk management entities, corporations, and individuals.

Mac McQuillin Named to Junior Achievement of Greater SC – Coastal Area Board of Directors

Mac McQuillin, an attorney with Haynsworth Sinkler Boyd, P.A., has joined the Coastal Area Board of Directors for Junior Achievement of Greater SC. In addition to his service to Junior Achievement, Mr. McQuillin was elected in 2014 to serve a four-year term on the Berkeley County School Board. He also serves on the Board of Directors for the Lord Berkeley Conservation Trust.

Mr. McQuillin's practice focuses on litigation involving local governments and local businesses; LLC and partnership disputes; and probate, estate, and trust cases. South Carolina Super Lawyers magazine named him a "Rising Star" for business litigation in Charleston the last three years (2014-2016).

James B. Robey III, Eric C. Poston, and Melissa B. Manning Join Richardson Plowden's Columbia Office

Richardson Plowden & Robinson, P.A. is pleased to announce that James B. Robey III, Eric C. Poston, and Melissa B. Manning have joined the Firm as associate attorneys in the Columbia office. Robey will focus his practice in General Litigation and Construction Law. Poston will focus on Medical Malpractice Defense. Manning will focus her practice in Employment Law.

John F. Kuppens of Nelson Mullins Riley & Scarborough LLP Named President-Elect of DRI

On October 22nd, John F. Kuppens of Columbia, SC became President-Elect of DRI-The Voice of the Defense Bar at the organization's Annual Meeting in Boston. With 22,000 members, the 56-year-old DRI is one of the three most prominent professional organizations for attorneys in the country and the largest to exclusively represent defense bar attorneys. Mr. Kuppens is a partner in Nelson Mullins Riley & Scarborough LLP's Columbia, SC office.

Mr. Kuppens has been a member of DRI for twenty-four years and recently served as a Board Liaison to the Corporate Counsel Roundtable and the Center for Law and Public Policy's Jury Preservation Task Force. He is a past chair of DRI's Product Liability, Young Lawyers, and Membership Committees. Mr. Kuppens has served on the DRI Board of Directors since 2011 and will ascend to the organization's presidency in October 2017.

He is a member of the International Association of Defense Counsel and served on the Board of Directors of the South Carolina Defense Trial Attorneys' Association from 2009-2014. He has been listed in Thomson Reuters' South Carolina "Super Lawyers" since 2009. Mr. Kuppens has been listed in The Best Lawyers in America for his defense work in the areas of Commercial Litigation and Product Liability Litigation since 2009 and in 2013 was named "Lawyer of the Year" in Columbia, SC for defending product liability litigation.

He graduated from Clemson University with a Bachelor of Science degree and received his J.D. from the University of South Carolina School of Law.

Haynsworth Sinkler Boyd Recognized in 2017 "Best Law Firms" List

U.S. News & World Report and Best Lawyers® released their 2017 "Best Law Firms" list, which included Haynsworth Sinkler Boyd, P.A., for the 7th consecutive year.

The Firm has been ranked nationally for its Litigation-Construction practice (Tier 3) and regionally in 62 practice areas.

Firms included in the 2017 "Best Law Firms" list are recognized for "professional excellence" based upon consistently impressive ratings from clients and peers. Achieving a tiered ranking signals a combination of quality and breadth of legal practice.

The following practice areas in three offices were recognized as Metropolitan Tier 1 Rankings:

Charleston, SC

- Business Organizations (including LLCs and Partnerships)
- Commercial Litigation
- Corporate Law
- Litigation – Real Estate
- Personal Injury Litigation – Defendants
- Product Liability Litigation – Defendants
- Public Finance Law
- Real Estate Law

Columbia, SC

- Appellate Practice
- Banking and Finance Law
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Corporate Governance Law
- Corporate Law
- Economic Development Law
- Financial Services Regulation Law
- Litigation – Antitrust
- Litigation – Banking & Finance
- Litigation – Bankruptcy
- Litigation – Construction
- Litigation – Intellectual Property
- Litigation – Real Estate
- Litigation – Securities
- Personal Injury Litigation – Defendants
- Product Liability Litigation – Defendants
- Public Finance Law
- Real Estate Law

Continued on next page

- Securities / Capital Markets Law
- Securities Regulation
- Tax Law
- Trusts & Estates Law

Greenville, SC

- Commercial Litigation
- Economic Development Law
- Health Care Law
- Immigration Law
- Litigation – Banking & Finance
- Litigation – Construction
- Litigation – Mergers & Acquisitions
- Litigation – Real Estate
- Mass Tort Litigation / Class Actions – Defendants
- Medical Malpractice Law – Defendants
- Personal Injury Litigation – Defendants
- Product Liability Litigation – Defendants
- Professional Malpractice Law – Defendants
- Public Finance Law
- Real Estate Law

Clawson and Staubes Names Samuel R. Clawson, Jr. Member

Clawson and Staubes, LLC is pleased to announce that Samuel R. Clawson, Jr. has been named a Member of the firm. Sam graduated from the University of South Carolina with Bachelor of Art and Juris Doctor degrees. He continued his education at New York Maritime College, where he graduated with honors with a Master of Science in International Transportation Management and Merchant Marine deck officer's license. Sam focuses his practice in the areas of admiralty and maritime, day care abuse and neglect, dram shop / liquor liability and personal injury. Sam practices in the firm's Charleston office located on Daniel Island.

Roe Cassidy Grows With the Addition of Jack Griffeth and Ross Plyler

Roe Cassidy Coates & Price, P.A., is pleased to announce that Jack D. Griffeth and Ross B. Plyler have joined the firm, bringing with them a wealth of legal knowledge and experience that will both compliment and broaden the firm's practice areas and the legal services it offers. Jack Griffeth has practiced law for over forty years, and concentrates his practice on mediation, representing colleges and universities in higher education matters, and insurance defense. Ross Plyler focuses his practice on business and employment litigation, higher education, and insurance law. Roe Cassidy welcomes both these outstanding attorneys and looks forward to working with them as the firm continues to grow and serve its clients throughout the State.

Midlands Mediation Center Honors Nelson Mullins' Ed Mullins

Edward W. Mullins Jr., partner emeritus with the law firm Nelson Mullins Riley & Scarborough LLP, received the Midlands Mediation Center's McKay Brabham Award on April 18 as an outstanding and determined champion of justice. The award recognizes individuals who have been recognized as champions of justice by working for reconciliation and peace and by transcending the barriers of social class, belief systems, racial status, and gender. He has been a Midlands Mediation Center volunteer mediator in both magistrate and family court cases since 2010.

Sowell Gray Robinson Stepp & Laffitte, LLC Ranked by Chambers USA

Sowell Gray Robinson Stepp & Laffitte, LLC is ranked among the nation's best in general commercial litigation in the forthcoming 2017 edition of Chambers USA – America's Leading Lawyers for Business. In addition, four of the firm's members are recognized among the nation's best in the same practice

area.

"We are proud to have our firm and members recognized again by Chambers USA," said managing member Cal Watson. "We have a talented group of lawyers, and pride ourselves on our commitment to our clients."

Sowell Gray Robinson is recognized by Chambers USA as a leading firm in general commercial litigation. The firm's litigators handle a wide variety of business issues, focusing both on complex commercial litigation and resolution of commercial disputes, and regularly litigate in all state and federal courts in South Carolina. Sowell Gray Robinson was first honored in Chambers USA in 2006.

In addition to the firm listing, three Sowell Gray Robinson members are individually recognized as leading lawyers in general commercial litigation:

Biff Sowell is an experienced litigator in both trial and appellate venues and has argued approximately twenty cases in the United States Court of Appeals. Chambers USA has named him a leader in general commercial litigation since 2006.

Bobby Stepp is an experienced litigator focusing on complex cases in varied commercial settings at the trial and appellate level. His practice includes professional liability defense, corporate governance disputes, contract matters, product liability defense, voting rights and constitutional issues. He has been selected by Chambers USA as a leader in general commercial litigation since 2007.

Cal Watson is a litigator with experience in complex business and insurance disputes, class actions, and professional liability and ethics. During his 29 years of practice, Cal has represented numerous individuals, local and national businesses, partnerships, insurance companies and financial institutions. Chambers USA has listed him as a leader in general commercial litigation since 2009.

Gallivan, White & Boyd, P.A. Named "Best Law Firm" by U.S. News and Best Lawyers in America

Gallivan, White & Boyd, P.A. has been listed in 2017 "Best Law Firms" by U.S. News & World Report and Best Lawyers®. The firm was recognized regionally in 20 practice areas. The "Best Law Firms" rankings are based on a rigorous evaluation process. Clients and peers were asked to evaluate firms based on the following criteria: responsiveness, understanding of a business and its needs, cost-effectiveness, integrity and civility, as well as whether they would refer a matter to the firm and/or consider the firm a worthy competitor.

Best Lawyers states, "Firms included in the 2017 'Best Law Firms' list are recognized for professional excellence with persistently impressive ratings from clients and peers." Gallivan, White and Boyd has been ranked a tier 1 or tier 2 "Best Law Firm" in the following practice areas:

Metropolitan Tier 1

Columbia

- Commercial Litigation
- Insurance Law
- Mass Tort Litigation / Class Actions - Defendants
- Personal Injury Litigation - Defendants
- Product Liability Litigation - Defendants

Greenville

- Appellate Practice
- Commercial Litigation
- Insurance Law
- Mass Tort Litigation / Class Actions - Defendants
- Mediation
- Personal Injury Litigation - Defendants
- Product Liability Litigation - Defendants
- Workers' Compensation Law – Employers

Metropolitan Tier 2

Columbia

- Workers' Compensation Law - Employers

Greenville

- Copyright Law
- Employment Law - Management
- Litigation - Construction
- Litigation - Intellectual Property
- Professional Malpractice Law - Defendants
- Trademark Law

Elmore Goldsmith, PA Receives Tier One Rankings in U.S. News - Best Lawyers® 2017 "Best Law Firms"

U.S. News - Best Lawyers® have released the 2017 "Best Law Firms" rankings and Elmore Goldsmith, PA, has been recognized in three areas. For the Greenville metropolitan area, the firm has received tier one rankings for Construction Law, Litigation – Construction, and Litigation – Securities.

Firms included in this seventh edition are recognized for professional excellence with persistently impressive ratings from clients and peers.

Roe Cassidy Names Josh Smith Partner

Roe Cassidy Coates & Price, P.A., is pleased to announce that Joseph "Josh" O. Smith, has been named a partner in the firm. Josh Smith's practice is focused on business, employment and environmental litigation in the state and federal courts at the trial and appellate levels. The firm congratulates Smith and looks forward to continuing to grow and serve its clients throughout the State.

Nelson Mullins' Carmen Harper Thomas Selected As Leadership Council on Legal Diversity Fellow

Carmen Harper Thomas, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, has been named a Fellow in the 2017 class of the Leadership Council on Legal Diversity (LCLD), which identifies, trains, and advances the next

Continued on next page

generation of leaders in the legal profession.

Founded in 2009, LCLD is an organization of more than 260 corporate chief legal officers and law firm managing partners who are personally committed to creating a more diverse and inclusive legal profession. The LCLD Fellows program, which has trained more than 1,000 mid-career attorneys since 2011, offers participants "an extraordinarily rich year of relationship-building, in-person training, peer-group projects, and extensive contact with LCLD's top leadership," according to President Robert J. Grey, Jr.

Ms. Thomas' law practice focuses on complex litigation and counsel on a variety of financial services issues; the intersection of law-related services and technology; and protecting trade secrets. She also defends businesses in class actions in state and federal courts and in issues involving state and federal agencies.

The McKay Firm Named to National Best Law Firm List

The McKay Firm pleased to announce that the firm has received recognition in U.S News & World Report's and Best Lawyers "Best Law Firms" publication for 2017. The publication is considered to be one of the most respected attorney referral services in the United States.

Firms included in the 2017 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. To be eligible for a ranking, a firm must have a lawyer listed in The Best Lawyers in America, which recognizes the top 4 percent of practicing attorneys in the U.S.

The McKay Firm received recognition in Medical Malpractice Law – Defendants and Workers' Compensation Law – Employers.

MGC Included in 2017 "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 2017. The firm was named to the "Best Law Firms" list in seven metropolitan areas:

Asheville, NC

- Workers' Compensation Law – Employers

Charleston, SC

- Employment Law - Individuals
- Employment Law - Management
- Litigation – ERISA
- Litigation - Labor & Employment
- Workers' Compensation Law – Employers
- Personal Injury Litigation - Defendants

Charlotte, NC

- Workers' Compensation Law – Employers
- Commercial Litigation

Columbia, SC

- Commercial Litigation
- Litigation - Banking & Finance
- Workers' Compensation Law - Employers

Greenville, SC

- Insurance Law
- Personal Injury Litigation - Defendants
- Workers' Compensation Law – Employers
- Commercial Litigation
- Product Liability Litigation - Defendants

Raleigh, NC

- Workers' Compensation Law – Employers
- Professional Malpractice Law - Defendants

The U.S. News – Best Lawyers® "Best Law Firms" rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.

National Legal Organization Honors Nelson Mullins' Dan Westbrook

The National Legal Aid & Defender Association has honored Daniel J. Westbrook, a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office, with the Arthur Von Briesen Award. The award honors a private attorney who has made substantial volunteer contributions in support of the delivery of civil legal aid or indigent defense representation, according to the organization.

Mr. Westbrook has been a leader of Nelson Mullins' nationally recognized pro bono program for more than 20 years and devotes hundreds of hours a year to providing access to justice for those who otherwise couldn't afford it. Mr. Westbrook was co-leader of a team that for 14 years represented men and women in South Carolina's prisons seeking to improve mental health services and the conditions of their confinement. Mr. Westbrook also was instrumental in developing a pro bono parole practice and pro bono appellate program. Mr. Westbrook has handled several capital state post-conviction relief and federal habeas actions and appeals.

The National Legal Aid & Defender Association is a network of advocates who seek to advance justice and expand opportunity for all by promoting excellence in the delivery of legal services for people who cannot afford counsel, according to the organization.

Nelson Mullins Elects Three Columbia Attorneys to the Partnership

The partners of Nelson Mullins Riley & Scarborough LLP have elected Michael J. Anzelmo, Brian M. Barnwell, and Keith Poston, all of the Columbia office to the partnership.

Mr. Anzelmo, formerly of counsel, joined the Firm in 2007 and practices with the Commercial, Appellate, Consumer, and Employment Litigation Team. He focuses his practice in the areas of appel-

late, business litigation, consumer financial litigation, tort litigation, state constitutional litigation, and Freedom of Information Act matters. He previously worked as a law clerk to the Honorable Kaye G. Hearn.

Mr. Barnwell, formerly an associate, joined the Firm in 2009 and practices with the Commercial, Appellate, Consumer, and Employment Litigation Team. He concentrates his practice in the areas of business litigation, consumer financial services litigation, insurance coverage and defense, and construction litigation. He currently serves as a commissioner of the S.C. State Ethics Commission.

Mr. Poston, formerly an associate, joined the Firm in 2009 and practices with the Banking, Bankruptcy, and Creditors Rights Team. He focuses his practice in the areas of bankruptcy and creditors' rights, consumer financial services litigation, and financial institutions. He previously worked as a controller and accountant for an international chemical and textile manufacturing corporation

Haynsworth Sinkler Boyd Elects Three New Shareholders

Haynsworth Sinkler Boyd, P.A. is pleased to announce Mac McQuillin, Ken Shaw, and Ross Shealy have been elected shareholders.

Mac McQuillin is a business litigation attorney and certified Circuit Court Mediator based in Charleston. A native of Charleston, Mac has established a successful practice advising individuals, local businesses and governmental entities in complex matters, including frequently litigating LLC and partnership disputes; probate estate and trust cases; and providing general counsel and litigation services to local governments. Mac has significant experience with both jury and non-jury trials.

An experienced trial attorney based in Greenville, Ken Shaw's practice centers on defending healthcare professionals and institutions in matters that range from medical malpractice to premises liability. Drawing from his general commercial litigation experience, Ken has also represented financial institutions, insurance companies, manufacturers and individual clients with actions involving breach of contract, breach of express and implied warranty, unfair trade practices and negligent and intentional misrepresentation actions. He is licensed to practice law in North Carolina and South Carolina.

Ross Shealy, a native of Cayce, is a general civil litigation attorney in the firm's Columbia office. His practice includes products liability defense, premises liability, professional negligence, insurance and construction matters. As a former Nuclear Submarine Officer for the U.S. Navy, he also represents clients in a variety of nuclear issues, which include security, employment and nuclear waste policy.

Elmore Goldsmith Reveals New Brand and Website

Elmore Goldsmith, P.A. practices law throughout the Carolinas, with a focus on construction and surety law. The firm's new brand encapsulates Elmore Goldsmith's modern approach and expertise in construction and surety law.

Elmore Goldsmith's new website carries forward the new brand and highlights the strength of the firm, its people. The site's clean, intuitive design allows the firm's audience to learn more about the firm, locate attorney information, and quickly access helpful resources. The attorneys of Elmore Goldsmith are committed to serving the entire construction industry as they freely share insightful information and the latest trends through the firm's Hard Hat Blog at www.elmoregoldsmith.com/hardhatblog.

Sowell Gray Robinson Stepp & Laffitte, LLC Invited to Join Meritas

Sowell Gray Robinson Stepp & Laffitte, LLC a Columbia-based law firm, announced that it has been invited to join Meritas, a global alliance of independent business law firms. The affiliation offers Sowell Gray Robinson access to over 7,450 lawyers in 240 global markets. The firm's clients will benefit from local legal insight, local rates and world-class client service. Sowell Gray Robinson will be the only law firm in South Carolina that is a member of Meritas.

Meritas is the only law firm alliance with an established and comprehensive means of monitoring and enhancing the quality of its member firms. Meritas membership is extended by invitation only, and firms are regularly assessed for the breadth of their practice expertise and client satisfaction. Only firms performing under the tenets of Meritas' unique Quality Assurance Program are recertified as members. This ensures that clients receive the same high quality legal work and service from every Meritas firm.

Nelson Mullins Riley & Scarborough's Ed Mullins Inducted into Warren E. Burger Society

The National Center for State Courts (NCSC) has inducted Edward W. Mullins, Jr., partner emeritus in Nelson Mullins Riley & Scarborough LLP's Columbia, S.C. office, into the Warren E. Burger Society, which honors individuals who have volunteered their time, talent, and support to NCSC. Mullins was among five new inductees into the society named for the former Chief Justice of the United States who helped found NCSC in 1971.

Burger Society inductees receive a limited edition portrait of Chief Justice Burger, which was commissioned by Texas attorney Charles Noteboom. There are 1,986 prints of the portrait. The first two are owned by Chief Justice Burger's children, and the last was owned by the late Chief Justice William H. Rehnquist, who took his oath from the retiring Chief Justice Burger in 1986.

In 2013 Mullins received the John Pickering award for meritorious service to NCSC's Lawyers Committee, on which he has served since 2005.

SCDTAA
EVENTS

2016 Annual Meeting Wrap Up

by Giles M Schanen, Jr.

On November 10-13, 2016, the membership of the South Carolina Defense Trial Attorneys' Association and more than 50 state and federal judges convened for the organization's 49th Annual Meeting.

Members, judges, and spouses were treated to a spectacular weekend at the exquisite Ritz Carlton Reynolds on Lake Oconee in Greensboro, Georgia, one of the most luxurious lakeside resorts in the country. This was the SCDTAA's first visit to the Ritz Carlton Reynolds, and it did not disappoint. Attendees were able to enjoy the resort's five championship golf courses, its world-class spa, a guided fishing trip on pristine Lake Oconee, and a host of other activities. Combining these recreational opportunities with timely and diverse educational programming and entertaining social gatherings created an unforgettable weekend.

In keeping with SCDTAA tradition, the meeting began on Thursday evening with the President's Welcome Reception on the lakefront. The reception was a great chance for attendees to reconnect with friends before venturing out to dinner at one of the resort's several outstanding restaurants.

Friday morning kicked off with the breakfast honoring the South Carolina Judiciary. The opportunity to thank the excellent members of our judiciary for their service is always a highlight of the weekend. After breakfast, the association held its membership meeting, during which David Anderson of Richardson Plowden was elected the association's new president, and a new slate of officers and board members were elected.

The CLE programming commenced with a thought-provoking presentation on mental wellness by Jack Pringle of Adams and Reese and Mike Ethridge of Carlock Copeland and Stair, who lead the South Carolina Bar's Wellness Committee. We are fortunate to have within our Bar two of the foremost speakers on attorney mental health in the United States, and all in attendance benefitted from their insight. Next, Roy Shelley of Rogers, Townsend and Thomas gave an informative presentation in the area of environmental litigation, and Michael Gross of CogentEdge, LLC, with the assistance of Lee Weatherly of Carlock Copeland and Stair, spoke concerning the importance of focused witness preparation. The morning session concluded with a Women in Law leadership panel, themed "Kicking that Glass Ceiling One High Heel at a Time," which consisted of PollyBeth Hawk, Physicians Compliance Officer at Roper St. Francis; Becky Laffitte of Sowell Gray Stepp and Laffitte; and Angie Littlejohn, General Counsel and Executive Associate Athletic Director of Furman University. Through this panel discussion, which was moderated by Beth McMillan of McAngus Goudelock and Courie, attendees learned of the unique challenges faced by this extraordinary accomplished group of lawyers, as well as the immense professional satisfaction and accomplishments they have enjoyed during their career.

After an afternoon of recreational excursions, attendees gathered in their formal best for a cocktail reception and our annual banquet in the Ritz's main ballroom. During this time, the association recognized outgoing president William Brown of Nelson Mullins for his able leadership of the organization, and presented him with a gift of appreciation. When

the banquet ended, the dance party began, and continued long into the night.

Saturday's programming began with an entertaining address from Chief Justice Costa Pleicones of the South Carolina Supreme Court. It was an honor to welcome the Chief Justice to our gathering, and to hear his thoughts on the state of the judiciary in South Carolina. Thereafter, Mike Freeman of Griffith, Freeman and Liipfert and Gary Lovell of Carlock Copeland & Stair gave substantive presentations in their respective areas of construction defect and medical malpractice litigation.

After a break, attendees were treated to a panel discussion by an esteemed group of SCDTAA members who currently hold leadership roles in national defense organizations. It was a privilege to hear from John Cuttino, current President of DRI; Mills Gallivan, current President of FDCC; John Kuppens, President-Elect of DRI; and John T. Lay, current President of IADC. During this discussion, moderated by Ron Wray, a Past President of the SCDTAA, the panelists noted the benefits of serving in national organizations and shared insight concerning their respective paths to attaining leadership positions. It is worth noting that, in addition to these leaders, former SCDTAA President Molly Hood Craig is a recent past president of IADC, but was unable to participate in the panel due to a scheduling conflict. It is truly remarkable that these important national defense organizations are being led by SCDTAA members, and speaks volumes concerning the reach and impact of the SCDTAA and its leadership.

The educational portion of the meeting ended with a highly entertaining presentation by Andrew Deutscher of The Energy Project titled "Transforming the Way You Work—the Science of High Performance." Deutscher is a nationally known speaker who has delivered keynote addresses for companies such as Michelin, PriceWaterhouse Coopers, Lego, and American Express. His presentation, which focused on how lawyers can change the way we work to be more energized and engaged and, consequently, perform at a higher level, ended the meeting's programming on a high note.

In the afternoon, many attendees gathered in the hospitality suite to watch our state's college football teams in action. It was not a good afternoon for South Carolina and Clemson fans, as the Gamecocks lost to the Gators, and the Tigers were upset at home by Pittsburgh (although their season turned out just fine!). Fortunately, all dampened spirits were revived at the lakeside barbeque and oyster roast, which featured excellent food and even better company.

The weekend wrapped up on Sunday morning as attendees said their goodbyes. Although this was our association's first trip to the Ritz at Reynolds, it certainly will not be our last. The Annual Meeting continues to provide outstanding networking, professional development, and social opportunities for members, judges, and spouses. We look forward to seeing you this November 9-12 as we celebrate the association's 50th Annual Meeting at The Cloister at Sea Island, Georgia.

SCDTAA EVENTS

SCDTAA's Summer Meeting

July 14 - 16, 2017

The Omni Grove Park Inn • Asheville, NC

by Elizabeth M. McMillan

Make plans to attend the 2017 SCDTAA Summer Meeting now.

This year promises to be another informative and entertaining Summer Meeting for the SCDTAA at The Omni Grove Park Inn in Asheville, North Carolina. This will be the last year in the foreseeable future that the Summer Meeting will be held at The Omni Grove Park Inn so go ahead and save the date and make plans to attend. Please note that the meeting will be held during a different time frame than the past. It will start on Friday July 14th and finish on Sunday, July 16th instead of starting on a Thursday and ending on Saturday.

The agenda for this year includes standout speakers such as Justice Toal and a presentation by Henry Deneen, Esq., who will discuss how to improve your Emotional Intelligence to maximize the benefits for yourself and your law firms. We will also have a Chief Counsel Mark Fava from Boeing discussing the Union vote and campaign that took place this past year. As always we will also have timely and informative substantive law breakouts in the areas of Workers' Compensation, Business/Corporate Law, Construction Law and others. Our social events will be just as fun as our substantive meetings are informative. We will host our annual Silent Auction and Welcome Reception on Friday night and will enjoy a Bluegrass, Blue Jeans and Barbeque on the Blue Ridge event Saturday night. For activities on Saturday, you will be able to choose from golf, horseback riding, and an wild food foraging adventure, or you can just enjoy the beautiful sights of Asheville and The Omni Grove Park Inn.

Please join us for another memorable Summer Meeting!

SCDTAA's 50th Anniversary
November 9 - 12, 2017
The Cloister • Sea Island, GA

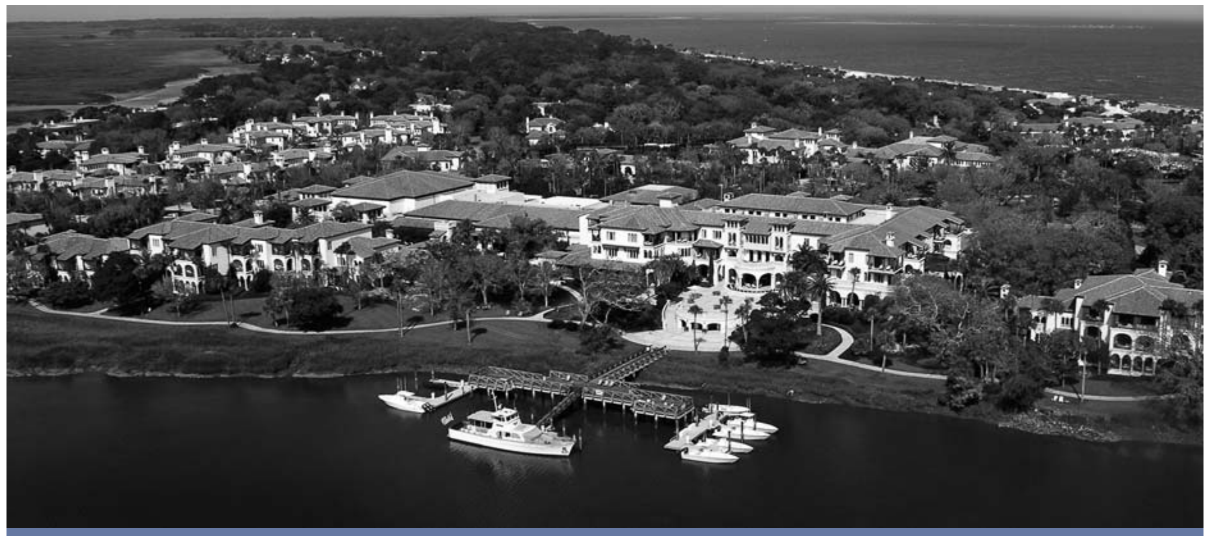
by Joshua L. Howard

The South Carolina Defense Trial Attorneys' Association will celebrate the Fiftieth Anniversary of your Annual Meeting from November 9 - 12, 2017. Mark your calendars now and register early as this meeting is not to be missed. After a 15-year hiatus, the Annual Meeting returns to the immaculate, five star rated The Cloister, Sea Island Resort in Georgia's Golden Isles.

Your Annual Meeting Committee is working hard to deliver the finest in CLE programming, but also allow ample time to catch-up with friends, colleagues and our judiciary, as well as experience and enjoy the beautiful Sea Island resort and amenities. Whether it is golf, tennis, fishing or simply enjoying the setting, Sea Island and The Cloister have something for everyone.

Programming for Friday and Saturday morning will feature an ethics presentation by Dean Robert M. Wilcox, an array of substantive law presentations, a judicial panel looking back over the last 50 years of South Carolina jurisprudence, and a corporate counsel panel looking at the next 50 years of the legal profession. We are also very excited to welcome Timothy Pratt, General Counsel of Boston Scientific, to speak on the "Do's and Don'ts" of a successful defense attorney. Last, we are excited and honored to welcome Chief Judge Roger L. Gregory, United States Court of Appeals for the Fourth Circuit, to spend the weekend with and address our Association.

Social activities will begin on Thursday with the President's Welcome Reception. Friday afternoon is yours to enjoy in planned recreational activities which, among others, include this year's golf tournament to be played on the Sea Island Golf Club's Plantation Course (which promises to be immaculate as it hosts a PGA tour event the week after the Annual Meeting), or relax on your own at the beach or simply enjoy the tranquility of the resort. Friday night will feature a cocktail reception followed by the black tie optional dinner and dance where we will be entertained by the music of The Maxx. Before Saturday evening's Oyster Roast at Rainbow Island, lounge poolside, make a reservation to visit the Sea Island Shooting School or enjoy an afternoon of college football.



Make your plans now!

The Fiftieth Annual Meeting of the South Carolina Defense Trial Attorneys' Association promises to be special.

Legislative Report

Spring 2017 Legislative Update

by Jeffrey N. Thordahl, SCDTAA Lobbyist

The 2017 legislative session is drawing to a close. Much has happened, and some hasn't happened at the time of this update. This is the first year under the new law that requires a shorter session. This year the General Assembly is scheduled to end on May 11th. As under the previous law, they have the ability to extend the session to finish named but unfinished legislation. The extended sessions are typically focused on limited issues such as finishing the budget and dealing with vetoes. This year it is possible they will come back to finish the roads debate. Big events and big issues have dominated the year.

This year has been memorable for many reasons including the appointment of former Governor Nikki Haley to be the United States Ambassador to the United Nations, which then triggered a domino effect in South Carolina politics. Specifically, Lt. Governor Henry McMaster stepped into the role of Governor causing the Lt. Governor seat needing to be filled. At that time, the President *pro tempore* of the Senate was Senator Hugh Leatherman, who stepped down from that role to prevent his ascension to the Lt. Governor seat. Sitting Senator Kevin Bryant from Anderson was then elected President *pro tempore* and was immediately sworn in as Lt. Governor. Senator Leatherman was then re-elected to President *pro tempore* in a contested race with Senator Harvey Peeler.

Several legislative seats have become vacant during the session due to various reasons requiring special elections to fill the seats. The seats that have become vacated are: the aforementioned Senator Kevin Bryant's seat, the seat of Representative Joe Neal from Richland County due to his sudden death, the seat of Representative Chris Corley due to his resignation, and the seat of Ralph Norman due to his resignation to run for the Fifth Congressional Seat, which was vacated due to the appointment of Congressman Mick Mulvaney to be the head of the Federal Budget and Management Office.

Given all the changes in leadership and the shorter session it has taken some time to find a rhythm in getting legislative work done. Along the way a pension bill dealing with the massive unfunded liability in the State pension system passed, and Governor McMaster is weighing his decision to sign it or not. The budget is close to resolution. Discussions are ongoing over a sizable bond bill, roughly $450 million, to mainly fund higher education maintenance and renovations needs. Perhaps the biggest issue of all is the ongoing debate over how to increase the funding of road maintenance and construction.

There are several issues of specific interest to the SCDTAA that have come up this year. Initially, there was the filling of the open seats on the SC Supreme Court and the SC Court of Appeals. Justice George "Buck" C. James, Jr. was elected to the Supreme Court and Judge D. Garrison "Gary" Hill was elected to the Court of Appeals. In addition, typically, a second round of judicial elections is held in the later part of the legislative session. However, as evidence of the many consequences of an earlier end to the session, there was insufficient time to file, screen, and elect judges a second time.

Further, legislatively, the SCDTAA has closely watched many bills affecting the legal profession and actively participated on a couple of occasions. Breon Walker with Gallivan, White & Boyd testified on Senate Bill 118 dealing with an increase of Magistrate's Court civil jurisdiction from $7,500 to $10,000. There have been efforts in the recent past to go as high as $25,000. Breon testified that the small increase was reasonable however if further increases were considered then issues such as discovery, magistrate qualifications, and the role of the Judicial Merit Selection Commission would need to be considered. The increase to $10,000 did pass out of the Senate and is pending in the House Judiciary Committee. Bill McDow, with Richardson Plowden, was prepared to testify against H. 3740 dealing with the Notice of Intent to file suit in a medical malpractice action. The bill was at the end of a long agenda, and the committee did not get to it. However, Bill was able to speak at length to the bill sponsor and discuss the nuances of the bill.

Finally, a brief update on tort reform; three bills have been introduced this year relevant to tort reform: 1. S. 239 Seat Belt non-use admissibility; 2. S. 419 Transparency in Private Attorney Contracting; and, 3. S. 452 Asbestos Trust Transparency. None of the bills have been assigned to subcommittee by the new Chairman of the Senate Judiciary Committee, Senator Luke Rankin. Therefore, there has not been any public debate on the bills.

The Honorable William Henry Seals, Jr.

South Carolina Circuit Court Judge

Judge William Henry Seals, Jr. was born in Marion County in 1961. His parents are the late William H. Seals, USMCR and attorney, and Melba Reid Seals. Judge Seals is married to the former Phoebe Anderson Richardson of Darlington, S.C. and they have one son, William Henry Seals, III.

Judge Seals graduated high school from Pee Dee Academy and from Charleston Southern University in 1982. Judge Seals then attended the University of South Carolina in their MBA program when he decided the law was his calling. He graduated from the Cumberland School of Law in 1990. Thereafter, Judge Seals practiced law in Marion with James E. Brogdon from 1990 to 1995 and then as a sole practitioner until 2009. Judge Seals engaged in the general practice of the law with an emphasis in civil litigation.

Judge Seals also served as Marion's Municipal Court Judge from 1996 to 2009. In this regard, he received from the City of Marion The Outstanding Public Service Award given in appreciation for his leadership, integrity and contributions to city government as an outstanding citizen and municipal employee. Judge Seals was elected as South Carolina Circuit Court Judge, At-Large Seat 6, on February 11, 2009, to fill the unexpired term of the Honorable James E. Lockemy.

Judge Seals and his family are active members of The Church of the Advent Episcopal Church in Marion. Both Judge Seals and his wife are coaches of their son's Sporting Clays Team at Pee Dee Academy, and all three love the outdoors. Judge Seals particularly enjoys NASCAR, canoeing the swamps of the Little Pee Dee River, and hunting, with a special affection for bow hunting and duck hunting. Judge Seals also enjoys spending time on his farm in the Zion Community of Marion County along with his German Shepherd, Gus.

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

I wanted to be a sniper for either SLED or the FBI, but somehow I got side tracked into the law. My Father was a lawyer, and his influences on me growing up made the law a natural pull for me as I entered adulthood.

2. Who or what has been the biggest influence in your legal career?

Many of what I would call the "old school" lawyers influenced me on how I practiced law and hopefully how I perform on the bench. These lawyers were prepared, timely, trustworthy, up front, polite, slow to anger, and simply nice. They were also very strong, tough and aggressive when needed but tempered, as mentioned.

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

Do exactly what I mentioned in number 2 above. Old school is not a bad thing. It will serve you well in the long term. Also, pre-mark exhibits and let me know what you can agree on as "in evidence" without objections. It makes the trial go much smoother and faster.

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

I like shooting weapons of all kinds such as bows, pistols, rifles and shotguns. There isn't much to do in Marion other than hunt and fish. I also like cycling. We do have many low speed, rural roads that meander throughout the countryside and make for great cycling. I also like to read and drink red wine.

5. What is your favorite meal to cook?

Anything on the grill or slow cooker. I also like to roast vegetables of all kinds using olive oils, and specialty salts.

6. What was the last book you read?

The Chemist by Stephenie Meyer

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

Pick up the telephone and talk to another lawyer. It is becoming a lost art. It is so easy to send an email. It is easy to be misconstrued in an email. It is easy to send an email while angry. It is easy to send an email to the wrong person. Furthermore, once it is sent it is forever out there. Call and talk! Develop a relationship with other lawyers and make a friend.

SCDTAA NEWS

Corporate Counsel Seminar

by Lucy Grey McIver

On April 25, 2017 the SCDTAA sponsored a 2-hour ethics seminar devoted exclusively to mental health and wellness issues. We had 25 registrants sign up for the seminar which was held in Columbia, South Carolina. The presentation began with our President, David A. Anderson, welcoming the attendees and encouraging them to join, support and get involved with SCDTAA.

The first portion of the seminar featured Dr. David L. Albenberg of Access Healthcare. Dr. Albenberg's presentation addressed the probing question, "Should your Counselor be in Counseling?" and provided a sense of the realities of mental health issues facing many in the legal profession. Dr. Albenberg is a family practice physician in Charleston, South Carolina.

Our own member, C. Stuart Mauney of Gallivan White & Boyd, next addressed the audience with his engaging presentation, "Taking Action. Recognizing and Responding to Depression and Substance Abuse in the Legal Profession." Stuart shed light on the impact that the pressures of the legal profession can have on our members. He then provided encouraging examples of how our Bar program, "Lawyers Helping Lawyers," has been effective in assisting our colleagues who may face the medical challenges of depression. This CLE was well received and we look forward to increasing the presence of corporate and governmental attorneys and providing them a forum within our Association.

Legislative Reception

by Robert E. Tyson, Jr.

On April 25th, the SCDTAA held its annual legislative reception at the Oyster Bar in Columbia. This year the reception followed a CLE for corporate counsel.

Invited guests included members and staff of the House and Senate Judiciary Committees and legislative leadership of both bodies. Many Representatives enjoyed the oysters and the festivities; however, the Senate was locked in a contentious debate over the gas tax which limited their participation. Also in attendance were Supreme Court Justices John Few and Buck James and other judges from the Court of Appeals and the trial bench.

This reception benefits members of the defense bar because it affords them a consistent opportunity to meet with key legislative leaders and staff to discuss issues affecting the lawyers. Fortunately, many Members on the House and Senate Judiciary Committees are attorneys; thus, the discussions with the defense bar can be specific and to the point.

It is important for lawyers to have relationships with the members of the General Assembly so that when issues important to the defense bar arise, we already have relationships and credibility with the General Assembly. It is extremely valuable to know your representatives so that when legislation is being discussed, the legislators know they can depend on our insight. For example, this year legislation has been introduced which raises the jurisdictional threshold for Magistrate's court and other issues important to the defense bar. Since the legislation concerning the jurisdiction of Magistrate's Court has been discussed at SCDTAA meetings, the SCDTAA actively participated in the legislation's committee process, including testifying on our views of the legislation.

Thank you to the members and staff of the General Assembly and the numerous Judges who came out to fellowship and visit with members of the defense bar.

The 27th Annual Trial Academy Recap

by Graham P. Powell, William W. "Trey" Watkins, Jr., Richard H. Willis, and Claude T. Prevost III

The 27th Annual South Carolina Defense Trial Attorneys' Association Trial Academy was held May 17-19, 2017 in Columbia. Our organization hosted twenty-four attorneys who participated in two days of exceptional instruction and intensive training at the offices of Richardson Plowden followed by mock trials held at the Honorable Matthew J. Perry Federal Courthouse.

Trial Academy participants received valuable instruction from some of the most highly skilled and experienced trial attorneys in the state. Many of our presenters are regular adjunct professors and mock trial coaches well versed not only in the art of trial advocacy but the manner in which it is effectively taught. The presentations tracked each stage of trial and were accompanied with case specific team breakout sessions focused on witness examinations and closing arguments.

Judge Robert Hood kicked off the Trial Academy providing substantive instruction on pre-trial matters and direction from the bench on professionalism, civility, and courtroom demeanor. S-E-A, Ltd. coordinated with our presenters providing materials on effective demonstrative evidence and an expert's perspective on effective direct and cross-examination. The participants received instruction from both plaintiff and defense counsel on effective closing arguments. Around the mid-point of the instructional program before the participants received excellent instruction on the more challenging aspects of mock trial preparations, a presentation solely devoted to guidance on becoming an effective trial attorney was particularly meaningful and well received.

In addition to Judge Hood, the SCDTAA would like to thank presenters Bre Walker (jury selection/voir dire), Monty Todd (opening statements), Ray Moore (evidence), Brian Boggess (expert testimony and evidence), John Cuttino (effective tips on becoming an effective trial attorney), Brett Bayne (direct and cross of fact witnesses), Dick Willis (direct and cross of expert witnesses), Ben Davis (jury charges, verdict forms, and special interrogatories), David Yarborough (closing statements from the plaintiff's perspective), Sarah Eibling (closing statements from the defense perspective), and Ward Bradley (directed verdict, post-trial motions).

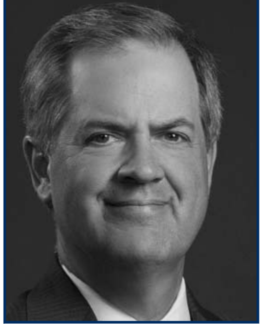
The Trial Academy culminated with six mock trials involving two-person co-counsel teams for the plaintiff and defendant based on a fact pattern modeled after Buoniconti v. The Citadel, et al. presided over by a Judges Mary G. Lewis, Stephanie P. McDonald, Thomas E. Huff, Thomas A. Russo, Eugene C. Griffith, Jr., and Robert E. Hood. The results of the trials were diverse ending with 3 hung juries, 2 verdicts for the plaintiff - both with significant comparative fault, and 1 defense verdict. Each judge was accompanied by an experienced attorney acting as a trial observer and the participants were provided with constructive feedback at the conclusion of each trial. Our trial observers this year were David Anderson, Chad Poteat, Barron Grier, Kelly Cannon, Shannon Bobertz, and Anthony Livoti. The participants left court in Columbia after their Friday afternoon trials feeling tired, relieved, fortunate, and more confident and better prepared advocates as a result of their experience.

The Trial Academy was a success thanks to the hard work of many including committee members, Graham Powell, Trey Watkins, Dick Willis, and Claude Prevost. Aimee Hiers pulled together a remarkable three days with the help of her team of Courtney Waldrup and Christina Jones who made the planning, coordination, and inherent improvisation it takes to make the Trial Academy a success appear seamless. Special thanks to our sponsor S-E-A, Ltd and its presenter Brian Boggess.

Finally, we were impressed by our colleagues who are the most likely readers of this recap. They include current members, officers and board of directors who served as trial observers, witnesses, presenters, and break out leaders; two past presidents who traveled from out of town to serve as witnesses; our current president, and those of you who we may have failed to mention by name. The SCDTAA is strong and we all came together to make this Trial Academy an experience the participates will carry forward with them for the rest of their careers

Powell

Watkins, Jr.


Willis

Prevost III

Young Lawyers Division Update

by Claude T. Prevost III

The Young Lawyers Division of the SCDTAA provides opportunities for lawyers in the early years of their practice to meet other lawyers, to build relationships, and to get involved in the SCDTAA. Derek Newberry with Hall Booth Smith, PC is the President-Elect of the YLD and will serve a two year term. There are other notable young lawyers who have taken a leadership role in SCDTAA and its committees:

- **Trey Watkins (Trial Academy/Membership and Diversity/Boot Camp)**
- **Jared Garraux (Marketing)**
- **Adam Neil (Sponsorship/Judicial)**
- **Alan Jones (DefenseLine/Amicus Curiae/Website)**
- **Geoff Gibbon (DefenseLine)**
- **Breon Walker (Women in Law/Substantive Law)**
- **Jessica Waller – (YLD Midlands Rep.)**
- **Mike Leech – (YLD Low Country Rep.)**
- **Batten Farrar – (YLD Upstate Rep.)**
- **Alex Joiner – (YLD At Large Rep.)**
- **Derrick Newberry- (YLD Vice President)**

There are many ways for Young Lawyers to be active in the SCDTAA: Trial Academy; Substantive Law Committees; Boot Camp; Silent Auction, and many others.

New Auction Committee

We are forming the Young Lawyers Division Silent Auction Committee. This is a new committee designed to get young lawyers involved in the SCDTAA. Any young lawyer participation in SCDTAA committees or events is welcomed and appreciated. If you would like to be involved in the YLD, please send your contact information to Aimee Hiers (aimee@jee.com) so you can be included on email announcements and know what's happening with SCDTAA and the YLD. We will send additional announcements for YLD events scheduled for later this year. If you have any questions about the YLD, please contact me any time.

Upcoming Events

Another upcoming event for Young Lawyers is the Motions Practice Boot Camp, which will take place this Fall. Please be on the lookout for information.

The SCDTAA Summer Meeting is scheduled for July 14 through July 16 at The Omni Grove Park in Asheville, North Carolina. We are excited to continue the tradition of have the Summer Meeting at The Omni Grove Park. The Summer Meeting is an excellent occasion for young lawyers to meet many Judges and Commissioners from across South Carolina.

For the Summer Meeting, the Young Lawyers Division is organizing the annual Silent Auction to benefit the National Foundation for Judicial Excellence, the South Carolina Bar Foundation, and Kids' Chance of South Carolina. The Silent Auction takes place in conjunction with the Welcome Reception. The Young Lawyers Division Silent Auction Committee needs your help in collecting auction items to benefit these charities. Please let us know if you, your firm, or someone you know can donate auction items this year. Please be on the lookout for emails and other announcements on how you can participate in the auction. The Silent Auction is a great time and a chance for the SCDTAA to raise money for worthy charities.

MARK YOUR CALENDARS

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

Fall of 2017
Motions Practice Boot Camp
Greenville, SC

ARTICLE

Do Not Be Deterred: Learning the High Art of Amicus Brief Writing

by Lawrence S. Ebner

With practice and dedication, any litigator can master the art of drafting a persuasive amicus brief.

Crafting a persuasive amicus curiae brief is a high art. Just like conducting an effective cross-examination, or drafting a comprehensive set of interrogatories, there is a unique set of guidelines, skills, and techniques that every amicus brief author should master.

Keep It Short

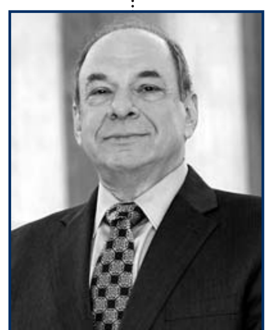
At the Supreme Court, petition-stage amicus briefs are limited to 6,000 words and to 9,000 words at the merits stage. *See* Sup. Ct. R. 33(g) (table). In the federal courts of appeals, the newly amended Federal Rules of Appellate Procedure limit amicus briefs to 6,500 words (unless modified by local circuit rules). *See* Fed. R. App. P. 29(a)(5) & 32(a)(7)(B)(i).

Truly effective amicus briefs, however, often do not require that much word volume to make an impact. Shorter is better. Because amicus briefs supplement the parties' briefs (which usually do occupy most of their allotted word volume), a concise amicus brief has a better chance of getting read and considered. This is especially true in appeals in which more than one amicus brief has been filed.

Utilize the Interest of the Amicus Curiae Section to Engage the Court

Every amicus brief begins with a section entitled something like "Interest of the Amicus Curiae." *See, e.g.*, Fed. R. App. P. 29(a)(4)(D). After glancing at the cover page and table of contents, the "Interest of the Amicus Curiae" section is usually what a member of the Court, or law clerks, read first. Unless the "Interest of the Amicus Curiae" section engages the reader, that may be the only part of the brief that he or she reads. (Amicus briefs frequently are filed on behalf of two or more amici curiae, in which case there will be an Interest of the Amici Curiae section. For convenience, this article refers only to a single amicus curiae.)

Inexperienced amicus brief writers sometimes make the mistake of limiting the Interest of the Amicus Curiae section to a few sentences identifying or describing the amicus curiae in general terms. For example, if the amicus curiae is a trade association, a neophyte amicus counsel may think that it is sufficient to borrow a few sentences from the "About" page on the group's website and use that alone as the amicus brief's "Interest of the Amicus Curiae" section. While that might be an appropriate way to begin the Interest section, it is not enough.



Instead, as the name implies, the Interest of the Amicus Curiae section should address exactly that subject: Why is this case, and/or the question presented, important to the amicus curiae and its members (and why should it be important to the Court)? What expertise, experience, or other background does the amicus curiae have in connection with the question presented and/or subject matter of the appeal? Has the amicus curiae filed other briefs on the same issue or related subjects in the same or other courts? If there is more than one question presented, which specific legal issue or issues does the amicus brief address? What will the amicus brief add to the Court's understanding or consideration of the issue or issues (e.g., a unique, broad, or practical perspective; insight on the policy implications; additional jurisprudential, legislative, regulatory, or scientific or regulatory background). What position does the amicus brief advocate?

An Interest of the Amicus Curiae section drafted in this manner can quickly establish the credibility of the amicus curiae as well as draw the Court into the brief. The converse is also true. If the Interest section fails to provide adequate information about why the amicus brief is being filed, it may not be read. And in some appellate courts, such as the U.S. Court of Appeals for the Seventh Circuit, a motion for leave to file an amicus brief (when the unsupported party has withheld consent) may be denied.

Avoid Getting Bogged Down by the Facts of the Case

Writing an amicus brief can be a liberating experience. The brief can and should address the legal issues in an appeal, including their broader implica-

Continued on next page

tions, without delving into the facts of the particular case in which the issues arise. No statement of facts is required, or desirable, in an amicus brief. *See, e.g.*, Fed. R. App. P. 29(a)(4). Although an amicus brief can be written at the "10,000-foot" or even "30,000-foot" level, it should not be totally oblivious to the facts of the case, especially when they squarely present a legal question or vividly illustrate the wisdom of a legal argument. Many amicus briefs weave a few factual and procedural background sentences into the "Interest of the Amicus Curiae" or "Summary of Argument" sections.

Stick to the Questions Presented

As a general rule, appellate courts will not consider legal issues that a party failed to raise and press in the lower courts, and thus preserve for appeal. Although it is permissible, and usually quite desirable, for an amicus curiae to present a new *argument* in connection with one of the questions presented, an amicus brief normally must avoid raising a legal issue that is not before the appellate court.

An interesting exception to this rule occurred in the case of *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014). In that case, which involved the evidentiary support needed to satisfy federal notice-of-removal requirements, the Supreme Court granted certiorari. DRI-The Voice of the Defense Bar filed a merits-stage amicus brief that aligned with the Court's ultimate decision on the merits. Another merits-stage amicus brief, filed by Public Citizen Litigation Group, argued that the notice-of-removal issue was not actually before the Court, and thus, that the Court lacked certiorari jurisdiction to consider that issue. Much of the hearing focused on that jurisdictional issue. In a 5–4 decision, over sharp dissents by Justices Scalia and Thomas, the Court retained jurisdiction and decided the notice-of-removal issue.

Do Not Repeat the Supported Party's Legal Arguments

In most cases, using your own words to reiterate the legal arguments that the supported party makes in its brief or petition will ensure that your amicus brief will be ignored. Even too much similarity between the argument headings in an amicus brief's table of contents and those in the supported party's brief or petition may enough to relegate the amicus brief to the bottom of the pile. Take the Supreme Court's admonition to heart:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

Sup. Ct. R. 37.1.

There is an exception to the admonition against repeating a party's arguments: In a rare case in which the supported party's brief does a truly inadequate job of articulating an argument on a legal issue, it probably is okay for an amicus brief to provide the court with the well-researched and written, high-quality legal argument that the supported party's brief failed to present. Such an amicus brief presumably would fall into the category of providing an appellate court with "relevant matter not already brought to its attention by the parties." *Id*.

Avoiding repetition of a supported party's arguments does not mean that an amicus brief should shy away from digging deeper into an argument. An amicus brief, for example, could provide an in-depth discussion of case law that the supported party's brief merely cites. Or an amicus brief can augment or bolster a party's argument by referring to law review articles or other scholarly materials. If a case involves interpretation of a statute, an amicus brief might present relevant legislative history. And of course, an amicus brief has free rein to criticize a lower court's opinion or the legal arguments that the opposing party has made or can be anticipated to make.

An amicus brief also can provide *non-case-specific* factual information that may be helpful to an appellate court's understanding of the legal issues or their implications or ramifications. Such extra-record factual information, which fits into the original notion of a "friend of the court," can range from historical background to economic or sociological statistics to engineering or scientific data.

But in all events, do not submit a "me-too" amicus brief that replicates arguments contained in other briefs. This also applies to situations in which more than one amicus brief is being submitted. Coordinating various amicus briefs, or submitting a single brief on behalf of co-amici, helps avoid the problem of duplicative amicus briefs.

Write in an Elevated and Restrained Tone

Appellate briefs are, or at least should be, fundamentally different from trial court briefs. As an amicus counsel, you can be a strong advocate for your amicus client's position without having to write a brief that is as confrontational or antagonistic, and even *ad hominem*, as many trial court briefs tend to be. An amicus brief can be written in a loftier style, and speak with authority, without adopting an erudite tone or reading like a law review article. The text should be as straightforward as possible. Keep sentences as short as possible, but do not use made-up acronyms. Vivid words and phrases can be used, but with care, and always in a way that is respectful to the judiciary and to the parties and their counsel. Remember that your amicus brief is directed to the questions presented, not to the litigating parties themselves.

The Office of the Solicitor General of the United States (OSG) is composed of outstanding appellate attorneys whose Supreme Court briefs provide aspirational examples of the appropriate writing style and tone for amicus curiae and other types of appellate briefs. (Note, however, that the OSG briefs have their own structural and citation formats.) OSG briefs are available online at https://www.justice.gov/osg/supreme-court-briefs.

Edit, and Re-edit, Your Brief

There is no such thing as too much editing or proofreading of an amicus brief, even if you have to eat some billable time to do it. Be certain to know and respect an appellate court's format requirements. Adhere to Bluebook or other standard citation style, including in the table of authorities. Limit the length of block quotes. Use "emphasis added" sparingly, and never use **bold font** to emphasize words or phrases. (Many appellate judges find bolding to be offensive.) Keep footnotes short and to a minimum, and do not use a font size so small (e.g., 8-point Times New Roman) that footnotes will be virtually impossible to read by anyone who does not have 20-20 vision.

Do Not Allow the Supported Party or Its Counsel to Write Your Brief

Supreme Court Rule 37.6 requires the first footnote on the first page of every amicus brief filed in that Court to "indicate whether counsel for a party authored the brief in whole or in part." Amicus briefs filed in the federal courts of appeals must include the same disclosure. *See* Fed. R. App. P. 29(a)(4)(E). The 2010 Advisory Committee Notes accompanying the federal appellate rule indicate that it "serves to deter counsel from using an amicus brief to circumvent page limits on parties' briefs." This does not mean, however, that a supported party's counsel should avoid contact with amicus counsel. To the contrary, party counsel's solicitation and coordination of amicus briefs, suggestions for topics, issues, or arguments, sharing of research materials, and commentary on near-final drafts, continue to be a common and desirable aspect of amicus brief practice. Indeed, the Advisory Committee Notes indicate that "coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments."

As a corollary, do not allow counsel for an opposing party to condition his or her consent to file an amicus brief on an opportunity to preview your brief. In the vast majority of cases there is no justification for a party to withhold consent for the filing of a timely amicus brief in support of the other side. An opposing counsel's preapproval of the content of an amicus brief as a condition for consent is simply out of line in appellate courts, and it does not serve the interests of justice.

The "Amicus Machine" Should Not Deter You from Learning the High Art of Amicus Brief Writing

As the title of this article suggests, writing an effective amicus brief is an art. Although it is a high art form that many appellate specialists have mastered, it would be too self-serving to suggest that only highly experienced appellate attorneys have the skill to write persuasive amicus briefs.

A recent law review article contends that at the Supreme Court level, a relatively small number of renown appellate advocates operate a self-perpetuating "amicus machine" that is both "clubby" and "elite." Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1908 (2016). The authors define the so-called amicus machine as "a systematic, choreographed engine designed by people in the know to get the Justices the information they crave, packaged by lawyers they trust." *Id*. at 1915. Armed with statistics about the elite law firms that solicit and file many Supreme Court amicus briefs, the authors go so far as to assert that "the modern Supreme Court itself embraces the work of the amicus machine. The Justices seem to prefer a system dominated by Supreme Court specialists who can be counted on for excellent advocacy." *Id*. at 1907. The list of contributors whom the authors interviewed for their supposedly objective article reads like the membership roster of the exclusive club that the authors laud.

Most Supreme Court "repeat players" are truly stellar appellate advocates who deserve their well-earned reputations as outstanding, sought-after members of the Supreme Court Bar, especially in the area of oral advocacy. While those marquee-level attorneys appear as counsel of record on Supreme Court amicus briefs, it is typically their juniors who do the actual drafting (or at least initial drafting) of amicus briefs. Those less experienced but talented attorneys produce excellent work product. But neither they nor their super-star colleagues have a monopoly on the ability to author high-impact amicus briefs. Instead, any dedicated attorney who wants to spend the time honing his or her writing skills at the appellate level can learn the art of drafting a persuasive amicus brief for submission to the Supreme Court, federal courts of appeals, or state appellate courts.

Lawrence S. Ebner is founder of Capital Appellate Advocacy PLLC, a Washington, D.C.-based appellate litigation boutique that focuses on federal issues in the Supreme Court and federal courts of appeals. Mr. Ebner is a Fellow of the American Academy of Appellate Lawyers and a graduate of Harvard Law School and Dartmouth College. He has written dozens of amicus briefs on behalf of industry groups and individual companies, and also for DRI. Mr. Ebner serves as chair of the DRI Amicus Committee and as publications chair of the DRI Appellate Advocacy Committee.

DRI Update

by James R. Courie

As I write my first column as DRI State Representative, I think it is appropriate to reflect on what DRI means, both professionally and personally. The professional part is easy. Everyone knows about DRI's 29 substantive law committees, excellent seminars, first class publications, and other available resources. DRI is a leader in the effort to improve our civil justice system for everyone, and works to be a counterbalance to the Plaintiff's Bar. DRI has a database of over 65,000 experts, online communities and neutrals. Finally, and more important than ever given today's rapidly changing world, DRI assists members in dealing with the economic realities of the defense law practice in today's competitive legal marketplace. Both my firm and I have benefited professionally from all these services and resources.

Many lawyers value DRI's networking and client development opportunities among the greatest value the organization provides. DRI can clearly be a marketing path to building a successful practice. I know many lawyers that credit DRI for much of the success they have had in developing their individual skills and their client base. Practices and even firms have been built on the business opportunities often created by DRI involvement.

But it doesn't stop there. I started by saying I would reflect on the impact I have witnessed both professionally and personally. To me, DRI's personal impact is the key.

I have met many friends through my association with DRI. I have had meals with their families and spent nights in their homes. Often the greatest part of DRI's outstanding seminars is the reunion with colleagues from near and far away. It is a special organization made up of special likeminded professionals. If you are an active member, you understand. If you are not a member or a member but not active, I urge you to become involved.

DRI offers many opportunities to join and more importantly to be an active participant. Start with joining a Substantive Law Committee, volunteer to write an article or even attend one of the great DRI seminars that is relevant to your practice area or involves issues that you believe are important. Construction Law, Products Liability, Insurance, Women in the Law or Diversity all provide great substantive programming and networking opportunities. I would also suggest you consider the Annual Meeting in Chicago October 4-8. Not to be confused with the stock car race this meeting is truly the granddaddy of all meetings. The Annual Meeting provides excellent educational and networking opportunities and is a great way to experience a little of everything that DRI has to offer. Whether you are new to join or ready to increase your level of activity I am confident you will experience what I have enjoyed for many years.

DRI values its partnership with our association and is offering a discounted first year membership rate of $285.00 for an individual membership and $165.00 for young lawyers. In addition you will receive a certificate for a complimentary registration to one of DRI's seminars (excludes Annual Meeting). There are other incentives for past members who would like to return as well as Government and Corporate counsel. Please reach out to me if you would like more information. I am more than happy to talk more about the many benefits of active DRI involvement. I am confident you will find it to be valuable investment—both professionally and personally. I can be reached at jcourie@mgclaw.com.

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ARTICLE

Beware the Ides of March
(or Some Time Thereabout): New Workers' Compensation Cases Dominate the Spring

by Kate Hemingway[1], Ryan Oxford[2] and Natalie Pike[3]

Soothsayer: *Caesar!*
Caesar: *Ha! who calls?*
Casca: *Bid every noise be still: peace yet again!*
Caesar: *Who is it in the press that calls on me? I hear a tongue, shriller than all the music, Cry 'Caesar!' Speak; Caesar is turn'd to hear.*
Soothsayer: *Beware the ides of March.*

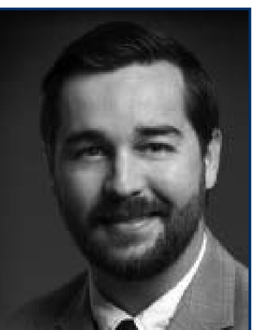
The ides of March are, technically, the 15th day of March. Famous for being the day Caesar was murdered, the Soothsayer's warning in Shakespeare's *Julius Caesar* could likewise have been applicable to employers, insurance carriers, and Workers' Compensation defense practitioners. Even though none were published on the exact ides, the month of March 2017 brought with it a flurry of cases that could heavily impact Workers' Compensation practitioners and their clients in the years to come. Beginning on March 8, 2017 with *Clemmons v. Lowe's Home Centers, Inc.*, South Carolina's appellate courts handed down three decisions that change the analysis on critical aspects of workers' compensation claims, including presumptions of permanent and total disability, notice to employers, and res judicata for changes of condition. Below, we examine each case in detail.

Clemmons v. Lowe's Home Centers, Inc.

On March 8, 2017, the South Carolina Supreme Court issued an opinion reversing and remanding *Clemmons v. Lowe's Home Centers, Inc*., and holding that a presumption of permanent and total disability, based on medical evidence indicating a claimant sustained more than fifty percent loss of use of his back, was not rebutted solely by evidence the claimant returned to work.[4]

In September 2010, Henton Clemmons, Jr., an employee at Lowe's, was assisting a customer when he slipped and fell, severely injuring his back.[5] Dr. Randall Drye, a neurological specialist, diagnosed Clemmons with a herniated disc causing severe spinal cord compression and requiring immediate surgical intervention.[6] Dr. Drye removed the herniated disc and fused Clemmons' C5 and C7 vertebrae.[7] Despite extensive physical rehabilitation after surgery, Clemmons continued to experience pain in his neck and back, as well as difficulty balancing and walking.[8]

Hemingway


Oxford

Pike

Clemmons filed a workers' compensation claim to recover medical expenses and temporary total disability benefits.[9] Clemmons' employer accepted the claim and agreed to pay temporary total disability benefits until Clemmons reached maximum medical improvement or returned to work.[10] In June 2011, Dr. Drye determined Clemmons had reached MMI and assigned a whole-person impairment rating of twenty-five percent based on the injury to his cervical spine, which converts to a seventy-one percent regional impairment to his spine based on the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*. Additionally, pursuant to a determination by Dr. Drye, Lowe's agreed to accommodate Clemmons' permanent work restrictions and permitted him to return as a cashier.[11]

Dr. Drye conducted a follow-up evaluation in June 2012, and reached the same conclusion regarding maximum medical improvement and the permanent work restrictions.[12] In response, the employer requested a hearing before the Commission to determine whether Clemmons was owed any permanent disability benefits.[13] Prior to the hearing, Clemmons visited several different medical professionals for additional opinions regarding his condition, and was assigned impairment ratings.[14]

At the hearing before the Single Commissioner, Clemmons argued he was entitled to permanent and total disability based on his loss of use of more than fifty percent of his back.[15] Lowe's argued Clemmons was only entitled to permanent partial disability, as

Continued on next page

he had less than fifty percent loss of use of his back based upon Dr. Drye's twenty-five percent whole-person rating and the fact that he returned to work.[16] The Single Commissioner determined Clemmons was not permanently and totally disabled and sustained only forty-eight percent loss of use of his back, which limited him to an award of permanent partial disability.[17] Both the full Commission and the Court of Appeals affirmed the Single Commissioner's Order.[18]

Clemmons appealed and argued before the South Carolina Supreme Court that the Court of Appeals erred in finding the Commission's order was supported by substantial evidence, as all the medical evidence indicated he suffered more than fifty percent loss of use to his back, entitling him to an award of permanent and total disability.[19] The Supreme Court agreed and held the Commission's conclusion was unsupported by the substantial evidence in the record.[20] Moreover, the Supreme Court found no evidence in the record to support that Clemmons suffered anything less than fifty percent impairment to his back and was therefore, presumptively permanently and totally disabled.[21] Specifically, the Supreme Court focused on the fact that every medical professional who assigned an impairment rating indicated Clemmons sustained more than seventy percent loss of use of his back.[22] The Supreme Court characterized the converted regional ratings to Clemmons' cervical spine as regional impairment to the entire spine or back.[23]

In addition, the Supreme Court held that the fact the claimant returned to work was not sufficient to rebut the presumption of permanent and total disability under S.C. Code Ann. § 42-9-30(21).[24]

In addition, the Supreme Court held that the fact the claimant returned to work was not sufficient to rebut the presumption of permanent and total disability under S.C. Code Ann. § 42-9-30(21).[24] The Court reasoned that allowing a claimant's ability to work alone to rebut the presumption of total and permanent disability undermines the established principle that the scheduled-member statute is separate and distinct from the general disability statute, and would have the undesirable effect of discouraging claimants from returning to the workforce.[25]

Wilson v. Charleston County School District

The South Carolina Court of Appeals recently reversed and remanded Wilson v. Charleston County School District, asserting that the lower court erred in holding that res judicata barred Wilson's change of condition claim.[26]

Wilson worked as a data entry clerk for the School District and was injured as a bystander to a fight between two male students on May 6, 2006.[27] Wilson, being 4'10, was inadvertently pushed up against a counter top, resulting in injuries to her neck and back.[28] She subsequently filed a Form 50 on January 6, 2009.[29] On November 29, 2007, the Single Commissioner found that Wilson suffered a 45% disability to her back.[30] A Form 19, reflecting the date of last payment of compensation, was filed on January 25, 2008 and an amended Form 19 was filed on May 7, 2008.[31] On March 29, 2011, Wilson filed another Form 50, alleging that she sustained a change of condition. Specifically, Wilson asserted that her back injury was affecting her mental health.[32]

The Single Commissioner heard the change of condition claim on June 29, 2011.[33] While Wilson admitted to taking anxiety medication following the death of her husband, she asserted that she did not experience significant depression until after the pain in her back worsened.[34] While her primary care physician had treated her for psychological issues in the past, not until May 2008 did her primary care physician refer her for psychiatric treatment.[35] The Claimant was later evaluated by Dr. Samuel H. Rosen, who noted that Wilson had a history of depression.[36] While Wilson suffered from depression when Dr. Rosen first saw her on May 16, 2008, he opined that she did not have "endogenous" depression at that time.[37] However, Dr. Rosen concluded that Wilson had since developed endogenous depression which was either exacerbated or caused by her work injury.[38] In light of these findings, the Single Commissioner concluded that Wilson had sustained a change of condition with regard to her psychologi-

cal issues.[39] The School District appealed and the Appellate Panel reversed, asserting that the doctrine of res judicata barred Wilson from asserting her psychological claim.[40] The Circuit Court affirmed the Appellate Panel.[41]

The Court of Appeals reversed and remanded the case, finding that Wilson was not barred from filing a change of condition by res judicata.[42] The court asserted that under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.[43] Based on this principal and the holding in *Estridge v. Joslyn Clark Controls, Inc*.,[44] the court concluded that "a symptom which is present and causally connected, but found not to impact the claimant's condition at the time of original award, may later manifest itself in full bloom and thereby worsen his or her condition. Such an occurrence is within the reasons for the code section involving a change of condition. Therefore, [an injury] is not barred by res judicata in a change of condition proceeding merely because it was not discussed in the initial award."[45] Additionally, the court asserted that "a mental condition, which is induced by a physical injury, is thereby causally related to the original injury and may properly be compensated in a change of condition proceeding as part of the original injury."[46] The court additionally found that "even if a mental condition is not raised at the original hearing, it may be raised at the change of condition hearing," as res judicata only precludes relitigation of issues litigated or those that might have been litigated in the first action.[47]

Ultimately, the Court of Appeals relied on the "full bloom" concept as laid out in *Estridge*.[48] Here, while Wilson had existing depression at the time of the first claim, her mental condition did not affect her condition at the time of the award. Instead, her psychological condition "manifested itself in full bloom" at a later date, worsening her condition. Additionally, Wilson never alleged psychological issues in her initial Form 50. This was to her advantage, as the issue of her depression had not been litigated and could not have been litigated in the first action. Consequently, the Court of Appeals reversed the Circuit Court's order, and remanded the case to the Appellate Panel for consideration of Wilson's change of condition.

Nero v. SC Dept. of Transportation[49]

In the recent opinion of *Nero v. South Carolina Department of Transportation*, the requirements for notice of an injury under Section 42-15-20[50], particularly with respect to formal notice, are addressed. In the decision, which was authored by Judge McDonald, the responsibility for the employee to notify their employer of an injury by accident is drastically reduced, at least in certain circumstances.

Otis Nero was working on a road crew for SCDOT on June 20, 2012 which was pouring concrete.[51] He was being supervised by lead man Benjamin Durant and supervisor Danny Bostick.[52] The work that day involved pulling a thirty-foot "squeegee board" to level and smooth the concrete.[53] That afternoon, after finishing the work for the day, Nero was talking with his crew, including Durant and Bostick, when he lost consciousness and fell to the ground.[54] After regaining consciousness, Nero informed his supervisors that he was fine and he drove home.[55] Upon returning home, Nero lost consciousness again in his driveway and he was taken to the hospital by his wife, where he indicated on his intake forms that he had "passed out talking to [his] boss."[56] It was later determined that Nero had cervical stenosis and he was referred to a neurosurgeon who performed a fusion surgery.[57]

Prior to his surgery, Nero completed FMLA paperwork through the SCDOT human resources department where he indicated that the approximate onset date of his condition was "several years — neck and syncope"; however, Nero did not mention the squeegee board incident from June 20, 2012.[58]

Nero requested a hearing before a Single Commissioner on January 6, 2014 for injuries sustained to his neck from pulling the squeegee board on June 20, 2012.[59] The Single Commissioner found that the injury was a compensable injury by accident that aggravated a pre-existing condition in Nero's neck.[60] Further, the Single Commissioner found that Nero had a reasonable excuse for not filing a formal report of his injury based on the facts that (1) his supervisors were present and knew of pertinent facts surrounding the accident which were sufficient to indicate the possibility of a compensable injury, (2) his supervisors followed-up with Nero, and (3) SCDOT was aware that Nero did not return to work following the June 20, 2012 incident.[61] The Single Commissioner also found that SCDOT had not been prejudiced by Nero's failure to file any kind of formal notice of his injury.[62]

SCDOT appealed the Single Commissioner's decision to the Appellate Panel which reversed the Single Commissioner's decision.[63] In doing so, the Appellate Panel found that, although Nero's supervisors witnessed the incident where he lost consciousness, he didn't notify them that that accident involved a "snap" in his neck and shoulders.[64] The Appellate Panel also found that SCDOT was prejudiced by Nero's failure to report because they were deprived of the opportunity to investigate whether the accident aggravated Nero's pre-existing cervical stenosis.[65] Nero appealed the decision of the Appellate Panel to the South Carolina Court of Appeals which reversed the decision of the Appellate Panel.

The standard for determining whether an employer has notice of an injury is found under

Continued on next page

Section 42-15-20 of the South Carolina Code of Laws which requires adequate or constructive notice of an injury[66], and that such notice must be given within ninety days of the accident unless reasonable excuse can be shown to the commission for any delay and that the employer was not prejudiced by a delay in reporting.[67] Relying on the fact that the statute does not prescribe a specific method for providing formal notice, the Court held that the "provision for notice should be liberally construed in favor of the claimants."[68] The Court of Appeals further explained that, because both Durant and Bostick were present when Nero lost consciousness, and were aware that he had been hospitalized and didn't return to work, SCDOT had adequate notice of the injury.[69]

SCDOT argued that, despite having knowledge of Nero's loss of consciousness and ensuing treatment at the hospital, it did not have notice of an actual injury involving his neck, of which there were opportunities to do so when Nero spoke with both Durant and Bostick while in the hospital.[70] Further, SCDOT argued that Nero's FMLA paperwork specified that his injury was pre-existing having been present for "several years."[71] Despite SCDOT's arguments that it was not provided proper notice of Nero's injury, the Court of Appeals found that Durant's and Bostick's knowledge of his falling episode, coupled with his resulting treatment, was sufficient notice of a potential injury.[72]

At the Appellate Panel, SCDOT argued that, although Durant and Bostick witnessed Nero's syncope episode, they were not provided notice of any accident resulting from pulling the squeegee board, which was the underlying cause of the injury.[73] They argued that Nero had numerous opportunities to provide notice of his injury within the ninety day requirement outlined in Section 42-15-20(B), and failing to do so was not reasonable. The Court of Appeals ultimately disagreed with that argument and held that, because Nero collapsed in the presence of both Durant and Bostick, he was not under an obligation to provide formal notice.[74] Similarly, because SCDOT had knowledge of his medical treatment and knowledge that he did not return to work after the June 20, 2012 incident, the employer was not prejudiced by his failure to provide formal notice.[75]

Footnotes

1 Kate K. Hemingway is an associate at Lueder, Larkin & Hunter in Charleston, South Carolina. She graduated law school from the University of South Carolina and served as a judicial law clerk to the Honorable Alison Renee Lee, Circuit Court Judge. She practices in the areas of litigation and workers' compensation and also handles general liability and insurance coverage matters.

2 Ryan D. Oxford is an associate at Lueder, Larkin & Hunter in Charleston, South Carolina. He graduated from the Charleston School of Law where he graduated cum laude. He practices in the areas of litigation and workers' compensation.

3 Natalie C. Pike is an associate at Lueder, Larkin & Hunter in Charleston, South Carolina. She received her J.D. from the Charleston School of law and graduated cum laude. She practices in the area of workers' compensation and focuses on Longshore, Defense Base Act, and War Hazard Compensation Act claims, along with North Carolina and South Carolina workers' compensation claims.

4 *Clemmons v. Lowe's Home Centers, Inc.,* _S.E.2d_, No. 2015-001350, 2017 WL 920730, at *1 (S.C. Mar. 8, 2017).

5 *Id*.

6 *Id*.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id*.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* A physical therapist, Tracy Hill, assigned Clemmons a thirty-six percent whole-person impairment rating and a ninety-one percent regional impairment rating with respect to his back. Additionally, Dr. Leonard Forrest, at the Southeastern Spine Institute assigned Clemmons a whole-person impairment rating of forty percent, which translates to a ninety-nine percent regional impairment of his back. Clemmons also presented medical testimony from Dr. Gal Margalit, who opined to a reasonable degree of medical certainty that he had lost more than fifty percent of the functional capacity of his back.

15 *Id*. at *2.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at *3.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at *4.

25 *Id.* at *4.

26 *Wilson v. Charleston County School Dist.*, No. 2014-002596, 2017 WL 1075196, at *1 (S.C. Ct. App. Mar. 22, 2017).

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at *2.

38 *Id.*

39 *Id.*

40 *Id.*

Continued on bottom of page 30

ARTICLE

The Statutory Employee: A Sword and A Shield

by Adam Ribock and Anna Barber Marsh[1]

In South Carolina, workers' compensation generally provides the exclusive remedy for workers who are injured on the job.[2] In return for providing workers' compensation benefits, the employer of an injured worker is immune from a civil suit. However, the employee is often injured as a result of a third party's actions or has more than one employer. Despite this, injured workers continue to bring claims against third parties for their work related injuries, even if the "third party" should be considered an employer, or at least, a statutory employer.[3]

A statutory employer is immune from a tort lawsuit as provided in "The South Carolina Workers' Compensation Law."[4] In other words, if a worker is properly classified as a statutory employee, his sole remedy for work-related injuries is to seek relief under workers' compensation.[5] Therefore, a statutory employee may not maintain a negligence cause of action against his direct employer or his statutory employer. Knowing what is considered a statutory employer-employee relationship is pivotal in South Carolina for a successful defense if you are representing someone who could be considered a statutory employer in a suit filed by an injured worker.

The statutory employer defense is "well recognized" law in South Carolina.[6] The defense is based upon § 42-1-400 of the South Carolina Code, which provides:

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

This provision in the 1976 code is identical to §72-111 of the 1962 Code and earlier statutes.[7] It provides an exception to the general rule by imposing liability upon an owner or "upstream" employer for the payment of compensation benefits to a worker not directly employed by either the owner or upstream employer. The defense is dependent on the nature of the work performed by the worker.

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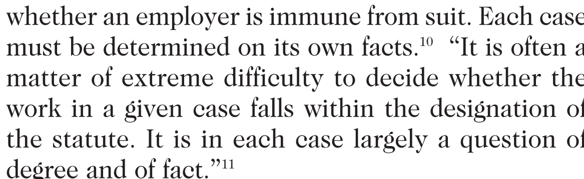
The South Carolina Supreme Court recognized that a statutory employer could use the provision as a defense in *Marchbanks v. Duke Power Company*. *Marchbanks* is a 1939 decision in which the Court held the "owner" or "statutory employer" should have the immunity from tort liability provided by workers' compensation law and the longstanding provision of the then- "Workmen's Compensation Act."[8] *Marchbanks* has been cited over 70 times, most recently by the South Carolina Court of Appeals in 2013 and the South Carolina Supreme Court in 1999.[9] More recent cases echo *Marchbanks* in holding the language of the statute is plain and unambiguous; however, there is no easily applied formula that can be used to determine



whether an employer is immune from suit. Each case must be determined on its own facts.[10] "It is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the statute. It is in each case largely a question of degree and of fact."[11]

The determination of whether a worker is considered a statutory employee is jurisdictional and a question of law.[12] The determination of a statutory employee is fact-driven. However, the proper procedure for raising this defense, when faced with a lawsuit, is to file a motion to dismiss pursuant to Rule 12(b)(1), rather than a motion for summary judgment pursuant to Rule 56.[13] In determining whether to dismiss the cause of action for lack of jurisdiction, the court may consider "affidavits and other evidence outside the pleadings . . ." without converting the motion into one for summary judgment.[14] "Indeed, because the statutory employer defense is a matter of law for the court to decide, it is inevitable

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that the court look beyond the pleadings to decide the issue."[15] The court will decide the jurisdictional facts in accord with the preponderance of the evidence.[16]

In order to be considered a statutory employer under § 42-1-400, an owner/employer must show the injured employee is engaged in an activity that is part of the owner/employer's trade, business, or occupation. "Thus, depending on the nature of the work performed by the subcontractor, an employee of a subcontractor may be considered a statutory employee of the owner or upstream employer."[17] In determining whether an employee is engaged in an activity that is "part of [the owner's] trade, business, or occupation" as required under section 42-1-400, the courts have applied a three-part test:

> (1) Is the activity an important part of the owner's trade or business?
>
> (2) Is the activity a necessary, essential, and integral part of the owner's business?
>
> *or*
>
> (3) Has the activity previously been performed by the owner's employees? [18]

If the activity meets even one of these three criteria, the injured employee qualifies as a statutory employee.[19] The test for a statutory employee obviously differs from, and should not be confused with, the test used to determine whether a worker is an independent contractor or employee. The two are wholly unrelated and the "right to control" is not analyzed for a statutory employee.[20] Further, the statutory employee status is not determined by the contract between the parties but by the nature of the work to be performed. The Court in *Collins v. Seko Charlotte* found the contract only provides a "necessary foundation for the creation of the statutory employee relationship."[21]

The Supreme Court has recognized the statutory employee determination can be a sword for the injured worker seeking workers' compensation coverage. However, it can also be used as a shield when a statutory employer is sued in tort.[38]

The three-part "test" now used by courts in South Carolina arose out of language in three different and distinct cases. The tests were summarized and first used together in the 1988 case of *Ost v. Integrated Prods., Inc.* Initially the Court held in *Marchbanks* that when a person performs work, which is part of the trade or business of the principal, the employees of the person will be considered statutory employees of the principal.[22] In *Marchbanks*, the Court concluded that a person who was injured while painting the power company's pole was engaged in the "trade, business or occupation" of the power company because the activity was an important part of the power company's trade or business.[23]

Thereafter, in *Boseman v. Pacific Mills*, the Court found that when an activity performed by the employees of a subcontractor is necessary, or essential to, or an integral part of, the operation of the principal employer's business, the employees of the subcontractor should be considered the statutory employees of the principal employer.[24] In *Boseman*, an employee of the subcontractor, who was painting a water tank at a mill, was killed when the tank caught fire and exploded.[25] The Court reasoned the water tank provided essential protection to the mill against fires and, therefore, should be considered an integral part of the trade or business of the mill.[26] As a result, the mill was subject to liability for the death of Boseman.[27]

The Supreme Court of South Carolina adopted another test in *Bridges v. Wyandotte Worsted Company*.[28] In *Bridges*, the plaintiff's employer was contracted to work on the transmission line owned by the defendant and located on defendant's property. The Court looked to see whether the identical activity (repairing or replacing the transmission line) had been performed by employees of the principal employer. The Court noted the line had been replaced on a previous occasion and was customarily maintained by a qualified crew that was regularly employed by the defendant. The Court therefore held the defendant was liable for the subcontractor's employee's injuries.

The South Carolina Supreme Court and South Carolina Court of Appeals have analyzed numerous activities under statutory employee tests since *Ost v. Integrated Prods., Inc.* in 1988. Of course, depending on the stance and positions of the parties, the finding either shields a statutory employer from

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liability in tort or allows an injured employee to use it as a sword and proceed against the employer for workers' compensation benefits.

In *Meyer v. Piggly Wiggly*, Meyer was employed by a wholesale bakery that was a vendor for the grocery store.[29] Meyer's duties included stocking shelves with the products and cleaning the display. While working at the grocery store, Meyer slipped and fell. He then filed an action in tort against the store. However, the Supreme Court found Meyer was not the grocery store's statutory employee because his activities were "insubstantial in the context of Piggly Wiggly's general business" and the relationship was vendor-vendee and not owner-subcontractor.[30]

However, just three years later, in *Hancock v. Wal-Mart*, the Court of Appeals upheld the trial judge's finding that Hancock was Wal-Mart's statutory employee.[31] Hancock was employed by Tru-Wheels, Inc., a vendor for Wal-Mart. Hancock's job duties included assembling merchandise exclusively for Wal-Mart. He was injured while assembling a riding lawnmower. Hancock argued he should be considered as a vendor of labor to Wal-Mart. However, the Court of Appeals found the facts did not point to a vendor-vendee relationship and Hancock's relationship with Wal-Mart satisfied all questions of the three-part test. Interestingly, the court noted that the affidavit provided by Wal-Mart indicated Hancock's duties were a vital and important part of Wal-Mart's business because, according to Wal-Mart, items display and sell better once they have been assembled. The Court also noted Hancock and Wal-Mart agreed that Wal-Mart's own employees often performed the same assembly duties.

Abbott v. The Limited provided the Supreme Court an opportunity to announce a bright-line rule that the mere recipient of goods delivered by a common carrier is not the statutory employer of the common carrier's employee.[32] The Court found "the fact that it was important to receive goods does not render the delivery of goods an important part of the business.[33] However, the Court later recognized that for some businesses, the delivery of goods was an important part of a company's business. In *Collins v. Seko Charlotte*, the Court held that a motor carrier was liable for workers' compensation benefits when a subcontractor's expedited delivery service driver was fatally injured.[34] The difference hinged on Seko Charlotte being in the cargo delivery business, the transportation of goods being their primary business, and their own employees completing the same type of deliveries.[35]

Among the cases where a worker was found to be a statutory employee include a maintenance associate of a subcontractor at a manufacturing plant and a transportation manager of a parent company who was a direct competitor.[36] There are also numerous cases where the courts have found the activity did not meet any criteria of the three-part test. As the Court stated in *Glass v. Dow Chemical*, where repairs are major, specialized, or the type which the employer is not equipped to handle with its own work force, they are not the statutory employer.[37]

As seen from the analysis and reasoning in the above cases, it is critical for the party seeking a statutory employer defense to analyze and evaluate the particular facts and relationship among the parties prior to filing a motion to dismiss. The motion to dismiss should also be supported with the necessary affidavits and evidence, even if deposition testimony needs to be taken before the motion is filed.

The Supreme Court has recognized the statutory employee determination can be a sword for the injured worker seeking workers' compensation coverage. However, it can also be used as a shield when a statutory employer is sued in tort.[38] "The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee."[39] Therefore, all upstream employers should make sure their subcontractors have adequate workers' compensation coverage. If not, the employee of a subcontractor who does not have workers' compensation insurance may have an argument that they should be considered a statutory employee of the upstream employer. Similarly, general contractors and companies hiring subcontractors should also be wary of workers, who should be deemed statutory employees, bringing civil suits for injuries covered exclusively by workers' compensation.

Footnotes

1 Adam Ribock and Anna Barber Marsh are associates with McAngus Goudelock & Courie in Columbia. They both practice general liability defense.

2 South Carolina does recognize exceptions including: acts of a subcontractor who is not the injured person's direct employer, intentional acts, slander, and certain occupations. However, for purposes of this article the exceptions outline in the Code and South Carolina case law are simply noted and not discussed. See generally S.C. Code Ann. § 42-1-540; § 42-1-350 through 375; *Dickert v. Met. Life Ins. Co*., 311 S.C. 218, 428 S.E.2d 700 (1993); and *Loges v. Mack Trucks, Inc*., 308 S.C. 134, 417 S.E.2d 538 (1992).

3 The focus of this article is defenses to certain third-party actions when workers' compensation benefits could be or have been awarded. The intricacies of workers' compensation procedures, rights, and defenses are only mentioned in passing as background information.

4 S.C. Code Ann. § 42-1-10 et seq. (1976).

5 *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 661 S.E.2d 395, 402 (Ct. App. 2008).

6 *Watkins v. United States*, 479 F. Supp. 785, 788 (D.S.C. 1979).

7 1962 Code Section 72-111; 1952 Code Section 72-111; 1942 Code Section 7035-22; 1936 (39) 1231.

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8 *Marchbanks v. Duke Power Company*, 190 S.C. 336, 2 S.E.2d 825 (1939)).

9 *Harrell v. Pineland Plantation, Ltd*., 337 S.C. 313, 523 S.E.2d 766 (1999); *Fortner v. Thomas M. Evans Constr. & Dev., LLC*, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013).

10 *Ost v. Integrated Prods., Inc*., 296 S.C. 241, 371 S.E.2d 796 (1988)).

11 *Smith v. Fulmer*, 198 S.C. 91, 15 S.E.2d 681 (1941) (citing *Fox v. Fafnir*, 107 Conn. 189, 139 A. 778 (1928)).

12 *Posey v. Proper Mold & Engineering, Inc.*

13 Of course, the defense should be asserted as an affirmative defense if an Answer is filed.

14 *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

15 *Glass v. Dow Chem. Co.*, 316 S.C. 116, 447 S.E.2d 209 (Ct. App. 1994) (affirmed in result *Glass v. Dow Chem. Co*., 325 S.C. 198, 200 (1997).

16 *White v. J.T. Strahan Co*., 244 S.C. 120, 125, 135 S.E.2d 720, 723 (1964).

17 *Voss v. Ramco, Inc*., 325 S.C. 560, 565, 482 S.E.2d 582, 585 (Ct. App. 1997).

18 *Id.*

19 *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483, 485 (2003); *Glass v. Dow Chemical Co*., 325 S.C. 198.

20 *See Anderson v. West*, 241 S.E.2d 551 (S.C. 1978).

21 *Collins v. Seko Charlotte*, 412 S.C. 283, 772 S.E.2d 510 (2015).

22 *Marchbanks v. Duke Power Company*.

23 *Id.*

24 *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E. (2d) 878 (1940)

25 *Id*.

26 *Id*.

27 *Id*.

28 *Bridges v. Wyandotte Worsted Company*, 243 S.C. 1, 132 S.E. (2d) 18 (1963).

29 *Meyer v. Piggly Wiggly No. 24, Inc*., 338 S.C. 471, 527 S.E.2d 761 (2000).

30 *Id*.

31 *Hancock v. Wal-Mart Stores, Inc*., 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003).

32 *Abbott v. Ltd., Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000).

33 *Id.*

34 *Collins v. Seko Charlotte*.

35 *Id.; See also Posey v. Proper Mold & Eng'g, Inc.*

36 *Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004); *Maloney v. Landmark Tours & Travel, Inc*., 2011 U.S. Dist. LEXIS 43001 (D.S.C. Apr. 19, 2011).

37 *Glass v. Dow Chem. Co.*

38 *See Olmstead v. Shakespeare.*

39 *Strickland v. Galloway*, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002).

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41 *Id.*

42 *Id.* at *6.

43 *Id.* at *3 (citing *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

44 325 S.C. 532, 537–38, 482 S.E.2d 577, 580 (Ct. App. 1997) (finding that if the appellant's mental condition is "causally connected and is a newly manifested symptom of his original injury which has caused a worsening of his condition, then it is properly considered . . . .").

45 *Id.* at 540, 482 S.E.2d at 581.

46 *Wilson*, 2017 WL 1075196 at *5 (citing *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 284, 678 S.E.2d 825, 832 (Ct. App. 2009)).

47 *Id.* at *6 (citing *Estridge*, 325 S.C. at 540, 482 S.E.2d at 581).

48 *Estridge*, 325 S.C. at 537-38, 482 S.E.2d at 580.

49 __ S.E.2d __, No. 2015-001277, 2017 WL 1161127 (S.C. Ct. App. Mar. 29, 2017).

50 S.C. CODE ANN. § 42-15-20 (2007).

51 *Nero*, at *1.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at *2.

64 *Id.*

65 *Id.*

66 S.C. CODE ANN. § 42-15-20(A) (2007).

67 S.C. CODE ANN. § 42-15-20(B) (2007).

68 *Id.* at *3 (citing *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951); Etheredge v. Monstanto Co., 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002).

69 *Id.* at *3.

70 *Id.* at *4.

71 *Id.*

72 *Id.* (*quoting Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 ("concluding 'notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim'")).

73 *Id.* at *6.

74 *Id.*

75 *Id.*

ARTICLE

Putative Class Action Plaintiffs Cannot Escape Their Enemy at the Gates

by Tyler P. Winton, Alexander E. Davis and Clinton T. Magill

Waiver May be a Valid Defense to the Trending Class Action in Construction Defect Litigation

Not long ago, many practitioners likely thought that class actions, while a relatively novel approach to large-scale construction defect claims, had limited realistic utility in construction defect litigation. Recently, however, courts have more leniently construed the concept of commonality, which has resulted in the filing of—and approval of—more and more putative class action construction defect claims every day. To remain vigilant in protecting our clients' individual defenses, we as practitioners must find "new" ways to combat class certification. Recently, the South Carolina Court of Appeals recognized the validity of a class action waiver in *Gates at Williams-Brice Condominium Ass'n v. DDC Construction, Inc.*[1] This article will briefly explore the growing class action trend and then dissect the courts' holding in *Gates* and the lessons to be learned therefrom.

The Class Action Trend in Construction Defect Litigation

While we do not have precise statistics on the frequency of class action construction defect claims in South Carolina, judging from the number of class action claims that we defend in our office alone; its popularity does not appear to be waning. Rather, the number of construction defect class actions seems to be growing, and the class actions themselves are proliferating. Unsurprisingly, the most frequent construction defect and design defect claims we encounter relate to condominium complexes. Nevertheless, we also see claims—albeit less frequently—relating to tract home builders that implement common construction methods on debatably similar single-family homes or townhome units.

Plaintiff's counsel will invariably offer differing justifications for the use of class actions to pursue their clients' interests. Although we have had success in defeating the certifications of putative classes, and thus avoiding some of the risks inherent in class action litigation; frankly speaking, it is difficult to ignore the many potential benefits that encourage some plaintiff's counsel to focus their practice on larger, multi-family putative class action claims. For some plaintiff's counsel, the potentially limited financial and labor investments (e.g., avoiding retention of multiple experts, the shorter total duration of class claims versus the cumulative duration of every individual claim, etc.) pales in comparison to the potential recovery for, inter alia, percentage-based attorneys' fees calculated from the entire class action settlement. This often makes representation of a putative class too enticing of an opportunity not to pursue.

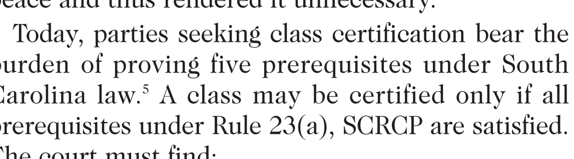
Winton

Davis

Magill

But wait, how did we get here? Arguably, class action litigation had its origin in bills of peace in equity involving multiple parties.[2] A bill of peace could be brought when a lord of the manor appropriated village common lands to the loss of the manorial tenants, or when a vicar quarreled with his parishioners about tithes.[3] For a time, class action litigation in South Carolina was governed by S.C. Code § 15-5-50 (prior to July 1, 1985), which provided: "When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." Common law roots of the class action "bill of peace" were eventually thrown out in *Baughman v. Am. Tel. & Tel. Co.*[4] In that case, the Court stated that SCRCP Rules 23 and 42 (related to class actions and consolidation) had the same effect as a bill of peace and thus rendered it unnecessary.

Today, parties seeking class certification bear the burden of proving five prerequisites under South Carolina law.[5] A class may be certified only if all prerequisites under Rule 23(a), SCRCP are satisfied. The court must find:



(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

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(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class; and,

(5) the amount in controversy exceeds one hundred dollars for each member of the class.[6]

In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied.[7] The burden in proving the five prerequisites under South Carolina law rests with the plaintiffs.[8] Importantly, "[t]he failure of the proponents to satisfy any one of the prerequisites is fatal to class certification."[9]

In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied.[7]

Notwithstanding these established rules for determining the appropriateness of putative class action claims, litigators continue to argue over how to actually apply the rules in the context of ever-proliferating class action scenarios. Although the courts' trending liberal interpretations of commonality and typicality have certainly betrayed many defense attorneys' principled understanding of the class action device, these loose interpretations did not appear out of thin air, devoid of any rational justification. Rather, they are likely a byproduct of the situational impracticality of trial courts efficiently and effectively presiding over hundreds—or even thousands—of individual homeowner claims in construction defect cases. In those situations, courts have become increasingly amenable to approving a putative class representing a bloated collection of homeowners with similar claims stemming from the same development. However, as the number of class actions has grown, so too have the recognized defenses to certification. One recent and important example is the class action waiver defense. This defense, as recognized by the Court of Appeals in *Gates*, is explored below.

Putative Class Action Plaintiffs Could Not Escape Their Enemy at The Gates

On August 31, 2016, the South Carolina Court of Appeals issued a decision clarifying the extent to which defendants may utilize certain defenses to Rule 23 class actions. In *Gates*, the Court of Appeals was asked to determine whether a class action waiver in the Master Deed of a condominium complex could prohibit the complex's property owners' association from bringing a class action against the developer and a number of contractors involved in the construction of the units.[10] In *Gates*, the putative class members alleged a myriad of construction defects at the project.[11] In response, the defendants sought enforcement of a class action waiver contained within a jury trial waiver subsection of the alternative dispute resolution section of the Master Deed.[12]

The Master Deed was originally drafted by the developer; however, shortly after the class action complaint was filed, the property owners' association amended the master deed.[13] The master deed was amended to remove class action and jury trial waiver provisions, as well as provisions related to the limitation of warranties and arbitration.[14]

The defendants filed a motion for a non-jury trial and to strike the homeowners' class action allegations and jury trial demand more than a year after the original complaint was filed— but only three days after the final defendant in the case answered the second amended complaint.[15] The trial court denied the defendants motion on a number of grounds, including

(1) that the master deed had been amended to remove the provisions in question;

(2) that the defendants waived enforcement of the arbitration provisions in the Master Deed, which included the class action and jury trial waiver;

(3) that the provisions in question were unconscionable, oppressive, and one-sided and, therefore, not enforceable; and,

(4) that the defendants failed to timely challenge the amendment or to challenge the mode of trial.[16]

On appeal, the South Carolina Court of Appeals rejected each of the trial court's grounds for refusing to grant Defendants motion.[17] The court held that the amendments to the master deed, which occurred after the initial filing of the complaint and as a result of the litigation, could not retroactively remove the class action and jury trial waivers.[18] Furthermore, the court found that the waivers were "conspicuous and unambiguous" and "expressly incorporated into each unit owner's purchase contract."[19] The court also noted that each purchaser was represented by counsel during the closing for the unit and could have directed questions about these waivers to counsel.[20] In light of this, the court held that the waivers were knowing and enforceable.[21] Finally, because it determined that the waivers remained valid and enforceable despite the decision of the Defendants not to seek arbitration, the court found that the jury trial and class action waivers were "completely separate and distinct" and set forth in different subsections of the master deed.[22] Therefore, the court reversed the decision of the trial court and remanded the case with instructions to grant the motion for a nonjury trial and strike the class action allegations.[23]

Lessons Learned from Gates

Two non-exhaustive, but important lessons should be taken from the Court of Appeals' decision in *Gates*. First, it is imperative that construction defendants named in a putative class action complaint immediately investigate whether defenses such as class action waiver, jury trial waiver, or arbitration agreements should be asserted in a responsive pleading. In *Gates*, a substantial portion of the parties' arguments and the written opinion of the court were dedicated to the issue of whether or not the Defendants had properly and timely raised the mode of trial defenses.[24] Although the Court of Appeals ultimately held that the issue was sufficiently raised and pled, early research and review of the Master Deed or other agreements and the specific assertion of class action waiver, jury trial waiver, the existence of an arbitration agreement, and other affirmative defenses may help avoid the need for costly appeals over these defenses.

The second lesson gleaned from *Gates* is that developers should continue to utilize clear, unequivocal language to waive the right to class actions and non-jury trials in Master Deeds. The provisions of the Master Deed should also be incorporated into the bylaws of the property owners' association, as the *Gates* court found this incorporation by reference to be additional support for its finding that the waivers in that case were enforceable.[25]

Conclusion

Although the class action trend in construction defect litigation is unlikely to dissipate anytime in the near future, more defenses to certification will be recognized as the class action enters a growing spotlight. While not an entirely novel concept, the class action waiver is now a recognized defense in South Carolina. Defendants should always be sure to check the Master Deed for class action waiver language, as they may be able to nip a putative class action in the bud. Because we handle more and more construction defect class actions every day, we are in a prime position to keep you apprised of the important developments in this area of the law.

Footnotes

1 No. 5438, 2016 S.C. App. LEXIS 110 (Ct. App. Aug. 31, 2016).

2 *See Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866-96 (1977).

3 I*n re Consumers Power Co. Sec. Litig.,* 105 F.R.D. 583, 600 (E.D. Mich. 1985).

4 378 S.E.2d 599, 601 (1989).

5 *See* Rule 23(a), SCRCP; *Waller v. Seabrook Island Prop. Owners Ass'n*, 388 S.E.2d 799, 801 (1990).

6 Rule 23(a), SCRCP.

7 *Waller*, 388 S.E.2d at 801 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982)).

8 *Id*. at 801.

9 *Ferguson v. Charleston Lincoln/Mercury*, 544 S.E.2d 285, 289 (Ct. App. 2001) (quoting *Waller*, 388 S.E.2d at 801).

10 No. 5438, 2016 S.C. App. LEXIS 110.

11 *Id*. at *1.

12 *Id*. at *8.

13 *Id*. at *4-5

14 *Id*. at *4-7.

15 *Id*. at *7-8.

16 *Id*. at *8-9.

17 *Id*. at *10-30.

18 *Id*. at *19-24.

19 *Id*. at *26.

20 *Id*.

21 *Id*. at *28. The court of appeals also noted that whether or not the homeowners were aware of the waivers, they could not avoid their effect under South Carolina law. *Id*. at *26.

22 *Id* at *29-30.

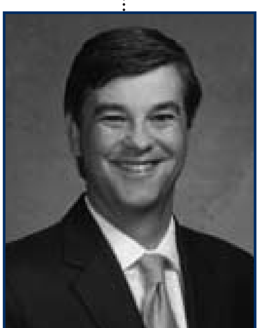
23 *Id* at *30-31. On November 17, 2016, the South Carolina Court of Appeals denied Plaintiffs petition for rehearing in this matter. *Gates at Williams-Brice v. DDC Constr., Inc*., No. 5438, 2016 S.C. App. LEXIS 151, at *1 (Ct. App. Nov. 17, 2016).

24 *See*, e.g., 2016 S.C. App. LEXIS 110, at *12-19.

25 *See id*. at *26.

The PAC Golf Classic

by J. Andrew Delaney

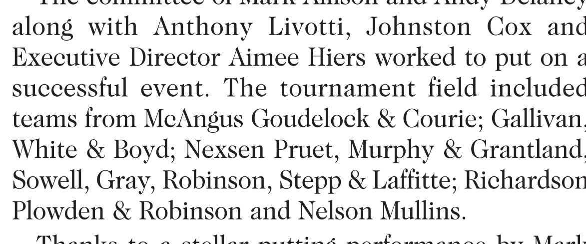


The 8th Annual SCDTAA PAC Golf Classic was held on May 5, 2017 at The Spur at Northwoods in Columbia, South Carolina. We are very grateful to SEA Ltd. who was our tournament sponsor. SEA, Ltd. has been a great supporter of the SCDTAA and the PAC Golf Classic for many years. CompuScripts sponsored the Hole-In-One Contest and Copper Dome sponsored the Longest Drive. Additional sponsors include Murphy & Grantland and Sowell, Gray, Robinson, Stepp & Laffitte.

The committee of Mark Allison and Andy Delaney along with Anthony Livotti, Johnston Cox and Executive Director Aimee Hiers worked to put on a successful event. The tournament field included teams from McAngus Goudelock & Courie; Gallivan, White & Boyd; Nexsen Pruet, Murphy & Grantland, Sowell, Gray, Robinson, Stepp & Laffitte; Richardson Plowden & Robinson and Nelson Mullins.

Thanks to a stellar putting performance by Mark Allison, the McAngus Goudelock & Courie team took the tournament title for the third year in a row. The Closest to the Pin was won by Greg Collins and the Longest Drive was won by Matt Moser.

Special thanks to the folks at The Spur at Northwoods for hosting the tournament and to all of our sponsors and participants. We look forward to seeing you all again at the 2018 PAC Golf Classic set for Spring 2018.



Verdict Reports

Type of Action: Medical Malpractice / Wrongful Death Action

<u>Injuries alleged</u>: Cardiopulmonary arrest and death

<u>Name of Case</u>: Melvin Williams, as Personal Representative of the Estate of Adrian B. Williams vs. M.P. Veerabagu, MD and Beth E. Levine, MD

<u>Court</u>: Anderson County, SC Court of Common Pleas

<u>Case #</u>: 2010-CP-04-3561

<u>Tried before</u>: Jury

<u>Name of judge</u>: The Hon. R. Scott Sprouse

<u>Amount</u>: Defense Verdict

<u>Date of verdict</u>: September 28, 2016

<u>Demand</u>: $450,000.00

<u>Highest offer</u>: Global offer of $75,000.00

<u>Most helpful experts</u>: Vince Degenhart, MD, anesthesiologist, Columbia and Camden, SC; Charles Wallace, MD, anesthesiologist, Charleston, SC; Robert Malanuk, MD, cardiologist, Columbia/Lexington, SC; Brent McLaurin, MD, cardiologist, Anderson, SC, Dev Vaz, MD, gastroenterologist, Greenville, SC

<u>Attorney(s) for defendant</u>: Steven A. Snyder of Davis, Snyder, Williford & Lehn, PA, of Greenville, SC, for Defendant Beth E. Levine, MD; and Howard W. "Pat" Paschal, Jr. of Greenville, SC, for Defendant M.P. Veerabagu, MD.

<u>Description of the case, the evidence presented, the arguments made and/or other useful information</u>:

Steven A. Snyder, a partner with Davis, Snyder, Williford & Lehn, PA in Greenville, South Carolina, and Howard W. "Pat" Paschal, Jr. of Greenville successfully defended a wrongful death medical malpractice case in an eight-day trial concerning a 34-year-old male patient who arrested while undergoing an endoscopic ultrasound, became and remained neurologically unresponsive following resuscitation and ultimately died seven days later.

In Melvin Williams, as Personal Representative of the Estate of Adrian B. Williams vs. M.P. Veerabagu, MD and Beth E. Levine, MD, Case Number 2010-CP-04-3561, Court of Common Pleas for the County of Anderson, South Carolina, Steve Snyder represented a board certified anesthesiologist who was alleged to have been negligent in clearing the patient for the procedure, failing to adequately supervise a Certified Registered Nurse Anesthesiologist (CRNA) and overdosing the patient with Propofol as the anesthesia medication, resulting in respiratory suppression, cardiopulmonary arrest and, ultimately, death. The co-defendant, a board-certified gastroenterologist represented by Pat Paschal, was alleged to have been negligent in failing to recognize cardiac conditions and contraindications and clearing the patient for the test.

The Plaintiff contended that the Defendants failed to appreciate the patient's alcoholic cardiomyopathy, which was diagnosed on autopsy, and his decompensated congestive heart failure that had emerged over the course of several emergency department and physician visits related to repeated bouts of severe abdominal pain during the month leading up to the procedure and arrest. The Plaintiff asserted that these conditions were contraindications for the endoscopic procedure.

The Defendants presented evidence to establish that the Plaintiff did not have decompensated heart failure, that recent complaints or incidents of shortness of breath were most likely the result to non-cardiac etiologies relevant to the ongoing workup and the endoscopic test at issue in the case, that the patient had the required functional capacity to undergo the low low-risk procedure, and that the unfortunate complication was a rare but recognized risk of the procedure, though unforeseeable in this patient. Definitions, interpretation and application of the ACC/AHA Guidelines on Perioperative Cardiovascular Evaluation and Care for Noncardiac Surgery became a battleground among opposing experts but ultimately supported the Defendants' evaluations and decisions to clear the patient for the procedure.

Snyder and his anesthesiologist client refuted the allegations of a Propofol overdose by teaching the jury and establishing that the standard of care for administering Propofol in a procedure such as this, which involved MAC (monitored anesthesia care) anesthesia, required that the dosage be determined by "titrating to effect"

(giving a series of small doses and monitoring the patient until the patient has received just enough of the medication to reach the desired level of sedation) rather than by a fixed, pre-determined dose. This is necessary because individual patient responses to Propofol can vary considerably from one patient to the next and, therefore, the administration must be individualized.

Experts for the Plaintiff lost credibility by selectively taking out of context certain patient complaints, findings and test results during the short weeks preceding the unfortunate event to support their opinions and criticisms. The defense presented the chronological progression of the patient's condition, workup, exam findings and tests that pointed to significant concerns for serious abdominal problems of various etiologies that appropriately led to the patient's requiring the endoscopic procedure, and effectively taught the jury the fuller context and meaning of the patient's complaints, test results and findings. Each side presented expert testimony by gastroenterologists, anesthesiologists and cardiologists. Strong cross-examinations of the Plaintiff's experts combined with a clear and educational presentation of the defense effectively exposed the attempts of experts for the Plaintiff to misdirect by relying upon selectively incomplete and out-of-context facts and details of the patient's course to support their opinions. Post-trial jury feedback revealed that this contrast significantly influenced their verdict.

The jury deliberated approximately two hours before returning a unanimous verdict in favor of all Defendants.

Date of Verdict: September 28, 2016

Type of Action: Medical Malpractice

Name of Case: Yolanda Nicole Gladden, as Personal Representative of the Estate of Sandra Gladden, deceased v. Charleston E.N.T. Associates, Erik Swanson, MD and Care Alliance Health Services d/b/a Roper St. Francis Healthcare d/b/a Bon Secours St. Francis Xavier Hospital, Inc.

Court: Charleston County Court of Common Pleas

Case number: 2014-CP-10-03893

Name of Judge: The Honorable Steven H. John

Amount: Defense Verdict

Date of Verdict: March 3, 2017

Attorneys for defendant: James B. Hood and J. Collier Jones of Hood Law Firm, LLC, Charleston, SC

Description of the case: Plaintiff alleged that the Defendants were negligent by failing to adequately convey appropriate discharge instructions to the Decedent and by resuming blood thinners too soon after surgery. The Decedent passed away five days after undergoing an adenotonsillectomy. The cause of death was determined to be hypovolemic shock and asphyxia due to a tonsillectomy resection margin bleed.

The Defendant physician instructed the Decedent to stop taking the blood thinner a week prior to the surgery. After two days of postoperative observation in the hospital with no sign of bleeding, the Decedent was discharged with instructions to resume the blood thinner. Plaintiff argued that the Defendant physician failed to adequately convey to the Decedent instructions for managing a postoperative bleed. Plaintiff's expert opined that if the Defendant physician had consulted with the Decedent's cardiologist regarding the anticoagulants and had conveyed appropriate discharge instructions, the Decedent would not have passed away from a surgical site bleed.

The defense proved that care and treatment was appropriate and within the standard of care and that the surgical site bleed experienced was a rare, but well-known, complication of an adenotonsillectomy. The jury returned a defense verdict.

Case Notes

Prepared by Evan T. Leadem and John W. Fletcher

Pee Dee Health Care, P.A. v. Estate of Hugh S. Thompson, III, Op. No. 5451, Nov. 2, 2016.

In this November 2016 opinion, the Court of Appeals ruled on an issue of first impression concerning the deadline for seeking sanctions under Rule 11 of the South Carolina Rules of Civil Procedure.

Pee Dee Health Care ("PDHC") employed Thompson as a medical doctor from 1998 to 2000. During his time with PDHC, Thompson was classified as an "excluded provider" by the U.S. Department of Health and Human Services' Office of Inspector General. Thompson and PDHC were, therefore, prohibited from billing Medicare and Medicaid for Thompson's services. Nevertheless, PDHC billed the Centers for Medicare and Medicaid Services ("CMS") over $200,000 for services rendered by Thompson.

In 2007, CMS demanded that PDHC return the funds it had paid for Thompson's services while he was listed as an excluded provider. PDHC, in turn, filed suit against Thompson's Estate seeking reimbursement for the amount it paid to CMS. During litigation, the Estate moved to disqualify PDHC's attorney on the ground that, as PDHC's CEO, he was a necessary fact witness in the case and could not appear as an attorney. The circuit court granted the motion and PDHC subsequently filed a motion to alter or amend the disqualification.

PDHC and the Estate then filed cross-motions for summary judgment on the underlying merits of the case. To avoid prejudicing PDHC, the circuit court permitted PDHC's CEO to appear as its attorney for the limited purpose of arguing the motion. The circuit court later denied PDHC's motion to alter or amend its disqualification and quashed all motions, subpoenas, and filings that contained only the CEO's signature. Then, the court granted the Estate's motion for summary judgment. When PDHC moved to alter or amend the summary judgment order in the fall of 2011, the court found the motion void ab initio because the CEO's signature was the only one on the motion, in violation of the court's disqualification order.

Subsequent appeals were taken over the course of the following years. Finally, the Court of Appeals issued a remittitur in the case on January 7, 2014. Nine days later, the Estate filed a motion for sanctions against PDHC and its attorneys pursuant to Rule 11, SCRCP, and the Frivolous Civil Proceedings Sanction Act ("FCPSA"). The Estate claimed that it expended nearly $100,000 defending against PDHC's allegedly meritless lawsuit and addressing the CEO's violation of the circuit court's disqualification order. The court awarded the Estate $34,150 in sanctions under Rule 11. It declined, however, to award sanctions pursuant to the FCPSA. Both parties cross-appealed the ruling to the Court of Appeals.

Leadem

Fletcher

Writing for a panel that included Judge Huff and Judge Thomas, Judge Williams vacated the award of Rule 11 sanctions and affirmed the lower court's denial of sanctions under the FCPSA. First, Judge Williams wrote that a circuit court's decision to award attorney's fees under Rule 11 and the FCPSA is one of equity. He wrote that a circuit court's award of sanctions should not be disturbed on appeal unless the decision is controlled by an error of law or based on unsupported factual contentions.

Turning to the parties' arguments, Judge Williams first addressed PDHC's position that the Estate's motion for sanctions under Rule 11 was untimely and the circuit court lacked jurisdiction to consider it. Judge Williams found that the Rule was silent as to when motions for sanctions should be filed and, further, that no appellate court had ruled on the issue. Thus, he categorized the question of law as one of first impression.

Given the Rule's silence concerning the deadline for seeking sanctions, Judge Williams engaged in statutory analysis. He began by reviewing the purpose of the Rule and whether such purpose provided any insight into when sanctions must be sought. He noted that the "primary purpose of sanctions against counsel is not to compensate the prevailing party, but to deter future litigation abuse." He also cited the value of streamlining court dockets, facilitating court management, and compensating victims of Rule 11 abuses as reasons for the Rule. Judge Williams further opined that although Rule 11 sanctions are collateral and not generally connected to rulings on the merits of cases, courts nevertheless should not retain the ability to award sanctions in perpetuity.Next, he looked to the approaches taken in sister jurisdictions under their own versions of Rule 11. He wrote that while some jurisdictions promulgate local rules on the issue, others, like the North Carolina Court of Appeals, require a party

Continued on next page

seeking sanctions against an opponent to do so within a reasonable time after discovering the inappropriate conduct.

Judge Williams ultimately ruled that South Carolina should follow the approach taken by the North Carolina Court of Appeals. That is, "a party must file for a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties." This approach, he wrote, comported with the purposes of Rule 11. Judge Williams cited to an opinion of the Third Circuit Court of Appeals, wherein that court held that promptly addressing alleged Rule 11 violations was necessary in order to avoid further potential violations during the remainder of litigation. Further, if a party's or attorney's actions are truly "abusive" as is required under the Rule, the adversary should be able to recognize it as such immediately and has no reason to delay seeking sanctions. It is best, Judge Williams continued, to avoid the fragmented appeals that could ensue if a party loses on the merits, initiates an appeal of that decision, then returns to the circuit court to seek sanctions and loses again. Such a scenario would require two appellate courts to dedicate resources to the case: one to address the merits and one to address the sanctions. Consolidating these issues in a single appellate court proceeding is best, he opined.

The Court of Appeals then turned to the case at bar and found the Estate's motion for sanctions under Rule 11 untimely. The Estate waited twenty-eight months after the circuit court granted summary judgment in its favor and thirty-three months after the circuit court disqualified the CEO before filing its motion. The Court of Appeals found this inconsistent with the purposes of the Rule, held that the circuit court abused its discretion by awarding sanctions and, therefore, vacated the sanctions.

The Court of Appeals then briefly affirmed the denial of the Estate's motion for sanctions under the FCPSA. Motions for sanctions under the FCPSA must be filed within ten days of the notice of entry of judgment. The Estate's motion was clearly filed after this time. Nevertheless, the Estate argued that its motion was timely because it was filed within ten days of the Court of Appeals' remittitur. The Court of Appeals found no basis in the FCPSA for adopting this position.

In conclusion, the Court of Appeals vacated the award of sanctions under Rule 11 and affirmed the denial of sanctions under the FCPSA.

Simmons v. Berkeley Elec. Coop., Inc. and St. John's Water Co., Inc., Op. No. 27674, Nov. 2, 2016.

In this opinion concerning land use and property rights, the Supreme Court clarified South Carolina law on prescriptive easements.

Simmons acquired title to two tracts of undeveloped land on Johns Island in 2003. The tracts were subject to easements that Simmons' predecessors-in-title had granted to Berkeley Electric Cooperative in 1956 and 1972. The easements permitted Berkeley to construct and maintain power lines on the tracts. Additionally, in 1977, Charleston County issued an encroachment permit authorizing St. John's Water Company ("St. John's") to install a water main along the road abutting the tracts. St. John's completed construction of the main in 1978.

In 2005, two years after acquiring title, Simmons discovered a water meter under a bush on one of the tracts. He then asked St. John's to "blue flag" the path of the main, revealing that the main crossed both of Simmons' tracts.

Simmons sued Berkeley and St. John's for trespass and sought a declaration that neither entity had property interests or rights in the tracts. Berkeley and St. John's moved for summary judgment before a master-in-equity and prevailed. The master-in-equity ruled that Berkeley's power lines were lawful under the 1956 and 1972 express easements and, in the alternate, that Berkeley enjoyed a prescriptive easement for the lines. Regarding St. John's, the master-in-equity ruled that the Charleston County encroachment permit operated as an express easement authorizing the location of the water main and, in the alternate, that St. John's also enjoyed a prescriptive easement for its use of Simmons' tracts.

The Court of Appeals affirmed the Master-in-Equity's ruling with respect to Berkeley's express and prescriptive easements and St. John's prescriptive easement. However, it reversed the Master's ruling on St. John's express easement, holding that counties lack the authority to grant easements via encroachment permits.

Then-Acting Chief Justice Beatty wrote the Supreme Court's opinion. He first addressed the law on prescriptive easements, stating that such easements are established if a claimant shows: "(1) the continued and uninterrupted use or enjoyment of the right for a period of 20 years; (2) the identity of the thing enjoyed; and (3) [that] the use [was] adverse under claim of right." Darlington Cty. v. Perkins, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977). Scrutinizing the third element of the prescriptive easement test, Justice Beatty addressed a line of cases holding that the element could be satisfied if the claimant showed its use to be either adverse or under a claim of right. He turned to the Supreme Court's 1917 opinion in Williamson v. Abbott, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917), in which the Court held that a claimant had to show that the use or enjoyment was "adverse, or under claim of right." (emphasis added). Justice Beatty noted that "[b]y placing a 'comma' after the term 'adverse,' this Court intended to modify the term 'adverse,' not create another method to establish a claim." Thus, Justice Beatty continued, the "third element of a prescriptive easement should be interpreted as requiring the claimant's use be adverse or, in other words, under a

claim of right contrary to the rights of the true property owner." He then analyzed this element in the context of the test as a whole. He found that the "continuous" and "uninterrupted" factors found in the first element were part and parcel of the "adverse use" requirement of the third factor.

In light of this complexity, Justice Beatty elected to simplify the prescriptive easement test, writing: "In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years."

The Court then turned to the facts. First, it overturned the lower court's holding that St. John's was entitled to summary judgment on its prescriptive easement claim. It found that genuine issues of material fact existed as to whether the water main was "open" and "notorious" on Simmons' property. It noted that the main was underground, its meter was hidden by bushes, and it had not been "blue-flagged" when it was discovered by Simmons. Further, a genuine issue existed as to whether the main was "notorious" because Simmons' property was on well water, and, although others in the area may have known of the existence of the main because they used St. John's-supplied water, the location of the main itself was largely unknown.

Turning to Berkeley, the Court affirmed the Master's grant of summary judgment on prescriptive easement grounds. The lower courts had considered affidavits of engineers stating that the lines were clearly visible from the road abutting Simmons' tracts, the lines had never been moved, the poles for the power lines had birthmarks of 1984 and 1986, and the configuration of the lines had remained the same since at least 1980. Simmons failed to present sufficient evidence to survive Berkeley's motion for summary judgment because the various plats and system maps he relied upon lacked detail, scale, and clear property lines, and his own affidavit failed to explain his own personal knowledge of the orientation of the lines through the years. The Court declined to address Simmons' argument that the lower court erred in granting summary judgment to Berkeley on express easement grounds, finding that the issue had not been properly preserved for review.

In conclusion, the Court affirmed the grant of summary judgment as to Berkeley, but reversed the grant of summary judgment as to St. John's and remanded it for additional proceedings in light of its most recent articulation of the law on prescriptive easements.

Rogers Townsend & Thomas, PC v. Stephen H. Peck, Thomas Moore, and Cmty. Mgmt. Grp., LLC, Op. No. 27707, Feb. 22, 2017.

In this recent declaratory judgment, the Supreme Court expanded the definition of unauthorized practice of law to include certain activities engaged in by a homeowners' association management firm.

Community Management Group, LLC ("CMG"), its president (Peck), and its employee (Moore), managed homeowners' and condominium associations in Charleston, Dorchester, and Berkeley Counties. Among other services, CMG collected assessments on behalf of its association clients. When a homeowner failed to pay an overdue assessment, CMG prepared and recorded a notice of lien, brought an action in magistrates court to obtain a judgment on the debt, and filed the judgment with the circuit court. CMG advertised that it could perform these services on behalf of associations.

Rogers Townsend & Thomas brought a declaratory judgment action in the Supreme Court, requesting that the Court find that CMG had engaged in the unauthorized practice of law. The Supreme Court issued a temporary injunction and reviewed the case in its original jurisdiction. In a per curiam opinion, the Court declared that CMG had engaged in the unauthorized practice of law in four particular ways: (1) representing homeowners' and condominium associations in magistrates court; (2) filing judgments in circuit court; (3) preparing and recording liens; and, (4) advertising that it could perform these services.

The Court first noted that the South Carolina Constitution grants it jurisdiction to regulate the practice of law in the state. Surveying prior case law, it noted that the practice of law includes the "preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts." It also stated that the practice of law "extends to activities . . . which entail specialized knowledge and legal ability." It noted, however, that beyond these statements, no comprehensive definition of the practice of law exists. Instead, it is defined on a case-by-case basis.

The Court paid special attention to two relatively recent developments in the legal representation of corporate entities. First, in In re Unauthorized Practice of Law Rules Proposed by South Carolina Bar, 309 S.C. 304, 306, 422 S.E.2d 123, 124 (1992), the Supreme Court modified prior case law to "allow a business to be represented by a non-lawyer officer, agent or employee" in certain situations. Further, Rule 21 of the South Carolina Magistrates Court Rules provides that a "business . . . may be represented in a civil magistrates court proceeding by a non-lawyer officer, agent, or employee . . .."

The Court then turned to the central question of the action: whether a third party entity like CMG qualifies as an "agent" under In re Unauthorized Practice of Law and Rule 21 and can therefore represent a corporation in certain situations. It held that its purpose in In re Unauthorized Practice of Law and Rule 21 was to permit "agents," who may not be

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officers or employees of a business but who otherwise have "some nexus or connection to the business arising out of its corporate structure," to represent the business. The Court provided the example of a corporate director, who is neither an officer nor an employee, but still qualifies as an "agent" because of his or her nexus to the business. The Court ruled that it never intended to allow non-lawyer third-party entities to be considered "agents" under In re Unauthorized Practice of Law and Rule 21.

The Court next applied this law to the case of CMG. First, it held that CMG engaged in the unauthorized practice of law when it represented associations in magistrates court. CMG did not hire an attorney, but rather sent Moore to represent the association in court. Such an act would only be permissible if CMG were considered an "agent." Because the Court held that third-party entities are not "agents," this constituted unauthorized practice of law.

CMG countered by citing an earlier opinion that authorized non-lawyers to present claims against an estate and petition for allowance of claims in probate court on behalf of a business. CMG argued that if such acts did not constitute unauthorized practice of law in the probate context, then neither should CMG's. The Court disagreed. It examined the character of the services entailed in presenting a claim against an estate and affirmed that the process does not require the professional judgment of an attorney or specialized legal knowledge and ability. It ruled that "the services required to represent a business in magistrates court are not comparable to making a claim against an estate or petitioning for the allowance of a claim in probate court." It thus held that CMG engaged in the unauthorized practice of law.

Next, the Supreme Court turned to whether CMG engaged in the unauthorized practice of law by filing judgments obtained orally in magistrates court with the circuit court. Filing a transcript containing a magistrate's oral ruling in the circuit court renders the ruling a circuit court judgment. The Court held that obtaining such a judgment constitutes representing the association, and that a non-lawyer cannot represent a client in circuit court. Thus, the act of filing civil court judgments constituted unauthorized practice of law.

Third, the Court examined CMG's practice of preparing and recording liens. If a homeowner failed to pay an assessment, CMG prepared a lien, including a legal description of the property, and filed it with the appropriate county. CMG admitted that it engaged in this process to put a "cloud" on the homeowner's title and define the association's rights with respect to the property and debt. The Court found that such liens constituted "legal instruments" because they set forth legal rights, duties, entitlements, and liabilities. Because non-attorneys cannot prepare legal instruments, CMG had engaged in the unauthorized practice of law by preparing and recording these liens.

Fourth, the Court stated that it is unauthorized practice of law for a non-lawyer to advertise that he or she can provide legal services. Because CMG had advertised that it could provide these services, and because the Court ruled that they were legal services, CMG had engaged in the unauthorized practice of law via its advertising.

In conclusion, the Court held that CMG had engaged in the unauthorized practice of law by (1) representing associations in magistrates court; (2) filing judgments in circuit court; (3) preparing and recording liens; and, (4) advertising that it could perform such services. The Court declined, however, to issue a permanent injunction after CMG represented that it would no longer engage in such activities.

Machin v. Carus Corp., Op. No. 27714, Apr. 26, 2017.

In this recent decision, the Supreme Court answered four certified questions from the District of South Carolina regarding the intersection of fault apportionment and workers' compensation.

During the course of his employment with the Town of Lexington, Plaintiff John William Machin was exposed to a chemical manufactured by Carus. The exposure caused Machin to experience chemically induced asthma. After filing a workers' compensation claim and receiving an award of benefits from the Town, Machin sued Carus and several other defendants in federal court seeking recovery for his injuries.

At trial, the federal court allowed the defendants to make an empty chair defense and assert that the Town, Machin's employer, was the sole proximate cause of the chemical exposure, not Carus or the other defendants in the case. The court barred the parties from mentioning workers' compensation during trial and declined to instruct the jury regarding the impact of workers' compensation on the case.

After deliberations began, the jury submitted the following question to the court: "Why is the Town of Lexington not included in the lawsuit?" The court informed the jury that they were to consider only the evidence presented and the court's instructions on the applicable law. The jury ultimately returned a defense verdict. Machin thereafter moved for a new trial, arguing that the court erred in refusing argument and jury instructions on workers' compensation while permitting Carus to argue the empty chair defense and place blame on the Town. Machin explained that only the *amount* of workers' compensation damages was inadmissible, but other issues related to the claimant's pursuit of such benefits was allowed. He continued that because Carus argued that the Town was responsible for his injuries, fairness dictated that he be allowed to explain to the jury why he did not file suit against the Town. Machin speculated that the jury found in Carus's favor after reasoning that Plaintiff had already received full compensation for his injuries via workers' compensation.

CASE NOTES CONT.

In response, Carus cited several cases purportedly allowing defendants to argue the empty chair defense even if fault could not be apportioned to an immune, non-party employer. Carus also argued that instructing the jury on workers' compensation would confuse, mislead, and distract jurors from their central inquiry: whether Carus was liable to Machin.

Finding South Carolina law unclear on the issues presented, the district court withheld a ruling on Machin's post-trial motion and certified the following four questions to the Supreme Court:

> 1. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the jury hear an explanation of why the employer is not party of the instant action?
>
> 2. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may a defendant argue the empty chair defense and suggest that Plaintiff's employer is the wrongdoer?
>
> 3. In connection with Question 2, if a defendant retains the right to argue the empty chair defense against Plaintiff's employer, may a court instruct the jury that an employer's legal responsibility has been determined by another forum, specifically, the South Carolina Workers' Compensation Commission?
>
> 4. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the Court allow the jury to apportion fault against the non-party employer by placing the name of the employer on the verdict form?

Justice Kittredge drafted the Supreme Court's answers and was joined by Chief Justice Beatty, Justice Hearn, and Acting Justice Toal.

Justice Kittredge noted that answering the questions required scrutiny of the Workers' Compensation Act and the Uniform Contribution Among Tortfeasors Act ("UCATA"). Discussing the nature and policy goals of the Workers' Compensation Act and its adoption of a "no-fault" system for adjudicating the rights of injured employees, he wrote that the Act provides an employee's exclusive remedy against his or her employer. The scheme supplants traditional tort law and provides for an efficient and predictable way for employers and employees to resolve workplace injury disputes. The scheme does not, however, prohibit employees from obtaining workers' compensation benefits and suing third parties they allege to be responsible for their injuries.

Moving on to UCATA, Justice Kittredge noted that the Act abolished joint and several liability and established a method for apportionment of percentage fault among defendants whose actions are a proximate cause of a single, indivisible harm to another.

The Court thus noted a dilemma between the exclusivity and limitations of workers' compensation as the remedy for on-the-job injuries and UCATA's fault apportionment goals.

Weighing the varying options for resolving the dispute, the Court elected to follow the lead of Tennessee, which encountered similar questions in *Schneider v. LTG Lufttechnische GmbH*. In *Schneider*, an employee was injured on-the-job by a machine that compressed cotton into bales. After obtaining workers' compensation benefits, the employee sued the companies that manufactured the machine. The companies, in turn, argued that the employer had altered or failed to maintain the machine, which was an intervening act of negligence that caused the employee's injuries.

The Tennessee Supreme Court held that the defendants could introduce evidence that the employer's alterations were a *cause in fact* of the injuries, but that the jury could not assess fault against the non-party employer because it could not be the *proximate* or *legal* cause of the employee's injuries. The reason? By enacting a workers' compensation regime, the Tennessee legislature, in effect, ruled that, for public policy reasons, employers cannot be the legal cause of their employee's injuries. The court recognized, however, the unfairness that such a holding could have upon the manufacturers: namely, the manufacturers' inability to argue to the jury that the employer caused the injuries. So, the court held that the manufacturers could introduce evidence of the employer's alterations, but the jury simply could not assign fault to the employer. Finally, the Tennessee Supreme Court held that the jury in such a case is to be instructed by the trial judge that the employer's legal responsibility will be determined at a later date or that it has already been determined in another forum.

The South Caroline Supreme Court found Tennessee's approach consistent with state law and public policy. It answered the Federal Court's first three questions in the affirmative, holding:

- If no defendant seeks to assign fault to the plaintiff's employer, there may be no reference at trial to workers' compensation.
- If, however, a defendant argues that the employer is at fault for the injuries at issue in the case, the defendant, using the empty chair defense, may present evidence regarding the employer's fault and ask the trier of fact to consider whether the employer's actions caused the injuries.

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- But, the employer cannot be the proximate or legal cause of any injuries due to its immunity under the workers' compensation scheme.

- So, the employer's actions may be considered, but only for the purposes of determining whether the plaintiff has met the burden of proving the elements of the claim necessary to recover against the defendant.

The Court even provided jury instructions to address this very issue:

> The plaintiff is prohibited from suing his employer in this court. At the time of the incident, the plaintiff was employed and the incident occurred during the course and scope of his employment. This is governed by workers' compensation laws, and an employer's responsibility, if any, for an employee's injuries will be determined, or has been determined, in another forum. A workers' compensation claim is not before you and you shall not give it any consideration in reaching a verdict in this case. However, the matter of the employer's alleged fault in causing the injury has been raised by the defendant, and it is proper for you to consider the employer's actions, but only insofar as you assess and determine whether the plaintiff has met his burden of proving the elements of the claim(s) necessary to recover against the defendant.

Finally, the Court responded to the fourth certified question in the negative. It held that the jury may not apportion fault to the non-party employer by placing the employer's name on the verdict form. Although defendants are able to cite the wrongful acts of other potential tortfeasors when mounting their defense, only other *actual defendants* may appear on the verdict form, per the plain language of UCATA. Plus, employers in such a situation are incapable of being "potential tortfeasors" because the workers' compensation scheme is no-fault and, by providing benefits to the employee, has had its potential liability extinguished.

Justice Pleicones provided the sole dissent. He would have found that juries must be permitted to make a fair and logical apportionment of 100% of the fault. This requires permitting the defendant to argue to the trier of fact that fault lies with an otherwise immune third-party, and further permitting the trier of fact to apportion fault to that third-party if appropriate.

Smith v. Tiffany, Op. No. 27715, Apr. 26, 2017

In *Smith v. Tiffany*, the Supreme Court clarified South Carolina law on whether a non-settling defendant may join a nonparty joint tortfeasor and, further, whether that joint tortfeasor may appear on a verdict form and be apportioned fault.

Norman Tiffany, a commercial truck driver, parked his vehicle on the shoulder of U.S. 178 in Saluda County after a mechanical breakdown. The truck was positioned near the entrance to a gas station parking lot. While exiting the gas station, Corbett Mizzell's view was obstructed by Tiffany's truck. As Mizzell eased into the roadway to get a better view of oncoming traffic, he collided with Walter Smith.

Mizzell's liability carrier tendered the limit of Mizzell's liability policy to Smith. In exchange, Smith executed a covenant not to sue Mizzell. Smith then filed suit against Tiffany and the corporate entities that owned and operated Tiffany's vehicle under various negligence theories.

In their answer, Tiffany and the trucking entities argued that Mizzell was to blame for the collision. They asserted numerous supporting affirmative defenses, argued that Mizzell was an indispensable party per Rule 19, SCRCP, and made a third-party complaint against Mizzell under Rule 14, SCRCP. They argued that despite the fact that Mizzell had previously settled with Smith, he was nevertheless responsible for Smith's injuries and they were entitled to a determination of his proportion of the fault.

The trial court granted Mizzell's motion for summary judgment and dismissed the third-party claim against him. The court found no evidence that Mizzell breached any duty owed to Tiffany and the trucking entities, or that Mizzell caused them any damages. Further, the court found that Mizzell's inclusion was not necessary under Rule 19, that the third-party complaint was improper under Rule 14, and that neither Tiffany nor the trucking entities saw their due process rights violated by the inability to join Mizzell or have him added to the verdict form for fault allocation purposes. Tiffany and the trucking entities appealed.

Writing for the Court, Justice Kittredge began with analysis of the South Carolina Contribution Among Joint Tortfeasors Act. He noted the Act's primary policy goals of fair apportionment of fault and promoting the settlement of disputes, while simultaneously providing due protection to nonsettling defendants.

He noted that the Act only allows apportionment of fault "among *defendants*." Non-parties, the Court held, may not be apportioned fault. In acknowledgment of the perceived unfairness brought on by such a holding, he noted that the Act allows defendants to argue the empty chair defense (that is, present evidence that another actor, whether a party or not, contributed to the plaintiff's damages) and offset the value of any settlement proceeds received by the plaintiff prior to the verdict. Despite finding that his holding could nevertheless lead to unfair results, Justice Kittredge wrote that the Court's hands were tied by the plain language of the Act, which stated clearly that fault was to be apportioned solely among *defendants*.

The Court then turned to whether Rules 14 and 19 could be used to support Mizzell's addition to the litigation and verdict form. Rule 14 allows the impleader of nonparties who are or may be liable to the plaintiff. The Court swiftly rejected the argument of Tiffany and the trucking entities that Mizzell faced such liability. The covenant not to sue that Smith had executed in Mizzell's favor discharged Mizzell's liability.

Next, Rule 19 requires joinder of an individual or entity if complete relief cannot be accorded among those who are already parties to litigation in the individual or entity's absence. Tiffany and the trucking entities argued that complete relief could not be accorded unless Mizzell was included in the apportionment analysis. They explained that, if Mizzell was not included, the fault apportionment would be distorted because the trier of fact would still be responsible for allocating 100% of the fault, even in Mizzell's absence. This would, they argued, lead to pure joint and several liability, which the Act abrogated.

The Court disagreed and held that being a mere joint tortfeasor did not render Mizzell an indispensable party. The Court deferred to the longstanding "plaintiff chooses" rule, permitting the plaintiff to be the master of the complaint and name or exclude any potential tortfeasor. It further reflected that prior cases held it inappropriate to include mere joint tortfeasors as defendants because the plaintiff's complaint contained no allegations against them, the unnamed parties do not claim any interest in the litigation, and the defendant may be found liable to the plaintiff regardless of whether the unnamed joint tortfeasor is named as a party. Finally, the Court noted that this holding was appropriate despite 2005 amendments to the Act that abrogated pure joint and several liability.

Thus, the Court affirmed the trial court's dismissal of the third-party complaint against Mizzell. Mere nonparty joint tortfeasors who previously entered into a settlement agreement with the plaintiff are not subject to fault apportionment or inclusion on the verdict form. Although commenting that the position taken by Tiffany and the trucking entities was equitable and defensible, it nevertheless held that the Act was clear and it was outside the province of the Court to upset the legislature's intent in passing the Act as written.

Although Chief Justice Beatty, Justice Few, and Acting Justice Moore joined in the majority opinion, Justice Pleicones dissented. After charting the history and evolution of the Act, he agreed that requiring the trier of fact to apportion 100% of the fault, while not also ensuring that all potentially at-fault individuals or entities were on the verdict form, led to distorted and inequitable results. He added that the common law "plaintiff chooses" rule must yield to the Act's fault apportionment provisions.

Harleysville Group Insurance v. Heritage Communities, Inc., Op. No. 27698, Jan. 11, 2017.

This was a declaratory judgment action seeking clarification of Harleysville's indemnification obligations in two similar lawsuits alleging construction defects at condominium complexes in Myrtle Beach.

Those complexes were constructed by Harleysville insureds (collectively "Heritage"). After Heritage completed construction, the purchasers discovered significant construction problems, including building code violations, structural deficiencies, and water-intrusion issues. The respective property owners' associations filed lawsuits in 2003 seeking compensation for the cost of repair. Additionally, as to one complex, individual owners filed a class action seeking to recover damages for loss of use of their properties.

During the period of construction, from 1997 to 2000, Heritage maintained several liability insurance policies with Harleysville. Heritage was uninsured after the last policy lapsed in 2001, and the strain of the lawsuits caused Heritage to go out of business in 2003.

Harleysville defended Heritage in the lawsuits, subject to a claimed reservation of rights to deny coverage. At trial, Harleysville's chosen counsel for Heritage conceded liability, leaving only the issue of damages. The juries in these lawsuits awarded the plaintiffs more than ten million dollars against Heritage (via general verdicts), including substantial punitive damages.

Subsequently, Harleysville commenced declaratory judgment actions against Heritage to determine what portion of the verdicts would be covered under the policies. The matter was referred to a Special Referee, who determined that Harleysville's responsibility for actual damages should be determined on a time-on-the-risk basis. Additionally, the Special Referee rejected Harleysville's argument that punitive damages were not covered by the policies. The parties filed cross-appeals. On appeal, the South Carolina Supreme Court affirmed (and modified in part) the Special Referee's decision.

The Court began its opinion with a detailed discussion of its prior cases concerning insurance coverage in the construction context. The Court first noted that it had previously decided that coverage may exist for damage to property other than the faulty workmanship itself, such as progressive water intrusion damaging otherwise non-defective construction components. On the other hand, coverage will generally not exist for the repair or replacement of defective work. Later, the Court held that (in cases of progressive injury that cannot be attributable to a specific insurance policy period) an insurer's pro rata share of damages is a function of the number of years damages progressed and the proportion of

Continued on next page

those years the insurer provided coverage. Having laid out this groundwork, the Court began its analysis of the issues before it.

The Court first held that the trial court correctly concluded that Harleysville failed to reserve its right to contest coverage as to damages for faulty workmanship, which are not covered under the law. Citing Couch, the Court noted that a reservation of rights letter "is a notice given by the insurer that it will defend [the insured in the lawsuit] but reserves all rights it has based on noncoverage under the policy." Such a letter must give fair notice to the insured that the insurer intends to assert defenses to coverage or pursue declaratory judgment. Because an insurer has the right to control litigation, some courts have found that where an insurer defends under a reservation of rights, it must inform the insured of the need for a verdict allocated between covered and noncovered damages. It is also under a duty not to prejudice its insured's rights by failing to request special interrogatories or a special verdict to clarify coverage of damages.

However, the insurer must place the insured on notice of the grounds upon which it may seek to deny coverage. If it does not do so, the insured is placed at a disadvantage because it cannot properly investigate and prepare its own defense. In such circumstances, "the insured has no reason to act to protect its rights because it is unaware that a conflict of interest exists between itself and the insurer." Thus, if the insurer's reservation of rights does not adequately, specifically and unambiguously set forth the grounds upon which it may seek to deny coverage, the insurer may be precluded from contesting coverage.

The Court concluded that, for the most part, Harleysville failed to sufficiently reserve its rights concerning noncovered actual damages. Harleysville's reservation of rights letters correctly identified the policies, parties and lawsuits; they also recited nearly ten pages of excerpt of various policy terms, including the insuring agreement, duty to defend provision, and numerous exclusions and definitions. However, Harleysville failed to discuss Harleysville's position as to those various provisions or explanation of its reasons for relying thereon. The reservation of rights letters did not advise Heritage of the need to allocate damages between covered and non-covered losses and never mentioned any possible conflict of interest or the potential for a declaratory judgment action following an adverse jury verdict. With respect to actual damages, Harleysville's reservations of rights were simply "no more than a general warning" and "too imprecise to shield" Harleysville. Thus, the reservation of rights letters were insufficient to reserve Harleysville's rights concerning actual damages.

The only issue that Harleysville sufficiently preserved in its reservation of rights letters was its right to contest punitive damages. It detailed its grounds to deny coverage, noting that punitive damages "would not arise from an 'occurrence,' do not fit the definition of 'bodily injury' or 'property damage,' and/or were 'expected and intended' within the meaning of exclusions."

Although Harleysville properly preserves its challenges to coverage for punitive damages, the Court held that those grounds were without merit. First, the Court held that punitive damages were within the scope of an "occurrence" under the policies, defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although there was not a single incident, the punitive damages in this case flowed from water intrusion, a "continued or repeated" exposure to a condition. The Court noted that it had previously determined that progressive injury may constitute an "occurrence" under a liability policy.

The Court also concluded that punitive damages did not fall within the exclusion for acts that are "expected or intended" from the standpoint of Heritage. The Court noted that the evidence showed that Heritage intended to construct quality condominiums. Harleysville failed to prove that Heritage expected or intended subcontractors to perform negligently or expected or intended property damage from negligent construction. There was no evidence that Heritage intended to harm anyone.

Having determined that Harleysville was obligated to indemnify Heritage for actual and punitive damages, the Court next proceeded to consider the issue of allocation. With regard to allocation, the default rule is that an insurer's share of progressive damages is the proportion of the number of years the insurer provided coverage (during the progressive damage) to the total number of years damages progressed. The Court concluded that it was appropriate to apply this time-on-the-risk approach to the general verdict, even though that verdict was not allocated between progressive damages subject to time-on-the-risk allocation and fixed losses not subject to such allocation.

Concerning damages for loss-of-use of property, the Court held that these should also be subject to time-on-the risk reduction. Under the policies, "[p]roperty damage" was deemed to occur "at the time of the 'occurrence' that caused it." Here, the relevant occurrence was the repeated infiltration of water, making it a progressive injury subject to allocation

Regarding the imposition of punitive damages, the Court concluded that such damages should not be allocated on a time-on-the-risk basis. There was no evidence that any of the acts giving rise to punitive damages occurred outside the relevant policy periods. To the contrary, all of Heritage's acts that justified the imposition of punitive damages occurred during Harleysville's policies. Thus, the Court refused to reduce Harleysville's liability for punitive damages based on the time-on-the-risk.

2017

Summer

SUMMER MEETING
July 14 - 16
The Omni Grove Park Inn
Asheville, NC

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ANNUAL MEETING
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