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

IN THIS ISSUE:

New SCDTAA Officers

L to R: David Anderson, Secretary; Curtis Ott, President; Sterling Davies, Immediate Past President; William Brown, Treasurer; Ron Wray, President-Elect

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Summer Meeting
Grove Park Inn
Asheville, NC
July 24-26

Annual Meeting
Pinehurst Resort
Pinehurst, NC
November 6-9

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

President's Message

by Curtis L. Ott

In 2012 and 2013, the SCDTAA witnessed a remarkable and noteworthy achievement. Our presidents for the last two years, Molly Craig and Sterling Davies, are children of past presidents. Mr. Bobby Hood and Mr. Bill Davies both led this association, and indeed both are recipients of the Robert W. Hemphill Award, the highest award the SCDTAA bestows to recognize distinguished and meritorious service. It speaks volumes about the generational excellence of the SCDTAA for Molly and Sterling to follow in their fathers' footsteps. We owe much to these two families for their dedication and leadership that have contributed to the SCDTAA's success.

In 2014, you can be assured that your Board of Directors is excited and committed to continuing the success of the SCDTAA. Under the guidance of our officers, Ron Wray, William Brown, David Anderson and Sterling Davies, we are working hard to ensure another productive year and provide you with the outstanding membership benefits that you have come to expect. In January, the Board hosted the Judicial Reception at the South Carolina Bar Convention and also participated in a long-range planning session. That meeting was encouraging and worthwhile as we creatively outlined concrete and incremental goals for the next five years. We will continue to foster leadership opportunities, increase our diversity and provide more membership benefits. The SCDTAA also held a Construction Law Seminar in March in Charleston that was preceded by a Young Lawyers Reception. We are grateful to Andrew Cole and Duffie Powers for assembling an informative and entertaining seminar that included a hands-on demonstration. In April, the SCDTAA, through our Political Action Committee, hosted our annual Legislative/Judicial Reception at the Oyster Bar in Columbia with members of the Senate and House Judiciary Committees and several judges. The event was well attended, which we think directly corresponds with our increased involvement with legislation that affects our members.

By the time you read this issue, we also will have hosted the 2014 Trial Academy in Columbia. In its 24th year, the Trial Academy is one of the jewels in the SCDTAA's crown, and we thank John Kuppens, Jack Riordan, Trey Watkins and Adam Neil for assembling a wonderful program and outstanding slate of speakers. We want to recognize Judge Childs, Judge Verdin, Judge Barber, Judge Hood and Judge James who generously donated their time to preside over the mock trials at the Matthew J. Perry, Jr. Courthouse. We also are very appreciative of the federal judges and courthouse staff for allowing us to use their facilities.

Going forward, we anxiously await our annual trip to Asheville for the Summer Meeting during July 24-26. Bill Besley, Mark Allison, Johnston Cox and Trey Watkins are preparing an excellent program for all defense attorneys, including the sessions specifically designed for workers' compensation practitioners. Additional seminar programs in 2014 include a Women in the Law seminar as we continue to grow that committee that we started in 2013, a Corporate Counsel seminar and a Workers' Compensation Happy Hour CLE. We also look forward to additional judicial receptions in Greenville and Charleston and our PAC golf tournament in September, which is vital to raise funds to support our increased legislative presence. Finally, our 47th Annual Meeting will be held November 6-9 in Pinehurst with all its attractions and activities. Breon Walker, Jamie Hood, Sarah Wetmore and Eric Englebardt have already begun assembling the agenda with many new and creative ideas, so please mark your calendars as you will not want to miss the CLE program, networking opportunities and social functions.

I hope from reading these words that you have gathered how excited I am for what 2014 has in store for all SCDTAA members. I conclude with an invitation to become more involved with the SCDTAA. Write an article for the *DefenseLine*, offer to speak at a CLE program or attend a judicial reception or seminar. Your involvement is necessary to continue the generational excellence, and you will find it personally and professionally rewarding. I sure have, and I am very grateful for the opportunity to serve the SCDTAA.

Letter from the Editors

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

Welcome to the *DefenseLine*! If you (1) practice law in South Carolina, (2) represent defendants in civil cases, and (3) are looking for an easy way to get up to speed on the legal landscape in the Palmetto State, then rejoice (or at least keep reading) - you have come to the right place. The *DefenseLine* is the publication for you.

The *DefenseLine* is not a general interest legal magazine or a neutral summary of the Advance Sheets. Instead, and as the name suggests, the *DefenseLine* is geared specifically and unapologetically toward the defense lawyer. It is a forum to exchange information and ideas that directly impact the defense bar in South Carolina. As editors, our objective is to keep you, the defense lawyer, educated on the breaking issues that matter most to our profession.

We are gratified that every word of this magazine is written by volunteer members of the SCDTAA. This month's articles touch on products liability, premises liability, damages, the Rules of Civil Procedure, and bad faith claims- a good representative sample of the breadth of our organization. There should be something for everyone.

If a topic is important to defense lawyers in this state, we aim to cover it. If you think we're missing an opportunity, we strongly encourage you to contact us and let us know how we can improve. Better yet, we encourage you to pen an article about a subject you believe our readers would appreciate.

Thank you for reading!

John C. Hawk, IV

Graham P. Powell

J. Derham Cole, Jr.

Breon C. M. Walker

Bobby Hood Awarded SCDTAA's Top Prize

During the SCDTAA Annual Meeting on November 9, 2013, Past-President Bobby Hood was given the Association's highest honor, the Hemphill Award. The award was presented by Bobby's long-time colleague and close friend, SCDTAA Past-President Barron Grier.

It was most appropriate for Bobby to receive the Hemphill designation. He has practiced law for 45 years and has been an SCDTAA member since our organization's inception. As a young lawyer, Bobby moved through the SCDTAA chairs and then served as its President. Bobby has been an active Past-President of the SCDTAA, attending its Annual Meeting and participating on the SCDTAA Nominating Committee every year.

Bobby is a Diplomat of the American Board of Trial Advocates, a past Board member of Defense Research Institute, a Past-President of the Association of Defense Trial Attorneys, and an ABOTA chapter President. He has been recognized by virtually every body that is craved by first-rate attorneys, including Chambers USA, Best Lawyers in America, and Bar Register of Preeminent Attorneys. Bobby is a Fellow in the Litigation Counsel of America.

Most importantly, Bobby has mentored countless young defense attorneys and has led many of them to become officers in the SCDTAA. He still maintains an active trial practice. Three of his children are active SCDTAA members, two have sat on the SCDTAA Board, and one is an SCDTAA Past-President. His trial victories have grabbed headlines in the national press.

OFFICERS

PRESIDENT
Curtis L. Ott
P.O. Box 7368
Columbia, SC 29202
(803) 779-1833 FAX (803) 779-1767
cott@gwblawfirm.com

PRESIDENT ELECT
Ronald K. Wray, II
P.O. Box 10589
Greenville, SC 29603
(864) 271-5362 FAX (864) 271-7502
rway@gwblawfirm.com

TREASURER
William S. Brown
P.O. Box 10084
Greenville, SC 29603
(864) 250-2297 FAX (864) 232-2925
william.brown@nelsonmullins.com

SECRETARY
David A. Anderson
P.O. Drawer 7788
Columbia, SC 29202
(803) 576-3702 FAX (803) 779-0016
danderson@richardsonplowden.com

IMMEDIATE PAST PRESIDENT
Sterling G. Davies
P.O. Box 12519
Columbia, SC 29211
(803) 779-2300 FAX (803) 748-0526
sdavies@mgclaw.com

EXECUTIVE COMMITTEE

Term Expires 2014
Mark A. Allison
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W. Edward Lawson
John P. "Jack" Riordan
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SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

SCDTAA Docket

MEMBER NEWS

SCDTAA Past President Honored with Statewide Award

The South Carolina Bar Foundation is proud to announce Mark W. Buyck, Jr. as the 2013 DuRant Distinguished Public Service Award recipient for meritorious service to the law and community. This annual recognition is the most prestigious statewide award members of the South Carolina Bar can bestow on a fellow attorney. The award was presented during the SC Bar Convention on January 24 at the Kiawah Island Golf Resort.

Bowman and Brooke Announces New Partner

Bowman and Brooke LLP, a national product liability defense firm, is proud to announce that Angela G. Strickland of the firm's Columbia office has been made a partner. Angela practices in the areas of product liability and personal injury defense, with a focus on the defense of automotive and other products, both consumer and industrial. She also maintains a practice representing clients in commercial and business litigation matters.

Half of Collins & Lacy Lawyers Honored Both Nationally and Statewide

Collins & Lacy, P.C. is pleased to announce 13 of the business defense firm's attorneys have been recognized for their work in the legal profession by three different awards programs.

The three awards programs were Columbia Business Monthly, Greenville Business Magazine and Best Lawyers of America.

Five attorneys were selected as part of the 2013 Legal Elite in their respective publications – Columbia Business Monthly and Greenville Business Magazine. Earlier this year, attorneys from the Midlands and the Upstate of the South Carolina Bar Association nominated the top attorneys in 20 practice areas. From these nominations, the Legal Elite were selected. The following Collins & Lacy attorneys received this honor:

2013 Midlands Legal Elite

- Kristian Cross (Columbia) - Workers' Compensation
- Charles Appleby (Columbia) – Labor & Employment
- Peter Dworjanyn (Columbia) – Insurance

2013 Upstate Legal Elite

- Michael Pitts (Greenville) – Labor & Employment
- Logan Wells (Greenville) – Insurance

Eight Collins & Lacy Attorneys Named 2014 Best Lawyers in America:

- Ellen M. Adams (Columbia) – Workers' Compensation Law
- Joel W. Collins, Jr. (Columbia) – Criminal Defense
- Peter Dworjanyn (Columbia) – Workers' Compensation
- Rebecca Halberg (Columbia) – Workers' Compensation
- Stanford Lacy (Columbia) – Workers' Compensation
- L. Henry McKellar (Columbia) – Banking & Finance Law, Litigation (Banking & Finance)
- Jack Griffeth (Greenville) – Arbitration, Mediation
- Michael Pitts (Greenville) – Employment Law, Litigation

Andrew Countryman Appointed To Serve On PLDF Legal Malpractice Committee

Carlock, Copeland & Stair is pleased to announce that Andrew Countryman has been appointed to serve as the Co-Chair for the Professional Liability Defense Federation's (PLDF) Legal Malpractice Committee for the 2013-2014 term.

This will be the inaugural year for the Legal Malpractice Committee. The committee will share expertise in the proper management of, and response to, legal malpractice claims. As co-chair, Andrew will be responsible for coordinating member participation and assisting in annual meeting seminar presentation planning.

Carlock, Copeland & Stair Elects Three New Partners

Carlock, Copeland & Stair, LLP congratulates Andrew W. Countryman, Jackson H. Daniel, III, and Amanda K. Dudgeon, on being selected to join the Firm's partnership.

Charleston Attorney Laura Paton Serves South Carolina Women Lawyers Association and Cinderella Project

Congratulations to Carlock, Copeland & Stair Attorney Laura Paris Paton on being selected to serve a two-year term on the Board of Directors for the South Carolina Women Lawyers Association (SCWLA).

In addition to her 2014-2015 nomination to the SCWLA Board of Directors, she has also been selected as the 2014 Donations Coordinator for the

Continued on next page

Member News cont.

Cinderella Project Charleston. Like her commitment to the SCWLA, Laura has worked with the Cinderella Project, an organization that collects and distributes donations of gently used formal wear for girls who are financially unable to purchase these items for prom, for more than 3 years.

Elbert Dorn Named to 2014 Edition of Best Lawyers

Nexsen Pruet is proud to announce that Myrtle Beach attorney Elbert Dorn has been named to the 2014 edition of Best Lawyers in America®. Dorn received the peer recognition for his work in the areas of Commercial Litigation and Product Liability Litigation - Defendants.

Gallivan, White & Boyd Earns the Defense Research Institute's Prestigious Law Firm Diversity Award

Gallivan, White & Boyd, P.A. is pleased to announce the firm was selected to receive the 2013 Defense Research Institute's (DRI) Law Firm Diversity Award.

Elmore Co-Editor of *Fundamentals of Construction Law*

Frank Elmore of Elmore Goldsmith, P.A. is a co-editor of *Fundamentals of Construction Law, Second Edition* published by the American Bar Association's Forum on the Construction Industry. Elmore co-edited the work of twenty-seven collaborative construction attorneys from around the county to develop the definitive primer on the subjects that are at the heart of every construction law dispute. In depth analysis explains the key principles of construction law, making this book is a "must have" for any lawyer practicing in this area, particularly those new to the field. Its scope is unique among construction treatises because it explains the perspectives of the various "players" - owner, designer, constructor, and surety, as well as discussing key contract provisions.

This new edition is expanded to include chapters on:

- Defects
- Damages
- Alternative dispute resolution

The book is available through the ABA's online webstore.

Elmore Goldsmith Firm and Attorneys Recognized in 2014 Best Lawyers in America: Elmore Named Greenville's Construction Lawyer of the Year

The law firm of Elmore Goldsmith is pleased to announce that the firm has been selected as a tier 1 firm in the Greenville metropolitan area for commercial litigation, construction law and construction litigation.

Three of the firm's attorneys have been selected by their peers for inclusion in The Best Lawyers in America® 2014. Additionally, Frank Elmore for the second consecutive year has been recognized as "Lawyer of the Year" for Greenville Litigation – Construction.

The following Elmore Goldsmith attorneys are included in The Best Lawyers in America 2014, with (10) designating those who have been recognized for at least ten years:

- L. Franklin "Frank" Elmore (10) :
  Construction Law and Litigation – Construction
- Mason "Andy" Goldsmith, Jr.:
  Construction Law and Litigation – Construction

Gallivan, White & Boyd Launches New Website

Gallivan, White and Boyd, P.A., one of the Southeast's leading business and commercial law firms, launched its redesigned website, www.GWBlawfirm.com, as part of its continuing effort to provide the highest level of service possible. The new website has been designed to provide a user-friendly experience with simpler navigation and a more visual layout.

Gallivan, White & Boyd Named Best Law Firm by U.S. News and Best Lawyers

Gallivan, White & Boyd, P.A. is pleased to announce that the firm has been ranked as a "Best Law Firm" by U.S. News and Best Lawyers. GWB has been ranked a Tier 1, Tier 2 or Tier 3 "Best Law Firm" in 12 practice areas:

- Arbitration
- Commercial Litigation
- Employee Benefits (ERISA) Law
- Employment Law – Management
- Insurance Law
- Legal Malpractice Law – Defendants
- Mass Tort Litigation/Class Actions – Defendants
- Mediation
- Personal Injury Litigation – Defendants
- Product Liability Litigation – Defendants
- Professional Malpractice Law - Defendants
- Workers' Compensation Law – Employers

Curtis L. Ott Begins Term as President of the South Carolina Defense Trial Attorneys' Association

Gallivan, White & Boyd, P.A. is pleased to announce that firm partner Curtis L. Ott was sworn in as President of the South Carolina Defense Trial Attorneys' Association (SCDTAA) November 7, 2013.

Gallivan, White & Boyd's Products Liability Blog Abnormal Use Recognized by the ABA Journal for the Fourth Consecutive Year

Gallivan, White & Boyd, P.A. is pleased to announce that in December of 2013 the editors of the ABA Journal selected the firm's product liability blog, Abnormal Use: An Unreasonably Dangerous Products Liability Blog, as one of the ABA Journal's Blawg 100 for the fourth year in a row. The ABA Journal describes its Blawg 100 as the year's "100 best legal blogs." The ABA Journal then asked read-

ers from around the country to vote for their favorite torts blog. As a result, GWB's Abnormal Use blog was again voted the reader's favorite blog in the Torts category for the fourth consecutive year.

Attorney Ron Tate Receives Presidential Citation Award From Home Builders Association of Greenville

Gallivan, White & Boyd, P.A. is pleased to announce that shareholder Ronald G. Tate has received the Presidential Citation Award from the Home Builders Association of Greenville (HBA).

M. Stephen Stubley Listed in Best Lawyers in America for Workers' Compensation Law – Employers

McKay, Cauthen, Settana & Stubley, P.A. is excited to announce that Partner M. Stephen Stubley has been named to The Best Lawyers in America © 2014 in the field of Workers' Compensation Law – Employers.

McAngus Goudelock & Courie Included in 2014 Best Law Firms List

The law firm of McAngus Goudelock & Courie has been included in U.S. News – Best Lawyers® "Best Law Firms" in 2014.

Tier 1 rankings in:

Charleston, SC:
- Litigation – ERISA
- Litigation – Labor & Employment

Columbia, SC
- Commercial Litigation
- Litigation – Banking & Finance
- Workers' Compensation Law – Employers

Greenville, SC
- Insurance Law
- Workers' Compensation Law – Employers

The firm received Tier 2 rankings in:

Charleston, SC
- Employment Law – Individuals
- Employment Law – Management
- Workers' Compensation Law – Claimants
- Workers' Compensation Law – Employers

Charlotte, NC
- Commercial Litigation
- Workers' Compensation Law – Employers

Columbia, SC
- Appellate Practice

Greenville, SC
- Personal Injury Litigation – Defendants

Raleigh, NC
- Workers' Compensation Law – Employers

McAngus Goudelock & Courie Ranked 8th Among South Carolina's Best Places to Work

McAngus Goudelock and Courie has been ranked #8 in the Large Employer Category in South Carolina as one of the Best Places to Work by SCBiz, in partnership with the South Carolina Chamber of Commerce and Best Companies Group.

McAngus Goudelock & Courie Adds Eight Attorneys and Opens Office in Florence

McAngus Goudelock & Courie is pleased to announce the addition of eight workers' compensation attorneys and the opening of an office in Florence.

Six attorneys are located in the firm's Greenville office and two attorneys are located in the firm's Florence office. The Florence office is the firm's eighth office in the Carolinas.

Greenville, SC:
- Vernon Dunbar
- Brad Easterling
- Ashley Forbes
- Stephanie Pugh
- Bill Shaughnessy
- Shayne Williams

Florence, SC:
- Walt Barefoot
- Brandon Hylton

U.S. News and Best Lawyers Rank Nelson Mullins a Top Tier Firm in Columbia, South Carolina

U.S. News and Best Lawyers® have ranked Nelson Mullins Riley & Scarborough LLP as a top-tier law firm in Columbia for 2014 in twenty-six practice areas:
- Administrative / Regulatory Law
- Appellate Practice
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Corporate Law
- Employee Benefits (ERISA) Law
- Environmental Law
- Financial Services Regulation Law
- Government Relations Practice
- Health Care Law
- Insurance Law
- Litigation - Banking & Finance
- Litigation - Bankruptcy
- Litigation - Environmental
- Litigation - Intellectual Property
- Litigation – Labor & Employment
- Litigation - Securities
- Litigation - Trusts & Estates
- Mass Tort Litigation / Class Actions - Defendants

Continued on next page

- Mergers & Acquisitions Law
- Mortgage Banking Foreclosure Law
- Personal Injury Litigation - Defendants
- Product Liability Litigation - Defendants
- Tax Law
- Trusts & Estates Law

Daniel Lumm and Chantelle Lytel Join Nelson Mullins in Columbia

Daniel Lumm has joined Nelson Mullins Riley & Scarborough LLP as an associate in the Columbia office where he practices in the areas of corporate law, contracts, technology law, Internet and privacy law.

Chantelle Lytle has joined the Columbia office of Nelson Mullins Riley & Scarborough LLP as an associate. Ms. Lytle practices in the areas of pharmaceutical and medical device litigation, business litigation, products liability, e-discovery and litigation readiness, and records and document management.

Seton Hall Law Awards Jennifer Mallory Clinical Research and the Law Graduate Certificate

Seton Hall University School of Law has awarded Jennifer Mallory, a partner of Nelson Mullins Riley & Scarborough LLP, a Graduate Certificate in Clinical Research and the Law.

Nelson Mullins' Ed Mullins Honored with NCSC's John H. Pickering Award

Ed Mullins, of counsel in Nelson Mullins Riley & Scarborough LLP's Columbia office, has been named the recipient of the 2013 John H. Pickering Award by the National Center for State Courts (NCSC).

Nelson Mullins Promotes Three Columbia Attorneys

The partners of Nelson Mullins Riley & Scarborough LLP have elected Jay Thompson to the partnership and have promoted Erin Stuckey and Geordie Zug to of counsel.

Nelson Mullins' Quattlebaum Selected as American College of Trial Lawyers Fellow From the American College of Trial Lawyers

Marvin Quattlebaum, a partner in Nelson Mullins Riley & Scarborough LLP's Greenville, S.C., office, has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America.

Nexsen Pruet Earns National Recognition and 57 First Tier Rankings in the Carolinas

Nexsen Pruet is proud to announce its results in the annual U.S. News – Best Lawyers® "Best Law Firms" rankings. The firm has been nationally ranked in three areas: Litigation-Construction, Construction Law and Corporate Law.

National Rankings:

- Litigation - Construction
- Construction Law
- Corporate Law

Metropolitan First Tier Rankings

Charleston:

- Admiralty and Maritime Law
- Appellate Practice
- Commercial Litigation
- Employment Law – Management
- Environmental Law
- Labor Law – Management
- Litigation – Environmental
- Litigation – Intellectual Property
- Litigation – Labor & Employment
- Real Estate Law

Charlotte:

- Litigation – Construction
- Litigation – Securities
- Trademark Law

Columbia:

- Administrative / Regulatory Law
- Banking and Finance Law
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Construction Law
- Corporate Law
- Employee Benefits (ERISA) Law
- Employment Law - Management
- Environmental Law
- Financial Services Regulation Law
- Health Care Law
- Labor Law – Management
- Litigation – Construction
- Litigation – ERISA
- Litigation – Intellectual Property
- Litigation – Labor & Employment
- Litigation – Patent
- Mergers & Acquisitions Law
- Real Estate Law
- Securities / Capital Markets Law
- Securities Regulation
- Tax Law
- Trusts & Estates Law

Greensboro:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Construction Law
- Corporate Law
- Eminent Domain and Condemnation Law
- Litigation - Bankruptcy
- Litigation - Construction
- Litigation - Real Estate
- Real Estate Law
- Tax Law

Greenville:

- Banking and Finance Law
- Employment Law - Management
- Environmental Law
- Litigation – Environmental
- Litigation – Intellectual Property
- Litigation – Labor & Employment
- Mediation
- Personal Injury Litigation – Defendants
- Real Estate Law
- Trademark Law

Myrtle Beach:

- Commercial Litigation

Raleigh:

- Health Care Law

Global Directory Ranks Nexsen Pruet's International Legal Network

The latest edition of Chambers & Partners Global Guide for Clients, one of the world's top legal directories, ranks Mackrell International as a leading law firm network in the "Band One" category.

2 Nexsen Pruet Attorneys Named to Legal Elite of the Midlands

Nexsen Pruet is proud to announce that 2 Midlands attorneys have been named to Columbia Business Monthly's list of "Legal Elite" for 2013:

- Daniel Leonardi - Intellectual Property
- Amy H. Geddes - Insurance.

Best Lawyers in America Names 18 Ogletree Deakins Attorneys to 2014 List

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree Deakins) announces that 18 attorneys from the firm's three South Carolina offices were selected for inclusion in The Best Lawyers in America© 2014:

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

Ogletree Deakins Elevates Two in Firm's Columbia Office

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree Deakins) is pleased to announce that Ted Speth and Kathy Dudley Helms have been elevated to executive positions within the firm. Speth, former managing shareholder of the firm's Columbia office, has been elected to the firm's Board of Directors and Helms has been named the new managing shareholder of the Columbia office.

Ogletree Deakins Shareholder Ted Speth Named BTI Client Service All-Star for Second Time

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree Deakins) is pleased to announce that Ted

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Member News cont.

Speth, a shareholder in the firm's Columbia office, has been selected as a 2014 Client Service All-Star by the BTI Consulting Group.

Roe Cassidy Again Ranked Among Top Law Firms in U.S. News Publication

Roe Cassidy Coates & Price, P.A., is pleased to announce its inclusion in U.S. News-Best Lawyers® "Best Law Firms" 2014 publication that recognizes the top practices in the nation. The firm received the following rankings:

First Tier (Greenville):

- Medical Malpractice Law – Defendants
- Bankruptcy & Creditor Debtor Rights/Insolvency & Reorganization Law
- Employment Law – Individuals

Second Tier (Greenville):

- Employment Law – Management

Third Tier (Greenville):

Litigation – Labor & Employment

- Commercial Litigation

Steven J. Pugh and Franklin J. Smith, Jr., Selected to Greater Columbia Business Monthly Midland's 2013 Legal Elite

Richardson Plowden & Robinson, P.A. is pleased to announce that attorneys Steven J. Pugh and Franklin J. Smith, Jr., were selected by their peers as Greater Columbia Business Monthly's Midlands Legal Elite. Pugh was selected for his work in Civil Litigation, and Smith was selected for his work in Construction Law.

Richardson Plowden selected as a 2014 Best Law Firm by Best Lawyers and U.S. News and World Report

Richardson Plowden & Robinson, P.A. was ranked by Best Lawyers in America® and U.S. News & World Report as a 2014 "Best Law Firm." The firm received a Metropolitan First-Tier Ranking for Columbia, SC in the areas of Administrative and Regulatory Law, Commercial Litigation, Construction Law, Legal Malpractice Law – Defendants, Litigation – Construction Law, and Real Estate Law.

Richardson Plowden Welcomes Bruce Hendricks Smith to the Firm's Myrtle Beach Office

Richardson Plowden & Robinson, P.A. is pleased to announce that Bruce Hendricks "Brucie" Smith has joined the Firm as an associate attorney in the Myrtle Beach office.

Richardson Plowden Welcomes Benjamin P. Carlton to the Firm's Columbia Office

Richardson Plowden & Robinson, P.A. is pleased to announce that Benjamin P. Carlton has joined the firm as an associate in the Columbia office.

Richardson Plowden names Garraux as a shareholder

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Jared H. Garraux was recently named a shareholder in the firm. Garraux joined Richardson Plowden in the Columbia office in 2007.

Richardson Plowden's Kelley appointed to State Workforce Investment Board

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Michelle Parsons Kelley was recently appointed by Governor Nikki Haley to serve on the State Workforce Investment Board (SWIB).

Caleb M. Riser selected to 2014 Class of the South Carolina Bar Leadership Academy

Richardson Plowden & Robinson, P.A. is pleased to announce that attorney Caleb M. Riser was recently selected to the 2014 Class of the SC Bar Leadership Academy.

Richardson Plowden Names Franklin J. Smith, Jr., as New Managing Shareholder

Richardson Plowden & Robinson, P.A. has named attorney Franklin J. Smith, Jr., as the firm's new managing shareholder.

Smith Moore Leatherwood Moves into ONE Development

Smith Moore Leatherwood LLP will be the first company settled in its corporate offices in Phase II of the ONE development when it moves its approximately 80 Greenville attorneys and staff to the new space this weekend. The law firm's offices on the corner of Washington and Main Streets will be open for business starting on January 21.

Eight Turner Padget Lawyers Selected for Inclusion in Euromoney's Benchmark Litigation 2014

Eight lawyers from Turner Padget were recently selected for inclusion in the seventh edition of Euromoney's Benchmark Litigation 2014. The firm was again named one of five "highly recommended" litigation firms in South Carolina.

The eight lawyers who were named "Local Litigation Stars" are:

- R. Wayne Byrd
- J. Kenneth Carter, Jr.
- Edward W. Laney, IV
- Steven W. Ouzts
- Thomas C. Salane
- W. Duvall Spruill
- John S. Wilkerson
- D. Andrew Williams

Turner Padget Receives First-Tier Rankings in the 2014 Best Law Firms Publication

Turner Padget is recognized in the following categories as the top law firm in the respective metropolitan areas:

Charleston
- Professional Malpractice Law – Defendants

Columbia
- Banking and Finance Law
- Employment Law - Management
- Insurance Law
- Litigation - Banking & Finance
- Litigation - Construction
- Litigation - Labor & Employment
- Litigation - Real Estate
- Litigation - Trusts & Estates
- Mediation
- Product Liability Litigation - Defendants
- Workers' Compensation Law - Employers

Florence
- Mediation
- Tax Law

Greenville
- Arbitration
- Mediation
- Personal Injury Litigation - Defendants
- Workers' Compensation Law - Employers

Myrtle Beach
- Real Estate Law

C. Pierce Campbell Named to City of Florence Design Review Board

C. Pierce Campbell, shareholder in Turner Padget's Florence office, has been named to the City of Florence Design Review Board. Mr. Campbell was nominated by the mayor, and unanimously appointed by Florence City Council. The Design Review Board considers all construction and renovation in Florence's revitalized downtown district.

Jaclynn Goings Joins Turner Padget Law Firm

Jaclynn Bower Goings has joined the law firm of Turner Padget Graham & Laney, P.A. and is based in the Charleston office. Ms. Goings is a member of the business transactions team and handles both transactional work and business and real estate litigation. Her practice focuses on commercial real estate, banking and corporate matters.

Kunz to Serve on Board of Directors

Andrew "Andy" Kunz has been chosen to serve on the Board of Directors of the Ronald McDonald House Charities of Columbia. His tenure began January 1, 2014.

John M. Scott, III Elected to Board of Trustees

Turner Padget Graham & Laney, P.A. is pleased to announce that John M. Scott, III has been elected to serve on the Board of Trustees of McLeod Health Foundation.

Turner Padget Elects Troy Thames Shareholder

Turner Padget Graham & Laney, P.A. has elected G. Troy Thames as a shareholder in the firm's Charleston office. He concentrates his practice on construction, personal injury and premises liability.

Willis Appointed to Board of Directors of South Carolina Chapter Community Associations Institute

Turner Padget Graham & Laney, P.A. is pleased to announce that Shawn R. Willis has been elected to serve on the Board of Directors for the South Carolina Chapter Community Associations Institute (CAI). Mr. Willis is an attorney in our Charleston office and a member of the Business Transactions practice group. He handles complex matters involving business structuring, commercial real estate, financing, taxation and also represents community associations.

Quinn Joins Turner Padget

Turner Padget Graham & Laney, P.A. is pleased to announce that Patrick D. Quinn has joined the firm. Mr. Quinn is based in the Columbia office and practices primarily in the areas of professional liability and personal injury defense.

Wall Templeton & Haldrup, P.A. has received a Tier 1 Ranking as a 2014 Best Law Firm for Insurance law by U.S. News - Best Lawyers

Shareholders Morgan Templeton and Mark Wall were ranked "Best Lawyers" for 2014.

Associates Taylor H. Stair and Peden Brown McLeod, Jr. have received the Martindale-Hubbell Peer Review Rating of "Preeminent AV."

Templeton Selected as Member of ABOTA

Wall Templeton & Haldrup is proud to announce Founding Shareholder Morgan S. Templeton's selection as a member of the prestigious American Board of Trial Advocates (ABOTA).

Three Associates Join Nelson Mullins in Columbia

Matt Abee, Graham Mitchell, and Everett McMillian have joined as associates in the Columbia office of Nelson Mullins Riley & Scarborough LLP. Mr. Abee practices in the areas of appellate, business litigation, consumer financial services litigation, and employment litigation. Mr. McMillian's practice will focus on representing public and private companies in aerospace matters, environmental issues, premises liability claims, and motor vehicle accidents. Mr. Mitchell focuses his practice in bankruptcy and creditors' rights, consumer financial services litigation, and financial institutions.

John T. Lay Elected President-Elect of the South Carolina Chapter of the American Board of Trial Advocates

Gallivan, White & Boyd, P.A. is pleased to announce that shareholder John T. Lay has been

Continued on next page

Member News cont.

elected president-elect of the South Carolina Chapter of the American Board of Trial Advocates (ABOTA).

Collins & Lacy, P.C. Launches New Website Created by South Carolina Companies

Collins & Lacy, P.C. has launched a new website created by South Carolina companies. The law firm's redesigned site showcases the talents of local enterprises while highlighting Collins & Lacy's commitment to being a client-focused business defense firm.

Phillip E. Reeves, C. Stuart Mauney & Steven E. Buckingham Receive Leadership in Law Honor

The law firm of Gallivan, White & Boyd, P.A. is pleased to announce that attorneys Phil Reeves, Stuart Mauney, and Steve Buckingham have been selected to receive the 2014 Leadership in the Law recognition by South Carolina Lawyers Weekly. These accomplished GWB attorneys have received this honor for their outstanding professional accomplishments, leadership, and community involvement.

John E. Cuttino Joins Gallivan, White & Boyd, P.A. Law Firm

Gallivan, White & Boyd, P.A. is pleased to announce that attorney John E. Cuttino has joined the firm as a shareholder in GWB's Columbia, South Carolina, office. John is a veteran litigator with over 30 years of experience in the state and federal courts of South Carolina.

Richardson Plowden's Francis M. Mack Announces Retirement after 32 years

Francis M. Mack of Richardson Plowden & Robinson, P.A. has announced his retirement as a long-time construction law attorney. Mack, who served in many leadership roles at Richardson Plowden, has made plans to retire after 32 years of practicing law with the firm.

Grayson Smith Named Co-Chairperson of the Richland County Bar's Young Lawyers Division

Gallivan, White & Boyd, P.A. is pleased to announce that Grayson Smith has been named co-chairperson of the Richland County Bar's Young Lawyers Division.

Cannon, Cheves, and Daniel Join Turner Padget

Turner Padget Graham & Laney, P.A. is pleased to announce that Rhame B. "Chip" Cannon has joined the firm in its litigation group. Mr. Cannon is based in Turner Padget's Charleston office and will focus his practice in the areas of construction, insurance, and personal injury litigation.

Langdon Cheves, III has joined the law firm and is based in the Greenville office. Mr. Cheves practices in the areas of insurance litigation, personal injury litigation, product liability and premises liability.

William H. (Buck) Daniel, IV has also joined the firm. Mr. Daniel is based in the Columbia office and will focus his practice on commercial litigation, insurance coverage matters and personal injury defense.

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

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

Columbia – 2014 South Carolina Super Lawyers:

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

Greenville – 2014 South Carolina Super Lawyers:

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

Columbia – 2014 South Carolina Rising Stars:

- Charles Appleby, Employment & Labor

Charleston – 2014 South Carolina Rising Stars:

- Bennett Crites, Personal Injury Defense

Myrtle Beach – 2014 South Carolina Rising Stars:

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

Elmore Goldsmith Attorneys Recognized as South Carolina Super Lawyers

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

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

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

- Bryan P. Kelley – Construction Litigation

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

The law firm of Gallivan, White & Boyd, P.A. is pleased to announce that sixteen Gallivan, White & Boyd, P.A. attorneys have been selected for inclusion in Super Lawyers 2014.

Greenville

- W. Howard Boyd, Jr. – Business Litigation
- Deborah Casey Brown – Workers' Compensation
- Phillip E. Reeves – Insurance Coverage
- T. David Rheney – Personal Injury Defense
- Luanne Lambert Runge – Business Litigation
- Daniel B. White – Personal Injury Defense: Products

Columbia

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

In addition, six GWB attorneys have been recognized as Rising Stars by Super Lawyers.

Greenville

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

Charlotte

- James M. Dedman, IV – Personal Injury Defense

Columbia

- Breon C.M. Walker – Personal Injury Defense

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

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

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

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

Held on Sat., Feb. 1, The Long Run 15k was presented by MGC and The Not-So-Long Run 5k was presented by Midlands Orthopaedics, P.A. Over 500 runners and walkers and 250 volunteers came out to support Souper Bowl of Caring.

Eleven McAngus Goudelock & Courie Attorneys Named in 2014 South Carolina Super Lawyers Magazine

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

Those selected for the 2014 S.C. Super Lawyers listing include:

- Rusty Goudelock (Columbia) – Workers' Compensation
- Erroll Anne Hodges (Greenville) – Workers' Compensation
- Amy Jenkins (Charleston) – Employment & Labor
- Tommy Lydon (Columbia) – Business Litigation
- Hugh McAngus (Columbia) – Workers' Compensation
- Dominic Starr (Myrtle Beach) – Civil Litigation Defense

Those selected for the 2014 S.C. Rising Stars listing include:

- Amanda Blundy (Charleston) – Business Litigation
- Trippett Boineau (Columbia) – Construction Litigation
- Andy Delaney (Columbia) – Business Litigation
- Jason Pittman (Columbia) – Civil Litigation Defense
- Robert Sansbury (Charleston) – Civil Litigation Defense

Twenty Columbia Nelson Mullins Attorneys Selected for 2014 Super Lawyers

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

Nexsen Pruet Attorneys Named to Top 25 List

8 Nexsen Pruet attorneys received the recognition for this year.

Charleston

Cherie Blackburn (Employment Litigation: Defense), Marvin Infinger (Business Litigation) and Brad Waring (Business Litigation).

Columbia

David Dubberly (Employment & Labor), Susi McWilliams (Employment & Labor)

Greenville

David Moore (Insurance Coverage),

Continued on next page

Member News cont.

Myrtle Beach

Elbert Dorn (Personal Injury Defense: Products)

Additionally, one attorney is listed as "Rising Stars" in Columbia: Amy Harmon Geddes (Insurance Coverage).

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

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

Super Lawyers

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

Rising Stars

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

Richardson Plowden's Bias Presented with Jonathan Jasper Wright Award

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

Richardson Plowden & Robinson, P.A., is pleased to announce that six attorneys were selected to the 2014 South Carolina Super Lawyers: Rising Stars listing. Four attorneys from Columbia were selected: Jared H. Garraux, Michelle P. Kelley, Jocelyn T. Newman, and Joseph E. Thoensen; and two attorneys from Charleston were selected: Drew H. Butler and Samia H. Nettles.

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

Julie Moose Elected Secretary of SCWLA

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

Sixteen Turner Padget Graham & Laney , PA Attorneys Selected for 2014 Super Lawyers

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

Columbia Super Lawyers:

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

Charleston Super Lawyers:

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

Charleston Rising Stars:

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

Florence Super Lawyers:

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

Florence Rising Stars:

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

Myrtle Beach Super Lawyer:

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

Myrtle Beach Rising Star:

- Audra M. Byrd – Civil Litigation Defense

Visit us on the web at www.scdtaa.com

2014 Trial Academy

by John F. Kuppens

Twenty young lawyers recently participated in the three-day Trial Academy in Columbia on April 23-25. We began with two days of lectures from these respected South Carolina trial attorneys: Bob McKenzie, Becky Lafitte, Dick Harpootlian, Bill Woods, Robert Brunson, Ron Diegel, Brian Comer, John Wilkerson, Breon Walker, and Roy Shelley. The presentations were riveting and educational. We are indebted to our speakers for their contributions to the success of the Trial Academy.

The Trial Academy concluded with day-long mock trials presided over by actual state and federal judges at the Mathew J. Perry Federal Courthouse in Columbia. Of the five trials, we had two hung juries, two defense verdicts, and one plaintiff's verdict. We are incredibly grateful to the following judges for devoting an entire day to the training of our young lawyers: Michelle Childs, Shiva Hodges, James Barber, Buck James, and Robert Hood. Additionally, John Grantland, Anthony Livoti, Chad Poteat, Jim Irvin, and William Brown served as trial observers and provided tips to the participants after the trials concluded. SCDTAA member lawyers played the roles of the fact and expert witnesses, and we had actual jurors who listened, deliberated, and tried to render verdicts.

At a recent Board meeting, President Curtis Ott remarked that the Trial Academy is the SCDTAA's "crown jewel," and after watching all of the people that contributed to making it run smoothly and provide unparalleled training, I have to agree. We have received positive feedback from our participants, and they all now want to get more meaningfully involved in SCDTAA. We are grateful and gratified to the many people who devote their time and effort to make the Trial Academy happen, and we are very thankful that Aimee Hiers and her staff make it all run so seamlessly. Finally, we thank Diane Hillman and the others at the courthouse who rearranged their schedules to allow us to use their wonderful facility.

The 46th Annual Meeting: A Great Success!

Westin Harbor Resort • Savannah, GA

by David A. Anderson

The Forty-Sixth Annual Meeting of the South Carolina Defense Trial Attorneys' Association took place at the Westin Harbor Resort in Savannah, Georgia on November 7 – 10, 2013. The Annual Meeting Committee put together a dynamic educational program coupled with plenty of time to relax and enjoy various leisure events. As always, the beautiful Westin Savannah Harbor Resort & Spa provided an excellent venue for the meeting activities even though we were competing with the "Rock and Roll" Marathon in which some of our attendees participated. We not only had 51 judges attend the Meeting, but we also enjoyed having the South Carolina Bar President, Alice Paylor, the National DRI President, J. Michael Weston, the Georgia Defense Bar President, Ted Freeman and the North Carolina Defense Bar President, Jonathan Berkelhammer join us as guests for the event.

Our meeting started off with a reception on Thursday evening where old and new faces got together with the Judiciary to catch up and share a cocktail overlooking the Savannah River. We then broke up to enjoy various dinner parties throughout the historic City of Savannah. Our educational program started off on Friday with two super presentations, United States District Judge Joe Anderson shared a riveting presentation on his latest book,

Effective Courtroom Advocacy. He was followed by Chief Justice Jean Toal, who gave an informative talk on the state of the Judiciary. We concluded with a fitting memorial tribute to Judge Karen Williams and past Hemphill award winner, Steve Morrison. On Friday evening we once again had our black tie dinner with entertainment from the Atlanta Rhythm and Groove Band.

Saturday began with a judicial breakfast followed by Dean Robbie Wilcox enlightening the attendees with an ethics hour of CLE credit entitled: "Selected Ethical Issues for Litigators." We also heard presentations from Dallas Attorney Ben Wright speaking on "Computer Privacy and Security Law: Trends and Implications" and "Legal Investigations in the Cloud"; William Latham's presentation on "Making the iPad a Litigation Force Multiplier"; and Representative G. Murrell Smith's Legislative Update. We concluded our educational topics with the newly-elected DRI National President, J. Michael Weston, sharing his thoughts on "The Defense Bar in 2013 - A National Perspective." This Meeting had much to offer both professionally and as a time to socialize with members of our association and the Judiciary.

Please mark your calendars for November 6-9, 2014 as we hold the 47th Annual Meeting at the Pinehurst Resort & Spa, Pinehurst, North Carolina.

2014 Summer Meeting
July 22-24 • Grove Park Inn, Asheville, NC

by William G. Besley and Mark Allison

William G. Besley

Mark Allison

Mark your calenders for the 2014 Summer Meeting! With over seven hours of cutting edge CLE set to the backdrop of the Appalachian Mountains in July, you can't afford to miss it. Come visit with old friends and make new ones as the SCDTAA intertwines CLE and networking. The Grove Park Inn is the perfect setting for a July vacation with spectacular golf, whitewater rafting, canopy tours, fishing and miles of hiking. The children's program makes this a fantastic family event.

During our CLE sessions, you will hear a presentation from Senator Tim Scott, and from lawyer, Jim Cooney, who successfully defended the Duke Lacrosse players and dealt with prosecutorial misconduct. For our members focusing on workers' compensation, four of the Commissioners are attending and participating in the dedicated workers' compensation portions of the meeting, including Breakfast with the Commissioners on Saturday. We are also pleased to have Aphrodite Konduros from the South Carolina Court of Appeals and Circuit Judge Gary Hill, who will share their perspectives on effective advocacy. Other sessions include a panel on the management of defense firms in the coming years, and substantive law updates by our substantive law committees.

Our silent auction offerings go international this year to include great deals on a house in Costa Rica and Argentinian Dove Hunt. Please see the Young Lawyers update on page 21 for a description of each.

We look forward to seeing you in July!

2014 Annual Meeting
November 6-9 • Pinehurst, NC

by James B. Hood

The 2014 Annual Meeting returns to Pinehurst, NC November 6-9! It is no coincidence that our President Curtis Ott leads us back to Pinehurst in November as this year marks the first time in golf history where the same course will host both the men's and women's US Opens in the same year. The resort, spa, village and, of course, the eight distinct and renowned golf courses will not disappoint! Your Annual Meeting Committee is working diligently to create a cutting-edge, practical and informative CLE program as well as scheduling social and recreational activities that will afford you ample opportunities to network, socialize and reconnect with new and old friends. In addition to world class golf, Pinehurst boasts an amazing spa, shopping and outdoor recreational activities. The Annual Meeting will begin on Thursday night with the President's Welcome Reception, and the educational programs will be offered Friday and Saturday mornings. Friday night will be the black tie optional dinner and dancing, and Saturday night will offer a relaxed atmosphere to enjoy a Taste of North Carolina at the Pinehurst Golf Club where you can even improve on your night putting while catching up with fellow SCDTAA members and members of the judiciary. Mark your calendars now for November 6-9, and plan to join us at Pinehurst.

4th Annual PAC Golf Classic
September 5, 2014

This year we return to Columbia Country Club for a great day of golf. This tournament has been a great success over the years and has helped the Association have a voice with our General Assembly. With 2014 being an election year, an active PAC is crucial.

Friday, September 5, 2014 – Columbia Country Club – Columbia

Sign up before August 31st and SAVE $150 per team!

Columbia Country Club
135 Columbia Club Drive
Columbia, SC 29016
For more information, call Aimee Hiers at SCDTAA headquarters (803) 252-5646 or (800) 445-8629 or email aimee@jee.com

Agenda:

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

Sponsorships:

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

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

Hole-in-One Contest with chance to win Brand New Car! Contest sponsored by

CompuScripts, Inc., Court Reporters

Car shown not the actual prize

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

Registration:

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

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

Payment:

Contact _____

Company _____

Address _____

Telephone ( ) _____

Cell No. ( ) _____

Email _____

Circle selection	Individual	Foursome
BEFORE 8-31-14	$225.00	$850.00
AFTER 8-31-14	$250.00	$1,000.00

Sponsorship	$
Donation to SCDTAA PAC	$
Total DUE	$

Make checks payable to **SCDTAA PAC**.

PAYMENT DUE on/before date of tournament.
MAIL TO: SCDTAA PAC, 1 Windsor Cove, Suite 305, Columbia, SC 29223
FAX TO: (803) 765-0860
EMAIL TO: aimee@jee.com

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

Young Lawyer Update

by Trey Watkins

New Leadership

As an organization, we are the sum of our parts, and I am pleased to announce the great new leadership of the Young Lawyers Division. The Young Lawyers elected Claude Prevost of Collins & Lacy as its new vice-president, and Jay Thompson of Nelson Mullins as its new secretary. Both of these gentlemen will serve with me as officers over the next two years. We are pleased to have as our area representatives Derrick Newberry of the Wilkes Law Firm for the Lowcountry, David Marshall of Turner Padget as our Midlands representative, Duffie Powers of Gallivan, White & Boyd as our Upstate representative, and Alan Jones of McAngus Goudelock & Courie as our Pee Dee representative.

Area Events

The Young Lawyers Division held local events in both Charleston and Columbia.

The YLD held a professional development event in Columbia on March 18, 2014. We met at the First Citizens Café on Main Street in Columbia for a professional development networking and social event with the Columbia Claims Association, a group of insurance adjusters in the midlands.

Also, Dixon Hughes partnered with us for a networking and social event in conjunction with a construction law seminar in Charleston, South Carolina. The YLD opened this networking opportunity to all who attended the construction law seminar. Special thanks goes to Dixon Hughes for this great event.

We are interested in other networking or professional development opportunities in other parts of the state, so if you know of a sponsor interested in holding such an event, please let me know.

Summer Meeting Auction Items

Save up your sky miles and join us at The Grove Park Inn to bid on some great trips. Two international trips are being offered this year:

Four Person/Three Day Argentina Dove Hunt

Joe Miles with Sporting Adventures International, LLC out of Camden, South Carolina is providing a four man, three-day dove hunting trip to the finest dove hunting area in the World, Cordoba, Argentina. There are 50 million doves in Cordoba Valley, and the birds never migrate. The accommodations are world class, and the staff is the best in the business.

The trip includes three full days of hunting for four people, gourmet meals plus lodging in one of their three five-star lodges. When you arrive in Cordoba, you will be greeted at the airport and enjoy a VIP reception (with drinks and baggage handlers). You will then be escorted to a private van to the hunting lodges. The trip includes English-speaking guides, all ground transportation to and from the hunting areas, bird boys, gun cleaning, and laundry service. You will be taken care of from the time you get off of the plane in Argentina until you board the plane back to the United States or your next destination. A representative of Sporting Adventures International will be with you at all times, and you can rest easy that you will be well taken care of on this hunt.

The retail price of this hunt is $11,000. However, bidding will start at $2,950. The trip must be taken within one year from the date of purchase.

So, put together a group of four people, and cash in your sky miles for a fantastic dove hunting experience. Morgan Templeton and I have been on this trip and highly recommend it. If you want additional information or a first-hand account, let one of us know.

Costa Rican Villa

Villa Aventuras in Playa Herradura, Costa Rica is also up for bid. Gather four couples or a large family and head down to Costa Rica for a six day, six night adventure. Villas Avenuras is a four bedroom, four

Continued on next page

Young Lawyer Update Cont.

bath villa with a three-level pool. The trip includes daily maid service and a daily gardener/grounds keeper. The trip is valued at $10,500 and bidding will start at $2,900. The trip must be taken within one year of purchase.

Villa Aventuras is located atop a mountain overlooking Playa Herradura. It is a ten acre compound and has everything you will need to get away and relax. A beautiful four bedroom, four bath house sits nestled in it's own private garden of eden. A three-level private pool with a sunbathing island centers the estate as well as an outdoor seating area with a private jacuzzi.

Three suites are located inside the main house with two on the bottom floor and the third on the top floor. Each room has it's own private outdoor sitting area and private bathroom. The guest house includes the fourth bedroom and opens onto the pool area. It houses a king size bed and spacious seating area as well as a king size loft and private outdoor seating area overlooking the pool and main house.

Each of the houses is made entirely of native lumber that must be harvested fallen, meaning it cannot be cut down for timber. The houses are made of teak and almond wood. High ceilings and open beams in both houses allow a visitor to see the hand crafting of each house. The grounds are double gated and surrounded by a perennial garden that is maintained daily by Louise, the Villa Aventuras groundskeeper. Such pristine gardens also attract numerous tropical birds and monkeys. Macaws and toucans frequent the property annually on their migration period.

Additional services can be added to the trip, including transfers to and from the airport, Los Suenos Marina Beach Club passes, a daily or weekly chef, rental cars, drivers, fishing, zip line tours, horseback tours, or ATV tours. Grocery shopping is also available prior to your arrival.

In addition to our international trips, other great opportunities include:

Three-Hour Harbor Cruise

The Hood's have graciously donated a 3 hour harbor cruise aboard the Compromise for up to 16 passengers. The Compromise is a beautiful 65í Paul Mann and it departs from Tolerís Cove Marina. Bidding will start at $500 for this trip.

Tour of the Charleston Harbor Pilot Boat and Waterfront

An exclusive tour of the working waterfront aboard a Charleston Harbor Pilot Boat for four guests. The trip will include a tour of the Harbor Pilotís facility and pilot vessels. The boat ride will be aboard one of the 75-foot offshore pilot vessels (Ft. Sumter or Ft. Moultrie) or the 40-foot jet drive pilot shuttle boat (Ft. Johnson). Pat participants have really enjoyed a trip up to the Wando terminal to watch the container cranes unloading a ship up close. As Pilots they will take you up close to whatever is going on in the harbor (ship traffic, dredging, etc. - anything you want to see). You will also get a full tour of the facility including a lot of historical pieces and art that show the Pilot's association history back to the 1800's. The tour will include the dispatcher's office where all the vessel traffic control for the whole port takes place. Please note the passengers must be adults and the tour has to occur midday on a weekday so that the office staff is present to coordinate. This item is priceless as the Pilots Branch does not take out passangers for hire.

Half-Day Fishing Charter

Join Captain Jamie Hough of Flat Spot Charters for a half-day inshore fishing charter www.flatsportcharters.com

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Charleston inshore fishing excursions provide all the adventure and excitement that fishing in Charleston has to offer. Redfish are plentiful all year long, ranging from small "puppy drums" to gladiator "bull reds." Trout are available most of the year with night trips during the summer months. Large jacks, sharks, flounder, and many others are also often caught.

This year is shaping up well for the YLD, and we look forward to seeing you at the next event.

Legislative Update

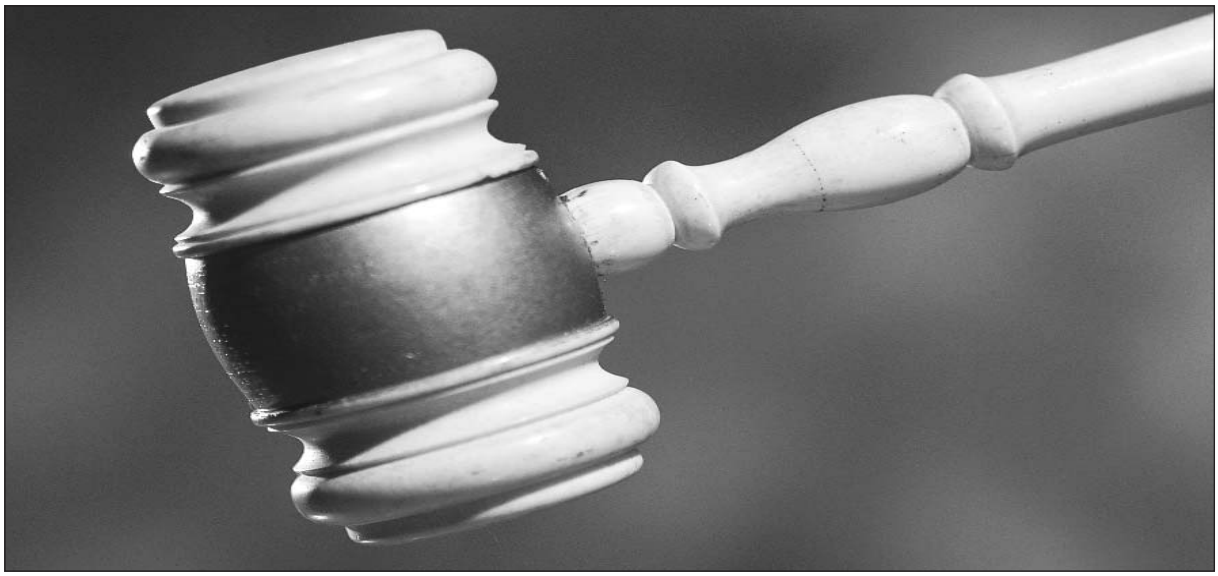
by Jeffrey N. Thordahl, SCDTAA Lobbyist

The 2014 Legislative Session, for the legal community, will most likely be defined by the Chief Justice election. Chief Justice Jean Toal won the election with a 95-74 vote count over Associate Justice Costa Pleicones. Given the mandatory retirement age of 72, it appears Justice Pleicones will run for the Chief Justice seat upon Chief Justice Toal's retirement in December of 2015. If successful, Justice Pleicones will serve for one year as Chief Justice before his mandatory retirement. Of course, these pending retirements over the next few years will open these seats to two new Supreme Court Justices.

Already there are other opportunities for new judges, including an opening on the Court of Appeals due to the retirement of Judge Daniel Pieper. Elections for these seats are likely to be on May 28, 2014. Depending on who wins those seats and other possible retirements, another set of open judicial seats will be up for election in the 2015 Legislative Session. Look for those opportunities after the May 2014 elections.

Perhaps the other defining moment this year was the unprecedented cancelling of two weeks of session due to winter weather! Unfortunately, the main effect of these storms on the SCDTAA was that a couple of legislative functions scheduled for the storm weeks ended up being rescheduled on the same night as the annual SCDTAA function with the House and Senate Judiciary Committees and judges. About half of each committee made it, including both House Judiciary Chairman Greg Delleney and Senate Judiciary Chairman Larry Martin. In attendance were a nice number of judges as well. The SCDTAA Board members as well as several young lawyers were very gracious to stay to the very end. This function remains one of the favorite events of the year for the two committees, and barring another series of winter storms next year, the attendance should greatly increase.

The big legislative issue of the year affecting the SCDTAA is and will be the series of Tort Reform hearings by a Senate Judiciary subcommittee. This subcommittee is chaired by Senator Shane Massey who is also the sponsor of the two tort reform bills. The subcommittee is taking extensive testimony on all sections of the bills in an orderly fashion. Senator Massey has made it clear he is not going to rush the bills this year but wants to get testimony on all of the issues and see if there is any common ground or, in the alternative, determine if each section will be a hard fight. It is likely Senator Massey will reintroduce the bills in 2015. They will stay in subcommittee this year, and because it is the end of the two-year session, they will have to be reintroduced next year. There is not a comparable House version of these two bills at this time.



Legislative/Judicial Reception

by Eric K. Englebardt

On April 9, the SCDTAA sponsored its annual reception for the Judiciary and members of the SC House and Senate Judiciary Committees at the Oyster Bar in Columbia. The event, as usual, was well-attended by members of the organization, judges and members of the General Assembly. House speaker Bobby Harrell, both House and Senate Judiciary Committee Chairs Greg Dellaney and Larry Martin, Supreme Court Justice John Kittredge and Court of Appeals Judge Bruce Williams all attended. The members of SCDTAA enjoyed the opportunity to visit with our lawmakers and to discuss issues of importance to our membership on the legislative docket.

The Honorable Robert E. Hood
South Carolina Circuit Court

by J. Derham Cole, Jr.

Judge Robert E. Hood was born in Atlanta, Georgia in 1975. He is the son of Herman C. and Brenda B. Hood of Kennesaw, Georgia. His father is a retired Southern Baptist minister and his mother is a retired preschool teacher. He is married to Kristina Kirk Hood and they are the parents of two children and attend First Baptist Church.

Judge Hood attended the public schools of Cobb County, Georgia. Upon graduation from high school, he attended The Citadel, The Military College of South Carolina, where he graduated in 1998 with a B.A. in political science with a focus on criminal justice. While at The Citadel, he was on the Dean's List, the Commandant's List, and the President's List.

After The Citadel, he attended the University Of South Carolina School Of Law and received his Juris Doctor in 2001. While in law school, he was a member of the Moot Court Bar, the Order of Barristers, and served as a law clerk for the 5th Circuit Solicitor's Office. After graduating from law school, he worked as an Assistant Solicitor for the 5th Circuit Solicitor's Office. In 2003, Judge Hood accepted a position with the Attorney General's office as an Assistant Attorney General for the State Grand Jury. In 2005, he accepted a position with the Strom Law Firm, LLC in Columbia and worked there until his election to the bench.

Judge Hood is a member of the South Carolina Bar and admitted to practice in the Fourth Circuit Court of Appeals, the U.S. District Court for the District of South Carolina, and all South Carolina State Courts. He is also a member of the Richland County Bar Association and a former member of the South Carolina Association for Justice and the South Carolina Association of Criminal Defense Lawyers.

Judge Hood was elected by the South Carolina General Assembly on February 1, 2012, to fill the unexpired term of the Honorable G. Thomas Cooper, Jr., Resident Judge of the Fifth Judicial Circuit, Seat 3.

Q. What has been the hardest part of transitioning to the position of Circuit Court Judge?

The hardest transition has been not arguing in Court. I was a trial lawyer for so many years that I want to constantly add myself to the argument. It has been a challenge to stop thinking like a lawyer and start thinking like a judge.

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

Scheduling. Whether we are in civil or criminal court, what lawyers want and need is some certainty of when their case will be called. I believe that the certainty in knowing when your case will be called makes for a better judicial system for all involved.

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

Be prepared, polite, and professional.

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

Knowing the rule at issue before coming into court. Failure to communicate with the other side about a potential resolution to the issue. Remember that candor to the court does so much for a lawyer's credibility, and candor cannot be lost in the heat of an argument.

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

Johnny Gasser was my first "boss" while I was a law clerk at the Solicitor's Office in Columbia. He taught me to be prepared, be fair, and always err on the side of doing what is right.

Continued on bottom of next page

SCDTAA EVENTS

Construction Law CLE

by Andrew N. Cole

The SCDTAA Construction Law subsection turned up its recent CLE to eleven with the assistance of the program sponsors, Applied Building Sciences and Watkins Services. The program on Thursday, March 20, 2014, at The Mills House in Charleston touched on numerous aspects that construction law attorneys see in their various practices. Richard Livingston with Dixon Hughes led off the program trying to explain how an accountant looks at lost use for both residential and commercial projects. The audience had a lot of questions about how the accounting principles apply to past and present cases.

Robert Turnbull and William Jordan next led a discussion for an ethics and substance abuse section of the CLE, which is now required once every three years. Robert and Will did not simply lecture the group, they told personal stories about how they overcame their own personal demons and, now, are continuing on their roads to recovery.

Frank Elmore presented his Case Law Update for construction cases. As always, he brought up a number of non-construction cases that will likely impact our practice of law. It appears that everyone's life is getting more complicated due to the recent decisions regarding class actions and compelling arbitration. Hopefully, Frank will get to talk about some positive news in future Case Law Updates.

Our program sponsors then conducted a hands-on demonstration for the installation of a roof. The facilities people at the hotel asked if we were part of the renovation crew when we moved the 4'x8' sample roof section into the meeting room. Alas, no. But we still made a lot of noise and some mess. This was a hands-on demonstration, lecture, and Q&A session all rolled up into one. After some cajoling, some of the audience installed some roofing with the air nail gun. We were lucky that the room next to us was vacant, so no one came to complain about the noise.

Hank Wall, Ron Tate, and Joey Floyd capped off the CLE with a discussion about mechanic's liens and collections. For some this was a refresher. For others this was a good discussion of the types of liens and bond recoveries that seem to creep up in construction cases with the goal of making them very complicated.

In all, this was a very successful CLE. We thank our sponsors as well as everyone else who presented at the meeting.

HOOD PROFILE CONT. FROM PAGE 25

Q. From your observations how has the use of technology in the courtroom impacted trial practice?

I believe that technology has significantly improved trial practice in this state. That being said, if you are going to use technology in the courtroom, get into the courtroom before the term of court and try out your technology to make sure it works so court time is not wasted.

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

Not having your rule book in civil court and criminal trials. Not having a sentencing book in criminal plea court.

Q. Counsel now takes an oath that requires fairness, integrity and civility not only to the court but also in all written and oral communications. Has this been a problem?

Yes. Lawyers should be nicer to each other, especially in the larger circuits. We have gone from the days of meeting with each other and picking up the telephone and calling each other to email. It is hard to read emotions in email, and I believe this is the cause of some of the unprofessional behavior that we see.

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

Hunting, fishing, and spending time with my family.

Q. What was the last book that you read?

Killing Lincoln.

ARTICLE

Balancing Act:
Does a South Carolina Property Owner Have a Duty to Protect its Invitees from Third-Party Crime?

by Robert W. Foster, Jr., Jay T. Thompson, and Brandon S. Smith [1]

Is a property owner liable when a person is injured on its property by a criminal act committed by a third party over whom the property owner has no control? This question is the preliminary legal issue in a premises liability, third-party crime case. As crime in the United States has become an increasing societal problem, courts have established analytical structures to determine whether a plaintiff can and should recover from the property owner. As set forth below, the analysis in third-party crime cases turns on which test the court applies to determine whether the third-party criminal act was foreseeable. This article discusses four tests applied in different jurisdictions and explains the "balancing test" South Carolina adopted in *Bass v. Gopal, Inc.*, 395 S.C. 129, 135-38, 716 S.E.2d 910, 913-15 (2011).

A. Legal Duty and Foreseeability

As a general proposition of law, to succeed on a cause of action for negligent or inadequate security in a premises liability case involving harm caused by a third-party criminal act, the plaintiff must prove each of the following elements: (a) the defendant owed a duty of care to the plaintiff; (b) the defendant breached that duty; (c) the breach was the legal or proximate cause of the plaintiff's injury; and (d) the plaintiff suffered damages.[2]

The property owner has a legal duty to protect against such harm only when the criminal act in question was legally foreseeable. *Id.* at 134-35, 716 S.E.2d at 913.[3] If the third-party criminal act was not legally foreseeable, then the property owner owes no legal duty to the injured party, and the plaintiff's claim should never get to the jury. *Id.*[4] Therefore, foreseeability is a key element that the plaintiff must prove.

B. Tests For Establishing Foreseeability

Courts and commentators have identified four tests applied in different jurisdictions to determine whether a landowner owes a duty to protect a patron from third-party criminal acts: (1) the "imminent harm" or "specific harm" test; (2) the "prior similar incidents" test; (3) the "totality of the circumstances" test; and (4) the "balancing test." *Id.* at 135-38, 716 S.E.2d at 913-15.[5] Each test is discussed separately below.

A criminal act is foreseeable if the property owner knows or has reason to know the act is reasonably likely to occur. A property owner "knows" that a third-party criminal act is going to occur when the property owner has actual knowledge—when the property owner has been informed in advance. Examples include bomb threats or warnings of gang violence. However, whether a property owner "has reason to know" a third-party criminal act is going to occur is a more fact-sensitive question. This question may be dispositive of a third-party crime case.

Foster

Thompson

Smith

1. "Imminent Harm" or "Specific Harm"

The "imminent harm rule" provides that "a landowner owes no duty to protect patrons from violent acts of third-parties unless he is aware of specific and imminent harm about to befall him." *Id.* at 135, 716 S.E.2d at 913. Prior to *Bass*, this was the law of South Carolina, as set forth in *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977), although it was called into question by the Court of Appeals in *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000). In *Shipes*, the plaintiff was assaulted at night by a third-party in the parking lot of a grocery store. The plaintiff alleged there was a breach of the duty to exercise reasonable care for his protection because the evidence indicated that parking lot lights were either not shining brightly or were not turned on, and therefore, the grocery store failed to adequately light its parking lot. The court concluded the store did not have a legal duty to protect the plaintiff in these circumstances. The incident occurred between 7:30 p.m. and 8:00 p.m. The evidence indicated that the neighborhood where the store was located included several bars, a liquor store, an awning company, and a real estate insurance company. No violent crimes had been committed in the neighborhood, and the only crimes known by the store manager to have occurred at the store

were the theft of an employee's cassette tape deck in the parking lot and shoplifting in the store. One arrest, for an unspecified offense, had been made in the parking lot between 10:00 p.m. and 11:00 p.m. Based on this evidence, the court affirmed a directed verdict for the store, concluding that the store owner "did not know or have reason to know of criminal attacks such as the one on [the plaintiff]." 269 S.C. at 485, 238 S.E.2d at 169. The *Shipes* court held that Piggly Wiggly did not know or have reason to know the specific assault at issue would occur, so the defendant owed no legal duty to protect the plaintiff from the third-party criminal act.

The South Carolina Court of Appeals questioned *Shipes* in *Miletic*, which involved a customer who was abducted from a Wal-Mart parking lot and brought an action against the store for failing to protect her from this third-party criminal act. The Court of Appeals followed *Shipes* because it was the law of South Carolina, holding Wal-Mart did not have a duty to protect the plaintiff because it did not know or have reason to know the specific criminal act at issue was about to occur. However, the court also questioned the propriety of the imminent harm test and laid the groundwork for the Supreme Court to abandon it. The court noted that *Shipes* relied primarily on a similar Tennessee case but that "the law ha[d] evolved in other jurisdictions since . . . *Shipes*," observing the Tennessee Supreme Court had overruled that case in 1996. 339 S.C. at 331, 529 S.E.2d at 69-70.

2. "Prior Similar Incidents"

The "prior similar incidents" test provides that "foreseeability may only be established by evidence of previous crimes on or near the premises." *Bass*, 395 S.C. at 135-36, 716 S.E.2d at 913.[6] This test envisions that a past history of criminal conduct will put the property owner on notice of a future risk. Courts applying this test consider the nature and extent of the previous crimes, as well as their frequency and similarity to the crime in question. The basic rationale is if similar crimes have occurred on or near the property in question, the premises owner should take reasonable steps to protect against reoccurrence. Trial courts are given some leeway in determining what qualify as "substantially similar" crimes. "[S]ome courts require that prior crimes be of the same general type and nature as the offense at issue, while others will impose a duty to protect patrons based on past crimes of any type." *Id*. at 135-36, 716 S.E.2d at 913-14 (internal citation omitted). For example, the Georgia Supreme Court held:

> In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activity and their likeness, proximity or other relationship to the crime in question. While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. . . . [What] is required is that the prior [incident] be sufficient to attract the [landlord's] attention to the dangerous condition which resulted in the litigated [incident].

Doe v. Prudential-Bache, 492 S.E.2d 865, 867 (Ga. 1977).

3. "Totality of the Circumstances"

The "totality of the circumstances" test is more liberal than the "prior similar incidents" test because the plaintiff can utilize additional factors in establishing foreseeability. This test, which is used in the majority of jurisdictions, considers "all relevant factual circumstances, 'including the nature, condition, and locations of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable.'" *Bass*, 395 S.C. at 135-36, 716 S.E.2d at 913 (quoting *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 972 (Ind.1999)).[7] It has been summarized as follows: "[a] substantial factor in the determination of duty is the number, nature, and location of prior similar incidents, but the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable." *Delta Tau Delta*, 712 N.E.2d at 973. This test is generally regarded as a more relaxed legal burden on plaintiffs because it considers additional factors to establish foreseeability.

Two California cases illustrate the difference between the "prior similar incidents" test and the "totality of the circumstances" test. Prior to 1985, California had settled on the "prior similar incidents" test in determining a property owner's liability for harm caused by third-party criminal acts. Then, in *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653 (Cal. 1985), California changed the test for proving foreseeability to "totality of the circumstances." However, in 1993, the California Supreme Court reverted to the "prior similar incidents" rule in *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993).

In *Isaacs*, the plaintiff, an anesthesiologist associated with the defendant private hospital, was shot by a stranger in the hospital's parking lot and brought a negligence action against the hospital for inadequate security. The court identified the issue as "whether foreseeability, for the purposes of establishing a landowner's liability for the criminal acts of third persons on the landowner's property, may be established other than by evidence of prior similar incidents on those premises. . . . [F]oreseeability is of primary importance in establishing the element of duty." *Isaacs*, 695 P.2d at 657. The court held that "foreseeability is determined in light of all the circumstances and not by a rigid application of a mechanical 'prior similar incidents' rule." *Id.* at 659.

The court took into account the following factors: the hospital was located in a high crime area, several threatened assaults had occurred in the emergency room near the parking lot, prior thefts in the area, incidents involving harassment were common, expert testimony that emergency room facilities and surrounding areas are "inherently dangerous," burned out lights in the parking lot, no security in the parking lot at the time the incident occurred, and security personnel was unarmed. *Id.*

The *Isaacs* court's rationale imposed an extremely high duty on property owners to protect their invitees from the criminal conduct of third parties, and the California Supreme Court retreated from the "totality of the circumstances" test in *Ann M.* and resurrected the "prior similar incidents" test. The plaintiff in *Ann M.* was raped at her place of employment and filed a complaint against the property owner for inadequate security. The court was faced with whether the shopping center owner's duty to maintain common areas and control in a reasonably safe condition included hiring security guards. *Ann M.*, 863 P.2d at 209. The court initially noted that "random, violent crime is endemic in today's society." *Id.* at 214. In light of the increase of violent crime and upon further reflection, the California Supreme Court decided to "refine" the rule it declared in Isaacs only eight years earlier. *Id.* at 215. In doing so, the court evaluated the facts of *Ann M.* under the "prior similar incidents" test and concluded that the scope of the defendant's duty did not include providing security guards. *Id.* at 216. The *Ann M.* court held:

> [T]he requisite degree of foreseeability [requiring the shopping center owner to provide security guards] rarely, *if ever,* can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would . . . force landlords to become the insurers of public safety, contrary to well-established policy in this state.

Id. at 215-16 (emphasis added).

Whereas *Isaacs* held that "foreseeability is *but one factor* to be weighed in determining whether a landowner owes a duty in a particular case," 695 P.2d at 658 (emphasis added), *Ann M.* held that foreseeability was a "*crucial factor* in determining the existence of a duty." 863 P.2d at 214 (emphasis added). Under either the prior similar incidents test or the totality of the circumstances test, the plaintiff has the burden of establishing the property owner knew or should have known the criminal act was foreseeable. Under both tests, foreseeability is required before the property owner owes any legal duty to the injured patron. Under both tests, the court determines, as a matter of law, whether a duty is owed or summary judgment appropriate. Under both tests, any alleged negligent conduct on the part of the hotel is irrelevant if no legal duty is owed. The difference between the two tests is the totality of the circumstances test allows the court to consider almost any factor in determining whether a third-party criminal act was foreseeable, whereas the prior similar incidents test is limited to prior similar crimes on or near the premises. Therefore, the totality of the circumstances test makes it far more difficult for a defendant to win summary judgment on the issue of foreseeability in a third-party crime case.

4. *Bass* and the "Balancing Test"

In *Bass*, the Supreme Court analyzed the three tests described above and abandoned prior South Carolina law to adopted a fourth test known as the "balancing test." The issue in *Bass* was whether a motel owner had a duty to protect a motel guest from being shot by a trespasser over whom the motel had no control. George Bass rented a room for an extended period at Super 8 Motel in Orangeburg, South Carolina, while he and several co-workers performed refrigeration work at a local grocery store. The Super 8, "an exterior corridor-style motel," was owned and operated by Gopal, Incorporated ("Gopal"). *Bass*, 395 S.C. at 132, 716 S.E.2d at 912. During the night, Bass and his roommate heard a knock at their motel room door. After looking through the peep hole of the door, Bass's roommate did not see anyone outside. Several minutes later, they received a second knock and noticed a man standing at the door, but they did not open the door. After a third knock, Bass and his roommate answered the door, without looking through the peep hole, and found the same man standing several feet from the door. The man pointed a gun at Bass and asked for his money "in unsavory terms." *Id.* at 133, 716 S.E.2d at 912. Bass refused, and the man shot Bass in the leg and fled. Bass subsequently filed suit against Gopal and Super 8, alleging the motel was negligent in failing to protect him from the third-party crime.

The circuit court granted summary judgment in favor of Gopal and Super 8, finding they did not owe a duty to Bass because the third-party criminal act was not foreseeable. The court of appeals affirmed the circuit court on the same basis, applying the prior similar incidents test described above. On appeal to the Supreme Court,[8] Bass argued the Court of Appeals placed "too much of an emphasis on the lack of evidence of other crimes committed at the motel prior to the assault" but instead "should have considered the evidence submitted as a whole." *Id.* at 134, 716 S.E.2d at 912-13. The Supreme Court stated that "a business owner has a duty to take reasonable action to protect its invitees against the foreseeable risk of physical harm" and assessed the "four basic approaches to . . . foreseeability" in the following ways. *Id.* at 135, 716 S.E.2d at 913.

First, the *Bass* court abandoned the imminent

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ARTICLE CONT.

harm test because it considered this approach "outdated" and "too minimal a duty on business owners to protect patrons," finding the reasoning of Miletic more persuasive than that of *Shipes*. *Id*. at 135, 716 S.E.2d at 913. *See also Posecai v. Wal-Mart Stores*, 752 So.2d 762, 766-67 (La. 1999) ("Courts have generally agreed that this rule is too restrictive in limiting the duty of protections that business owners owe their invitees.").

Second, the *Bass* court considered the prior similar incidents test. Both the circuit court and the court of appeals in *Bass* used the prior similar incidents test to examine whether the plaintiff raised a genuine issue of material fact to survive summary judgment. However, the Supreme Court did not follow this approach, stating "the rule leads to results contrary to public policy," lends itself "to arbitrary results and distinctions," and "erroneously equates foreseeability of a particular act with previous occurrences of similar acts." *Id.*

Third, the *Bass* court considered the totality of the circumstances test but stated that it "shifts too great a burden on business owners, and effectively requires businesses to anticipate crime by virtue of the unfortunate fact that crime is endemic in today's society." *Id*. at 138, 716 S.E.2d at 915.

Finally, the *Bass* court adopted a fourth option known as the "balancing test," which "'acknowledges that a duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed.'" *Id*. at 138, 716 S.E.2d at 915 (quoting *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 901 (Tenn.1996)).[9] The court reasoned that "the more foreseeable a crime, the more onerous is a business owner's burden of providing security." *Id*. "Under this test, the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." *Id*.

The *Bass* court acknowledged the criticism surrounding the balancing test, namely that the test "bleed[s] the line between duty and breach." *Id*. at 139, 716 S.E.2d at 915. However, the court reasoned that this approach does not alter the existing duty "on business owners to employ reasonable measures to protect invitees from foreseeable harm." *Id*. Instead, the balancing test "elucidate[s] how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm." *Id*. Quoting Judge Posner of the Seventh Circuit Court of Appeals, the court stated "'the hotel should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs . . . to the hotel's guests.'" *Id.* at 138-39, 716 S.E.2d at 915 (quoting *Shadday v. Omni Hotels Mgmt. Corp*., 477 F.3d 511, 514 (7th Cir.2007).).

Although it labeled its analysis as a "balancing test," the *Bass* court's analysis resembled the totality of the circumstances test in that it analyzed numerous facts and circumstances to determine whether the third-party criminal act was foreseeable. The court considered a CRIMECAST report [10] offered by Bass to demonstrate that the Super 8 motel had an elevated risk crime based on national and state averages. The court stated "[t]he especial high probability of crime at the Super 8 compared to the national and state averages raised at least a scintilla of evidence that the crime against [Bass] was foreseeable." *Id*. at 140, 716 S.E.2d at 916. The court evaluated whether Bass provided any evidence that Gopal's "preventative actions were unreasonable given this risk." *Id*. Although Bass asserted that Gopal should have "either hired a security guard to patrol the premises or installed a roving camera security system," the court reasoned that "the hiring of security personnel is no small burden" especially "[c]onsidering a business's economic interest." *Id.* at 141, 716 S.E.2d at 916-17. The court found it "difficult to imagine an instance where a business would be required to employ costly security guards in the absence of evidence of prior crimes on the premises." *Id*. However, the court reasoned that a property owner like Gopal "in a high crime area" even "without evidence of prior criminal incidents may be required to institute less costly measures to offset an elevated risk of harm, such as installing extra lighting, fences, locks, or security cameras, or simply training existing personnel on best security practices." *Id*. at 141, 716 S.E.2d at 917.

Even though the Supreme Court found that Bass raised at least a scintilla of evidence as to foreseeability of a criminal assault, thus raising "at least a scintilla of evidence that the crime against [the plaintiff] was foreseeable," *Id*. at 141, 716 S.E.2d at 916, the court still affirmed summary judgment in favor of Gopal because Bass failed to present evidence that Gopal's "preventative measures were unreasonable under the circumstances." *Id*. at 134, 716 S.E.2d at 912-13. The court found it persuasive that "the only evidence supplied by [Bass] that spoke to the reasonableness of [Gopal's] precautions" was the findings of his own expert witness, who gathered criminal incident data several years after the incident occurred and testified that there wasn't enough data to suggest that Gopal needed to "spend a bunch of money" on extra security measures. *Id*. at 141, 716 S.E.2d at 917. Therefore, the court held that, because the expert "failed to provide any evidence that [Gopal] should have expended more resources to curtail the risk of criminal activity that might have been probable," the court of appeals properly affirmed summary judgment in Gopal's favor. *Id*.

C. Implications and Conclusion

After *Bass*, the "balancing test" is the guiding analysis in South Carolina to determine whether an

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ARTICLE

Evidence Review: Limiting Past and Future Medical Damages

by Brian E. Sopp [1]

In personal injury actions, special damages are often used by both plaintiff and defendant as a starting point for case valuation. Special damages can be an indicator for general damages which in turn can be an indicator of a potential punitive damages award.[2] For this reason evidentiary issues surrounding the admissibility of special damages have always been an integral part of personal injury actions. With the rise of tort reform in many states, however, battles over the admissibility and relevance of special damages is increasingly important. In South Carolina, for example, S.C. Code Ann. § 15-32-220 (A) limits noneconomic damages in medical malpractice actions to $350,000 per claimant.[3] Similarly, the South Carolina Fairness in Civil Justice Act of 2011, codified at S.C. Code Ann. § 15-32-510 *et seq., inter alia,* creates a tiered structure of caps on punitive damages.[4] Because medical damages are often the most significant portion of special damages, personal injury plaintiffs try to maximize past and future medical damages in order to maximize total awards. A review of relevant evidentiary rules affecting past and future medical damages is helpful to defense counsel tasked with limiting irrelevant and unreasonable special damages.

I. Past Medical Damages: "Reasonable Value"

Case law in South Carolina states that "[a] plaintiff in a personal injury action seeking damages for the cost of medical services provided to him as a result of a tortfeasor's wrongdoing is entitled to recover the reasonable value of those medical services . . . "[5] Neither the amount billed nor the amount paid is automatically deemed the reasonable value of the medical services provided.[6] In an environment where health care providers often write off portions of medical bills as part of agreements with insurers, it is no surprise that defendants have argued that the reasonable value of medical services should be the amount health care providers actually receive in payment for services rendered, not the amount billed. However, in reality, application of the collateral source rule—which provides that "compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer"—can often create a presumption that the amount billed is the reasonable value of medical services.[7]

In *Haselden v. Davis*, the decedent's estate sued a treating physician for failing to timely read a suspicious mammogram which would have led to an earlier diagnosis of the decedent's breast cancer.[8] The defendant argued that the court should not have allowed the plaintiff to introduce the medical expenses billed to the plaintiff, but only the amounts actually paid by Medicaid.[9] The South Carolina Court of Appeals found that "both the amount of the Medicaid payment and the amount billed by [the doctor] were admissible to establish the amount of [the plaintiff's] damages."[10]

At the time of the *Haselden* opinion, the court's decision appeared to indicate a loosening of the collateral source rule in this narrow context. However, in *Covington v. George*, the defendant in an automobile accident case attempted to present evidence that the amount the Plaintiff's health care provider accepted in payment was less than what it charged for its services.[11] The South Carolina Supreme Court held that the collateral source rule excludes such evidence for two reasons.[12] First, "[a] tortfeasor cannot take advantage of a contract between an injured party and a third person . . . ."[13] Second, the court argued that even if a party seeks only to introduce the fact of a compromised payment rather than the payment's source, "unexplained, the compromised payments would in fact confuse the jury."[14] The court continued, "any attempts on the part of the plaintiff to explain the compromised payments would necessarily lead to the existence of a collateral source. Inevitably, the inquiry would lead to the introduction of matters such as contractual arrangements between health insurers and health care providers . . . ."[15] Although the *Covington* opinion appears to directly contradict the holding in *Haselden*, the Supreme Court did not overturn *Haselden*. Instead, the court distinguished the cases

Continued on next page

in two ways. First, "[t]he admissibility of the actual payment amount was not an appellate issue in Haselden, but rather the issue was Plaintiff's entitlement to recover the difference between the billed amount and the actual payment amount."[16] Second, "[t]he case at hand differs substantially from the situation in *Haselden*. Here, [the defendant] did not object to [the plaintiff's] introduction of the full amount of the bill but thereafter sought to introduce the actual payment amount. [The plaintiff's] objection to this offer was sustained."[17]

Another distinction that could be made between *Covington* and *Haselden*, but has not been addressed by South Carolina courts, is that in *Haselden*, unlike the facts in *Covington*, the defendant was also the billing health care provider. Therefore, arguably, the write offs did not come from a collateral source. In *Rose v. Via Christi Health Sys., Inc.*, the Kansas Supreme Court addressed whether a defendant health care provider could submit evidence of billed amounts that were written off.[18] The court explained: "Under the facts of this case, the source of the $154,000 of medical services not reimbursed by Medicare was [the hospital], the tortfeasor, not an independent source."[19] Therefore, the collateral source rule did not apply.

At least one court outside South Carolina has expressly disagreed with the reasoning of *Covington*. In *Martinez v. Milburn Enterprises, Inc.*, the Kansas Supreme Court found that write-offs by health care providers were not a collateral source and that evidence of the write-offs or the amount actually paid to the health care provider is relevant to determining the reasonable value of the plaintiff's medical expenses.[20] The court reasoned that jury confusion can be alleviated by a vigilant trial court.[21] Other states have reached similar conclusions.[22] In South Carolina, however, where courts continue to enforce traditional interpretations of the collateral source rule, counsel is left navigating the narrow gap in the law created by the distinctions that exist between the facts of *Covington* and the facts of *Haselden*.

II. Future Medical Damages

Practitioners and courts alike have confused the standard of proof to establish proximate cause or the standard of proof to establish future medical damages with the standard of admissibility. In *Pearson v. Bridges*, a medical expert testified that there were four scenarios where the plaintiff could incur future medical expenses.[23] The expert testified that there was a 25 to 30 percent chance scenario two would occur and that scenarios three and four would only occur if scenario two failed.[24] The defendant physician argued at trial that the testimony was inadmissible because the plaintiff was required to prove future expenses would "most probably" occur.[25] "The majority of the Court of Appeals agreed with the trial court that the evidence was admissible, holding, the most probable standard required to prove causation is not the standard to be applied in determining the admissibility of evidence of future damages. Rather, the evidence must be beyond speculation or conjecture and reasonably certain to occur."[26] The Supreme Court agreed with the Court of Appeal's finding that the "most probable" standard is not the standard of admissibility in South Carolina, but found that the Court of Appeals also confused the proper standard.[27] "Whether future damages are 'reasonably certain' to occur is the *standard of proof* for future damages, not the standard of admissibility."[28] "Under current South Carolina law, the *standard of admissibility* for evidence of future damages is any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts if otherwise competent."[28]

As *Pearson* demonstrates, the low threshold for the admissibility of future damages makes it difficult to exclude or even limit expert testimony on future medical damages. In fact, case law shows that "rejection of expert testimony is the exception rather than the rule."[30] However, although the standard of admissibility for future damages is low, damages experts, like any expert witnesses, must be qualified and their testimony must be admissible. In personal injury actions, where plaintiffs often retain expert life care planners to maximize medical damages awards, it is important to limit a life care planner's testimony to their area of expertise.

Rule 702 of the South Carolina Rules of Evidence explains that if an expert witness is qualified "by knowledge, skill, experience, training, or education," they are allowed to offer opinion testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."[31] This rule limits an expert's testimony to their area of expertise. The court in *Nelson v. Taylor*, for example, excluded the testimony of an expert in the field of physical therapy regarding causation of a rotator cuff tear.[32] The court explained that "[e]ven though the General Assembly has eliminated the requirement for treatment by prescription from a physician or dentist, a physical therapist is still restricted in terms of the extent to which a patient may be treated without the referral of a licensed physician."[33]

Rule 702 also requires that expert testimony consist of specialized knowledge that will assist the trier of fact. "To present expert testimony, a party must show the witness possesses through either study or experience the knowledge or skill in a business, profession, or science making him or her better qualified than the jury to form an opinion on the particular subject in question."[34] Therefore, even if an expert is qualified to testify regarding one aspect of damages, their testimony on another element of damages is not necessarily proper. For this reason, in *Hall v. Clarendon Outdoor Adver., Inc.*, the court

excluded the testimony of an automobile expert that attempted to opine on property damage to a vehicle based only on pictures of the vehicle.[35] The automobile expert was in no better position than the jury to judge the extent of the damage to the vehicle based solely on photographs of the vehicle.

"At present, there are very few published court decisions regarding the admissibility of life care planners' testimony."[36] However, the available case law suggests that while life care planners are generally allowed to create cost projections for treatment recommended by health care providers, a life care planner should be excluded from making treatment recommendations. Courts that have allowed the testimony of life care planners into evidence assume that the life care plan is based on recommendations of a health care provider.[37] In *Juaire v. United States*, for example, the South Carolina District Court explained that "[a]ny award of future medical expenses must also be based upon something more than mere speculation."[38] For this reason, the court excluded two charges in the plaintiff's life care plan, holding:

> [T]he Court does not find that the psychological counseling listed in the life care plan . . . is a necessary, non-speculative medical expense. Additionally, as no physician has ordered any further physical therapy, the Court finds the one time amount for physical therapy listed in the life care plan . . . is an amount not appropriately awarded.[39]

Courts in other jurisdictions have followed this approach. In *In re Ethicon, Inc., Pelvic Repair Sys. Products Liab. Litig.*, for example, the court excluded portions of a life care plan that were not "specifically grounded" in a physicians medical opinions.[40] Similarly, in *Norwest Bank, N.A. v. Kmart Corp.*, the court excluded a life care plan, explaining that "it is the physician, and not the life care planner, who determines the treatment ultimately received by the patient."[41] However, it is not always clear whether a life care planner's projections are based on a physician's recommendation. The court in *Marcano Rivera v. Turabo Med. Ctr. P'ship*, for example, found that a life care planner's methodology was sufficient where he testified that his proposed care plan was based on a review of medical records, a letter from the plaintiff's physician, and an interview of the plaintiff's family and caregiver.[42] The trial court held that defense counsel's voire dire questions focusing on the expert's failure to have a physician review his projections went to the weight of the evidence, not its admissibility.[43] Thus, the available case law suggests that defense counsel faced with limiting a life care planner's testimony may have more success questioning the basis for each separate cost projection rather the care plan as a whole.

III. Conclusion

Medical damages are often the foundation of a plaintiff's personal injury claim. They can be an indicator of the size of a potential compensatory damages award and in turn an indicator of the size of a potential punitive damages award. While the collateral source rule, the standard of admissibility for future damages, and the standard for admissibility of expert testimony often allow plaintiffs to blackboard large damages numbers at trial, understanding the evidentiary issues surrounding the admissibility of past and future medical damages will allow defense counsel to properly value a case, prepare for trial, and exclude irrelevant and unreasonable special damages.

Footnotes

1 Brian Sopp is an associate with Barnes, Alford, Stork & Johnson in Columbia, S.C. His practice focuses primarily on general liability defense and workers' compensation defense.

2 *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, (2003) ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

3 The noneconomic damages cap in S.C. Code Ann. § 15-32-220 is adjusted each year based on the Consumer Price Index. The cap for 2014 is $428,625. 38 S.C. Reg. 16 (February 28, 2014).

4 The applicable punitive damages caps are adjusted annually based on the Consumer Price Index. The caps for 2014 can be found at 38 S.C. Reg. 16 (February 28, 2014).

5 *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003).

6 *Id.*

7 *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

8 353 S.C. 481, 483, 579 S.E.2d 293, 294 (2003).

9 *Id.*

10 *Id.*

11 359 S.C. 100, 103, 597 S.E.2d 142, 144 (2004) ("The question for this Court is whether a party can introduce evidence of the actual payment amount to challenge the reasonableness of the medical expenses sought by the plaintiff.").

12 *Id.* at 103-04, 597 S.E.2d at 144.

13 *Id.* at 103, 597 S.E.2d at 144.

14 *Id.* at 104, 597 S.E.2d at 145.

15 *Id.*

16 *Id.* at 103, 597 S.E.2d at 143-44 (internal citation and punctuation omitted).

17 *Id. See also Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 288, 607 S.E.2d 711, 717 (Ct. App. 2005) ("Similar to the case sub judice, [the defendant in Covington] did not object to the plaintiff's introduction of the full amount of the hospital's bill, but thereafter sought

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to introduce the actual payment amount to challenge the reasonableness of the plaintiff's medical expenses.").

18 *Rose v. Via Christi Health Sys., Inc./St. Francis Campus*, 279 Kan. 523, 529, 113 P.3d 241, 246 (2005).

19 *Id.*

20 233 P.3d 205, 222 (Kan. 2010).

21 *Id.* at 226-27 (internal citations omitted).

22 *See, e.g., Stanley v. Walker,* 906 N.E.2d 852, 858 (Ind. 2009) ("The collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services. To the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.").

23 344 S.C. 366, 370, 544 S.E.2d 617, 619 (2001).

24 *Id.*

25 *Id.*

26 *Id.* (citing *Pearson v. Bridges,* 337 S.C. 524, 533, 524 S.E.2d 108, 113 (Ct. App. 1999)) (internal punctuation omitted).

27 *Id.*

28 *Id.* at 371-72, 544 S.E.2d at 619 (citing *Haltiwanger v. Barr,* 258 S.C. 27, 186 S.E.2d 819 (1972)) (emphasis in original).

29 *Id.* at 372, 544 S.E.2d at 620 (quoting *Martin v. Mobley*, 253 S.C. 103, 109, 169 S.E.2d 278, 281-82 (1969)) (internal punctuation omitted) (internal punctuation omitted).

30 Fed. R. Evid. 702, advisory committee's note (2000 Amendments).

31 An examination of the reliability of scientific testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and its state court analog, *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), are beyond the scope of this article. For an explanation of these cases and the distinctions between the state and federal rule, see Young, The Hon. Roger M., *How Do You Know What You Know: A judicial perspective on Daubert and Council/Jones Factors in Determining the Reliability of Expert Testimony in South Carolina*, 15 S.C. Law. 28 (Nov. 2003).

32 347 S.C. 210, 213, 553 S.E.2d 488, 489 (Ct. App. 2001).

33 *Id.* at 215-17, 553 S.E.2d at 490-91 (Ct. App. 2001) (internal citations omitted).

34 *State v. Harris,* 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995).

35 311 S.C. 185, 188, 428 S.E.2d 1, 2 (Ct. App. 1993)("To be competent as an expert, a witness by reason of study or experience or both must possess such knowledge or skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.").

36 1 Stern and Brown, Litigating Brain Injuries § 6:13.

37 *See generally Hundley ex rel. Hundley v. Rite Aid of S. Carolina, Inc.*, 339 S.C. 285, 295-96, 529 S.E.2d 45, 51 (Ct. App. 2000) (Allowing an economist to testify regarding present value of a life care plan because the information "would have been no less hearsay had the economist made the inquiry from the health care providers himself.").

38 4:09-CV-709-TLW, 2012 WL 527598 at *13 (D.S.C. Feb. 16, 2012).

39 *Id.*. at *13.

40 2:12-MD-02327, 2014 WL 186872 at *13 (S.D.W. Va. Jan. 15, 2014).

41 3:94-CV-78RM, 1997 WL 33479072 (N.D. Ind. Jan. 29, 1997).

42 415 F.3d 162, 171 (1st Cir. 2005).

43 *Id.* at 170.

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innkeeper has a duty to protect its guests from the criminal acts of a third party. Under this standard, property owners must be aware of the propensity and risk of criminal acts in their area and on their property and be prepared to demonstrate the preventative safety measures taken to curtail the risk of criminal activity.

Footnotes

1 Robert W. Foster, Jr. ("Robbie") and Jay T. Thompson are partners, and Brandon S. Smith is an associate in the Columbia office of Nelson Mullins Riley & Scarborough, LLP.

2 This article does not discuss the fact-sensitive matters of breach of duty and damages. Once it is determined that a property owner owes a legal duty to a patron injured by a third party crime, it will almost always be a jury question whether the defendant breached its duty of care. A property owner is not liable for damages suffered by a plaintiff unless its breach of duty is the proximate cause of the alleged injuries. *Daniel v. Days Inn, Inc.*, 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987).

3 *See also Posecai v. Wal-Mart Stores*, 752 So. 2d 762 (La. 1999); *Sturbridge Partners, Ltd., et al. v. Walker*, 482 S.E.2d 339 (Ga. 1997).

4 *See also Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207, 214 (Cal. 1993); *Nicole M. v. Sears, Roebuck & Co.*, 76 Cal. App. 4th 1238, 1244 (Cal. Ct. App. 1999).

5 *See also* Steven C. Minson, Note: A Duty Not to Become a Victim: Assessing the Plaintiff's Fault in Negligent Security Actions, 57 Wash. & Lee L. Rev. 611 (2000).

6 *See also Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756-57 (Tex. 1999); *Sturbridge*, 482 S.E.2d at 341; *Polomic v. Golub Corp.*, 640 N.Y.S.2d 700, 701 (N.Y. App. Div. 1996).

7 *See also Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (Ind. 1999); *Clohesy v. Food Circus Supermkts*., 694 A.2d 1017 (N.J. 1997); *Seibert v. Vic Regnier Builders, Inc*., 856 F.2d 1332 (Kan. 1993).

8 The appeal against Super 8 was dismissed before the Supreme Court issued its October 10, 2011 opinion in *Bass*.

9 *See also Posecai*, 752 So.2d at 767.

10 A CRIMECAST report purports to measure the risk of criminal activity at a particular site and rates the site in comparison to a national average, a state average, and a county average for various categories of crimes.

ARTICLE

Admissibility of Accident Causation Evidence in Crashworthiness Cases: Has the Tide Turned?

by David C. Marshall & Andrew W. Kunz [1]

It is well-settled in South Carolina that a plaintiff's comparative fault in causing an accident constitutes an affirmative defense to a negligence action.[2] The same is true for negligence cases involving product liability claims against a manufacturer or seller. Nevertheless, the plaintiffs' bar for years has argued that the cause of an accident, including a plaintiff's comparative negligence, should be excluded from evidence in crashworthiness cases where the defect is alleged to have caused enhanced injuries. Because this evidentiary issue has not been specifically addressed by the appellate courts of South Carolina, the bar has historically sought guidance from a 2001 Fourth Circuit opinion affirming the exclusion of such evidence.[3] However, recent changes to the legal landscape in our state, including a 2013 district court opinion on the same issue, should change the way attorneys evaluate the admissibility of accident causation evidence in product crashworthiness cases. This article will outline and examine some pertinent considerations of this issue.

I. The Historical View

South Carolina has adopted the crashworthiness doctrine via judicial decision.[24] Under this doctrine, it is presumed that an automobile manufacturer is aware that many users of its product will be involved in collisions. As such, auto manufacturers are under a commensurate duty to "furnish reasonable protection to collision victims in the statistical certainty that there would be such victims among the users of the cars produced and in the clear foreseeability of harm to such victims if care were not exercised." [5] The crashworthiness analysis is guided by general negligence principles.[6]

Under the crashworthiness doctrine, liability is imposed not for defects that cause collisions but for defects that cause injuries after collisions occur. In *Jimenez v. DaimlerChrysler Corp.*, the plaintiff's theory of liability was that the vehicle manufacturer designed and sold a defective product that did not cause the accident, but rather caused an enhanced injury when the vehicle occupant was ejected from the vehicle after a crash and suffered a "second collision."[7] In *Jimenez*, the district court accepted the plaintiff's argument that evidence regarding the cause of the original accident is not relevant to the crashworthiness analysis, which is premised solely on the enhanced injury after the original accident.[8] The court reasoned:

> Therefore, while there is a divergence of opinion on the issue, the better-reasoned rule is to exclude any evidence relating to [the driver's] alleged negligence. First of all, such a rule intrinsically dovetails with the crashworthiness doctrine: Because a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. Secondly, the concept of "enhanced injury" effectively apportions fault and damages on a comparative basis; defendant is liable only for the increased injury caused by its own conduct, not for the injury resulting from the crash itself. Further, the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision.[9]

Marshall

Kunz

Reviewing this issue, the United States Court of Appeals for the Fourth Circuit recognized South Carolina courts had not addressed the issue of admissibility of accident causation evidence in crashworthiness cases, and that there was a split of authority in other jurisdictions.[10] Without conducting any significant legal analysis, the Fourth Circuit concluded: "Although we cannot be certain what rule South Carolina would adopt, we cannot say that the district court erred in concluding that in light of the crashworthiness principle, the cause of the original accident was not relevant to proving a claim for enhanced injury."[11]

These two *Jimenez* opinions have led to the general view that evidence of accident causation would be inadmissible in South Carolina in cases involving crashworthiness defects. However, it is often overlooked that the plaintiff in *Jimenez* was

Continued on next page

not the driver of the vehicle, but rather an 8-year old passenger. This critical fact played a significant role in the court's analysis and decision because the driver's negligence in running a red light and causing the accident would not constitute comparative negligence of the minor plaintiff.

II. The Emerging New Era

In June 2013, another South Carolina district court was asked to examine the issue of admissibility of accident causation evidence in a crashworthiness product liability case. In *Quinton v. Toyota Motor Corp.*, the driver died after a single-vehicle rollover accident where she lost control and crashed into an embankment.[12] Her estate filed a product liability action against the vehicle manufacturer alleging crashworthiness defects related to the vehicle's airbag system.[13] These defects were not alleged to have caused the crash, but were instead alleged to have caused the driver to sustain enhanced injuries in the accident. The manufacturer sought to introduce evidence of the circumstances surrounding the accident, including the vehicle's pre-accident speed which was preserved by the vehicle's event data recorder and analyzed by accident reconstruction experts, and was in excess of the posted speed limit.

Relying on *Jimenez*, the plaintiff moved to exclude all evidence of causation and fault related to the underlying accident. The plaintiff reasoned that, because the driver would not have died but for the alleged defective airbag, any evidence of her speeding or fault was irrelevant, prejudicial, misleading, and confusing. In response, the vehicle manufacturer argued against the misinterpretation of *Jimenez* and against abandonment, in crashworthiness cases, of the principle that parties are held responsible for the natural and probable consequences of their actions. The manufacturer alleged such accident causation evidence constituted comparative negligence irrespective of the alleged crashworthiness defect.

Acknowledging there was still no South Carolina law on this issue, the district court in Quinton offered to certify the question to the South Carolina Supreme Court, but the parties indicated their preference to instead have the court try to ascertain how South Carolina courts would rule on the issue.[14] Thus, the resulting order allowing such evidence stands in stark contrast to the Fourth Circuit's opinion in *Jimenez*, which made no effort to predict South Carolina law. As the court noted: "The *Jimenez* court did not hold that South Carolina would not admit evidence of cause in a crashworthiness analysis, but only that the district court did not err in excluding such evidence under the current South Carolina law."[15] Additionally, the facts of *Quinton* are different than *Jimenez* because the plaintiff was the driver, whose conduct directly affected the cause of the initial accident potentially serving as the basis for comparative negligence, as opposed to the passenger plaintiff in *Jimenez*.

Recognizing the lack of South Carolina authority on point and the split of authorities in other jurisdictions, the district court in *Quinton* conducted a thorough analysis and held that South Carolina courts will likely allow evidence of accident causation, including comparative negligence, in crashworthiness product liability cases. The court relied upon five primary factors for its ruling:

1. South Carolina has undisputedly adopted comparative negligence for tort cases.

Recognizing the lack of South Carolina authority on point and the split of authorities in other jurisdictions, the district court in *Quinton* conducted a thorough analysis and held that South Carolina courts will likely allow evidence of accident causation, including comparative negligence, in crashworthiness product liability cases.

2. The *Restatement (Third) of Torts: Product Liability* squarely addresses the issue and states that "the contributory fault of the plaintiff in causing an accident that results in defect-related increased harm is relevant in apportioning responsibility between or among the parties, according to applicable apportionment law."[16] Further, the *Restatement Third* provides that a "plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care."[17] Thus,

the *Restatement Third* plainly states that accident causation is relevant in crashworthiness cases.[18] Although these precise sections have not been adopted by South Carolina, the legislature's adoption of the *Restatement (Second) of Torts* § 402A, and the adoption by the South Carolina Supreme Court of other sections and comments of the Restatement Third in *Branham v. Ford Motor Co.*, make it likely that South Carolina would look favorably upon these sections as well.[19]

3. The majority of jurisdictions that have considered the issue have held that accident causation or comparative negligence is appropriately considered in crashworthiness cases.[20]

4. The court was persuaded by the dissent in *Jimenez* pointing out that crashworthiness cases always require a jury to determine the proportion of injury sustained in the underlying collision from the enhanced injuries sustained due to the alleged product defect, thus asking the jury to compare the behavior of the respective parties in determining causation. Because a crashworthiness plaintiff is not entitled to any recovery except for enhanced injuries, the doctrine itself always apportions liability, so the jury should be allowed to consider evidence needed to make such determinations.[21]

5. Even if evidence of accident causation was not admitted for crashworthiness, such evidence serves as the foundation of the expert's accident reconstruction, thus making it relevant and admissible.

The district court's analysis in *Quinton* provides a clear and practical approach to allowing evidence of a plaintiff's conduct and fault in causing an accident in crashworthiness product liability cases based on negligence.[22] Any other result would alter the fundamental principles of proximate causation, thereby creating separate rules for plaintiffs and defendants. The court recognized that the cause of an accident, no matter who is at fault, is a relevant inquiry in crashworthiness cases, and plaintiffs should not be shielded, as a matter of law, from the natural and probable consequences of their actions.

Additionally, although not addressed by the court in *Quinton*, it can be argued that the South Carolina Legislature's 2005 amendments to S.C. Code § 15-38-15 evinces a clear intent to provide litigants with a true apportionment of fault when there are multiple defendants. In order for there to be a full and fair allocation of fault in crashworthiness cases under § 15-35-15, the plaintiff's comparative negligence must be considered so evidence of accident causation is necessary. This is a statutory right afforded to defendants, and there is no exclusion for cases involving crashworthiness defects as there are for other types of cases.

III. Conclusion

The question of admissibility of accident causation evidence, including a plaintiff's comparative negligence, in product liability crashworthiness cases remains undecided by the appellate courts and legislature of South Carolina. However, attorneys should be careful not to assume such evidence will be excluded in light of recent legal developments and instead seek to introduce such evidence for the reasons analyzed by the district court in *Quinton*.

Footnotes

1 David C. Marshall and Andrew W. Kunz are attorneys with Turner Padget in Columbia, S.C. They are members of the firm's product liability team and defend cases involving products liability, construction, trucking, and other matters.

2 *See, e.g., Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).

3 *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001) (applying South Carolina law).

4 *See Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969).

5 *Id.* at 186.

6 *Id.* (quoting with approval *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968) ("Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable.")).

7 *Jimenez*, 269 F.3d at 452.

8 *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 564-65 (D.S.C. 1999) (holding "comparative negligence in causing an accident is not a defense to a negligence claim pertaining to crashworthiness").

9 *Id.* at 566.

10 *Jimenez*, 269 F.3d at 453.

11 *Id.*

12 *Quinton v. Toyota Motor Corp.*, No.: 1:10-cv-02187-JMC; 2013 U.S. Dist. LEXIS 80402 (D.S.C. June 7, 2013) (Childs, J.).

13 The estate asserted causes of action for negligence, breach of warranty, and strict liability.

14 *Quinton* at 1, n.1.

15 *Id.* at 4.

16 *Restatement Third* §16, comment f.

17 *Id.* at. § 17(a).

18 *Quinton* at 5.

19 See *Quinton* at 4-5 ("In deciding to adopt at least a portion of the *Restatement Third*, the Court, 'believe[d] that the Legislature's foresight in looking to the American Law Institute for guidance in this area is instructive.") (referring to *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010) (adopting the risk-utility test for a design defect cases as set forth in the Restatement Third)).

20 *Id.* (citing *Dannenfelser v. DaimlerChrysler Corp.*, 370 F.Supp. 2d 1091, 1096 (D. Haw. 2005) (collecting cases)).

21 *Quinton* at 5.

22 There may be additional considerations if the defect theory is premised upon breach of warranty or strict liability, as opposed to negligence.

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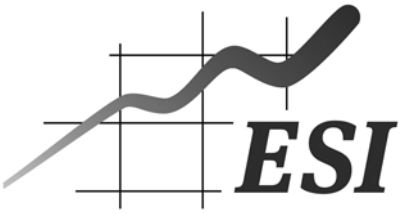


ARTICLE

Riley v. Ford Extends *Branham*, Yet Shortens Plaintiffs' Burden

Can a Product be Reasonably Safe in One Accident, yet Unreasonably Dangerous in Another?

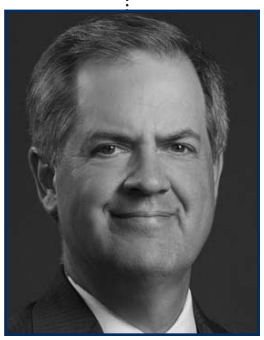
by Richard H. Willis, Courtney C. Shytle and Patrick J. Cleary [1]

In its groundbreaking decision in *Branham v. Ford Motor Co.*,[2] the South Carolina Supreme Court held:

> In sum, in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous.[3]

This holding was amplified by the Court in *Graves v. CAS Med. Systems*.[4] In *Graves*, the Court affirmed summary judgment despite the plaintiff's presentation of evidence of reasonable, presumably safer, alternative design, because there was no identification of a specific design flaw in the baby monitor.[5] Most recently, the Court of Appeals discussed the elements of a design defect product liability case in *Riley v. Ford Motor Co.*,[6] holding, among other things, that the statement from *Branham* – that the plaintiff must "point to a design flaw in the product" … "relates to the plaintiff's burden of proving a reasonable alternative design, not a requirement of proving the existence of a design defect."[7]

Reading these three cases together raises some interesting questions about the plaintiff's burden of proof in a design defect case in South Carolina.[8] We note from the outset that the *Branham* language quoted above does not end with the words "in this accident" or "and would have prevented plaintiff's injuries." So to meet his burden, must a plaintiff present evidence that the proposed alternative design is reasonably safe in all foreseeable circumstances, or just that it would have prevented the specific injuries of this plaintiff? Did the *Branham* Court impose a two part burden upon the plaintiff: evidence of (1) a specific design flaw in the product and (2) an alternative design that would have prevented the product from being unreasonably dangerous; or, as the Court of Appeals recently held, is the "design flaw" element part of (as opposed to in addition to) plaintiff's alternative design burden? Is evidence of a feasible alternative design sufficient to sustain a verdict or must plaintiff also demonstrate the existence of a "design flaw" in the original design that makes the product unreasonably dangerous? Finally, must plaintiff present expert testimony to satisfy this burden in a product liability case, or may he rely upon circumstantial evidence?



Willis

Shytle

Cleary

In *Riley v. Ford Motor Co.*, the South Carolina Court of Appeals spoke to the evidence necessary to sustain a jury verdict in a design defect product liability claim, interpreting the Supreme Court's edicts in *Branham* and *Graves*. In this crashworthiness case, Plaintiff asserted that the decedent's fatal injuries resulted from a defectively designed door latch system in Mr. Riley's Ford F-150 that allowed the door to open during his crash, as a result of "foreshortening" of the rod in the rod-linkage system. Riley's expert opined that had Ford utilized the alternative cable linkage system, the door would not have opened in the crash and Riley would have survived. The jury found in Riley's favor, and the court denied Ford's post-trial motions.

Ford appealed the denial of directed verdict, asserting that Plaintiff failed to meet his burden of proof because his expert (1) failed to identify a "design flaw in the product" and relied upon the mere fact that the door opened to support his opinion that it was defective; and (2) failed to opine that the alternative design offered (a cable linkage system) would have made the truck reasonably safe in all foreseeable crashes. The Court of Appeals affirmed the jury's findings, holding, *inter alia*, that South Carolina law does not require an expert to "champion" an alternative design or present evidence that the alternative design "would have prevented the door from opening in every foreseeable collision". As the Court stated, "through its expert and through Ford's witnesses and documents," Plaintiff met his burden of proving defect.[9]

The *Riley* opinion continues the post-*Branham* evolution of South Carolina product liability law. In

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2010, the South Carolina Supreme Court determined, consistent with the Third Restatement, that the risk-utility test analysis is the exclusive method for demonstrating a design defect claim in South Carolina.[10] South Carolina law has long been that in a product liability action, the plaintiff must prove (1) that he was injured by the product; (2) that the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant.[11] In *Branham*, the Court held that the only way to meet the second element is for the plaintiff to "point to a design flaw in the product and show how his alternative design that would have prevented the product *from being unreasonably dangerous*."[12] The state's highest court noted that this holding was in accord with the approach the trial and appellate courts of the state had been following, the majority of other jurisdictions, and the Restatement (Third) of Torts which provides that "[a] product is defective … in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller … and the omission of the alternative design renders the product not reasonably safe."[13]

The *Branham* Court also emphasized that a jury question is not created merely because a product can be made safer, adhering to South Carolina's "longstanding approval of the principle that a product is not a in a defective condition unreasonably dangerous merely because it can be made more safe."[14] This tenet was reiterated by the Court in *Graves*: "one cannot draw an inference of a defect from the mere fact that product failed."[15]

In *Graves v. CAS Med. Sys.*,[16] the Supreme Court affirmed the grant of summary judgment to the manufacturer of a baby monitor, concluding that plaintiff had failed to present evidence that the monitor design was defective. Importantly, the Court concluded that while plaintiff had presented evidence of feasible alternative designs, they failed to present any direct evidence of a specific design flaw in the product.[17] Despite affirming the exclusion of plaintiff's experts, the Court did not dismiss the case until it had examined the remaining evidence presented, noting that circumstantial evidence may in some instances be sufficient to establish a design defect. However, the court concluded that it "need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony [was] dispositive" of the claim.[18] The Court reiterated that an inference of a defect cannot be drawn from mere product failure. Rather, the plaintiff must offer some evidence of defect beyond the product's failure, and that expert testimony was required because the issues were too complex to be within the ken of the ordinary lay juror.[19]

In the first post-*Graves* design defect case examined on appeal, *Riley v. Ford*, the South Carolina Court of Appeals revisited the proof needed to sustain a jury verdict in a design defect case.[20] In *Riley*, the decedent was driving his 1998 F-150 truck when it left the highway and rolled over. Plaintiff claimed that the driver was ejected through the open door. Plaintiff claimed that rod-linkage system used in the Riley F-150 door-latch was defective and unreasonably dangerous because it was vulnerable to foreshortening in frontal collisions, which allowed the door to open without the handle being pulled or stressing the latch. Plaintiff pointed to Ford's cable-linkage system utilized previously in the 1992-95 F-series as a feasible alternative design that, if installed on Riley's truck, would have prevented the door from opening.

In support of the estate's defect claim, Plaintiff presented Ford internal documents that provided crash test comparisons with the rod-linkage and cable-linkage door-latch systems that purported to show the latches in trucks with rod-linkages failing in frontal collisions. Plaintiff asserted that the Ford documents showed Ford's own "risk/utility"

analysis between the two systems, including discussions of the costs and benefits of both designs. The estate cross-examined Ford witnesses about both designs and presented an expert witness who testified that using the cable-linkage system would have prevented the door from opening in this crash.

Ford's grounds for appeal turned on two key admissions by Plaintiff's expert. First, he agreed that there was "nothing inherently wrong with" a rod-linkage system and that use of a rod rather than a cable is not, in itself, a design flaw.[21] Second, plaintiff's expert refused to identify the cable-linkage system as a non-defective door latch system; he testified only that the cable-linkage system would have prevented the door from opening in this crash.[22]

On appeal, Ford argued that *Branham* required Plaintiff to show the rod-linkage system was defective and that Ford's failure to utilize the cable-linkage system rendered the product not reasonably safe. The Court of Appeals affirmed the verdict, noting that Plaintiff's expert had identified a defect in the truck -- that the "particular rod-linkage system in Riley's truck allowed the door to unlatch due to a very small amount of longitudinal crush of the door."[22] The Court of Appeals also cited Ford internal "risk/utility" documents as evidence of defect.

To the extent that Plaintiff limited his expert proof to evidence that the door system was unreasonably dangerous "in the subject crash," it falls short. The Court's ruling suggests that a plaintiff needs to demonstrate that only the as-sold design was unreasonably dangerous in the underlying accident, not that it is generally unsafe. The Court's reasoning on alternative design is consistent with this analysis. In response to Ford's assertion that Plaintiff failed to present evidence that the proposed alternative design made the truck reasonably safe in all crashes, the Court of Appeals stated that Plaintiff had met his reasonable alternative design burden by providing a feasible alternative design (the cable-linkage) that would have prevented the door from opening in the *Riley* collision. In so holding, the Court of Appeals appears to suggest that an alternative design that would have prevented the underlying injuries of a particular crash is sufficient to meet the requirements of *Branham*, without regard to whether it would be a preferable design generally.

Does a plaintiff have to show that the alternative design would have prevented the alleged failure, in this the door opening, in all crashes? Of course not. A reasonably safe design does not mean no failures or injuries will ever occur. To the contrary, a reasonably safe design simply means it is non-defective. South Carolina and virtually every other jurisdiction recognizes that a failure or injury standing alone is not indicative of a defect – failures occur in safe non-defective products. But there must be some evidence presented by the plaintiff that the alternative design proposed is reasonably safe under the risk/utility analysis, and not just that it would have prevented a particular plaintiff's injuries. Perhaps more importantly though, plaintiff must first prove that the omission of the alternative design renders the as-built design unreasonably dangerous. This latter showing is a separate requirement under *Branham* that, while related to the alternative design analysis, remains an independent showing.

So, the answer to the original question posed – can a product be reasonably safe in one accident, but not another – should logically be "no." South Carolina has long held that: (1) a malfunction in and of itself is not evidence of a defect and (2) evidence that a product may be made safer is not evidence of a defect. The clear import of *Branham* and *Graves* is that a plaintiff must present evidence to support a finding that the product design is not reasonably safe. This is not a new proposition in South Carolina law, but the requirement that plaintiff must also come forth with evidence of a feasible alternative design has raised some interesting issues.

A savvy plaintiff will argue that evidence of an alternative design that would have prevented the plaintiff's injuries in a particular accident is sufficient to defeat summary judgment (or sustain a verdict) without regard to the reasonableness of the as-built design. Neither *Branham* nor *Graves* supports such a conclusion. Rather, to satisfy his burden, a plaintiff must make two separate showings: (1) that the product is not reasonably safe and (2) there is an alternative design that would have made the product reasonably safe, had it been implemented. The Graves case appears to confirm this two part requirement, as the Court noted that plaintiff had presented evidence of feasible alternative designs, but nevertheless affirmed summary disposition of all of the plaintiff's claims.

What does the *Riley* opinion mean for South Carolina defense attorneys?

The *Riley* decision suggests an extension of the *Branham* and *Graves* opinions on design defect cases to a particular focus on the incident giving rise to litigation. We should therefore expect plaintiffs to use the *Riley* opinion to argue that they need only prove the product was defective in the incident giving rise to the litigation, to expand the scope of corporate discovery requests for all means of possible alternative designs, and to prepare expert witnesses who will testify that their alternative design was feasible and would prevent plaintiffs injuries in this accident.

How do you effectively defend the product?

Product defendants should continue to argue that a plaintiff must point to a specific design flaw in the

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original design that makes the product unreasonably dangerous. Design defect claims should depend upon objective standards of design. Plaintiff must present affirmative evidence that a reasonably designed door lock system, for example, is one that can withstand a certain amount of force in a certain direction. When the plaintiff begins with the accident facts and the alleged failure, and works backwards to develop an alternative design that could have been used to prevent that particular failure in that accident, he has only met half of his burden. There must also be admissible expert evidence that the design employed was unreasonably dangerous on the date of manufacture. Failure to provide expert testimony on this threshold issue is fatal to a plaintiff's case. Otherwise, a product could be reasonably safe in one crash, but defective when considered in the context of another.

Second, because a key test in a South Carolina design defect case is whether the reasonable alternative design would have improved the safety of the product, expect plaintiffs to use manufacturer's own documents, competitor designs, and corporate witness testimony as evidence that their alternative design was reasonable and feasible. In response, defendants should strongly consider using a corporate witness to tell the product development story.

Third, counsel should assert aggressive *Watson* challenges to plaintiffs' experts on all appropriate grounds. These include challenges to the methodology and to establish a defect in the product and demonstrating they do not have the support for presenting their feasible alternative design. Defendants can challenge the "helpfulness" of the expert's opinion if he fails to show why the existing design was detective absent alternative design modification.

Finally, defendants must remain vigilant to guard against the introduction of post-distribution evidence for the important reasons identified in *Branham*. Post-distribution alternative designs are not admissible in a South Carolina product liability trial. Part of plaintiff's proof of defect is evidence of a feasible alternative design, the omission of which renders the existing design unreasonably dangerous when the product is sold. However, if a manufacturer knew of a non-implemented design at the time of sale, and then later used that same design, expect plaintiff to offer the future use of the design as *prima facie* evidence that the design was both reasonable and overall improvement under the risk/utility test. In particular, this will become an issue when one manufacturer uses a particular feature, which is then adopted by other manufacturers in the same field. Witnesses who can explain why a particular design was chosen at that time could be critical. Also, experts for the defense need to be prepared to explain that while other designs may be desirable or even better in some circumstances, the existing design was not unreasonably dangerous at the time of tis manufacture. This can prove challenging but in a time of constant evolution and improvement of products, it is critical to explain the concept of unreasonably dangerous to the jury. In sum, while proof of an alternative design was a defense victory, good plaintiffs' lawyers have always known that such evidence was one of the easiest ways to prove "defect". Defense counsel must rely on their corporate witnesses and experts to defend the as-built product even in the face of "new and improved" designs.

Footnotes

1 Richard H. Willis, Courtney C. Shytle are partners with and Patrick J. Cleary is an associate at Bowman and Brooke in Columbia, S.C. All three defend manufacturers in product liability cases in South Carolina, the Southeast, and across the country, with particular emphasis on automotive and toxic tort litigation.

2 390 S.C. 203, 701 S.E.2d 5 (2010).

3 390 S.C. 203, 701 S.E.2d 5 (2010).

4 401 S.C. 63, 735 S.E.2d 650 (2012).

5 401 S.C. at 79, 735 S.E.2d at 658.

6 -- S.E.2d --, 2014 WL 463068 (S.C. Court App. Feb. 5, 2014).

7 *Id*. at *5

8 *Branham* is limited expressly to design defect cases. A plaintiff may proceed with the consumer expectations test or the risk/utility test to demonstrate the existence of a manufacturing defect in a product under South Carolina law.

9 *Id*. at *5, at *6.

10 *Branham v. Ford*, 390 S.C. at 220, 701 S.E.2d at 14.

11 *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995).

12 *Branham*, 390 S.C. at 225, 701 S.E.2d at 16 (emphasis added).

13 *Id*. at 223, 701 S.E.2d at 16 (quoting Restatement (Third) of Torts: Product Liability §2(b)(1998)) (emphasis added).

14 *Id*. (internal quotations omitted).

15 *Id*. at 80. 735 S.E.2d at 658 (quoting *Sunvillas Honmeowner's Ass'n v. Square D Co*., 301, S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990); see also Bragg, 319 S.C. at 543, 462 S.E.2d at 328.

16 401 S.C. 63, 735 S.E.2d 650 (2012).

17 *Graves*, 401 S.C. at 79, 735 S.E.2d at 658.

18 *Id*. at 80; 735 S.E.2d at 658.

19 *Graves*, 401 S.C. at 80, 735 S.E.2d at 659.

20 *Id*. -- S.E.2d --, 2014 WL 463068 (S.C. Court App. Feb. 5, 2014).

21 *Id*. at *5.

22 *Id*.

23 *Id*. at *6 (internal quotation marks omitted).

ARTICLE

2013 Amendments to Rule 45: Significant Changes to Subpoena Practice

By Robert E. Sumner, IV[1] & Lesley A. Firestone[2]

Rule 45 of the Federal Rules of Civil Procedure governs the form, issuance, service, place of compliance, and enforcement of a subpoena in federal court. Since its adoption in 1938, Rule 45 has been amended eleven times. The most recent and significant amendments to Rule 45 went into effect on December 1, 2013. Prior to the 2013 amendments, Rule 45 had not been substantively amended since 1991.[3]

The Civil Rules Advisory Committee (the "Committee") proposed amendments to Rule 45 following a multi-year study and period of public comment.[4] The study, which included a review of relevant literature and consultation of various bar groups, was aimed at identifying problems with the rule that warranted modification. In addition to addressing specific complications with Rule 45, the Committee focused on ways to simplify the rule because many practitioners found it lengthy and complex. The Committee's study of Rule 45 produced seventeen potential revisions, which were narrowed down to four specific amendments.

The Committee designed the amendments to Rule 45 to abrogate what they referred to as the "three-ring circus" of challenges for lawyers seeking to use subpoenas.[5] The Committee identified the three rings as: (i) uncertainty regarding the "issuing court;" (ii) uncertainty regarding how and where service should be accomplished; and (iii) uncertainty regarding where compliance could be required, which was complicated by the various provisions scattered throughout the rule governing the place of compliance.[6] To eliminate the three-ring circus, the amendments designate the court where the action is pending as the issuing court, permit service of subpoenas anywhere in the United States, and combine all provisions regarding the place of compliance into one section. This article provides an in-depth examination of the amendments to Rule 45.

Issuing and Serving Subpoenas

The amended rule simplifies the practice of issuing and serving a subpoena. Under Rule 45(a)(2), a subpoena must now issue from the district court in which the action is pending. Prior to the amendments, a subpoena for attendance at a deposition or production of documents was typically issued from the district court where the witnesses or documents were located. Pursuant to the changes to Rule 45(a)(2), the issuing court will always be the court where the action is pending. Additionally, Rule 45(b)(2) now permits service of a subpoena anywhere in the United States. Therefore, lawyers will no longer need to consult foreign state laws on service of subpoenas or obtain different subpoena forms for the district court in which the witnesses or documents are located.

Sumner

Firestone

Notice of Service of Documents-Only Subpoena

Pursuant to the 1991 amendments, parties serving a document-only subpoena were required to give notice of service of such subpoena to other parties prior to serving the subpoena on the intended recipient.[7] The 2007 amendments clarified the requirement in the 1991 amendments that notice was to be given prior to serving the witness with the subpoena.[8] During its study of Rule 45, the Committee was informed that practitioners frequently ignored this requirement in the rules and obtained documents pursuant to subpoenas without notice to the other parties.[9] This practice created problems because the parties were often surprised by new documents at or before trial. This practice also led to disputes over the documents' admissibility and the need for additional discovery.

In an attempt to garner broader compliance with the notice requirement, the amendments make it more prominent by moving it to its own subsection, Rule 45(a)(4), and adding the heading "Notice to Other Parties Before Service." The relocated provision also makes a minor change to the rule in that it now requires an actual copy of the subpoena be sent to other parties in addition to notice. The purpose of this modification is to make the parties aware of the

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exact scope of the request and allow them to better determine whether they have any objections to the materials being sought or need to conduct additional discovery of their own.[10]

The amended rule still does not address the parties' rights to obtain copies of the information produced in response to a subpoena. The Committee Notes (the "Notes") indicate that a party desiring documents produced in response to a subpoena must follow up with the subpoenaing party or the subpoena recipient in order to obtain the information.[11] Rule 45(a)(4), as amended, does not limit the district court's ability to order notice of the receipt of produced materials or access to the produced materials. Further, the Notes state that the subpoenaing party is expected to provide reasonable and prompt access to the materials that are produced.[12]

Subpoena-Related Motions

Amended Rules 45(d)(2)(B), (d)(3), and (e)(2)(B) require that subpoena-related motions must be brought in the court where compliance is required. Subpoena-related motions include motions to quash a subpoena, to compel production or inspection from a person subject to a subpoena, and to determine a claim of privilege as to information produced in response to a subpoena. Under the old rule, subpoena-related motions were brought in the issuing court. Because the issuing court will now always be the court where the action is pending, this change in terminology retains the previous practice of hearing such matters in the court where compliance is required.

The amendments recognize that the issuing court may be the more appropriate court to entertain subpoena-related motions. Therefore, the amended rule includes a new subsection, Rule 45(f), which permits the transfer of a motion from the compliance court to the issuing court in certain instances. There are two instances in which a compliance court may transfer a motion under this rule: (i) if the person subject to the subpoena consents; and (ii) if the court finds "exceptional circumstances."

The rule does not define "exceptional circumstances;" however, the Notes indicate that the standard for transferring a motion will be rigorous.[13] The Notes emphasize that the prime concern should be avoiding undue burdens on non-parties who are subject to subpoenas.[14] While the standard for a transfer may be exacting, the Notes acknowledge that there are certain instances in which a transfer may be warranted.[15] A transfer may be desirable when the issuing court has knowledge of the underlying lawsuit and has already ruled on issues raised by the motion or if the same discovery disputes are likely to arise in different districts. To obtain a transfer, the proponent of the transfer must show that the benefits from transferring the motion outweigh the non-party's interest in local resolution of the motion.[16] Additionally, the Notes offer that it may be helpful for the judge of the compliance court to consult with the judge of the issuing court when considering subpoena-related motions.[17]

If a motion is indeed transferred, Rule 45(f) seeks to minimize the burden to the non-party by permitting the non-party's attorney who is admitted in the compliance court to appear and file papers in the issuing court, even if the attorney is not admitted in that court. Following along the same lines, the Notes encourage judges to permit non-parties and their counsel to utilize telecommunication methods to appear in the issuing court.[18] Finally, to enforce an order on the motion, the issuing court may transfer the order back to the compliance court.

Place of Compliance

The revised place of compliance provisions remain essentially the same as in the previous version of the rule. Unlike the old rule, however, the place where service occurs is no longer determinative of where compliance can be required.[19] Additionally, the amended rule combines the various provisions governing place of compliance into one subsection, Rule 45(c), in an effort to simplify compliance.

Rule 45(c)(1) governs subpoenas for attendance at trials, hearings, and depositions. Like the old rule, the amended rule provides that a non-party may be commanded to attend a trial, hearing, or deposition within 100 miles of where the person resides, is employed, or regularly conducts business in person.[20] Additionally, as in the old rule, non-party witnesses may be required to travel more than 100 miles within the state where they reside, are employed, or transact business if they would not incur "substantial expense" in doing so.[21] In the event a non-party witness would incur substantial expense, the subpoenaing party may pay for such travel, and the court can make compliance contingent on that payment.[22]

Importantly, the amendments resolve a split of authority that arose in the U.S. District Court for the Eastern District of Louisiana regarding trial subpoenas for distant parties and party officers. In one instance, the District Court interpreted Rule 45 to mean that the geographical limits that applied to other witnesses did not apply to parties or party officers.[23] Conversely, in another instance, the District Court held that the rule's geographical limitations applied to all trial witnesses, including parties and party officers.[24] Amended Rule 45(c) clearly establishes that parties or party officers may not be required to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state. Further, the Notes also clarify that a subpoena is not necessary to compel parties, and officers, directors, and managing agents of parties to appear at a deposition, and for those witnesses only notice of the deposition is required pursuant to the terms of Rule 30.[25]

Rule 45(c)(2) provides that inspection will occur at the premises to be inspected and that production of documents, electronically stored information, or tangible things may be commanded to take place within 100 miles of where the subpoena recipient resides, is employed, or regularly transacts business in person. The Notes recognize that parties frequently agree to transmit documents, especially electronically-stored information, electronically.[26] The Notes make it clear that nothing in the amendments should be read to limit the parties' abilities to make these types of arrangements.[27]

Changes to Contempt Provisions

The word subpoena derives from the Latin words *sub poena*, meaning "under penalty," which signifies that disobedience of a subpoena may result in penalty.[28] Rule 45(g), as amended, retains the rule's authority to punish disobedience of subpoenas as contempt and permits a court to impose contempt sanctions for disobedience of a subpoena or a subpoena-related court order. The contempt provision was slightly modified to clarify that in the event of a transfer of a subpoena-related motion, a person who fails to comply with a subpoena can be held in contempt of both the compliance court and the issuing court.[29] As discussed above, amended Rule 45(f) permits the transfer of an order from the issuing court back to the compliance court if needed to effectively enforce its order. A conforming change to Rule 37(b)(1), regarding contempt of orders directing a deponent to be sworn or to answer a question, was also made.[30]

Conclusion

The 2013 amendments to Rule 45 bring welcomed changes that clarify and simplify the rule. Importantly, the amendments eliminate many common challenges that lawyers faced under the old rule. The amendments to Rule 45 are intended to provide more definite guidance, which should reduce the time and costs related to the issuance of a subpoena in federal court.

Footnotes

1 Mr. Sumner is a Member of Moore & Van Allen, PPLC and maintains an active litigation practice in state and federal courts.

2 Ms. Firestone recently joined Moore & Van Allen PLLC as an Associate after working as a staff attorney for the South Carolina Court of Appeals.

3 Fed. R. Civ. P. 45 advisory committee's note.

4 Committee on Rules of Practice and Procedure: Proposed Amendments to Civil Rule 45 and 37 for Final Approval 80 (June 11-12, 2012), available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-06.pdf (last visited March 24, 2014).

5 *Id.*

6 *Id*.

7 Fed. R. Civ. P. 45 advisory committee's note, subdivision (a).

8 *Id.*

9 Committee on Rules of Practice and Procedure, supra note 4, at 83.

10 Fed. R. Civ. P. 45 advisory committee's note, subdivision (a).

11 *Id*.

12 *Id*.

13 Fed. R. Civ. P. 45 advisory committee's note, subdivision (f).

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*.

19 Fed. R. Civ. P. 45, advisory committee's note, subdivision (c).

20 Fed. R. Civ. P. 45(c)(1)(A).

21 Fed. R. Civ. P. 45(c)(1)(B)(ii).

22 Fed. R. Civ. P. 45 advisory committee's note, subdivision (c).

23 *See In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d. 664 (E.D. La. 2006) (requiring a party officer from New Jersey to testify at a trial in New Orleans).

24 *See Johnson v. Big Lots Stores, Inc*., 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require plaintiff's attendance at trial in New Orleans when they would have to travel more than 100 miles outside the state).

25 Fed. R. Civ. P. 45 advisory committee's note, subdivision (c).

26 *Id*.

27 *Id*.

28 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2451 (3d ed. 2008).

29 Fed. R. Civ. P. 45 advisory committee's note, subdivision (g).

30 Fed. R. Civ. P. 37(b)(1).

Please see Table of Amendments on following page.

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RULE	AMENDMENT
"Issuing Court" Rule 45(a)(2)	All subpoenas must issue from the court where the action is pending.
"Notice to Other Parties Before Service" Rule 45(a)(4)	A party serving a subpoena for documents or inspection of premises must provide notice and a copy of the subpoena to all parties prior to serving the subpoena on the intended recipient.
"Service in the United States" Rule 45(b)(2)	Subpoenas may be served at any place in the United States.
"Place of Compliance" Rule 45(c)	Rule 45(c) -All witnesses may be compelled to attend a trial, hearing, or deposition if it is within 100 miles where they reside, are employed, or regularly transact business in person. -A non-party witness may be compelled to attend a trial anywhere within the state where they reside, are employed, or regularly transact business in person if they would not incur "substantial expense." -A party or party's officer may be compelled to attend a trial anywhere within the state where they reside, are employed, or regularly transact business in person.
Subpoena-Related Motions Rule 45(d)(2)(B), (d)(3) & (e)(2)(B)	Motions to quash a subpoena, to compel production or inspection from a person subject to a subpoena, and to determine a claim of privilege as to information produced in response to a subpoena must be brought in the court where compliance is required.
"Transferring a Subpoena-Related Motion" Rule 45(f)	The compliance court may transfer a subpoena-related motion to the issuing court if: (1) The party subject to the subpoena consents; or (2) The court finds "exceptional circumstances." To enforce its order, the issuing court may transfer the order back to the compliance court.
"Contempt" Rule 45(g)	-A court may impose contempt sanctions for disobeying a subpoena-related order in addition to the subpoena itself. -In the event a subpoena-related motion is transferred, a person who fails to comply with a subpoena can be held in contempt of both the compliance court and the issuing court.

ARTICLE

A Disclaimer of Coverage is (Probably) Not Enough:
Insurance Bad Faith Claims in the Post-*Conley* Era

By Matthew G. Gerrald [1]

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." For nearly half a century, this phrase from *Conley v. Gibson* [2] represented the *de facto* pleading standard by which complaints were judged under Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure. It was memorized by first-year civil procedure students and regularly cited by lawyers and judges alike. Indeed, Conley's "no set of facts" language was so ubiquitous that it was cited in an average of 60 reported cases per month from January 1, 2000 until May 20, 2007. Then, on May 21, 2007, the U.S. Supreme Court announced, in *Bell Atlantic Corp. v. Twombly* [3] that "this famous observation has earned its retirement."[4] The Court replaced the familiar maxim with the requirement that a complaint contain "enough facts to state a claim to relief that is plausible on its face."[5]

Two years later, the Court expounded on *Twombly* in *Ashcroft v. Iqbal*.[6] Reviewing a complaint brought against former U.S. Attorney General John Ashcroft by Javaid Iqbal, a Pakistani citizen arrested and charged with fraud and conspiracy in the months following the terrorist attacks of September 11, 2001, the Court explained two principles underlying its decision in *Twombly*. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[7] "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss."[8] Regarding the second principle, the Court noted:

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief. [9]

Relying on these principles, the Court then announced a two-step analysis for lower courts to follow when reviewing a complaint which is the subject of a motion to dismiss for failure to state a claim. First, the court should identify and ignore conclusory allegations which are not entitled to a presumption of truth.[10] Second, the court should accord a presumption of truth to the remaining, well-pleaded factual allegations and determine whether those allegations state a claim which plausibly entitles the plaintiff to relief.[11] If they do, the complaint survives, but if they do not, the complaint—like the one at issue in *Iqbal*—must be dismissed.

Of course, *Twombly* and *Iqbal* have ramifications for just about every type of litigation, but they have particular application in the context of bad faith claims asserted against insurance companies. The principles announced in those cases provide the defense bar with a powerful mechanism for challenging the sufficiency of many such claims. This is because, in the author's experience, counsel for an insured disgruntled by an insurer's disclaimer of coverage will often tack a bad faith claim onto a declaratory judgment or breach of contract action without pleading any factual allegations—aside from the disclaimer itself—supporting the assertion that the insurer acted in bad faith. The following hypothetical cause of action is representative.

FOR A SECOND CAUSE OF ACTION

15. The allegations of the above paragraphs are realleged as if fully set forth herein verbatim.

16. The insurer's refusal to defend or indemnify its insured was unreasonable and in bad faith.

17. The Plaintiff is entitled to recover actual, consequential, and punitive damages from the insurer.

Continued on next page

ARTICLE CONT.

These allegations contain no factual matter but merely unsupported labels and conclusions. "Completely absent from the [allegations] are any facts that describe who, what, where, when, and how the alleged bad faith conduct occurred."[12] They state little more than that the insurer's coverage position amounts to bad faith. However, that is insufficient under Rule 8(a) as interpreted and applied by *Twombly* and *Iqbal*.

Numerous cases from around the country—including the *PGT Trucking* case quoted above—have applied *Twombly* and *Iqbal* in the context of insurance bad faith claims. In many (if not most) of those cases, the insured's bad faith cause of action has been found wanting. For example, in one of the earliest cases, *Hibbets v. Lexington Insurance Co.*,[13] the insurer disclaimed or allegedly misadjusted a number of claims for property damage sustained by its insureds when Hurricane Katrina struck Louisiana in 2005. Two of those insureds filed a putative class action against the insurer, alleging, among other things, that it had violated Louisiana's insurance bad faith statutes. They asserted that the insurer "breached and continued to breach its duties of good faith and fair dealing, as well as its duty to fairly adjust claims," "breached and continues to breach its duty to timely adjust claims upon satisfactory proof of loss," and "misrepresented pertinent policy provisions," and that the insurer's actions were "arbitrary, capricious, and unsupported by any evidence" and "constitute bad faith."[14] Relying on *Twombly* and *Iqbal*, the Fifth Circuit found that these allegations were "nothing more than labels and conclusions" and affirmed the district court's dismissal of the plaintiffs' bad faith cause of action because "[s]imply stating a conclusory allegation that [the insurer's] actions were arbitrary, or that [the insurer] breached a duty, without providing factual allegations in support is insufficient to state a claim." *Id*. at 356.

Similarly, in *Atiyeh v. National Fire Insurance Co. of Hartford*,[15] an insurer disclaimed coverage for water damages to an insured's building and personal property as the result of frozen pipes. Asserting that the insurer had handled his claim in bad faith pursuant to Pennsylvania law, the insured alleged the following:

> [T]hat [the insurer] (1) falsely and fraudulently represented that [the insured] had not performed routine maintenance on the premises; (2) unreasonably refused to indemnify [the insured] for his loss; and (2) breached its duty of good faith and fair dealing by: (a) failing to conduct a reasonable investigation, (b) denying benefits to [the insured] without a reasonable basis, (c) knowingly or recklessly disregarding the lack of a reasonable basis to deny [the insured's] claim, or (d) asserting policy defenses without a reasonable basis.[16]

On the insurer's motion for judgment on the pleadings, the U.S. District Court for the Eastern District of Pennsylvania held these allegations were "merely conclusory legal statements and not factual averments" and that the plaintiff had provided "no factual support from which [the court could] conclude that [the insurer's] actions in investigating and evaluating plaintiff's claim were unreasonable."[17]Accordingly, the court granted the insurer's motion and awarded it judgment on the pleadings.[18]

More recently, in *Felsenthal v. Travelers Prop. Cas. Ins. Co.*, the U.S District Court for the Northern District of Illinois relied on *Twombly* and *Iqbal* in dismissing an action brought under an Illinois statute authorizing the recovery of attorneys' fees and statutory damages against insurers which have engaged in "vexatious and unreasonable" conduct.[19] Borrowing terminology from *Iqbal*, the court held that the insured's "threadbare" recitation of the elements of the cause of action was insufficient because it provided "almost no factual support for its claim, and only conclusorily allege[d] that [the insurer's] denial of [the insured's] claim [was] unreasonable."[120] Likewise, in *Vance v. Nationwide Ins. Co*., the U.S. District Court for the Eastern District of Tennessee dismissed a statutory bad faith claim because all the insured offered in support of the claim were "statements that [the insurer] has refused to pay the claim under the policy and that [the insurer] acted in bad faith."[21] The court found that "[the insured's] statement that [the insurer] acted in bad faith is no more than a legal conclusion that is insufficient to state a claim for relief."[22]

Many other courts have reached conclusions similar to those in *PGT Trucking, Hibbets*, *Atiyah*, *Felsenthal*, and *Vance*. *See, e.g., Martinez v. Nat'l Union Fire Ins. Co.*, 911 F.Supp.2d 331, 337 (E.D.N.C. 2012) (holding that, after stripping away her conclusory allegations, the insured at most alleged an honest dispute with her insurer's interpretation of applicable law, an allegation which did not plausibly constitute bad faith); *Palmisano v. State Farm Fire & Cas. Co.*, 2:12-cv-00886-NBF, 2012 WL 3595276 at *13 (W.D. Pa. Aug. 20, 2012) ("There is simply no factual support for Plaintiffs' conclusory allegations concerning [the insurer's] alleged bad faith conduct and their averments surely do not suffice to allege a plausible claim that could sustain their burden at trial."); *Hudgens v. Allstate Texas Lloyd's*, 4:11-cv-02716-MH, 2012 WL 2887219 at *7 (S.D. Tex. July 13, 2012) (noting that the insured failed to "provide any facts that show that [the insurer's] liability was reasonably clear, that her claims were covered under particular provisions of the policy, what [the insurer] knew at the time it denied her claims, any proposed settlement within the policy limits that [the insurer] failed to effectuate, why and how [the insurer's] payments were

Continued on page 50

DRI Update

By John F. Kuppens

The DRI Annual Meeting was held in Chicago from October 16-20, 2013 and was well-attended by SCDTAA members. At the meeting, Sam Outten was elected as the Mid-Atlantic Regional Director, whom I have succeeded as the South Carolina State Representative. At our annual meeting in Savannah, our newly installed DRI President, Michael Weston, spoke to the attendees. My partner, John Cuttino, was elected as the Second Vice President of DRI. John will serve as President of DRI in 2017.

The first week of January, I attended DRI's Joint Leadership Conference with other state representatives and SCDO offices from around the country to learn more about what DRI has to offer to members. A few of those offerings you should consider include the law student diversity scholarship and law student memberships. DRI provides two annual law student diversity scholarships to African-American, Hispanic, Asian, or Native American law students as well as female law students of any ethnic background. Each scholarship is in the amount of $10,000 and is awarded to the applicant who best meets the following criteria:

- Demonstrated academic excellence,
- Service to the profession,
- Service to the community; and
- Service to the cause of diversity.

If you know of a law student who meets these criteria, please get in touch with me or go to the DRI website at www.DRI.org for an application. Additionally, DRI allows law student members to join for the discounted price of $20.00. For any of you who have law clerks, this is an excellent opportunity to get them involved in DRI.

As many of you know, the vast majority of SCDTAA members are small law firms. DRI is offering the small law firm advantage program which is geared to firms ranging from 1 – 20 lawyers. For a nominal annual fee, participating firms can gain access to significant discounts to DRI services and its strategic partners. For more information, go to the DRI website at www.DRI.org.

Finally, the Mid-Atlantic Regional Meeting took place in Charleston May 1-3 at the Charleston Marriott. This was an exciting meeting of not only the Mid-Atlantic regions but also the Southern and Southeast regions as well. If any of you have any questions about DRI or its many offerings, please do not hesitate to contact me.

DRI FOR LIFE

unreasonably delayed, or where its investigation was not reasonable"); *Miracle Temple Christian Acad. v. Church Mut. Ins. Co.*, 2:12-cv-00995-RB, 2012 WL 1286751 at *3 (E.D. Pa. Apr. 16, 2012) ("[The insured] has provided no factual allegations indicating that [the insurer] lacked a reasonable basis for denying the policy benefits[.]"); *Schlegel v. State Farm Mut. Auto. Ins. Co.*, 3:11-cv-02190-ARC, 2012 WL 441185 at *7 (M.D. Pa. Feb. 10, 2012) ("Plaintiffs' allegations are legal conclusions that [the insurer] has generally acted unreasonably and without good faith. Yet, there are no facts in the Complaint to indicate what [the insurer] specifically did to lead to those conclusions[.]"); *Blasetti v. Allstate Ins. Co.*, 2:11-cv-06920-TNO, 2012 WL 177419 at *4 (E.D. Pa. Jan. 23, 2012) (dismissing the insureds' bad faith claim due to a lack of sufficient factual allegations and noting that the insureds "would have [the court] infer reckless indifference from the mere fact that [the insurer] denied their request for coverage"); *Eley v. State Farm Ins. Co.*, 2:10-cv-05564-MMB, 2011 WL 294031 at *5 (E.D. Pa. Jan. 31, 2011) (dismissing the insureds' bad faith cause of action on the grounds they had alleged no facts from which the court could infer the insurer had "no reasonable basis" for denying coverage); *Littlefield v. Concord Gen. Mut. Ins. Co.*, 2:10-cv-00007-WKS, 2010 WL 5300814 at *3 (D.Vt. Dec. 22, 2010) (holding that the insured's complaint contained "no facts, merely an absence of facts, to support the notion that [the insurer] lacked a reasonable basis to deny the claim" and that the insured had failed "to state a claim for insurance bad faith that is plausible on its face"); *Johnson v. Liberty Mut. Ins. Co.*, 3:10-cv-00494-MLC-DEA, 2010 WL 2560489 at *2 (D.N.J. June 24, 2010) ("Lacking any factual support, the plaintiff's claim of bad faith stands alone as a bare averment that she wants relief and is entitled to it.").

Insurers and their insureds often disagree regarding the coverage provided by policies of insurance. Insureds are understandably displeased when claims are denied. However, despite negative depictions of insurance companies by politicians and in popular culture, it is the author's informed opinion that relatively few disclaimers are the result of bad faith. In those instances where an insurer's conduct rises to that level, the insured and her counsel should have little trouble pleading facts sufficient to state a plausible claim for relief. However, when insureds—as they often do—fail to specify how the insurer's actions were unreasonable, *Twombly*, *Iqbal*, and their progeny provide a powerful tool for stopping bad faith claims in their tracks.

Footnotes

1 Matthew G. Gerrald is a partner with Barnes, Alford, Stork & Johnson, LLP in Columbia, SC. He practices primarily in the fields of civil litigation and appeals, professional liability defense, and insurance coverage, along with collections, construction law, real estate, and church law.

2 355 U.S. 41 (1957).

3 550 U.S. 544 (2007).

4 *Id.* at 563.

5 *Id*. at 570.

6 556 U.S. 662 (2009).

7 *Id*. at 678.

8 *Id*. at 679 (citing *Twombly*, 550 U.S. at 556).

9 *Id*. (citations omitted).

10 *See id.*

11 *See id*.

12 *Liberty Ins. Corp. v. PGT Trucking, Inc.*, 2:11-cv-151-TFM, 2011 WL 2552531 at *4 (W.D. Pa. Jun. 27, 2011).

13 377 F.Appx. 352 (5th Cir. 2010).

14 *Id*. at 355-56.

15 742 F.Supp.2d 591 (E.D. Pa. 2010).

16 *Id*. at 599.

17 *Id*. at 599-600.

18 *Id*. at 600.

19 1:12-cv-07402-AJS, 2013 WL 1707931 at *2 (N.D. Ill. Apr. 19, 2013).

20 *Id*. at *4.

21 2:13-cv-00160-LJ, 2013 WL 4647154 at *2 (E.D. Tenn. Aug. 29, 2013).

22 *Id*. at *3.

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Case Notes

Summaries prepared by Breon C. M. Walker

***Riley v. Ford Motor Company*, Op. No. 5195 (Ct. App. Feb. 5, 2014)**

(For more in-depth analysis of this case, see article on page 39.)

On August 29, 2007, Riley was killed while operating his Ford F-150 pick-up truck in Bamberg County. Riley died after being ejected from the truck after another vehicle entered his lane of travel from a side road. The impact of the collision caused Riley's truck to leave the road and roll over. Riley was ejected after the driver's side door opened during the initial impact with the other vehicle.

Riley's Estate ("the Estate") filed suit against Ford and the driver of the other vehicle alleging wrongful death and survival claims. Specifically, the Estate alleged that Ford negligently designed the door-latch system in Riley's truck and that Riley would not have died but for the door opening and Riley being ejected. The Estate settled with the other driver for $25,000.00 with $20,000.00 allocated to the survival claim and $5,000.00 to the wrongful death claim. At trial, the Estate withdrew the survival claim and proceeded against Ford on the wrongful death claim. The jury returned a verdict of $300,000.00 in actual damages against Ford.

There were several post-trial motions submitted by the parties. Ford moved for JNOV arguing the Estate failed to prove both the existence of a defect in the door-latch system and a reasonable alternative design. Ford also moved for a set-off in the amount of $25,000.00 for the settlement the Estate reached with the other driver. Both of Ford's motions were denied in a form order without explanation. The Estate moved for a new trial nisi additur which was granted and the circuit court ordered Ford to pay an additional $600,000.00 bringing the total verdict amount to $900,000.00. Ford appealed each of the aforementioned rulings.

Ford's JNOV Motion

Reasonable Alternative Design

In assessing Ford's JNOV motion, the Court first addressed whether the Estate presented evidence of a reasonable alternative design. The plaintiff in a product liability action will be required to prove a design flaw in the product and show how his alternative design would have prevented the defective product from being unreasonably dangerous. *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010). The Court found that the Estate met the alternative design requirement by presenting evidence of Ford's own alternative design, which it used in F-150 trucks manufactured prior to the 1998 model Riley was operating and also originally incorporated into the design of the 1998 model. Specifically, the Court reviewed the trial testimony of the Plaintiff's mechanical engineering expert as well as studies performed by Ford. This analysis included a comparison of the rod system—which was present in Riley's truck—and the cable system which the Estate argued was a safer alternative. The Court concluded that Ford conducted its own risk-utility analysis in which it determined that the cable system was of "improved quality" and "easier to install." The study also showed that the cable system was more "robust for door foreshortening" which Plaintiff's expert argued was the reason the door opened after the initial impact. Based on the aforementioned, the Court found there was evidence of a feasible alternative design.

Barefoot

Ford additionally argued that the Estate failed to meet the requirements of *Branham* because it failed to "point to a design flaw in the product." 390 S.C. at 225, 701 S.E.2d at 16. Specifically, Ford argued that it was not enough for the Estate to present evidence showing that the rod system allowed the door to open with minimal amounts of foreshortening and that a different system would have prevented this. Instead, Ford argued that the Estate must prove how a specific feature of the rod system allowed the door to open and then offer an alternative design to that feature. The Court disagreed with Ford's argument and noted that the *Branham* statement relates to a plaintiff's burden of proving a reasonable alternative design and not the requirement of proving the existence of a specific design defect. The Court found that the Estate met the requirements of *Branham* by pointing to a design flaw in the rod system and by showing how the alternative cable system would have prevented the system from being unreasonably dangerous.

Lastly, Ford argued that the Estate failed to propose an alternative design that would have prevented the product from being unreasonably dangerous in all foreseeable collisions. The Court disagreed and stated that the law does not require

Continued on next page

the Estate to prove its alternative design would have prevented the door from opening in every foreseeable collision; instead, the law required the Estate to prove (1) the design of the rod system in Riley's truck "created an unreasonable risk of injury" that was "readily foreseeable as an incident to the normal and expected use of [the] automobile," *Mickle v. Blackmon*, 252 S.C. 202, 228, 232, 166 S.E.2d, 173, 184, 186 (1969), and (2) the alternative cable system "would have prevented the product from being unreasonably dangerous." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16.

Design Defect

Regarding the design defect, Ford argued that the Estate failed to prove the existence of a design defect by relying merely on the fact that the door opened during the accident. In making this argument, Ford relied on *Graves v. CAS Med. Sys*., 401 S.C. 63, 80, 735 S.E.2d 650, 658-59 (2012), which states that a plaintiff cannot rely on "the mere fact [that] a product failed," but "must offer some evidence beyond the product's failure itself." The Court noted that the Estate's expert testified that the door of Riley's truck "came open without damage to the latch" which should not have happened. He further testified that the particular rod system in Riley's truck allowed the door to unlatch while withstanding a "very small amount of longitudinal crush…[of] the door." The Court distinguished this case from Graves. In Graves, the circuit court excluded all of the plaintiff's experts, thus leaving the plaintiff with no evidence regarding how, or whether, the product failed. Therefore, the plaintiff in Graves did not prove a failure or a defect. In this case, the Court noted that the failure was the door opening without pulling the handle and that the defect was a door-latch system that allowed the door to open with only "a very small amount of longitudinal crush."

Ford's Motion for Set-Off

Ford next argued that the trial court erred in refusing to grant the $25,000.00 set-off to account for the settlement money paid to the Estate by the driver of the other vehicle, due to the lack of evidence of any conscious pain and suffering by Riley. The Estate conceded that the trial court erred by refusing to grant "any set-off," but stated that Ford was only entitled to the wrongful death set-off of $5,000.00 because there was "ample evidence" showing Riley suffered conscious pain and suffering.

The Court disagreed with both parties and found that there was "some evidence that Riley suffered consciously." The Court held that both parties were entitled to have the trial court analyze the proper settlement allocation and make findings of fact on the record as to whether—and how—the remedy of set-off should be applied to the case. The Court reversed the trial court's decision denying set-off based on the lack of analysis in the circuit court's form order denying set-off and the Estate's concession that Ford was entitled to at least $5,000.00 set-off.

The Court noted that there was some evidence of survival based on the testimony of the first witness to arrive on the scene. That witness stated that he heard "something in the bushes" and heard Riley make "a gasping sound." The Court stated that this was enough to allocate some portion of the settlement to the survival claim, but not eighty-percent. Additionally, the Court noted that Ford was not a party to the settlement and, thus, not bound by its terms. *See Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct. App. 2000). Therefore, the Court held that a trial court should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable as it relates to a non-settling defendant's claim for set-off. If not, the trial court should reallocate the proceeds accordingly. Based on the aforementioned reasons and the evidence presented at trial, the Court found that a fair allocation of the settlement was eighty-percent to the wrongful death claim and twenty-percent to the survival action, thus making Ford's set-off amount $20,000.00.

The Estate's Motion for New Trial Nisi Additur

Lastly, Ford argued that the trial court erred by increasing the jury verdict from $300,000.00 to $900,000.00. The Court noted that its analysis of the trial court's decision to grant additur must be made in deference to the jury's verdict and is based on the trial court's compelling reasons for invading the jury's decision.

The Court noted that the Estate presented a total economic loss of $238,801.00 and the jury returned a verdict of $300,000.00, leaving the Estate's non-economic damages at $61,199.00. In reviewing the trial court's order, the Court noted that there were no compelling reasons to invade the province of the jury simply because the court disagreed as to whether the amount was sufficient. The Court stated "as a general rule, the 'determination of reasonable compensation for non[economic] damages…is…left to the jury's discretion.'" Citing *Scott v. Porter*, 340 S.C. 158, 169, 530 S.E.2d 389, 395 (Ct. App. 2000). The Court held that a trial court's mere disagreement with the sufficiency of the verdict amount is not a compelling reason for granting additur and reversed the award and reinstated the jury's original verdict of $300,000.00.

HOLDING: The Court affirmed the trial court's decision to deny Ford's JNOV, reversed the decision to deny set-off and reversed the decision to grant additur. The Court reinstated the jury's verdict of $300,000.00 and awarded a set-off of $20,000.00.

Horton v. City of Columbia, Op. No. 5200 (Ct. App. Feb. 26, 2014)

On September 9, 2009, the Roly Poly restaurant in downtown Columbia, South Carolina, was broken into after someone threw a cinder block through the glass door and subsequently pushed through the glass to gain entry. During the course of the investigation by the Columbia Police Department ("CPD"), a partial print was lifted from the glass which returned twenty possible matches. Upon further investigation by three officers, Horton was identified as the most probable match.

The lead investigating officer contacted Horton's probation officer in Bennettsville, South Carolina, and advised him that the CPD was seeking a warrant for Horton's arrest. Horton's probation officer advised the CPD that he had doubts regarding Horton's involvement in the crime based on her limited transportation and the recent birth of her third child. Nevertheless, on September 17, 2009, a warrant was issued for Horton's arrest for second-degree burglary and petit larceny. The CPD officer did not mention the reservations of Horton's probation officer in requesting the warrant. The next day, Horton turned herself in and was transported to the detention center in Columbia. Horton was not fingerprinted at the time of her arrest or the subsequent three days. On September 21, 2009, Horton was fingerprinted and the print was examined by the CPD and the South Carolina Law Enforcement Division ("SLED"). Authorities were unable to confirm a match for the prints and Horton was immediately released.

Horton subsequently filed suit for false arrest, false imprisonment, malicious prosecution, negligence, and assault and battery. The City of Columbia ("the City") moved for summary judgment as to all causes of action, which was granted in full by the circuit court. Horton appealed.

On appeal, the City argued that summary judgment should be affirmed based on the two-issue rule. "Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). In this case, the circuit court considered whether there was probable cause to arrest Horton in deciding to grant summary judgment. Additionally, the circuit court addressed the City's Tort Claims Immunity argument as an additional sustaining ground. The Tort Claims Immunity Act, Subsection 15-78-60(5) of the South Carolina Code (2005), precludes liability by a governmental entity for a loss resulting from the exercise of discretion or judgment by a governmental employee, or the performance or failure to perform any act or service that is in the discretion or judgment of the employee. The Court noted that Horton made no mention of Subsection 15-78-60(5) or the Tort Claims Act in her appellate brief and, therefore, sustained the circuit court's granting of summary judgment with respect to the negligence, false arrest/imprisonment, and malicious prosecution causes of action under the two-issue rule.

Regarding Horton's assault and battery cause of action, the Court first addressed whether a police officer can be liable for an unlawful arrest, even in the absence of excessive force. The Court concluded that South Carolina is in the minority of jurisdictions where an unlawful arrest can support a claim for assault and battery, even in the absence of excessive force. *State v. McGowan*, 347 S.C. 618, 623, 557 S.E.2d 657, 660 (2001). The Court then addressed whether Horton's arrest was lawful. In its analysis, the Court cited *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2008), which states "the fundamental issue in determining lawfulness of an arrest is whether there was probable cause…probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise." Horton argued that there was no probable cause for her arrest because the officer requesting the arrest warrant omitted information regarding her transportation issues and the recent birth of her child. The Court addressed acts of omission in which exculpatory material is left out of an affidavit under *Franks v. Delaware*, 438 U.S. 154 (1978); *see also State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). "There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." *Id*. The Court also stated that a party alleging information was intentionally or recklessly omitted from an arrest warrant affidavit "bears a heavy burden of proof." *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008).

The Court agreed with the circuit court that Horton offered no proof that the officer omitted information with the intent to mislead in obtaining the arrest warrant and, therefore, Horton was not entitled to a Franks hearing. The Court then reviewed the officer's affidavit and the arrest warrant without the inclusion of the contested information and determined that there was probable cause for Horton's arrest.

HOLDING: The Court affirmed summary judgment in favor of the City as to Horton's claims for false arrest/imprisonment, malicious prosecution, and negligence based on the two-issue rule. The Court affirmed summary judgment in favor the City as to Horton's claim for assault and battery based on Horton's failure to meet the high burden of proving the intentional or reckless omission of information from the investigating officer's affidavit in requesting the warrant.

Verdict Reports

Type of Action: Medical Malpractice

Name of Case: *Betty Hazel v. William H. Lynch, M.D.*
Court: Charleston County Court of Common Pleas
Case number: 2010-CP-10-9713
Name of Judge: The Honorable J. C. Nicholson, Jr.
Amount: Defense Verdict
Date of Verdict: October 11, 2013
Attorneys for defendant: Molly H. Craig, Jennifer F. Nutter and Brian E. Johnson of Hood Law Firm, LLC, Charleston, SC

Description of the case: The Plaintiff sued her husband's general surgeon for negligently perforating the bowel during a routine abdominal procedure and failing to discover the perforation for four days resulting in septic shock and peritonitis. Following the second surgery to repair the perforated bowel, the Decedent went into heart failure and kidney shutdown, requiring dialysis. Once resuscitated, the Decedent was on a ventilator for approximately one month. The Plaintiff alleged ongoing medical problems for twenty (20) months related to the sepsis requiring additional surgeries and hospitalizations.

The defense presented testimony from Defendant, expert physicians, and two treating surgeons who testified a bowel perforation is a known complication of any abdominal procedure that can occur in absence of medical negligence. The Defendant also proved the injury was timely recognized and fixed. Additionally, the Defendant proved that all subsequent medical care for twenty months prior to the death were related to a condition unrelated to the bowel perforation.

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

2014

Spring

TRIAL ACADEMY

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Summer

SUMMER MEETING

July 24-26

The Grove Park Inn

Asheville, NC

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Fall

ANNUAL MEETING

November 6-9

Pinehurst Resort

Pinehurst, NC

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