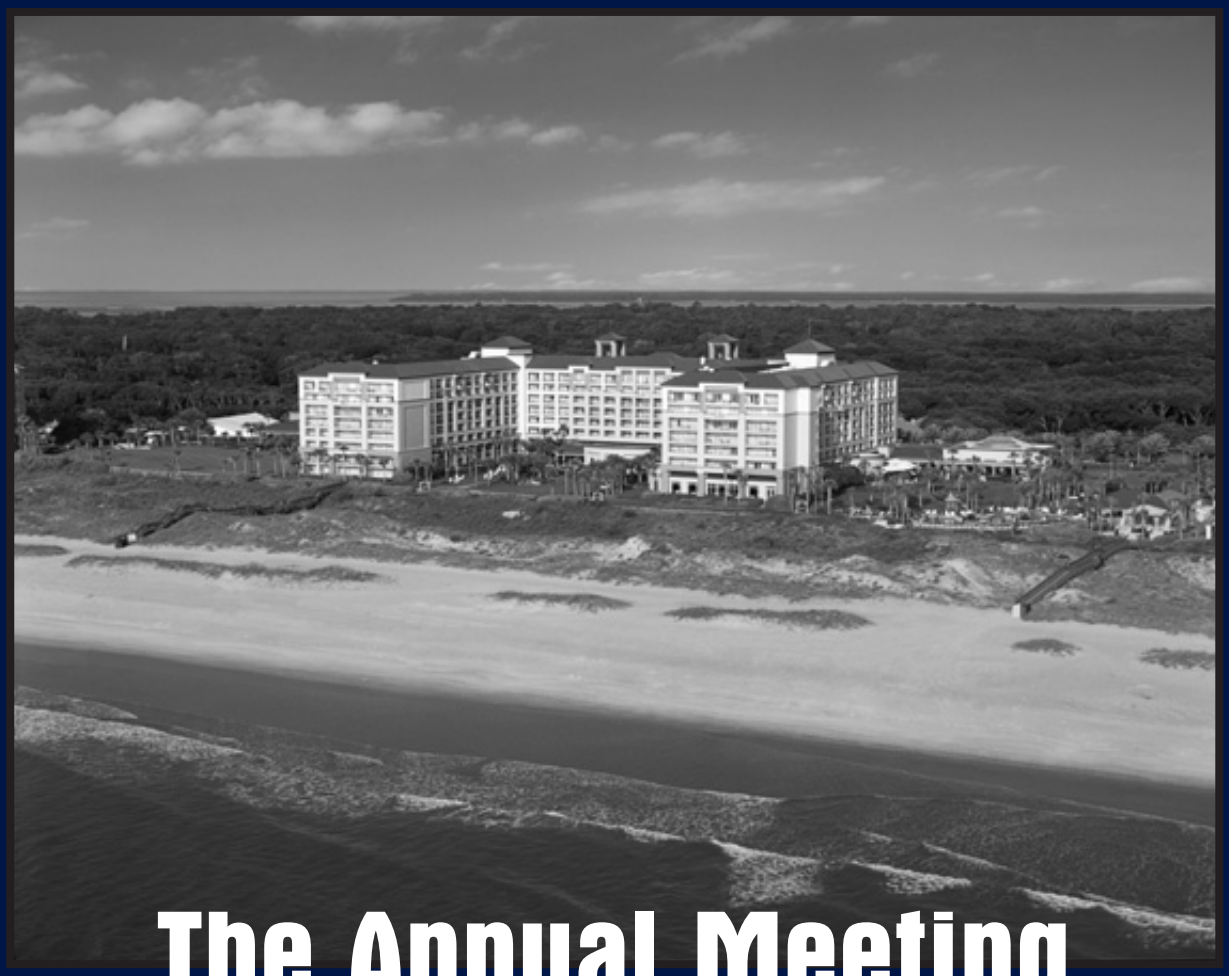
SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



The Annual Meeting
Amelia Island, Florida
November 13 – 16

http://www.scdtaa.com

President's Message

by Donna S. Givens

It seems that Fall is upon us. As you will read below, your Association has been very busy during these Summer and early Fall months. Lest you think that it's all about our meetings and such, I am sure that most would admit it was hard to ignore the 2008 Beijing Summer Olympics. And, of greater historic significance, we had barely turned from winners and losers in the sport, than we were in the thick of the sparring of the Presidential Election. We've since watched, waiting to see whose dreams will come true, and whose will be lost in the most memorable Presidential Election of most of our lives to date. So, while we have no idea who will prevail, we can get out and exercise our right to vote. While the pundits and spinners wear us out with their polls and make us dizzy with their spinning, this election, though undecided now, will be determined by the time we meet at Amelia Island in November. Whether we inaugurate the country's first woman as a Vice President or the first African American as a President, we cannot deny that this will be among the most significant developments of our lifetimes thus far.

Both leading up to and in the midst of this, your SCDTAA is energized and full of great ideas. At times, we have been called into action, as when your Association was heavily involved with supporting adoption of an Expert Witness rule about which the Association submitted written comments and spoke at the hearing before the Supreme Court on the adoption of the rule. Our ability to band together for our common good is what makes us better and stronger. In that vein, I am proud to announce and to thank the Membership Committee Chair Sterling Davies, and his Co-Chair Johnston Cox for using their time, effort, sweat and good advocacy to increase our membership to well over 1000 members.

We enjoyed a successful Trial Academy in Greenville thanks to the tireless efforts of Committee Chair Matt Henrikson, and his Co-Chairs, Bill Besley, Alan Lazenby and Sterling Davies, who pulled together an agenda that resulted in the longest waiting list in our recent history. As always, a special thanks goes to the judges who so kindly gave of their time to preside over the mock trials and to provide constructive commentary for the Trial Academy lawyers.

We concluded a successful Joint Meeting between our membership and the Claims Managers Association of South Carolina. Participation was increased by both groups. Our substantive and social programs were outstanding, truly one that was fun for all ages. Thanks to Committee Chair Molly Craig, and her Co-Chairs, Mitch Griffith and Anthony Livoti for their hard work.

We have had much ongoing with our Legislative Committee and, thanks to the efforts of Chair Eric Englebardt and his Co-Chair David Anderson, we are well abreast of the developments. Instead of reacting, we are now prepared in advance. We enjoyed excellent Judicial Receptions thanks to the efforts of Chairs Catherine Templeton and Glenn Elliott.

In closing, please take time to peruse the agenda you received for our Annual Meeting set for November. Annual Committee Chair Curtis Ott, and his Co- Chairs Ron Wray, Hugh Buyck and Wendy Keefer have worked extremely hard, and we look forward to a great time. A large number of state and federal judges are already registered so come down and mingle with them.

By pulling together, we accomplished much thus far, and we have time yet to do more. As always, I encourage and invite you to contact me with any and all concerns you have about this great Association. Please remember that it is only through our willingness to communicate, and to address the good and the bad, that we can continue to grow and to further the exemplary efforts of the many who have worked to bring us this far.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

Letter From The Editors

by Wendy J. Keefer and Erin D. Dean

"You have to spend money to make money." This old adage is familiar to most of us. In the law, it is often more accurately stated, "you have to spend money to save money." Just as the basic economic premise is difficult to understand and even more difficult to implement, so too is the legal premise difficult for our clients. Where the economy is or appears to be in a down cycle – whether due to true economic instability, market corrections or mere investor and consumer perception – returning to these basic principles is key.

Businesses and individuals cannot often weigh the risks fully when determining whether to spend money – whether for preventive legal advice or to pursue a particular litigation strategy – on legal services. Indeed, it is our expertise as lawyers that is necessary to guide such decisions. In tough economic cycles, it is even more important, yet more difficult, to keep these basic economic principles in mind. We can provide an invaluable service to our clients by ensuring they have all the information required to make intelligent decisions about how to spend their perhaps now restricted funds.

News about the economy impacts more than the actual position of individual businesses, stocks or markets. Instead, economic news itself can change how money is allocated or spent. And, though saving money or ensuring sufficient liquid assets is crucial during economic down cycles, shortsightedness poses a unique risk. Deciding now not to spend funds on sound legal advice can result in significant costs down the road. As lawyers, it is our job and responsibility to educate our clients in this regard. Though seemingly self-serving, the reality is that legal dollars spent wisely today may actually reduce legal fees incurred later. Thus, contrary to increasing our overall intake, wise legal decisions can ultimately result in lower total legal costs.

With news of the economy seemingly bleak, now is the time to let clients know what they can do to protect themselves from less certain legal liabilities. Few can dispute that acting without legal input only later to find some legal error, no matter how inadvertent, creates risks the cost of which cannot typically be accurately calculated. What can be calculated is the cost that could be incurred to prevent or at least lessen the chance of risks of legal error.

But informing clients of how to deal with tight economic times is only part of the solution of protecting economic viability. Just like our clients, our law firms must also make decisions taking economic conditions into account. What better way to shore up stability among our member law firms than to share ideas with one another about best practices for cutting costs while continuing to provide top notch legal service. This cooperation and sharing of information is exactly the focus of participating in this association.

We share our experiences to the benefit of us all as defense attorneys. And, with a presidential election right around the corner followed by our own Annual Meeting, the timing could not be better for us to come together, share our experiences, remind ourselves of the value of our profession, and simply relax together. We hope to see all of you at this meeting and look forward to the close of one year and the start of another in which defense attorneys continue to rise to the highest levels of client and community service, serving the interests of both in good and in not so good economic times.

Wendy J. Keefer

Erin D. Dean

For All Those Interested in Associate Retention Issues:

FEDERATION OF DEFENSE AND CORPORATE COUNSEL RELEASES WHITE PAPER ON ASSOCIATE RETENTION

The Federation of Defense and Corporate Counsel released its publication of a significant White Paper on the issue of Associate Retention: Finders and Keepers: How to Attract and Retain Top-Level Associates. This White Paper is the result of a year-long study which included an extensive survey of law firm management and associates. The White Paper lays out the scope of the problem of associate retention and suggests solutions for increasing associate retention. It concludes with a list of Best Practices which should be of assistance to firms in addressing issues relating to Associate Retention. The entire White Paper can be downloaded by going to: www.thefederation.org and clicking on the Associate Retention link.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

The SCDTAA Docket

Defense Verdict in Medical Malpractice Case

On September 5, 2008, Molly H. Craig, James B. Hood, and Elizabeth W. Ballentine of the Hood Law Firm, obtained a defense jury verdict in the Greenville County Court of Common Pleas. The plaintiffs sought damages for claims of professional negligence in connection with an alleged failed surgical procedure.

Plaintiff underwent an overlapping sphincteroplasty for complaints of fecal incontinence. She underwent surgery in December 2006 and the operating physician wrote an order for the covering physician to remove the packing inserted at the surgical site. Defendant was the covering physician who changed the order to have a nurse remove the packing. The plaintiff was discharged with the packing in place. Six days after discharge, the operating physician removed the packing. Plaintiff alleged that the packing caused an infection which resulted in a failed surgical procedure. Plaintiff further alleged the failed repair resulted in complete incontinence to stool and flatus and severe emotional problems. Plaintiff had a subsequent sphincteroplasty at the Cleveland Clinic which was deemed a success.

Prior to the trial, Plaintiff made a demand of $750,000.00. Timothy E. West, M.D. (Charleston) and Jose Albert, M.D. (Columbia) were experts for the Defense. *Julie A. Waltz v. James A.Robbins, M.D., Greenville Colon & Rectal Associates, P.A.* 07-CP-23-3901.

Nexsen Pruet Secures $107 Million Settlement in Textile Price Fixing Case

SCDTAA Members Dennis Lynch, Travis Wheeler and Kristian Cross participated in the Antitrust Practice Group that recently settled federal claims against Hoechst Celanese Corporation and its affiliated entities for $107 million in a case involving allegations that the company and other major suppliers of polyester staple fiber conspired to fix prices and allocate customers. Nexsen Pruet represented 17 textile and carpet companies in North and South Carolina and Georgia. The settlement came shortly before the start of trial on June 2, 2008.

Since 2004 Nexsen Pruet led the case against Hoechst, which by the end of 2005 was the only defendant that had not settled. In addition to establishing evidence of the conspiracy, the Nexsen Pruet team of attorneys was able to prove that Hoechst knowingly sat on hundreds of thousands of pages of relevant documents. Initially, the company produced only 220 pages of records, claiming all its business documents had been transferred to Arteve/KoSa when its U.S. and Mexican polyester assets were sold to that company.

In June 2006, the court found Hoechst guilty of discovery abuse and allowed Nexsen Pruet to engage in discovery regarding Hoechst's document productions. After Nexsen Pruet deposed six present and former in-house Hoechst lawyers and the lead lawyer at its two outside law firms, Hoechst was forced to admit that it had continually misrepresented the facts about its documents to the court and to plaintiffs since June 2003. On November 16, 2006, U.S. District Judge Richard L. Voorhees found Hoechst guilty of serious discovery abuse and required the company to pay the plaintiffs more than $110,000.00 for attorneys' fees and costs incurred on the discovery issue. Hoechst ended up producing more than 750,000 pages of relevant documents that it had claimed for years no longer existed. Three days before the trial was scheduled to begin, Hoechst settled and agreed to pay $107 million to resolve the claims of the 22 plaintiffs. Nexsen Pruet's clients obtained approximately $56 million.

Collins & Lacy Founder Selected to Speak at ABOTA Conference in Lisbon Portugal

Collins & Lacy, PC founder, Joel W. Collins, Jr., was a featured speaker at the recent American Board of Trial Lawyers conference in Lisbon, Portugal. The ABOTA-sponsored conference, *Judges and Attorneys in Interaction: The Commonalities and the Differences in Portuguese and American Legal Systems*, was conducted on May 14th at the auditorium Cardenal Medeiros at the Catholic University Law School in Lisbon. Mr. Collins, President of the ABOTA Foundation, spoke with a translator on the topic *Benefits of a Jury System*. He began his presentation by saying that " Jury trials in America are not merely a custom or tradition. Jury trials are a cherished and precious American Right." He continued by outlining the development of the jury trial system by our founding fathers, quoting Thomas Jefferson who once stated, " I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its Constitution." He went on to explain the jury selection process, including the compilation of the jury venire.

Collins & Lacy Attorney Selected for *The Best Lawyers in America*

Collins & Lacy, PC attorney, Jack D. Griffeth has been selected for inclusion in the 25th anniversary edition of *The Best Lawyers in America*. Mr. Griffeth has been selected for his work in Alternative Dispute Resolution.

Collins & Lacy Associate Awarded by Rotary Club of Five Points

Collins & Lacy, PC is pleased to announce that Rebecca K. Halberg, an associate with the firm, was recently named as the co-winner of the Charles C. Foster Rotarian of the Year awarded by the Rotary Club of Five

Continued on next page

Points. The award is named after the Rotary Club of Five Points' first president, Charles C. Foster. In addition, she was awarded a Certificate of Achievement for her role in raising money and awareness for Alzheimer's research.

Ms. Halberg is an associate who joined the firm in 2006 practicing in workers' compensation. She received her undergraduate degree in Journalism and Mass Communication from the University of North Carolina at Chapel Hill before earning her Juris Doctor from the University of South Carolina. In addition to her volunteer work with the Rotary Club of Five Points, she is also an active volunteer for Children's Chance in Columbia.

Chief Justice Toal and Ed Mullins to Serve on Prestigious Legal Board

South Carolina Supreme Court Chief Justice Jean Toal and Nelson Mullins Riley & Scarborough Partner Ed Mullins will serve terms on the Board of Trustees of The American Inns of Court Foundation, America's oldest, largest, and fastest growing mentoring organization. Chief Justice Toal serves on the board in her capacity as immediate past chair of the National Center for State Courts (NCSC) and as immediate past president of the Conference of Chief Justices. Mr. Mullins, who also serves on the NCSC board alongside Chief Justice Toal, was elected to represent the Fourth Judicial Circuit.

Firmly rooted in the noble 800 year-old tradition of the Inns of Court in England, the American Inns exists to supplement the academic and technical training of American lawyers through the time-honored English tradition of practice of "pupillage"-the sharing of wisdom, insight and experience of seasoned judges and lawyers with newer practitioners.

Chief Justice Toal began her service as an Associate Justice on the Supreme Court of South Carolina in March 1988. She was re-elected in February 1996 and was installed as Chief Justice in March 2000 for the balance of the term of her predecessor. She was re-elected again in February 2004 and was installed as chief Justice in June 2004 for a 10-year term. Chief Justice Toal received the South Carolina Trial Lawyers Outstanding Contribution to Justice Award in 1995 and the prestigious Margaret Brent Women Lawyers of Achievement Award from the American Bar Association's Commission on Women in the Profession in 2004.

Mr. Mullins history of service on the state and national level includes his prior service as President of the S.C. Defense Trial Attorneys' Association and DRI, the Defense Research Institute and Trial Lawyers Associations, and the Lawyers for Civil Justice. He has served on the board of directors of the Federation of Defense and Corporate Counsel and the Product Liability Advisory Council as well as the Board of Regents of the American College of Trial Lawyers.

Appellate Academy Elects Nelson Mullins Partner Mitch Brown to Membership

The American Academy of Appellate Lawyers has unanimously elected Nelson Mullins Riley & Scarborough Partner C. Mitchell Brown to membership in the prestigious organization.

The American Academy of Appellate Lawyers was founded in 1990 to recognize outstanding appellate lawyers and promote the improvement of appellate advocacy and the administration of the appellate courts. Academy membership is by invitation only and is open to a person who possesses a reputation of recognized distinction as an appellate lawyer. To be eligible for membership, a nominee's practice must have focused substantially on appeals during at least the last 15 years. Academy membership is limited to 500 members in the United States. There are currently fewer than 300 Fellows in the Academy nationwide.

Nelson Mullins Partner to Receive DRI Lifetime Professional Achievement Award

Nelson Mullins Riley & Scarborough Partner Ed Mullins will receive the DRI Lou Potter Award for lifetime professional achievement, at the DRI Annual Meeting in New Orleans on October 23. This is DRI's most prestigious award and Mullins will become only the thirteenth lawyer in the country to receive this recognition. This award recognizes Ed's leadership in the defense Bar and the community. Mullins is a past President of the South Carolina Defense Trial Attorneys' Association, DRI, and Lawyers for Civil Justice. He currently serves on the board of Directors of the National Center for State Courts and the Board of Directors of the American Inns of Court.

45 Nexsen Pruet Attorneys Selected for *Best Lawyers*

Forty-Five Nexsen Pruet attorneys will be included in the 2009 edition of *The Best Lawyers in America*. The publication also ranks Nexsen Pruet #1 in eleven practice areas in South Carolina and three in North Carolina. The South Carolina attorneys on the list are as follows:

Charleston: Molly Hughes Cherry, Labor and Employment Law; Paul A. Dominick, Bet-the-Company Litigation, Commercial Litigation; J. David Hawkins, Corporate Law; Harold W. Jacobs, Commercial Litigation; Neil C. Robinson, Jr., Real Estate Law; Thomas S. Tisdale, Jr., Commercial Litigation, First Amendment Law; Bradish J. Waring, Commercial Litigation.

Columbia: Michael T. Brittingham, Employee Benefits Law; Henry W. Brown, Construction Law; Russell T. Burke, Commercial Litigation; David E. Dubberly, Labor and Employment Law; Victoria L. Eslinger, Family Law, Labor and Employment Law; William H. Floyd, III, Labor and Employment Law; Jay Hennig, III, Corporate Law, Securities Law; Timothy L. Hewson, Health Care Law; Fred L. Kingsmore, Jr., Tax Law, Trusts and Estates; William Y. Klett, III, Intellectual Property Law; Mark Knight, Corporate Law, Mergers & Acquisitions Law, Securities Law; W. Thomas Lavender, Jr.,

Environmental Law; Alan M. Lipsitz, Banking Law, Public Finance Law; W. Leighton Lord, III, Real Estate Law; Burnet R. Maybank, III, Tax Law; Susan P. McWilliams, Labor and Employment Law; Rick Mendoza, Jr., Bankruptcy and Creditor-Debtor Rights Law; Edward G. Menzie, Corporate Law, Mergers & Acquisitions Law, Real Estate Law, Securities Law; William G. Newsome, III, Trusts and Estates; Julian J. Nexsen, Trusts and Estates; Samuel F. Painter, Workers' Compensation Law; R. Kent Porth, Employee Benefits Law; Matthew B. Roberts, Health Care Law.

Greenville: E. Grantland Burns, Labor and Employment Law; Leon C. Harmon, Environmental Law; Russell T. Infinger, Workers' Compensation Law; Michael S. Pitts, Labor and Employment Law; Thomas L. Stephenson, Alternative Dispute Resolution, Labor and Employment Law; and B. Joel Stoudenmire, Trusts and Estates.

Richardson, Plowden & Robinson named #1 in South Carolina for Construction Law

The 2009 edition of *The Best Lawyers in America* has ranked Richardson Plowden Attorneys at Law number one in South Carolina for Construction Law. Additionally, four of the Firm's attorneys have been selected as Best Lawyers: Frederick A. Crawford, Health Care Law; Francis M. Mack, Commercial Litigation and Construction Law; Frank E. Robinson, II, Real Estate Law; and Franklin J. Smith, Jr., Construction Law.

American Heart Association Recognizes Richardson Plowden

The attorneys and staff of Richardson, Plowden & Robinson, P.A. opened their hearts and wallets for this year's American Heart Association 2008 Start! Midlands Heart Walk held in March 2008. The law firm was recognized by the American Heart Association as the "Littlest Company with the Biggest Heart," an awarded given to the organization who has shown the most enthusiasm for raising funds and participating in the walk.

Richardson Plowden collected more than $4,250.00 to contribute to the fight against heart disease. The Firm also won first place for the highest monetary donation by a company with less than 100 employees, and second highest participation by employees of a company its size.

Willcox, Buyck & Williams Partner Receives Honorary Degree

Mark W. Buyck, Jr. of the law firm of Willcox, Buyck & Williams of Florence and Surfside received an honorary Doctor of Laws degree from the University of South Carolina at the spring graduation. He was also the commencement speaker at the USC Law School graduation exercises.

He is a past President of the South Carolina Defense Trial Attorneys' Association and received the Robert W. Hemphill award in 1997. He is a member of the American College of Trial Lawyers and the American Board of Trial Advocates as well as numerous other professional organizations.

McAngus Goudelock & Courie's Commitment to "Practicing Green" Recognized by the American Bar Association and EPA

Based on its commitment to environmental sustainability through the WasteWise Program, McAngus Goudelock & Courie has been recognized as a Law Office Climate Challenge Partner, an honor founded through the collaborative efforts of the American Bar Association (ABA) and the Environmental Protection Agency (EPA). To be recognized as a Law Office Climate Challenge Partner, MG&C must implement two of three Best Paper Practices promulgated by the ABA. These practices include purchasing office paper with at least 30% recycled content, recycling discarded office paper or using double-sided copying and printing for drafts and internal documents. In addition to the traditional goals of reducing, reusing and recycling, MG&C has committed to purchasing environmentally friendly products; conserving energy, water and natural resources; and utilizing tele- and video-conferencing for internal and external meetings in light of pressing energy concerns.

Collins & Lacy Opens Myrtle Beach Office

The law firm of Collins & Lacy, P.C. is pleased to announce that it has opened a new office in Myrtle Beach, South Carolina effective September 18, 2008. Collins & Lacy currently has other offices in Columbia and Greenville and is among the fastest growing firms in South Carolina. The firm's expansion into the Myrtle Beach area signifies its commitment to the strategic expansion of the firm to more effectively serve its clients throughout the entire state of South Carolina.

Nexsen Pruet Announces New Attorneys

Nexsen Pruet is pleased to announce that Cherie W. Blackburn has joined the firm as a Partner in its Charleston office where she will practice with the employment and labor law group. Ms. Blackburn is a leading Charleston attorney with more than 20 years of experience in employment and business litigation. She has been recognized for her work and is listed in *The Best Lawyers in America*.

"Cherie Blackburn is an experienced employment attorney, a leader highly respected in the community, and a class act in all respects," says board member Neil Robinson of Nexsen Pruet's Charleston office. "Nexsen Pruet is delighted and honored to have Cherie join us where she will complement our established employment practice." Ms. Blackburn is a certified mediator in federal and state court and is an arbitrator in the Court of Common Pleas for Charleston County. She is a member of numerous professional organizations and has held leadership positions which include serving in the South Carolina Bar's House of Delegate and on the board of directors of the Women Lawyers Association.

Ronald B. Cox has joined the Columbia office of Nexsen Pruet as Special Counsel in the business litigation practice group. Cox is an experienced litigator who has concentrated his practice in the areas of civil litigation, product liability, toxic torts, and construction litigation. Cox is a member of the Richland County Bar Association, the South Carolina Bar, the Defense Research Institute and the South Carolina Defense Trial Attorneys' Association.

PROPOSED BY-LAW CHANGES

SCDTAA Proposed By-Law Changes

Strikethrough indicates deletion and underline indicates insertion

ARTICLE I

NAME:

The organization shall be named "South Carolina Defense Trial Attorneys' Association".

ARTICLE II

PURPOSE:

The purpose of this Association shall be to bring together by association, communication and organization, lawyers and corporate counsel of South Carolina who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense; to provide for the exchange among the members of this association of such information, ideas, techniques or procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers and corporate counsel, to elevate the standards of trial practice in this area and, in conjunction with similar associations in other areas, to develop, establish and secure court adoption or approval or a high standard code of trial conduct and courtroom manner; to support and work for the improvement of the adversary system of jurisprudence in our court; to work for the elimination of court congestion and delays in civil litigation; and in general to promote improvements in the administration of justice and to increase the quantity and quality of service and contribution which the legal profession renders to the community, State and nation.

~~Lobbying and legislative~~ **Legislative** activities shall be limited solely to furthering the specific purposes of the South Carolina Defense Trial Attorneys' Association as set forth hereinabove ~~and as contained in the bylaws of the organization~~..

It is understood and contemplated herein that said activities may from time to time require the Association to act in coalition with other organizations for or against legislation within the purview of the Association's stated interest. However, the South Carolina Defense Trial Attorneys' Association does not intend to act ~~as a lobbyist solely for~~ **in** the interest of any other organization or person.

Political contributions shall be made for the sole purpose of supporting candidates for election to public office who will support legislation that is in accordance with the stated purpose of the organization and the ~~lobbying and~~ legislative policy set forth hereinabove.

ARTICLE III

QUALIFICATIONS FOR MEMBERSHIP:

Those persons shall be qualified for membership who (1) Are members in good standing of the South Carolina Bar; or are Corporate Counsel who maintain their office in South Carolina and are admitted to a state bar in the United States; (2) Are actively engaged in the private practice of civil law, **are employed** as corporate counsel, or are employed by governmental bodies; and (3) Individually devote a substantial portion of their time in litigated matters to the defense of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or (b) the representation of management in labor disputes.

Application for membership must be made upon a form provided by the Secretary or the association administrator and submitted to the Secretary, who shall then refer the application to the Membership Committee. A check for annual dues, in an amount fixed by the Executive Committee, shall accompany the application.

Life Membership shall be granted to applicants who have held membership in the South Carolina Defense Trial Attorneys' Association for twenty (20) consecutive years and have retired from full-time legal practice. Life membership status will grant all rights and privileges awarded any other members, however the Life Member's annual dues will be waived. Application forms for life membership will be available upon request by the member.

Law students of ~~the University of South Carolina~~ **accredited law schools located in South Carolina** who are members in good standing of the student division of the Association shall be qualified as "Student Members" of the Association.

ARTICLE IV

OFFICERS:

The officers of the Association shall be a President, a President-Elect, a Treasurer and a Secretary.

ARTICLE V

EXECUTIVE COMMITTEE:

There shall be an Executive Committee which shall consist of the officers, the immediate past-president, one past president (referred to as "past president committee member") whose term of office expired more than five years prior to election, and a minimum of fifteen executive committee members made up of two representatives from districts as set forth herein and three at large executive committee members. For the purposes of the election of ~~officers~~ **members** of the Executive Committee, the districts shall have those boundaries set forth in Appendix A. Each district shall have one additional member of the Executive Committee for each 100 members of the Association in the District. ~~Sixty percent (60%)~~ **Fifty percent (50%)** of the members of the Executive Committee shall constitute a quorum. The ~~s~~**S**tate ~~chairman~~ **Representative** of the Defense Research Institute shall be an ex-officio member of the Executive Committee provided this person is a member of the Association in good standing. The chairperson of the SCDTAA'S Young Lawyers Division shall be an ex-officio member of the Executive Committee. The ~~corporate~~ **Corporate** ~~counsel~~ **Counsel** ~~section's~~ **Section's** chairperson or designated representative shall be a voting member of the ~~executive~~ **Executive** ~~committee~~ **Committee**.

ARTICLE VI

ELECTION OF OFFICERS AND TERMS OF OFFICE:

The election of officers shall take place at the Annual Meeting of the Association, the date to be determined by the Executive Committee. Officers shall be elected by a majority vote of the members present. The members of the Executive Committee who are not officers, ~~or~~ the immediate past-President**,** or the past President committee member shall be elected in the same manner. The past President committee member shall be elected annually by majority vote of the Executive Committee and shall serve a one year term, not to exceed three consecutive terms.

The terms of each officer and member of the Executive Committee shall begin on the date of election and end on the election of his or her successors. No person shall be eligible to succeed himself or herself as President except as provided in Article VII.

The term of each member of the Executive Committee who is not an officer**, the past President committee member,** or ~~an~~ **the** immediate past-president shall be three years. One-third of these shall be elected at each annual meeting. Vacancies in office, other than the President and President-Elect, shall be filled by the Executive Committee. **In the event of the death, disability or resignation of any officer, the officers remaining shall assume any vacant position of the person next higher in the rotation of the officers. The Executive Committee may then appoint a member to serve the remaining term of the Secretary until the next Annual Meeting. At that time an election shall be held under the usual procedure for all officer positions.**

ARTICLE VII

DUTIES OF THE OFFICERS:

THE PRESIDENT shall preside at all meetings of the Association and of the Executive Committee**, if present**. The President shall, with the assistance of the Secretary, present to each meeting of the Association and of the Executive Committee an agenda of the matters to come before such meeting. The President shall perform such other duties and acts as usually pertain to his or her office and as may be prescribed by the Association and/or the Executive Committee.

THE PRESIDENT-ELECT shall succeed to the office of President upon the expiration of the President's term or upon the President's death, disability, or resignation. In the event of succession to the office of President by reason of death, disability or resignation of the incumbent, the President-Elect shall serve out the remainder of that term and the term for which he was elected. While serving as President-Elect, he or she shall assume the duties of the President upon the President's request or when the President is absent or otherwise unable to perform the duties of his or her office.

THE TREASURER shall be the custodian of all books, documents, funds and other property relating to the financial aspects of the Association. The Treasurer shall perform the usual duties of a treasurer in associations of this kind: collect dues, keep accounts and except for current expenses shall disburse the money of the Association only upon direction of the Executive Committee of the Association at every meeting of the Association and of the Executive Committee. If required by the Executive Committee, the treasurer shall have a good and sufficient bond for the performance of his or her duties.

THE SECRETARY shall be custodian of all books, papers, documents and other records of the Association. The Secretary shall keep a true record of the proceedings of the Association and the Executive Committee and do and perform all acts usually pertaining to his or her office and as may be prescribed by the Association and/or Executive Committee--all under the supervision and direction of the Executive Committee. ~~He~~ **The Secretary** shall make reports of the Association's activities at every meeting of the Association and of the Executive Committee.

Continued on next page

PROPOSED BY-LAW CHANGES

ARTICLE VIII

MEETINGS:

The Association shall meet annually at such time and place as the Executive Committee may determine. Special meetings may be called by the President or by a majority of the members of the Executive Committee, upon five days' written notice to the membership.

Those present at any meeting shall constitute a quorum except for the purpose of changing the By-Laws. For the purpose of changing the By-laws, after fifteen (15) days written notice as required in Article XII, those Association members present at the meeting shall constitute a quorum.

ARTICLE IX

COMMITTEES:

The following committees shall be appointed annually by the President, by and with the advice and consent of the Executive Committee: Amicus Curiae Committee, The Defense Line Committee, Judiciary Committee, Legislative Committee, Long Range Planning Committee, Membership Committee, Programs and Conventions Committee, Seminars Committee, Trial Academy Committee, Finance Committee, Ethics Committee, By-Laws Committee and Practice and Procedures Committee. The President shall have the authority to appoint, from time to time, such other standing or special committees as he of she deems advisable. Each standing and special committee shall consist of a number of members to be determined by the President, one of whom, when feasible, shall be a member of the Executive Committee.

A Nominating Committee composed of the immediate past president and at least three (3) other past presidents of the Association, ~~chosen by the President prior to the business meeting~~ **registered and in attendance at the Annual Meeting, with the assistance of any other past presidents registered and in attendance,** shall recommend and report to the membership at the Annual Meeting names of Association members nominated by such Nominating Committee to serve as officers and members of the Executive Committee. In the event of the inability of the immediate past president to serve ~~on~~ **as chairperson of** the Nominating Committee, the past president ~~or past presidents~~ most recently having served as president and available to serve shall ~~be appointed~~ **serve as chair of** ~~to~~ the Nominating Committee. If less than three (3) past presidents are available to serve, the President may appoint other members of the Association in their stead.

ARTICLE X

REMOVAL OF MEMBERS:

A member may be ~~removed or~~ expelled from membership by the Executive Committee or by a majority vote of the Association at any regularly called meeting, for conduct which is adverse to the best interest of the Association. A member shall have the right to a full hearing before the Executive Committee before expulsion. **The decision of the Executive Committee after the full hearing shall be final.**

ARTICLE XI

FISCAL YEAR:

The fiscal year of the Association shall be from January 1 through December 31.

ARTICLE XII

AMENDMENTS:

These By-Laws may be amended or rescinded at any meeting of the Association by an affirmative vote of two-thirds of the members present, provided further, that notice of the proposed change be given by the Secretary to the members by mail at least fifteen (15) days before the meeting at which such action is proposed.

ARTICLE XIII

Upon dissolution of the Association, the assets of the Association must be distributed exclusively to another eleemosynary corporation which is exempt from South Carolina income tax and will in no event inure benefit of any private individual.

Attention Members:

Please submit information for the Expert Witness database on the SCDTAA Website.

Visit
www.scdtaa.com
for more details.

2008 SCDTAA Annual Meeting

November 13 - 16
Ritz Carlton, Amelia Island, FL

Agenda

Thursday, November 13, 2008

3:00 p.m. to 5:00 p.m.
Executive Committee Meeting

4:00 p.m. to 6:00 p.m.
Registration Desk Open

5:00 p.m. to 6:00 p.m.
Nominating Committee Meeting

5:00 p.m. to 6:00 p.m.
Young Lawyer's Meeting

7:00 p.m. to 8:00 p.m.
President's Welcome Reception

Dinner on your own

Friday, November 14, 2008

7:30 a.m.
Registration Desk Open

7:30 a.m.
Coffee Service

8:15 a.m. – 8:30 a.m.
Welcome and Opening Remarks
Donna S. Givens, President SCDTAA

8:30 a.m. – 9:15 a.m.
The New Presidential Administration
Secretary Richard W. Riley, Esq.

Continued on next page

9:15 a.m. – 10:00 a.m.
Judicial Panel on Multi-Week Trial Docket for Ninth, Fourteenth, and Fifteenth Judicial Circuits
Moderator: Graham P. Powell, Esq.

10:00 a.m. – 10:15 a.m.
Break

10:15 a.m. – 11:15 p.m.
Substantive Law Breakouts:
Auto/Torts –
A. Johnston Cox, Esq. & William E. Lawson, Esq.

Managing Partners – Associate Hiring & Retention
James R. Courie, Esq.
Gray T. Culbreath, Esq.
John T. Lay, Jr., Esq.
Moderator: H. Mills Gallivan, Esq.

Products Liability –
Joshua L. Howard, Esq. & John D. Hudson, Jr., Esq.

Workers' Compensation –
Daniel W. Hayes, Esq.

11:15 a.m. – 12:15 a.m.
Federal Judges Panel

12:30 p.m.
Golf Tournament
Played at The Golf Club of Amelia Island

12:45 p.m.
Backwater Fishing

1:15 p.m.
Horseback Riding

1:30 p.m.
Horse Drawn Carriage Historical Tour

3:00 p.m.
Wine Tasting

7:00 p.m.
Oyster Roast and Low Country Boil Dinner

Saturday, November 15, 2008

8:00 a.m.
Registration Desk Open

8:00 a.m.
Coffee Service

8:00 a.m. – 8:30 a.m.
SCDTAA Business Meeting
Open to all SCDTAA Members

8:30 a.m. – 9:30 a.m.
Civility Panel (Ethics Hour)
Moderator: Ronald K. Wray II, Esq.

9:30 a.m. – 9:45 a.m.
"The Courage of a Lawyer" and Introduction of The Honorable Matthew J. Perry
The Honorable John C. Few

9:45 a.m. – 10:15 a.m.
The Civil Rights Movement - Personal Memories
The Honorable Matthew J. Perry

10:15 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11:15 a.m.
Expert Challenges in State Court
Gray T. Culbreath, Esq.

11:15 a.m. – 12:15 p.m.
Women in the Law Panel
Pamela J. Roberts, Esq.

12:15 p.m.
Closing Remarks
Donna S. Givens, SCDTAA President

Afternoon on your own / Hospitality Suite Open

3:00 p.m.
Wine Tasting

5:30 p.m. – 6:30 p.m.
Past President's Reception (invitation only)

7:00 p.m. – 8:00 p.m.
Cocktail Reception

8:00 p.m. – 12:00 midnight
Final Night Dinner & Dancing
(Black Tie Optional)

2008 SCDTAA Trial Academy

by William G. Besley

The 2008 SCDTAA Trial Academy was a grand success. It was held in Greenville, South Carolina, on June 18th through the 20th. Twenty-four of the brightest young civil defense attorneys in our state got to hear some of the most accomplished veteran defense attorneys speak on trial advocacy and defense skills and were able to hone their trial academy skills in a full length trial with live witness testimony and real jurors.

The Trial Academy co-chairmen, Matt Henrikson, Bill Besley, Sterling Davies and Alan Lazenby would like to thank Judges W. Garrison Hill and Timothy L. Brown for outstanding lectures. We would also like to thank members Barron Grier, Bruce Shaw, Marvin Quattlebaum, Jim Hudgens, Becky Laffitte, Doc Morgan, Ellis Johnston and Sam Outten for their lectures and advice on trial advocacy, mediation and our roles as defense attorneys.

The Trial Academy culminated with full length mock trials on Friday at the Greenville County Courthouse. Judges William P. Keesley, J. Mark Hayes, II, Alexander S. Macaulay, Roger L. Couch, J.

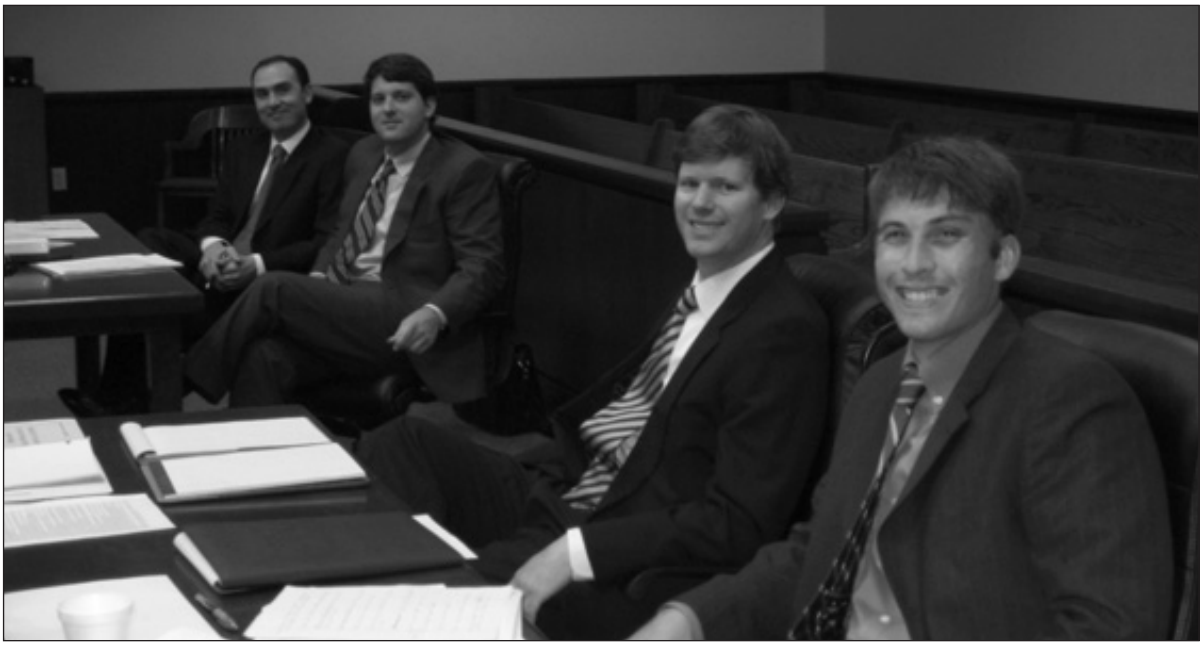
Continued on next page

Derham Cole and Gary E. Clary kindly traveled to Greenville and gave their entire Friday to preside over the trials and provide valuable feedback to the students following the trials. Special thanks are due to 2008 Trial Academy sponsor Ogletree, Deakins, Nash, Smoak & Stewart, not only for their generous sponsorship, but also for the use of their meeting rooms and offices.

The SCDTAA Young Lawyers Division sponsored the Wednesday night social at Larkins on the River. The Thursday night dinner and judicial reception was hosted at the beautiful home of Fred and Judy Suggs.

The students also greatly benefited from the insightful comments and feedback from veteran lawyers Phillip Kilgore, Don Cockrill, Bill Coates, Mills Gallivan, Frank Gibbes, and Heyward Clarkson who served as trial observers.

The Trial Academy Committee would also like to give thanks to the numerous members who served as breakout leaders, witnesses and/or jurors during the Academy and the trials. The Academy participants had an outstanding experience and felt they learned a lot from the speakers and trial opportunity. Next year's Trial Academy will be held in Charleston, South Carolina.



2008 Trial Academy Teams and Results

Plaintiff Team #1 Matt Bogan Allison Moon	**Defendant Team #1** Charles Appleby Carrie Fox ***Defense Verdict***	**Plaintiff Team #4** Jonathan Yarborough Nosi Ralephata	**Defendant Team #4** Amy Neuschafer Matt Whitehead ***Defense Verdict***
Plaintiff Team #2 Jared Garraux Mike Freeman	**Defendant Team #2** Todd Carroll Amanda Morgan ***Defense Verdict***	**Plaintiff Team #5** Jason Reynolds Steven Johnson	**Defendant Team #5** Kassi Sandifer Walker Wilcox ***Defense Verdict***
Plaintiff Team #3 Jeremy Hodges Jake Kennedy ***Plaintiff's Verdict***	**Defendant Team #3** James Floyd Trey Watkins	**Plaintiff Team #6** Geoff Gibbon Jonathan Dunlap	**Defendant Team #6** Travis Vance Melinda Powers ***Defense Verdict***

2008 SCDTAA and CMASC Joint Meeting Revisited

by Anthony W. Livoti

The Grove Park Inn Spa and Resort served as the beautiful backdrop for the Joint Meeting of the S.C. Defense Trial Attorneys' Association and the Claims Management Association of South Carolina July 24th through 26th . The theme of this year's meeting was "From Here to Eternity: The Life of a Lawsuit," and focused on aspects of trial tactics and case management. The meeting kicked off Thursday night with the Welcome Reception and Silent Auction, with proceeds going to South Carolina Bar Foundation's Children's Fund and the Wills for Heroes Program. Thanks to the generous support of our members and others around the state, the auction raised over $10,000 to these worthwhile causes. Drew Butler, assisted by Paul Greene and Ryan Earhart, headed up this effort and the results showed how much work went into this great night.

Friday morning started with a panel discussion on the new Business Courts in South Carolina. Gray Culbreath moderated the panel and Judges Michelle Childs, Roger Young and Edward Miller spoke on the new Business Courts pilot program and how it can be used for resolving business disputes quickly and efficiently. David Kibler and John Massalon talked about the transition from claims investigation to litigation and noted several areas of concern for adjusters and attorneys alike. Karl Brehmer and Gene Covington gave an entertaining and spirited discussion on opening statements from the defense and plaintiff perspective. John Lay analyzed the potential pitfalls to vetting and hiring experts, as only John T. can. Despite some "technology challenges," Jamie and Bobby Hood showed the benefits of using technology for demonstrative evidence at trial. Attendees filled their Friday afternoon with visits to the world-class spa, playing in the golf tournament at Donald Ross' Grove Park Golf Course, whitewater rafting, or trips into beautiful Asheville. The weather was wonderful for an afternoon of leisure. Friday night marked the return of "Bluegrass, Bluejeans, and Barbeque" at the Grove Park Country Club. Attendees enjoyed gorgeous mountain weather, great food, and a spectacular fireworks display.

At the Saturday SCDTAA Business Meeting, members were updated on the hard work of the Executive Committee and several upcoming issues the Association will be dealing with for the remainder of the year. Judge John Few had the audience capti-

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vated with his talk entitled "The Courage of a Lawyer." Ron Diegel provided pertinent and useful information on explaining and exposing expert testimony at trial. Carl Solomon and Marvin Quattlebaum gave rousing and persuasive closing arguments from the plaintiff's and defendant's perspective, respectively. Judge Diane Goodstein gave a glimpse into the perspective trial judges have on the work trial lawyers do. And the program closed with a moving and heartwarming talk from two lawyers serving our country in battle. Bill Connor and James Smith, two Columbia attorneys, spoke on their experiences in Afghanistan as lawyers and soldiers to a packed room and a standing ovation. In addition, the program featured several informative breakout sessions.

Led by the outstanding work of meeting chairs, Molly Craig, Anthony Livoti and Mitch Griffith, the committee sought to include more participation from families with a Children's Program hosted by the SCDTAA exclusively for kids of meeting attendees. Word is that all the kids loved the movies, pizza, and playing the Wii.

Special thanks goes out Aimee Hiers and her staff for all the behind the scenes work she and her staff did. Also a special thanks goes out to all our members who helped with the Silent Auction or by speaking at the meeting. This year's Joint Meeting was a tremendous success and has us already looking forward to our return to the Grove Park next year.

FEATURE ARTICLE

Assert Comparative Negligence in Defense to All Three Product Liability Theories

by Thomas M. Kennaday*

Ever since the adoption of comparative negligence in South Carolina, it has been assumed, but not decided, that South Carolina does not recognize comparative negligence as a defense to products liability claims brought in strict liability and warranty. Those assumptions are based on old contributory negligence cases, and the time has come to revisit the issues. The joint and several liability statute enacted as part of the 2005 tort reforms, S.C. Code Ann. § 15-38-15, appears to have codified comparative negligence as a defense to strict liability and warranty in some cases. At the very least, the statute indicates a public policy movement toward limiting liability in proportion to fault. In this new light, holes appear in those old contributory negligence cases. So the next time you assert comparative negligence in response to a product liability complaint, assert the defense as to all causes of action.

The Codification Of Comparative Negligence

S.C. Code Ann. § 15-38-15 was enacted "SO AS TO PROVIDE IN AN ACTION TO RECOVER DAMAGES RESULTING FROM PERSONAL INJURY, WRONGFUL DEATH, DAMAGE TO PROPERTY, OR TO RECOVER DAMAGES FOR ECONOMIC LOSS OR NONECONOMIC LOSS, JOINT AND SEVERAL LIABILITY DOES NOT APPLY TO A DEFENDANT WHO IS LESS THAN FIFTY PERCENT AT FAULT" Act 27, 2005 Leg., 116 Sess. (S.C. 2005). By the plain language the statute, it applies to any action for personal injuries or property damage that arises from tortious conduct, regardless of the theory of liability. Subsection A of the statute sets forth the statutes' application and effect as follows:

> (A) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.

The statutory language makes no distinction between the legal theories used to bring the actions to which the statute applies, so long as the action seeks recovery of damages caused by tortious conduct. This description fits all three product liability theories; negligence, strict liability, and breach of warranty. Although a product liability claim for breach of warranty alleges a breach of a contractual duty, the conduct that gives rise to the action is the same conduct that gives rise to a claim for strict liability. As explained in *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997), the elements of strict liability and breach of warranty are the same and are included within the elements of negligence. As further explained in *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 345, 384 S.E.2d 730, 736 (1989), "[w]here a purchaser buys a product which is defective and physically harms him, his remedy is in either tort or contract." Because the conduct involved in a product liability claim brought under a warranty theory would also give rise to a tort claim, the conduct is tortious and the joint and several statute applies, even though the legal theory is contractual.

Subsection A further limits the application of the statute to cases in which "indivisible damages are determined to be proximately caused by more than one defendant." Again, this language makes no distinction between legal theories. To the contrary, proximate cause is an essential element of all three product liability theories. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). The use of "proximately caused" in this part of the statute further supports application of the statute to all three product liability theories.

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The use of the word "fault" in the statute lends itself to the argument that the statute does not apply to strict liability and warranty, so called "no-fault" theories of liability. But, for the reasons stated above, and due to the plain language of Subsection (A), such an argument must fail. Subsection (A) states, "joint and several liability **does not apply** to any defendant whose conduct is determined to be less than fifty percent of the total fault." S.C. Code Ann. § 15-38-15(A) (emphasis added). No fault is necessarily less than 50% of the total fault. Therefore, if the word fault as used in Section 15-38-15 is given the same meaning as when it is used to describe strict liability or warranty as "no-fault" theories of liability, then a defendant found liable only in strict liability or warranty, and not in negligence, could never be jointly and severally liable. That would be an attractive interpretation for defendants, and there is policy justification for it. Between a defendant who was proven negligent and a defendant whose negligent conduct could not be proven, the former would more fairly bear the burden of joint and several liability than the later.

Attractive as this reading of the statute may be to defendants, the reading of the statute that fairly considers the whole of the statute, including the triggering phrase "if indivisible damages are determined to be proximately caused by more than one defendant," is to equate fault with proximate cause, so that the jury assigns percentages of proximate causation to each liable defendant, regardless of the liability theory, and to the negligent plaintiff. This makes sense from a plain meaning perspective as the Miriam Webster definition of "fault" is "responsibility for wrongdoing or failure <the accident was the driver's *fault*>," and "proximate cause" must be found before responsibility, in the form of liability, can be assigned to a defendant. This interpretation also makes sense from the perspective that "no-fault" as a descriptor for strict liability is a misnomer. The doctrine of strict liability does not impute liability to those without fault, rather, it assigns fault to sellers of defective products regardless of whether the sale of the defective product resulted from negligence. As stated in the comments to Section 402A, which were statutorily adopted with Section 402A pursuant to S.C. Code Ann. § 15-73-30, "the justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special *responsibility* toward any member of the consuming public who may be injured by it." Restatement (Second) Torts, § 402A cmt. c. (emphasis added).

If strict liability, breach of warranty, and negligence are all treated equally for purposes of determining the "fault" of the defendants, then by statute a plaintiff's comparative negligence is now a defense to strict liability and breach of warranty. As the statute provides, "the fault of all the defendants" is compared with "the fault (comparative negligence), if any, of the plaintiff" to determine whether a defendant is 50% or more at fault and therefore jointly and severally liable. After that comparison, a defendant less than 50% at fault "shall only be liable for that percentage of the indivisible damages." S.C. Code Ann. § 15-38-15(A). That, by effect and specific reference, applies the defense of comparative negligence to strict liability and warranty claims.

Lonely Defendants Have Arguments Too

The statute applies only when "indivisible damages are determined to be proximately caused by more than one defendant." So what about when indivisible damages are proximately caused by a single strictly-liable or warranty-breaching defendant and a negligent plaintiff? In light of the public policy movement toward proportional liability evidenced by the 2005 tort reforms, our courts should find that comparative negligence is also a common law defense to strict liability and breach of warranty. A fresh look at the old contributory negligence cases, Restatement (Second) of Torts, §402A, and decisions from other jurisdictions confirms the merit of these arguments.

The assumption that comparative negligence does not apply to strict liability claims is based on the holding in *Wallace v.*

Owens-Illinois, Inc., 300 S.C. 518, 389 S.E.2d 155 (Ct. App. 1989) that contributory negligence was not a defense to strict liability. Citing comment n. to Restatement (Second) Torts, Section 402A, the *Wallace* court stated: "In South Carolina, contributory negligence is an affirmative defense to an action for negligence. It has no application to an action based on breach of warranty or liability for a defective product." *Id.* at 523, 389 S.E.2d at 157. After a brief discussion about contributory negligence ordinarily being a question of fact, the Court of Appeals held: "In this case, the judge erred in granting summary judgment on the breach of warranty and strict liability causes of action. The defense of contributory negligence does not apply to those claims." *Id.* at 523, 389 S.E.2d at 158. The four sentences just quoted constitute the Wallace court's entire discussion of the application of contributory negligence to strict liability claims.

A closer look at comment n. reveals the *Wallace* court's declaration to be overly broad. The comment states: "Contributory negligence of the plaintiff is not a defense **when such negligence consists merely in a failure to discover the defect in the product, or to guard against its possible existence.** On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name **assumption of risk, is a defense** under this Section as in other cases of strict liability." Restatement (Second) Torts, Section 402A, cmt. n. (emphasis added). The comment is silent on whether ordinary failure to use due care in a manner other than failure to discover or guard against the defect is a defense to strict liability. Several courts have recognized this silence and held that comparative negligence is a defense to strict liability, except to the extent that the comparative negligence is limited to failure to discover or guard against the defect. *Kidron, Inc. v. Carmona*, 665 So.2d 289, 291 (Fla. 3d DCA 1995) ("comparative negligence [is] a defense in strict liability actions if based upon grounds other than [the] failure of the user to discover the defect in the product or ... to guard against the possibility of its existence"); *D'Amario v. Ford Motor Co.*, 806 So.2d 424, 442 (Fla.2001) (principles of comparative fault concerning apportionment of fault as to the cause of the underlying crash will not ordinarily apply in crashworthiness or enhanced injury cases, but comparative fault may be asserted as a defense in a strict liability claim for crashworthiness where there is a valid issue as to whether Plaintiff's negligence contributed to the cause of the enhanced injuries, as opposed to the initial crash); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) (finding that "a plaintiff's contributory negligence is a defense to strict products liability actions when that negligence does not rise to the level of assumed risk or unforeseeable product misuse, but is more than a mere failure to discover a product defect."); *Mooney Aircraft Corp. v. Altman*, 772 S.W.2d 540 (Tex Ct. App. 1989) (applying Duncan to comparative negligence); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W.Va. 1982) (citing comment n. and stating, "[w]e therefore hold that comparative negligence is available as an affirmative defense in a cause of action founded on strict liability so long as the complained of conduct is not a failure to discover a defect or to guard against it."). Further, the policy behind strict liability as stated in comment c., that "the burden of accidental injuries *caused by products* intended for consumption be placed on those who market them," (emphasis added), favors application of comparative negligence when the plaintiff's negligence is also a *cause* of the injuries.

Since the adoption of comparative negligence, our appellate courts have been silent on whether comparative negligence applies to strict liability, but trial courts do not charge the defense. This practice persists even though assumption of the risk has been subsumed within the doctrine of comparative negligence. *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71508 S.E.2d 565 (1998).

It is time to challenge that practice. The rule in *Wallace* was set down at a time when contributory negligence was giving way nationwide to comparative negligence. Exceptions to contributory negligence were popular due to the harsh nature of contributory negligence's complete bar to recovery for a plaintiff who was the least bit at fault. *See generally Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) opinion quashed on procedural grounds by *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (1984) (cited by *Nelson v. Concrete Supply Company*, 303 S.C. 243, 339 S.E.2d 783 (1991)). Only 14 months after *Wallace*, the Supreme Court adopted comparative negligence, "the more equitable doctrine," in *Nelson v. Concrete Supply Company*, 303 S.C. 243, 339 S.E.2d 783 (1991) (adopting *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984)). Perhaps if *Wallace* had been decided after *Nelson*, comment n. would have been more closely scrutinized. Regardless, the *Wallace* court read comment n. too broadly and it is time to correct the error.

The underpinnings of the South Carolina case that held contributory negligence was not a defense to breach of warranty are similarly suspect. In that case, *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975), Imperial Die alleged that J. A. Piper Roofing Co. "constructed and installed an exhaust system which allegedly caught fire and 'sucked fire into the plant area'" of Imperial Die's facility. Based on facts not described in the opinion, Piper asserted Imperial Die's contributory negligence in defense of the negligence and breach of warranty claims. The trial court struck the

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defense on the basis that contributory negligence was not a defense to breach of warranty. The Supreme Court adopted the trial court's decision:

> In ruling upon the matter the lower court held as follows, with which we agree:
>
> "I feel an excellent expression of this law is contained in *Brown v. Chapman*, 304 F. (2d) 149 (9th Cir. 1962). The court in that case stated:
>
> 'In our view, the better rule is that **contributory negligence is not a defense to breach of warranty where it serves simply to put the warranty to the test.** As stated in *Hansen v. Firestone Tire & Rubber Co.*, 6th Cir., 1960, 276 F. (2d) 254; 258:
>
> 'Negligence on the part of the buyer would not operate as a defense to the breach of warranty. If the manufacturer chooses to extend the scope of his liability by certifying certain qualities as existent, the negligent acts of the buyer, bringing about the revelation that the qualities do not exist, would not defeat recovery * * *'
>
> * * * * *
>
> 'One may well rely upon a warranty as protection against aggravation of the consequences of one's own carelessness.
>
> * * * * *
>
> 'The jury was instructed that if it found assumption of risk, this would bar recovery in implied warranty. We agree with the district court that under Hawaii law contributory negligence less than assumption of risk will not bar recovery in implied warranty under the facts of this case.' 304 F. (2d) at 153."

Imperial Die, at 609-610, 216 S.E.2d at 534 (emphasis added). The Supreme Court also stated that on retrial Piper should be allowed to assert misuse of the product, in addition to assumption of the risk, in defense of the breach of warranty claim. *Id.*

Thus, *Imperial Die* should allow assumption of the risk, product misuse, and plaintiff's negligence other than negligence that simply puts the warranty to the test, such as an intervening or concurring cause perhaps, to be defenses to breach of warranty in a products liability case. Rather than a complete bar to contributory negligence as a defense to breach of warranty, the rule set forth in *Imperial Die* is comparable to the limitation in comment n. of 402A, which precludes contributory negligence "when such negligence consists merely in a failure to discovery the defect in the product, or to guard against its possible existence," but maintains assumption of the risk and other forms of negligence as defenses to strict product liability. Yet, practitioners and trial courts have carried the exclusion of contributory negligence as a defense to breach of warranty into the age of comparative negligence as an absolute bar to the defense.

Again, it is time to challenge this practice. The practice is unsupported by the case law and, in light of legislative movement toward proportional liability, the practice is inconsistent with South Carolina public policy.

Assert The Defense At Your Next Opportunity

In the precursor to the adoption of comparative negligence, Chief Judge Sanders explained why *stare decisis* did not preclude the judicial development of the common law:

> While we agree that the need for stability in the law requires that substantial change should not be undertaken hastily or lightly, we also are of the opinion that the need for stability should not be allowed to stultify the natural development of the common law. Neither should courts perpetuate injustice resulting from the application of a doctrine in need of reevaluation, no matter how long or often it has been applied.

Langley v. Boyter, 284 S.C. 162, 325 S.E. (2d) 550 (Ct. App. 1984). Chief Judge Sanders also pointed out that "appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked," and that the question of whether comparative negligence should be adopted had never been asked.

Likewise, the application of comparative negligence to strict liability and warranty product-liability claims is the next step in the natural development of the common law. It would halt the perpetuating injustice of only the negligent defendant benefiting from the defense, and the question has never been asked of our appellate courts. In addition, the legislature has already enacted proportional liability in cases with multiple at-fault defendants. It is time to ask our appellate courts to confirm that legislative action and to take the next step toward proportional liability in all product liability claims, regardless of the number of defendants or the legal theory on which liability is found.

** Tom Kennaday is Special Counsel to Turner Padget Graham & Laney P.A. and is resident in the firm's Columbia office.*

FEATURE ARTICLE

The Recent Success of "Silent Tort Reform"

by Shaun Blake and John T. Lay, Jr.

As the Bush Administration draws to a close, the debate over whether the Administration has engaged in "silent tort reform," tort reform achieved without Congressional action, continues to rage in academic circles.[1] Policy concerns about silent tort reform have been at the center of these conversations. Regardless of your political views, however, a review of recent case law and regulations exposes efforts of the Administration to urge the courts to find common law actions for product liability preempted by federal authority. As practitioners, this intervention by federal agencies and the regulations propounded by them under the Bush Administration may have a significant impact on the defenses that we pursue before the courts on behalf of our clients in product liability cases.

A recent example of the importance of federal agency intervention is found in the Supreme Court's affirmation of the Second Circuit's decision in *Riegel v. Medtronic, Inc.*, - U.S. -, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008), a controversial decision granting summary judgment in a product liability case based on the doctrine of preemption. In *Riegel*, a cardiac patient sued the manufacturer of a balloon catheter used in his angioplasty, asserting state-law claims including strict liability, breach of implied warranty, and negligent design, testing, inspection, distribution, labeling, marketing, sale and manufacture. The trial court granted summary judgment to Medtronic on all of these claims because of the preemption clause enacted in the Medical Devise Amendments of 1976 (MDA). Under the MDA, where the federal government has established requirements applicable to a medical devise, no state can alter these requirements.[2]

The Court utilized a two-step analysis in *Riegel* to find that the state causes of action were preempted by federal law. First, the Court found that the catheter balloon had undergone pre-market approval by the FDA. Importantly, the Court held that pre-market approval was prima-facie evidence that the Federal Government has established "requirements" sufficient to satisfy the first prong of the MDA. Second, the Court looked to New York common law to see if the state causes of action altered the "requirements." Relying on earlier authority, the Court determined that common law duties imposed by the state causes of action constituted "requirements."

Notably, the Court chose to iterate a broad conclusion of statutory construction for the benefit of Congress. The Court noted that "[a]bsent other indication, reference to a State's "requirements" includes its common-law duties." *Riegel*, 128 S.Ct a 1008. Following the Court's analysis in *Riegel*, in any product liability case involving medical devises subject to the MDA, so long as the product has undergone pre-market approval, any state product liability cause of action is preempted by federal law and is subject to summary judgment.

As evidence of the administration's pursuit of "Silent Tort Reform," the U.S. Justice Department weighed in as amicus curiae urging the Court to find that the state causes of action were preempted in *Riegel*. This effort by the administration played a role in the Court's decision. Specifically, the Court noted that where the preemptive scope of federal law is in some way affected by a federal agency's regulations, then the "agency's reading of its own rule is entitled to substantial deference." In *Reigel*, agency regulations played a lesser role, since the MDA itself included a preemption clause that the Court ultimately found unambiguous. However, the Court specifically refused to state that FDA regulations could not be used to interpret the preemptive scope of congressional action.

The Court's refusal to state that agency regulations cannot guide the Court on the issue of preemption in *Riegel* is significant because of recently adopted federal regulations. Often cited as glaring evidence of "Silent Tort Reform" by the Administration, federal agencies have gone beyond intervening in court cases to urge for preemption. More recently, federal agencies are placing preemptive language in the preambles to the regulations governing various products. Whether these preambles can effectuate preemption of state law claims is a controversial topic, and it requires a brief consideration of basic preemption principles.

Recall that preemption stems from the Supremacy Clause found in Article VI of the United States Constitution. According to the Supremacy Clause, the laws of the United States are the supreme law of the land; therefore federal law and regulations may preempt any state law which conflicts with federal authority. Preemption can result when Congress

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expressly states that it intends to do so, as evidenced by the *Riegel* decision. However, preemption normally occurs in one of the two following ways: 1) field preemption, where Congress has occupied the entire field, or 2) conflict preemption, where preemption is implied because of actual conflicts between state and federal law.[3]

The application of these principles of preemption has had a meaningful impact in product liability litigation. Since 2000, for instance, the FDA has intervened in pharmaceutical cases to argue that the Supremacy Clause bars state tort liability for failure to include a warning in a drug label that is in conflict with, or contrary to, warnings approved by the FDA.[4] Now, in the wake of the highly publicized Vioxx litigation, the FDA has placed express preemption language in the preamble to its January 2006 prescription drug labeling rule, causing quite a stir amongst legal academics.[5] In April of this year, the United States Court of Appeals for the Third Circuit weighed in squarely on the preamble's preemptive effect as the first federal court of appeals with an opportunity to do so since the FDA issued the preamble. *See (Colacicco v. Apotex*, 2008 WL 927848 (3rd Cir. April 8, 2008)).

Two district courts in the Third Circuit reached opposite conclusions as to whether a pair of drug manufacturers, Pfizer and Apotex, was entitled to judgment as a matter of law against state product liability claims for failure to warn of suicide risks. In *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006), the plaintiff asserted that the label on a generic version of Paxil was insufficient to warn the deceased patient of a risk of suicide due to the anti-depressant. The Pennsylvania trial court dismissed the plaintiff's claim as conflict-preempted by FDA regulations.

In *McNellis ex rel. DeAngelis v. Pfizer, Inc.*, No. Civ. 05-1286(JBS), 2006 WL 281904 (D.N.J. Sept.29, 2006), the New Jersey trial court was faced with an identical claim based on Pfizer's antidepressant Zoloft. The court denied Pfizer's motion for summary judgment, but after the Pennsylvania court reached the opposite conclusion, the New Jersey court vacated its opinion and certified the question of conflict preemption to the Third Circuit. The Third Circuit consolidated the actions and agreed with the Pennsylvania trial court that the product liability claims were conflict-preempted.

In reaching its conclusion in *Colacicco*, the Third Circuit first discussed the presumption against preemption that federal courts regularly apply. According to this doctrine, courts are to rule against preemption absent a "clear and manifest intent by Congress." In its analysis, the court discussed the tension that exists between Supreme Court authority in this area, as the Court has both been willing to apply a presumption against preemption in some product liability cases and to denounce the presumption in others.[6] This tension arises in conflict preemption cases because inherently no explicit statement by Congress manifesting the intent to preempt exists, arguably rendering the presumption inapplicable. In *Colacicco*, the Third Circuit reached a compromise holding by recognizing the presumption against preemption, but applying it with lesser force because these two cases involved implied conflict preemption.

The Third Circuit went on to discuss the problems that would arise if state tort actions could continue against pharmaceutical manufacturers for failure to warn. The court noted that preemption would avoid pharmaceutical companies being subject to varying standards from state to state. Like the Court in *Riegel*, the Third Circuit pointed to the pre-approval process of the FDA and the controls in place to ensure adequate labeling. The court undertook a detailed discussion of the FDA's position regarding the lack of a warning indicating that either Paxil or Zoloft could cause an adult to commit suicide. The court noted that, in addition

to preemption in terms of statutes and regulations, preemption can be effectuated by the actions taken by a federal agency pursuant to its statutory authority. Therefore, the FDA pre-approval of the labels, in conjunction with its prior determination on the precise issue of suicidal risks for Zoloft and Paxil, were sufficient to effectuate preemption of the state product liability claims.

Importantly, the Third Circuit directly discussed the FDA's preemption statement included in the preamble to the 2006 amendment to the drug labeling regulations. Although the court noted that it would normally be "leery" of an agency's own position on preemption, the Supreme Court afforded an agency's position on preemption "some weight." *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). Therefore, the Third Circuit found that the FDA's position on preemption was entitled to receive "*Skidmore*" deference, another compromise reached by the Third Circuit that affords the FDA's preemption statement in its preamble an intermediate level of deference.[7] Therefore, the Court affirmed the Pennsylvania court's dismissal and ordered that the New Jersey Court grant Pfizer's motion for summary judgment.

The importance of this decision will have affects on product liability cases beyond the realm of pharmaceuticals. Recently other agencies, including the National Highway Traffic Safety Administration and the Consumer Product Safety Commission, have passed regulations with preambles containing express preemption provisions that relate to rollover standards for motor vehicles and fire safety standards for mattresses.[8] These actions and others taken by federal agencies are reforming manufacturers' product liability in state and federal court by affording these defendants a meaningful preemption shield against a myriad of tort liability. Prudent practitioners will be sure to check any federal regulations that may govern their client's product, even those seemingly innocuous preambles, to see if federal preemption is a defense available to product liability claims.

Footnotes

1 Margaret Gilhooey, *Addressing Potential Drug Risks: The Limits of Testing, Risk Signals, Preemption, and the Drug Reform Legislation*, 59 S.C. L. REV. 347-390 (2008); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227-259 (2007); Robert L. Rabin, *Poking Holes in the Fabric of Tort: A Comment*, 56 DEPAUL L. REV. 293-306 (2007).

2 21 U.S.C.A. § 360k(a)(1) (2007).

3 Jill D. Jacobson and Rebecca S. Herbig, *The Transformation of Preemption Law*, FOR THE DEFENSE, 40-44, 88 (December 2007).

4 Sharkey, *supra*, at n. 99.

5 Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922 (Jan. 24, 2006) (effective June 30, 2006).

6 *Contrast Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (applying a presumption against preemption where the plaintiff alleged negligence against a manufacturer) *and Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) (declining to apply a presumption against preemption where the plaintiff alleged fraud against a manufacturer).

7 *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944) (holding that agency interpretations contained in statements that "lack the force of law" are "'entitled to respect'" only to the extent they have the "'power to persuade'").

8 Starkey, at 230-36.

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Case Notes

State

Ex Parte: Eric Steven Bland and Ronald L. Richter, Jr., Op. No. 26547 (S.C. Sept. 22, 2008).

Respondents Bland and Richter represented plaintiffs in an underlying legal malpractice suit against the law firm of Nexsen Pruet Jacobs Pollard & Robinson ("Nexsen Pruet"). In that underlying action, Nexsen Pruet produced its firm's policies and procedures relating to the opening of files and conflicts checks. Those policies were disclosed only pursuant to a protective order, which expressly identified those documents as "confidential" and to be used only in that litigation. Moreover, upon settling the underlying action, the parties – including the Respondents – signed a settlement agreement that contained a "covenant of strict confidentiality."

Two years after execution of the settlement agreement, Respondents undertook another action in which they were representing a different plaintiff against Nexsen Pruet. During discovery, Nexsen Pruet produced only portions of the full policies previously produced in the earlier litigation. At that point, Respondents discovered that they still possessed the complete policies, which policies were subject both to the protective order and confidentiality provisions of the settlement agreement. Nonetheless, Respondents indicated to Nexsen Pruet's counsel that they were in possession of full policies and intended to use them in upcoming depositions. Nexsen Pruet then filed an action under the caption of the first suit seeking enforcement of the settlement agreement and sanctions for violation of that agreement and the protective order.

The trial court determined that Respondents did not materially breach the protective order or settlement agreement and refused to award any relief. Nexsen Pruet appealed. The South Carolina Supreme Court certified the appeal from the court of appeals.

Disagreeing with the trial court, the Supreme Court determined that "retention of the policy manual and the introduction of that manual in the [later] litigation violated both the protective order and the settlement agreement, and [ordered] that all copies of the policy manual which were improperly held following conclusion of the [previously settled] litigation be returned to Nexsen Pruet. . . ." The matter was remanded to the trial court for determination of the proper sanction.

In reaching this conclusion, the Court did not accept Respondents' contention that subsequent events – e.g., that the same policies were ultimately requested in later litigation – could permit the party to a court order and settlement agreement unilaterally to decide to violate the terms of those documents. The Court went on to explain that "[w]hile Nexsen Pruet disputes that Bland and Richter's initial possession of the policy manual was 'innocent and inadvertent,' Nexsen Pruet argues that leaving initial possession aside, Bland and Richter's retention of the policy manual and the use of the manual in other litigation demonstrates a willful intent to violate the settlement agreement and the protective order. We agree." The Court concluded that the trial court's decision that Respondents did not willfully violate the protective order was without evidentiary support.

Justice Beatty concurred in the primary decision but dissented in connection with the majority's suggestion that the $10,000 per violation liquidated damages clause in the settlement agreement was the proper measure of damages for any sanction by the trial court on remand. Justice Pleicones went further, dissenting from the majority opinion, based on the conclusion that – given the standard of review in contempt and sanctions matters – the Court did not properly find any abuse of discretion in the trial court's original determination that the violation was not willful.

Collins Holding Corp. v. Wausau Underwriters Ins. Co., Op. No. 26544 (S.C. Sept. 8, 2008).

Plaintiff was the owner, operator and distributor of gambling machines at a time when those machines were legal in South Carolina. In 1997, Collins was sued by several plaintiffs. The plaintiffs claimed that they were induced into using the gambling machines by several wrongful actions of Collins, including exceeding maximum daily limit payouts, advertising in ways that fraudulently induced plaintiffs into thinking they could win jackpots in excess of these daily limits, and otherwise enticing or inducing the plaintiffs into use of the gambling machines by unlawful means. The present case arose from Collins' declaratory judgment action, in which Collins alleged that his insurer breached its duty to defend him in these actions.

After reviewing the underlying complaint, the trial court granted summary judgment to Collins on the duty to defend issue. The basis of the trial court's decision was that the plaintiffs inclusion of a claim of

negligent misrepresentation triggered the duty to defend by alleging at least one claim that constituted an "accident or occurrence" as required under the policy. The insurance company appealed this summary judgment decision. The South Carolina Supreme Court reversed.

> We hold that Insurance Company did not breach its duty to defend Collins against the underlying lawsuit because the Plaintiffs' complaint did not allege the possibility of an "occurrence" as defined in the policy. The facts of the complaint asserted that Collins systematically violated South Carolina laws specifically enacted to protect the public from excessive gambling losses.
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> . . .
>
> While the complaint does state a cause of action for negligent misrepresentation, we must look beyond the label of negligence to determine if Insurance Company had a duty to defend Collins. [citations omitted] … To support their negligent misrepresentation claim, the Plaintiffs incorporated the previous facts and alleged Collins sold, leased, and distributed machines that were equipped in a manner "as to permit manipulation" and that were configured to be used in a manner that violated laws expressly designed to protect the public from the lure of excessive gambling. In our view, these allegations do not support a claim for negligent conduct. . . . Therefore, because the negligent misrepresentation claim incorporates the same facts and does not allege and "occurrence," we hold that this cause of action did not trigger Insurance Company's duty to defend.

Justice Pleicones dissented from this decision concluding that the trial court "correctly held that the Plaintiffs alleged a negligent misrepresentation claim based on intentional acts that may have inadvertently violated the law."

Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., Op. No. 26535 (S.C. Aug. 25, 2008).

This case arises out of defects in fire retardant treated (FRT) wood used in the roof truss system in a building owned by the plaintiff. The case was filed in the federal district court and involved questions regarding, among other things, the recovery in tort in light of the economic loss doctrine. The federal district court certified two questions to the South Carolina Supreme Court: (1) whether the user of a defective product may recover in tort when only the product itself is injured and where the product violated either generally accepted industry standards or posed a serious risk of bodily harm, and (2) whether an end user of a product who did not purchase it directly from the manufacturer may obtain relief under the South Carolina Unfair Trade Practices Act? The Court answered the first question no as to violation of generally accepted industry standards and yes as to products posing serious risk of bodily harm. The Court answered the second question in the affirmative as well.

In considering the economic loss doctrine, the Court posed the question as one seeking an answer to "whether the legal duties to conform to industry standards and to avoid creating a serious risk of bodily harm found in *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989), are limited to the residential housing arena or whether they have wider application." Having long recognized that tort actions lie for purely economic damages where the loss results from the breach of a duty outside the contract, the Court explained that the focus is on the actor's actions rather than just the consequences: "it is our view that the parties should not have to wait until a dangerous and defective product causes serious bodily injury before seeking a tort action. In this regard, we see no reason to treat commercial parties differently from home buyers or other consumers." "Manufacturers have a duty, separate and apart from contractual duties, to create safe products, and they are liable for poorly made products used in a foreseeable manner."

To limit this rule's application the Court adopted a balancing test: "the nature of the damage threatened and the probability that the damage would occur should be examined to determine whether there is a 'clear, serious, and unreasonable risk of death or personal injury.'" Thus, merely a breach of industry standards without an accompanying breach of an actual existing legal duty does not give rise to a separate tort action for economic loss. On the other hand, where there is a breach of a separate (non-contractual) duty and a "clear, serious and unreasonable risk of bodily injury or death" a separate tort action for economic loss exists.

Justice Pleicones concurred in part and dissented in part, disagreeing with the scope of the majority's extension of the narrow exception to the economic loss rule recognized in *Kennedy*.

Ex Parte: Joe W. Kent, Op. No. 4434 (S.C. Ct. App. Aug. 28, 2008).

Joe Kent is an experienced expert witness, testifying in the area of accident reconstruction. When asked at trial what factors of the accident report were considered in formulating his opinion in the underlying action, Mr. Kent included – among other things – the citation of the defendant driver for failing to

Continued on next page

yield right of way. The plaintiffs in this underlying auto accident case moved for a mistrial. The trial judge opted for a curative instruction. In addition, the trial court issued contempt sanctions upon the expert witness based on a determination that given his experience as an expert, he should have known that the existence of a citation was inadmissible. Kent appealed and the South Carolina Court of Appeals reversed.

The court of appeals explained that "[b]ased upon the testimony at trial and the evidence in the record, we find there is not sufficient evidence to suggest that Kent, in fact, knew the testimony was inadmissible or that he willfully disobeyed a court order." Justice Thomas dissented on this issue given the existence of evidence supporting the trial court's civil contempt sanctions and the authority of the trial court to issue such sanctions.

Hatcher v. Edward D. Jones & Co., L.P., Op. No. 4431 (S.C. Ct. App. Aug. 14, 2008).

This case involves "a broadly-worded arbitration clause." Plaintiff invested funds with Defendant Edward D. Jones & Co. He filed suit as a result of the wrongful electronic transfer of his funds, without his authorization, and the ultimate withdrawal of his funds by a third party. The court framed the issue as follows: "whether a broadly-worded arbitration clause contained in an agreement for investment services should be applied to a lawsuit alleging the client's funds were transferred electronically to a third party without his authorization or consent."

The arbitration clause at issue provided that "any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents, and/or employees for me, to this agreement, or to the breach thereof . . . from the inception of such account shall be settled by arbitration." Relying on the South Carolina Supreme Court's decision in *Aiken v. World Finance Corp. of S.C.*, 644 S.E.2d 705 (S.C. 2007), in which the South Carolina Supreme Court determined that claims based on the theft by World Finance employees of the plaintiff's personal information was "outrageous conduct that could not possibly have been foreseen when Aiken agreed to do business with World Finance" and, thus, clams for outrage, emotional distress, negligence, negligent hiring/supervision, and unfair trade practices were not subject to the arbitration clause. Similarly here, the court of appeals concluded that though factually related to performance of the contract, and though the claims for breach of that contract, breach of contract accompanied by a fraudulent act, and breach of fiduciary duty were claims arising out of the contract and subject to the arbitration clause, the claims for negligent and violation of the South Carolina Unfair Trade Practices Act were not subject to the arbitration agreement.

TAILGATE WARM UP A ROUSING SUCCESS

by E. Glenn Elliott

In anticipation of the Wofford vs. South Carolina football game, on Friday, September 19, 2008, SCDTAA hosted a "Tailgate Warm Up" honoring the South Carolina Judiciary. The reception was held at 300 At Canal & Senate in Columbia. The venue was excellent and even provided a view of the river. Attendees enjoyed a true tailgate affair featuring boiled eggs, bar-be-cue, fried chicken, and peach cobbler. A number of members of the Judiciary were in attendance along with members of the Association from Columbia, Greenville, Charleston, Florence, and all points in between.

The venue was perfect, the food was excellent, and the libations were generous. Even the occasional outbursts of, "GO TERRIERS!" or "GO GAMECOCKS!" couldn't ruin the evening (said the Tiger fan). By all accounts the tailgate warm up party was enjoyed by all!

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