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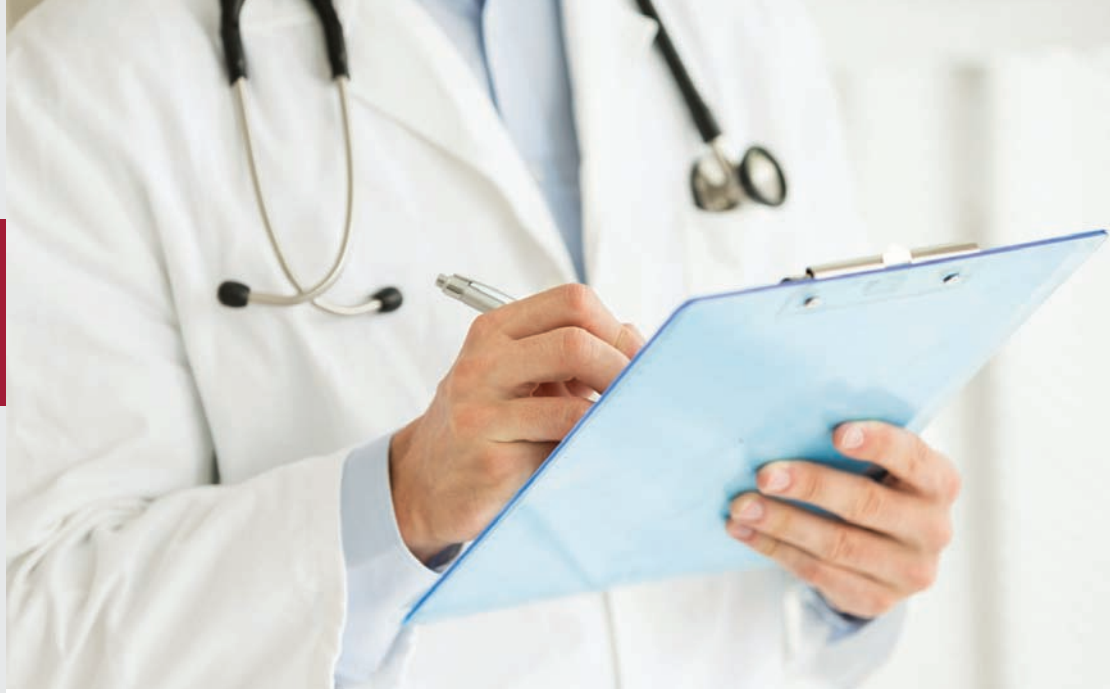

Policies and Procedures As a Basis for Liability

By Associate, Neil Edwards and Summer Associate, Meg Twomey

Well-crafted policies and procedures are an essential part of the operation of modern health-care facilities. They promote practice consistency and are believed to improve clinical outcomes; however, in the event of a bad outcome, policies and procedures become evidence in litigation, and "violations" frequently become the central focus of malpractice claims.

When violations of policy are brought up by claimants, they argue that the policies and procedures prove the applicable standard of care. Defendants counter that policies and procedures are "aspirational guidelines" or "best practices," but not proof of the standard of care.

Most courts allow policies and procedures to be introduced as evidence that the jury can consider while evaluating standard of care arguments, and recent appellate decisions throughout the country trend toward allowing evidence of violations of policies and procedures as evidence of malpractice. In rare cases, a violation or deviation from written policies and procedures may be considered negligence *per se,* supporting a finding of liability. On the other end of the spectrum, violations of policies and procedures may be considered inadmissible in some situations. The modern trend appears to be toward the middle of these extremes, where evidence of "violations" of policies and procedures is admissible, but does not alone establish a breach of the standard of care. In this article, we look at the different approaches across the country.

The Majority Trend: Violations Can Bolster Expert Testimony But Do Not Establish the Standard of Care

The majority of states require expert testimony to establish a violation of the standard of care and causation in a medical malpractice lawsuit, but still allow violations of policies and procedures to be considered by the jury as evidence of negligence.

Illinois

Heastie v. Roberts, 877 N.E.2d 1064, 1088 (Ill. 2007): The plaintiff caught fire while restrained, and the hospital was found liable at trial for the injuries on the grounds that

its employees violated an internal policy by failing to perform a contraband check. On appeal, the court considered whether expert testimony was necessary to establish the standard of care, or if the violation of an internal policy was sufficient. The court reaffirmed the Illinois rule that hospital customs or polices are not determinative of the standard of care, but may be considered by the jury along with information such as expert testimony, accreditation standards and community practice. Customs and policies alone, however, may be determinative of a breach of duty to the patient only with respect to administrative and managerial duties. *Id.* (The court ultimately upheld the trial court decision on the grounds that the policy was administrative in nature (a concept addressed in further detail below).)

Kansas

Treatser v. HealthSouth Corp., 442 F. Supp. 2d 1171, 1188-89 (D. Kan. 2006): The plaintiff, who had impaired judgment and confusion from a head trauma, fell out of his bed and brought a vicarious liability action against the hospital because he was not restrained properly. The court held that expert testimony was required because the nature and degree of restraints that would be appropriate for a brain trauma patient are not within the realm of common knowledge, and hospital policies and procedures alone did not establish the standard of care.

Kentucky

Blankenship v. Collier, 302 S.W.3d 665 (Ky. 2010): The court held that summary judgment was proper where the plaintiff failed to provide expert testimony and relied solely on a violation of the training manual to establish negligence. In referencing an earlier decision, the court reasoned, by way of example, that a phlebotomist's failure to follow his employer's training manual on taking blood could be evidence of negligence, but a medical expert was needed to substantiate the training manual.

Missouri

Luscombe v. Mo. State Bd. of Nursing, No. WD 75049, 2013 WL 68899 at *8 (Mo. Ct. App. Jan. 8, 2013): In a case brought by a nurse against the state board that revoked her license based on hospital directives and protocols she failed to follow, the court held that "the standard of care applicable to professional conduct cannot be established by a hospital's rules and regulations, and even if it could, mere violation of a hospital rule or regulation does not establish a violation of the standard of care without expert testimony regarding whether the factual explanation for the violation is outside the standard of care."

The Liberal Minority Trend: Violations of Policies Alone May Establish Breach of Standard of Care

Few states allow policies and procedures alone to establish the standard of care or a breach thereof, under any circumstances. However, in Louisiana, the law has long been that violation of a policy alone can be evidence of a standard-of-care breach, and recent decisions indicate that the rule continues to be upheld. In Connecticut, courts adhere to the majority rule, but recent decisions indicate a willingness to adopt a more liberal construction of the rule, based on the facts of the particular case.

Louisiana

McCorkle v. Gravois, 152 So.3d 944 (La. Ct. App. 2014): The Louisiana Court of Appeals recently reaffirmed that expert medical testimony is not required to establish a breach of the standard of care where "the alleged negligence consists of violating a statute and/or the hospital's bylaws." The Court of Appeals, in applying this rule, decided that the medical doctor's failure to instruct a patient on the use of the drug Lunesta in accordance with the manufacturer's inserts was not alone a breach of the standard of care. In so ruling, however, the court made clear that it was adhering to the long-held rule that violations of hospital bylaws were indeed sufficient to establish a violation of the standard of care.

Policy violations alone may establish a breach of the standard of care.

Connecticut

DiLieto v. Cty. Obstetrics and Gynecology Grp., 998 A.2d 730 (Conn. 2010): Connecticut has long held the majority view that rules, regulations and policies do not themselves establish the standard of care. *See, e.g., Doe v. Saint Francis Med. Ctr.*, 72 A.3d 929, 964 (Conn. 2014) (quoting *Petriello v. Kalman*, 576 A.2d 474 (Conn. 1990). However, the recent *DiLieto* decision suggests that expert testimony, under certain circumstances, may not be required to establish a standard-of-care violation.

In *DiLieto,* the issue before the court was whether a first-year gynecological fellow should have been permitted to perform surgery without supervision. At trial, the evidence was that the relevant procedures required the first-year fellow to be supervised during the surgery. In addition, a supervising oncologist confirmed that the first-year oncologist was not permitted to perform unsupervised surgery except in rare emergency situations. The court held that the policy and procedure, in combination with the supervising oncologists' testimony about how the policy worked, was sufficient evidence for the jury to infer a standard-of-care violation. The court was careful not to overrule the longstanding general rule, but rather, distinguished the case from *Petriello*.

It remains rare that violations of policies and procedures alone can establish negligence of a health-care practitioner or facility. However, it is possible that courts could begin leaning in this direction. The *DiLieto* decision has arguably opened the door in Connecticut for argument that, under certain circumstances, expert testimony is not required to establish a standard of care violation. This trend could continue in other states currently adhering to the majority rule. Practitioners should be aware that even if their state has long sustained the "majority rule," certain facts and circumstances may incline the appellate court to rule that violations policies and procedures alone can establish negligence.

The Conservative Minority: Violations of Policies Are Not Relevant to Standard Of Care

Even rarer than jurisdictions that hold that violations of policies or procedures are adequate evidence that the standard of care has been violated are states that hold that such violations have no relevance to liability or standard of care issues whatsoever. In fact, Michigan appears to be the only state where violations of policies and procedures are not at all admissible as evidence of a standard of care breach.

Michigan

Melick v. William Beaumont Hosp., No. 319495, 2015 WL 1739980 (Mich. Ct. App. Apr. 16, 2015): The Michigan Court of Appeals recently held that hospital policies and procedures were not even discoverable where only vicarious liability is alleged. The plaintiff alleged that a hospital was vicariously liable for the nurses it employed, and sought to compel the production of the hospital's policies and procedures. The Court of Appeals overturned the trial court's order directing production of the internal policies and procedures, and reasoned that relevant policy "does not establish the standard of care, it does not show whether the nurses' conduct in question was a breach of that standard of care, it does not demonstrate that [Plaintiff] suffered injury, or whether the nurses' breach of the standard of care was the proximate cause of that injury."

Michigan seems to be the lone state to continue with this approach. The *Melick* opinion even suggests that, under certain circumstances — such as where direct liability of a hospital is alleged — it could be persuaded that policies and procedures are discoverable and admissible. However, for the time being, Michigan is holding to its traditional rule that internal policies and procedures cannot be admitted to show standard of care. *Gallagher v. Detroit-Macomb Hosp. Assoc.*, 431 N.W.2d 90 (Mich. Ct. App. 1988).

Next, we will discuss other ways in which violations of policies and procedures can affect actions against medical care providers in ways beyond the establishment of the standard of care.

Policies, Procedures and Proximate Cause

All states appear to follow the rule that there must be evidence, established by an expert, that the violation of the policy and procedure was the proximate cause of the alleged injuries. However, there does not appear to be a uniform consensus as to how the nexus between the violation and the alleged injury must be established.

Even in the few states where violations of the policies and procedures alone could be considered evidence of negligence, there is still a requirement for expert testimony to establish proximate cause. For example, in Louisiana, the plaintiff has the burden of demonstrating by a preponderance of the evidence a causal nexus between the defendant's violation of a policy and procedure and the injury alleged. See *Pfiffner v. Correa*, 643 So.2d 1228 (La. 1994).

In the Georgia case of *Herrington v. Gaulden*, 751 S.E.2d 813 (Ga. 2013), the court discussed that the failure to follow the policy must demonstrate "increased risk of harm to patients." The court ultimately concluded that there was no evidence of an "increased risk of harm," but suggested that this could be the standard moving forward. In this regard, the court cited the Restatement 2d Torts § 324A(a), which states that one who negligently performs an undertaking to another may be liable if "his failure to exercise reasonable care increases the risk of such harm." While many states are adopting the language of the Restatement and the "increased risk of harm" standard, others continue to use different standards.

For example, in a failure-to-diagnose claim in Missouri's Court of Appeals, the court required "cause in fact" causation, which is often shown using the "but for" test. *Wicklund v. Handoyo*, 181 S.W.3d 143 (Mo. Ct. App. 2005). The court stated there that in failure-to-diagnose cases, especially, expert testimony must show a "reasonable degree of medical or scientific certainty" that a defendant's negligence caused the harm. Some of the evidence used to show that the doctors failed to exercise the proper standard of care included their failure to properly monitor and failure to respond to nurses' calls — actions that may commonly be required by policies.

Based on a survey of the current case law, there appears to be no uniformity on the standard of proof required to establish the causal link between a violation of a policy and procedure and the cause of the alleged injuries. It appears certain, however, that there must be some expert testimony to establish the link. In prosecuting or defending a case for litigation, it is important that an expert be able to explain why (or why not) the violation led to the alleged injuries. It is equally important that the attorney is aware of the standard of proof.

Administrative Policies Not Involving Medical Judgments

In a majority of states that do require expert testimony to establish a breach of the standard of care, there is a common exception for policies and procedures which do

not involve medical judgments. This exception makes sense, as expert testimony would generally not be required where medical judgments were not involved. Often, courts may be presented with a dispute as to whether the policies are purely administrative or related to medical judgments. Therefore, whether or not this exception applies depends upon the circumstances of each particular case.

Vermont

In *Taylor v. Fletcher Allen Healthcare*, 60 A.3d 646 (Vt. 2012), the plaintiff alleged that a nurse withdrew support and assistance while she was using the bathroom, causing her to fall violently on a toilet. The plaintiff presented evidence that the nurse breached the standard of care in the form of a nursing text and the method taught by the head nurse of defendant's facility. In deciding whether the evidence was sufficient without the testimony of an expert, the court held that "while medical malpractice plaintiffs must generally use an expert witness to satisfy their burdens of proving the elements of medical negligence, an exception to the general rule exists in cases where the violation of the standard of medical care is so apparent to be comprehensible to the trier of fact."

South Carolina

Under facts quite similar to those in Vermont's *Taylor* case, in *Dawkins v. Union Hospital District*, 758 S.E.2d 501 (S.C. 2014), South Carolina's high court considered a plaintiff's claim that "she would not have suffered injuries 'had the [Hospital's] staff performed their duties in compliance with the Hospital Policies.'" The court articulated South Carolina's rule that "if a patient received nonmedical, administrative, ministerial, or routine care, expert testimony is not required and the action sounds in ordinary negligence rather than medical malpractice." The court found that the nurses' failure to follow the policy was sufficient to support a finding of negligence, and determined that no expert testimony was necessary. Therefore, the violation of the policy alone was a basis for liability because of this exception.

New Mexico

New Mexico courts conduct a case-by-case analysis of the facts to determine if specialized knowledge or a judgment call is required with respect to the policy at issue. *Richter v. Presbyterian Healthcare Servs.*, 326 P.3d 50, 57 (N.M. Ct. App. 2014), involved a medical testing laboratory that failed to deliver results to a patient before she was discharged from the hospital, and failed to notify her physicians of abnormal tests results. The court made an important distinction in its opinion between a lab value missed because of the practitioner's failure to realize the urgency of the situation and a lab value missed because polices (such as patient charting policies or lab delivery policies) were not followed. The court held that if the administrative charting or delivery polices were not followed, the internal policies, contracts or regulations themselves could be used as evidence of negligence in place of expert testimony.

In most states, this will be an important consideration, and will significantly affect how allegations and defenses are crafted in a medical malpractice case. The manner in which policies and procedures are drafted should also take this issue into account. As a practical matter, there is likely a good-faith argument that most policies are merely administrative. Where expert support is lacking or limited, the allegations could be crafted to address the "administrative" aspects of the conduct. Similarly, defenses should be presented such that the opponent is not absolved of the expert testimony requirements. Further, health care practitioners and administrators should take note that ambiguously worded policies may increase the likelihood of a court finding that the administrative exception applies.

Conclusion

The majority rule is that policies and procedures may be used against a medical facility or practitioner. However, most states will not allow violations of a policy and procedure to stand alone as a basis for liability. The most important and common exception to this rule is for polices that involve administrative or ministerial tasks. Only Michigan continues to apply the conservative approach whereby policies and procedures have no relevance to the standard of care.

While most states continue to require expert testimony to establish a breach of the standard of care, evidence that policies and procedures were violated will still be admissible and can be powerful. For example, the fact that a physician violated his or her employer's policies or a hospital policy may resonate with jurors. Accordingly, both those drafting policies and those defending medical malpractice cases should fully understand all relevant policies and procedures and their implications for litigation.

The challenge for facilities is to craft responsible and effective policies and procedures that do not make compliance nearly impossible. It would be wise for practitioners and administrators to consult with attorneys for advice on the current law regarding policies and procedures in their state.

Neil Edwards is an attorney practicing in the Atlanta office of Carlock, Copeland & Stair, LLP. He defends physicians, nurses, medical practices and long-term care facilities in medical malpractice and other litigation. Meg Twomey is a summer associate at the firm.

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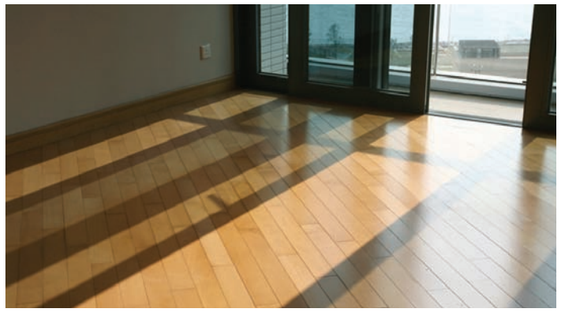
S.C. Court of Appeals Affirms Disclaimer of Liability by Original Developers following Property Sale and Condominium Conversion



By Associate Robin Graham

On June 26, 2015, a three judge panel of the South Carolina Court of Appeals heard oral arguments in the case *Long Grove at Seaside Farms, LLC, et al. v. Long Grove Property Owners' Association, et al.* (C/A No. 2009-CP-10-6746). The case, a declaratory judgment action, arises out of an underlying construction defect suit brought by the Long Grove POA which alleges latent defects and damages in their 17 building, 272 unit complex located in coastal Mt. Pleasant, SC. The declaratory action centers on the validity of the original developer's attempt to disclaim all liability to downstream purchasers as part of the sale of the property, built originally as apartments, to a second developer. The case has created strange bedfellows, aligning the condominium conversion developer and the Long Grove POA in the fight to keep the original owners and developers in the underlying suit.

In a move surprising many members of the South Carolina construction bar, the Court of Appeals on July 29, 2015 issued a per curiam opinion affirming the trial court's decision to grant summary judgment to the original developers and their affiliated general contractor and architect. That's a second victory for the original developers and for the legitimacy of liability and warranty disclaimers. However, few expect the story to end there. The state's construction bar, developers and their affiliates throughout the Southeast and their insurers are now watching for a next stop at the South Carolina Supreme Court. Here's a look at where the case has been and where it might be going.

The Developers Cut a Deal

Plaintiffs in the instant declaratory judgment case are the original owners, developers and builders of the property who originally constructed Long Grove in 1999 as an apartment complex. In addition to single-purpose Long Grove at Seaside Farms, LLC, Plaintiffs in this action are the well-known South Carolina real estate developer The Beach Company, as well as The Beach Company's general contracting subsidiary, Gulfstream Construction Company, Inc. The original developers subsequently sold the property – six years later in 2005 – to a second developer, who purchased the property with the express intention of converting the apartments into condominiums. The second developer, a defendant in both actions, is Atlanta-based Vista Realty Partners, LLC. Both groups are sophisticated and experienced development entities. The Beach Company's portfolio spans properties from a wide range of residential developments to commercial and industrial properties through the Southeast. According to Vista's website, the company has developed or owns nearly 12,000 units of multi-family housing to a tune of $1 billion. When these parties came to the table to negotiate the sale of the Long Grove property, their pencils were sharpened and their intentions were clear.

The critical element in the sale of the Long Grove development – and in the current lawsuit – is that declaratory action Plaintiffs, as a necessary condition of the sale to converting developer Vista, required the permanent disclaimer and release of any liability related to the improved property and the assumption of that liability by Vista. Those terms became an essential component to the negotiations and to the deal ultimately struck between the two developers. The issues in this case now focus on whether the Plaintiffs' actions succeeded, under South Carolina law, in operating as a disclaimer and release, thereby relieving both them and their affiliates of any and all liability in the underling multi-million construction defect suit.

Short-Circuiting the POA's Suit

Several years after the 2005 sale and condominium conversion, and with a marked change in the economic landscape, the Long Grove POA – now firmly in the control of the condominium unit owners – began exploring a construction defect suit for negligence, amongst other causes of action, against the original developers (The Beach Company crowd), the conversion developers (The Vista crowd), and the other usual suspects of design, subcontractor, and supplier defendants. Before the construction defect suit hit the court, Plaintiffs filed this declaratory judgment action, setting out to establish that the terms of their 2005 sale of the property to Vista extinguished their subsequent liability to future purchasers. In summer 2012, Plaintiffs – i.e., The Beach Company crowd – prevailed over South Carolina's notorious "scintilla of evidence" summary judgment standard and won their argument at the circuit court. Along with The Beach Company crowd, the general contractor and the architect for original construction, as affiliates of The Beach Company who were identified in the Sales Contract, were also dismissed from the underling construction defect claim.

The Lower Court's Decision

In issuing his Order Granting Summary Judgment, Judge Michael Baxley framed the questions as follows: "This case raises the novel question of whether an owner-developer of improved real property, upon selling the property to another developer who intends to alter the condition and legal status of the premises, can: (1) disclaim to the current and subsequent buyers any and all warranties as to the conditions of the improvements on the property; (2) permanently release itself from any liability for the condition of such improvements; and (3) require the developer-buyer to assume any and all related liability therefrom." [1]

Judge Baxley answered "yes" to these questions, finding that the POA's claims against The Beach Company entities, as the original owner/developers, were barred as a matter of South Carolina law. In reaching his decision, Judge Baxley relied on several key factual details and points of law.

First, The Beach Company insisted during the negotiation process that the sale of Long Grove to Vista was contingent on the disclaimer, release, and assumption of liability provisions. The release specifically included Long Grove at Seaside Farms, LLC, The Beach Company, Gulfstream Construction Company, and all "affiliates" involved in the design, development, or construction of the original apartment buildings. These conditions were specifically negotiated and were, according to deposition testimony, a contentious point between the parties. All of these terms were eventually agreed upon and written into Vista's contract to purchase the property ("the Sales Contract"). The Sales Contract also contained the explicit terms that the property was being sold in an "as is," "where is," "without recourse" and "with all defects" basis.

The circuit court, in reviewing the negotiations between two sophisticated and experienced parties, found that "the issues of release, disclaimer, and assumption of liability were specifically debated and bargained for, were understood by all parties, and were a core component of the sales transaction." [2]

Second, The Beach Company also insisted, as a term of the Sales Contract, that the assumption of liability, disclaimers and release provisions be included in any condominium regime Master Deed recorded by Vista. Including the provisions in the Master Deed was The Beach Company's means of providing notice to subsequent buyers of the release of all claims against The Beach Company related to the construction and condition of the property, and the assumption of that liability by Vista. These provisions were not only included in the Long Grove HPR Master Deed, they were also referenced in the individual deeds of sale for each of the unit purchasers. The circuit court found that "requiring Vista to include the notice on the Master Deed was a reasonable and practical means to ensure that subsequent buyers of condominiums received notice that [the original developers] and its affiliates had disclaimed and been fully released from all liabilities related to the condition of the property." [3]

Third, as a matter of law, Judge Baxley pointed out that "the fundamental premise underlying the South Carolina Supreme Court's imposition of liability based on implied warranties and negligence against builders and developers for defective new residential construction is based on the Court's policy of protecting new home buyers against builders that place defective construction 'into the stream of commerce.'" [4] Judge Baxley found that, quite simply, The Beach Company and its affiliates had not placed the Long Grove condominium units into the stream of commerce.

The POA's Appeal

Of course, there are two sides to every story, and the Long Grove POA vigorously argued their points to the Court of Appeals. Their arguments are founded primarily on the validity of the Sales Contract which they contend contains impermissible "exculpatory" terms. The POA argued that the contract terms are against public policy and are, therefore, void because they allow the original developer, contractor and designer to avoid their "statutory, regulatory and common law duties with which they must comply to protect the health, safety and welfare of the public." [5] Further, they argued the contract is unenforceable against the POA: first because the POA was not a party to the contract and was not in existence at the time of the contract, and second because – much like their first argument – the contract is unconscionable and therefore unenforceable. In citing the same case on which the Circuit Court relied to decide against them, the POA pointed out the South Carolina Supreme Court's statement that: "We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce." [6]

The Court of Appeals courtroom on June 26th was packed with members of South Carolina's construction bar, implying this case was anything but a slam dunk for the Plaintiffs and making the two paragraph per curiam decision, which adopted the circuit court's order in full, that much more of a surprise.

Next Stop the S.C. Supreme Court?

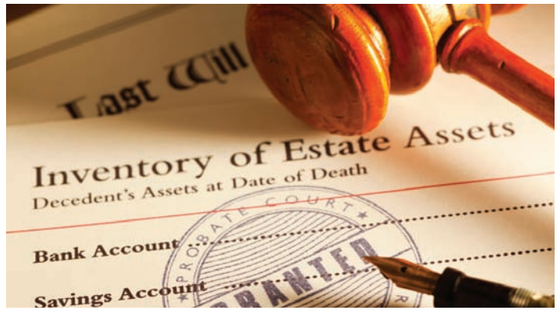
Given the implications not just for this case but for South Carolina's construction bar generally, the prevailing expectation is that the POA will appeal to the South Carolina Supreme Court. The Court, provided it exercises its discretion to accept the appeal, would have a variety of options on how to decide the case.

Predictions are risky business, but one possible outcome is that the Court will write back into the case the original general contractor and designer of the Long Grove apartments – the "affiliates" who were released along with the owner/developer – while allowing the original owner/developer, The Beach Company and its related entity Long Grove at Seaside Farms, LLC, to benefit from the terms of the contract which they directly negotiated. Another potential outcome, not mutually exclusive from the first, is that the Court will specifically tailor its decision to the unique facts and circumstances of this case. A third possibility is that the Court would drill straight into the meat of the POA's argument and decide whether such disclaimers of liability and warranties are consistent with or against public policy. Such a decision, or even a simple affirmation of the Court of Appeals, would tailor – perhaps significantly – South Carolina's warranties law and the future liability of developers.

Whatever the ultimate outcome of this case, it will influence the rules of the game for South Carolina's property developers, contractors and designers; the insurance companies which insure them; and the attorneys that represent parties on both sides of construction defect litigation. **Stay tuned**.

1 Order Granting Summary Judgment to Plaintiffs and Third-Party Defendant Harwick in this Declaratory Action and Dismissing Underlying Construction Defect Claims Against Those Parties, J. Michael Baxley, Presiding Judge, July 23, 2012, at p.1.
2 Id. at p.10.
3 Id. at p.25.
4 Id. at p.20 (citing Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989).
5 Brief of Appellant, at p. 12.
6 Id. at p.11 (citing Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) (emphasis added).

Legal and Accounting Trusts and Estates Engagements: There Be Dragons



By Joe Kingma

Trusts and estates engagements typically involve complexity, conflicts, and lots of cash. Both lawyers and accountants have seen a ground swell of malpractice litigation arising from these engagements, and both the professionals and their insurers should be wise to the risks these engagements entail.

Professionals have a hard time saying no to their family and their clients, and people often turn to their lawyer or accountant relatives to help with trust and estate work. Conflicts begin at that moment when the professional is also a beneficiary. Unfortunately, they often start work with little expertise in the area. Thus, professionals sail off into a stormy trusts and estates sea which is seeded with land mines. Engagement letters, conflict waivers and proper planning are often left on the dock.

Even the sophisticated professional has great risk in trust and estates work. Tax laws are byzantine and constantly changing. Testators' desire to control their wealth for three or four generations creates very complex testamentary schemes. Large dollar amounts in play bring out the worst in families, and the common second spouse versus the children battle is a risk for the drafter and the executor.

The role of the professional can shift from: (1) tax planner; (2) drafter; (3) trustee; (4) executor; (5) advisor; (6) trial counselor; and even (7) beneficiary. Likewise, the plaintiff may be the client who had the trust or will drafted, a beneficiary, or the ultimate trustee or successor trustee.

The worst problem in trusts and estates malpractice claims is conflict of interest. Professionals have often worked with three or even four generations in varying roles and with varying degrees of success. When the family blows up into a big fight, the professional is in the middle. Too often he or she sides with the best long term business source but maintains relationships with other adverse family members. Plaintiffs' lawyers can go a long way on a betrayal theme under these circumstances, and punitive damages and returns of fees are only a couple of the elements of damages that arise.

Finally, there are often multiple professionals involved in a complex trusts and estate matter, and mistakes not infrequently arise when something falls through the cracks. Conflicts and cross claims between the professionals create more risk and complexity.

There is lots of money to be made as the Greatest Generation completes its transfer of wealth to subsequent generations. On the other hand, there is risk as well. Price your services and your product appropriately, and keep a weather eye out for monsters lurking on the horizon.

Firm News

Congratulations to Douglas MacKelcan and Michael McCall on being selected to join the Firm's Partnership

Douglas W. MacKelcan has experience representing clients throughout South Carolina in all stages of civil litigation, alternate dispute resolution, and licensure matters, including serving as lead counsel in jury and non-jury trials that reached a verdict and defending clients at a contested hearing before the South Carolina Department of Labor, Licensing and Regulation.

His practice involves the defense of professionals in legal, accounting, and real estate malpractice lawsuits and directors and officers of homeowner associations. Doug also represents clients in general business litigation, automobile, trucking, premises liability, personal injury cases, ERISA disability cases and provides insurance coverage opinions.

In addition to his active litigation practice, Doug serves as general counsel for homeowners associations in the area. This involves assistance with drafting and revising governing documents and advising clients on the broad range of issues facing associations in South Carolina.

In 2014, Doug was appointed to the Community Association Institute (CAI) Tri-Counties Regional Advisory Council.

Michael B. McCall is a partner in the Charleston office with over 10 years of litigation experience. He practices primarily in the areas of legal and accounting malpractice, premises and products liability, insurance coverage, and appeals. Mike has a significant amount of trial experience in state and federal courts throughout South Carolina, including over 75 cases tried to verdict. Mike is one of the firm's lead appellate lawyers, and has successfully handled appeals in state and federal courts involving a wide variety of issues, ranging from insurance coverage, professional negligence and general liability to real estate and zoning disputes, and municipal law. Mike also has experience representing insurance carriers in various coverage matters, from providing coverage opinions to initiating and defending declaratory judgment and bad faith actions.

Mike is a member of the firm's Commercial Litigation, General Liability, Insurance Coverage and Bad Faith Litigation, and Appellate practice groups. He is active in the South Carolina Bar and previously served on the Bar's Professional Responsibility Committee. Mike was honored on the 2012, 2013 and 2014 South Carolina Rising Stars lists as one of the best young lawyers in the state. Less than three percent of the lawyers in the state are named to the list.

Congratulations to Laura Paris Paton on Promotion to Of Counsel

Laura Paris Paton is a member of Carlock Copeland's Construction Litigation and General Liability Practice Groups. Laura currently holds an AV Preeminent rating by Martindale-Hubbell and was named a South Carolina Rising Star for 2014 by Super Lawyers Magazine. In addition to her practice with the firm, Laura is a member of the Board of Directors for the South Carolina Women Lawyers Association and serves as the Donations Coordinator for the Cinderella Project Charleston.

New to Firm: One Partner, Eleven Associates and Four Summer Associates

Richie Foster is a partner in our Atlanta office, dedicates his practice primarily to motor carrier liability, commercial insurance coverage, and general commercial insurance defense. Richie has acted as lead counsel in more than 50 jury trials in his career, often defending trucking companies involved in serious accidents resulting in catastrophic injuries and death. Richie has tried cases throughout the State of Georgia and parts of the Southeast.

Richie helps spearhead the firm's 24-hour emergency response team that investigates major trucking accidents in Georgia and throughout the Southeast.

A former print journalist, Richie has authored numerous articles in the areas of motor carrier liability and coverage. He also speaks at national seminars on various topics relating to motor carrier liability and insurance coverage issues and regularly provides continuing education services for clients. Richie has served as national coverage counsel for his trucking clients and has argued trucking coverage appellate cases before the federal Fourth Circuit, Eighth Circuit and Eleventh Circuit.

Associates

Beth Bentley Atlanta - Trucking & Transportation
Marcus Brown Atlanta - Workers' Compensation
J. T. Gallagher Atlanta - Construction
Matt Gass Atlanta - Commercial Litigation
Abby Grozine Atlanta - General Liability
Marc Hood Atlanta - Trucking & Transportation
Ryan Kolb Atlanta - General Liability
Hillary Morris Atlanta - Healthcare
Mark Potter Atlanta - Workers' Compensation
Kimberly Reeves Atlanta - Trucking & Transportation
Madison Suttie Charleston - Workers' Compensation

Summer Associates

Clinton McGill Charleston
Alexandra Williams Charleston
Alexandra Hughes Atlanta
Margaret Twomey Atlanta

Case Wins

Defense Verdict in Medical Malpractice Case in Cobb County

August 24, 2015

Wade Copeland and **Lee Gutschenritter** obtained a defense verdict in a medical malpractice case after a three-day jury trial in Cobb County State Court in front of Judge Kathryn Tanksley. The allegations against our client, a facial plastic surgeon, were that he failed to timely diagnose and appropriately treat a seroma that formed on the plaintiff's neck resulting in permanent disfigurement of his neck. This required an additional 12 months of treatment by another plastic surgeon followed by a subsequent revision surgery to remove a large amount of scar tissue in his neck. The plaintiff's attorney suggested to the jury that they should award $600,000. The jury deliberated for 39 minutes before returning a verdict in favor of the facial plastic surgeon.

Defense Verdict in Medical Malpractice Case Regarding Standard of Care

August 3, 2015

Dave Root and **Neil Edwards** successfully defended a nurse accused of medical malpractice during an epidural steroid injection operation. Plaintiff's counsel alleged that his client was deprived of oxygen during the operation, which rendered his client minimally conscious and "locked in" for six years, and eventually caused her death. Plaintiff's counsel accused our client of contributing to this injury by failing to advocate for the patient and take affirmative steps to halt the operation. After a two week trial, and years of hard fought legal motions and discovery, a jury heard all of the evidence and decided that our client met the standard of care and did not cause any injuries to the patient. This verdict was a win at trial for an outstanding nurse who has dedicated her life to taking care of patients.

The jury rendered a verdict for the Plaintiffs against the remaining Defendants for $21.9 million.

Smith and Owens Defeat Wrongful Eviction Claims

July 15, 2015

Doug Smith and **Will Owens** won affirmance of summary judgment in a wrongful eviction case. The plaintiff claimed wrongful eviction and conversion of more than $500,000 worth of personal property. Will convinced the trial court that the landlord had complied with eviction law even though the writ of possession was later vacated by the magistrate court. The Court of Appeals ultimately agreed and held that a landlord who follows all the law for executing a writ of possession may not be held liable in tort just because the writ was later vacated.

Georgia Supreme Court Vacates Injunction Entered Against Law Firm

July 9, 2015

Shannon Sprinkle and **Tyler Wetzel** recently convinced the Georgia Supreme Court to vacate a trial court order permanently enjoining CCS's law firm client from placing certain advertisements. The matter arose early last year after the law firm ran a newspaper advertisement soliciting clients for nursing home neglect cases.

The day after the advertisements ran, the nursing home obtained an ex parte temporary restraining order from the trial court and sought both preliminary and permanent injunctive relief aimed at curtailing the law firm's advertising. At a hearing occurring only a few weeks later, the trial court entered a permanent injunction against the law firm.

On appeal, Shannon and Tyler argued the trial court committed numerous procedural errors in reaching its ruling and, after oral argument, the Georgia Supreme Court unanimously agreed. The Supreme Court held the trial court erred by consolidating the hearing on the preliminary injunction with the trial on the merits because it failed to provide the parties with sufficient notice of its intent to do so. The Supreme Court also ruled in favor of the law firm on a novel issue raised in a subsequent appeal of the same case and held the trial court erred by excluding certain documents from the appellate record. The case has been remanded to the trial court for further proceedings.

Please contact Shannon or Tyler if you have questions about actions for injunctive relief, legal advertising, or issues relating to the record on appeal.

Expert Witness Retains His Files and Prevails for Fees

June 30, 2015

Brian Spitler, **Joe Kingma** and **Ty Wetzel** represented an accountant who was owed six figures in fees after his extensive work as an expert witness. When the client stopped paying the fees, the expert stopped work. The former client sued, trying to gain access to the expert's work product. Brian and Joe had that case dismissed by the trial court and filed a separate suit to recover the fees. The defendant contested the claim vigorously and also sought to compel arbitration. On September 18, 2014, the trial court denied the motion to compel arbitration and awarded 100% of the expert fees, interest and attorneys' fees sought. On June 28, 2015, the Court of Appeals affirmed.

Georgia Supreme Court Rules for Receiver on Complex Immunity Question

June 17, 2015

Brian Spitler and **Joe Kingma** prevailed for their clients , an accounting firm/receiver, on June 1, 2015. The receivership had been created in attempt to salvage a once thriving business that had been hamstrung by a bitter fight amongst its principals. While the receivership was still in place, one of the principals sued the receiver, claiming gross negligence and breach of fiduciary duty. Joe and Brian filed a motion to dismiss which was granted, but that was just the beginning. Two trips to the Court of Appeals and the Supreme Court's grant of certiorari followed.

The defenses sprung from the confluence of official immunity, judicial immunity, and statutory immunity under the Georgia Tort Claims Act. The plaintiff argued, amongst other things, that an accounting firm cannot itself be protected by official immunity because only its principal was the receiver. In the years following Carlock, Copeland & Stair's first motion, the Supreme Court had issued numerous opinions on immunity and, in this case, specifically asked that the parties describe all the various immunities which might protect a receiver. At oral argument Joe was peppered with questions from the Justices who clearly had strong views on immunity. At the close of the argument one of the lions of the Georgia Bar approached Joe and muttered "Bad Day at Black Rock" referencing the old western wherein a lone traveler is assaulted by all the members of a small town.

A unanimous Supreme Court vacated much of the Court of Appeals immunity analysis but agreed with Brian and Joe that dismissal for lack of jurisdiction was required. CCS convinced the Court that this plaintiff was not entitled to another day in court, however the law remains complex. Please contact Brian or Joe if you would like to discuss the nuances of immunity protection for receivers.

Federal Court Grants Dispositive Motion for Financial Services Firm

June 1, 2015

David Overstreet and **Steve Kropski** recently obtained the dismissal of a multi-national financial services firm from a pending case in District Court. The Court granted the Motion to Dismiss with prejudice based upon the argument that the firm owed no duty to the Plaintiff.

Jury Rejects Amputee's Claim for Four Million Dollars

May 29, 2015

Lee Weatherly and **Kristen Thompson** defended an automobile driver who crashed into a motorcyclist. The crash lead to the amputation of plaintiff's left leg and almost $750,000 in medical bills.

While preparing for trial, Lee discovered a video from the investigating officer's dashboard camera that contained a witness's statement supporting the Defendant's claim that the Plaintiff suddenly made a U-turn in front of her. Although during discovery Plaintiff had admitted to drinking a single beer shortly before the accident, the defense team discovered that the Plaintiff had been drinking much more alcohol and had been seen coming out of a second previously undisclosed bar shortly before the accident.

The defense retained a pharmacologist and presented overwhelming evidence that the Plaintiff had consumed almost five times the amount of alcohol than was admitted in discovery and the plaintiff was likely impaired by alcohol at the time of the crash. The Plaintiff presented evidence by a prominent expert accident reconstructionist from Charleston and a well-known toxicologist to counter Lee's defense.

Prior to Lee and Kristen's involvement other insurance companies had paid the Plaintiff almost $200,000 based on the strength of Plaintiff's case as originally presented. At trial, the Plaintiff asked the jury to return a verdict of four million dollars. The jury returned a unanimous verdict that the Defendant was not negligent in any way and awarded the plaintiff nothing.

Defense Win in Challenging Venue

May 29, 2015

Eric Frisch and **Claire Sumner** obtained a defense verdict in DeKalb County State Court in a wrongful death case against a physician and his hospital employer. Plaintiff alleged that the physician failed to diagnose and treat post-operative pneumonia in a timely manner. The defense argued that the patient developed acute respiratory distress syndrome and pulmonary edema, which were properly treated.

Case results are provided for informational purposes only. Past success does not indicate the likelihood of success in future cases.

Upcoming Events

Please look for us at the following upcoming conferences and events:

National Association of Professional Surplus Lines Office LTD (NAPSLO) September 8-11/ San Diego, CA

Claims Litigation Management (CLM) Claims College September 9-12/ Philadelphia, PA

ABA Professional Liability Conference September 16-18/ Scottsdale, AZ

Arkansas Trucking Seminar September 16-17/ Bentonville, AR

ABA Fall National Legal Malpractice Conference September 17 2015 / Scottsdale, AZ

Georgia Society for Healthcare Risk Management (GSHRM) Fall Meeting September 21/ Georgia Aquarium, Atlanta

Carlock Copland Seminar: Insurance Coverage and Bad Faith For Claims Professionals September 23/ Atlanta Botanical Garden

NCMIC/PSIC Defense Counsel Seminar September 23-25/ Scottsdale, AZ

Habitat for Humanity Build September 26/ Atlanta, GA

A&E Defense Counsel Meeting September 29-30/ Chicago, IL

Professional Liability Defense Federation (PLDF) Annual Meeting September 30-October 2/ Chicago, IL

Community Associations Institute (CAI) State Annual Conference October 1-2/ Kingston Plantation, South Carolina

The American College of Trial Lawyers, (ACTL) Annual Meeting October 1-4 / Chicago, IL

Title Standards CLE October 2/ State Bar of Georgia Center, Atlanta, simulcast to Savannah and Tifton

Joint Conference of the Maryland Society of Professional Engineers and Maryland Society of Surveyors October 7 - 9/ Baltimore, MD

DRI Annual Meeting October 7/ Washington, D.C.

ABA Tort Trial & Insurance Practice Section (TIPS) Fall Meeting October 14 - 18/ Scottsdale, AZ

American Society for Healthcare Risk Management (ASHRM) October 18-21/ Indianapolis, IN

CLM Cyber Summit October 21/ New York, NY

Accountants and Lawyers' Annual Defense Network Conference (ALADN) October 21-23/ Marco Island, FL

Workers'Compensation Law Institute October 22/ St. Simmons Island, GA

CLM Women's Leadership Forum October 22/ New York

Litigation Management Institute October 23/ New York

South Carolina Women Lawyers Association Conference October 22-23/ Columbia, SC

Marine Corp Marathon October 25/ Washington, DC Lynn Olmert will run her 10th full marathon in October to raise funds for cancer research. Lynn will run with The Leukemia & Lymphoma Society Team.

The Trucking Industry Defense Association (TIDA) October 27-29 / San Antonio, TX

South Carolina Hospital Association (SCHA/SCAHRM) SC Association for Healthcare Risk Management Joint Fall Conference November 6/ Columbia, SC

Carlock Copeland seminar: A&E Atlanta November 3/ Cobb Galleria, Atlanta, GA

CLM Construction Conference November 4/ Atlanta, GA

Institute for Continuing Legal Education (ICLE) Medical Malpractice November 5-7/ Amelia Island, FL

Professional Liability Underwriting Society (PLUS) Annual Meeting November 11-13/ Dallas

CLM Insurance Coverage Conference December 3/ New York

DRI Professional Liability Coverage December 3/ New York

For event details contact Patricia O'Toole, Business Development Director, Office: 404.221.2268

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Carlock Copeland in the Community

Atlanta Office Donates 15 Book Bags

The Atlanta Office donated school supplies for 15 book bags. The supplies were donated to the "Back-2-School" Event at Georgia Justice Project, where they are committed to ensuring that the school-aged children of their clients have all the right things to confidently kick-off a positive school year.

Left to right, top to bottom row: Evan Beauchamp, Kelly Bennett, Pat Calvert, Elizabeth Googe, Will Underwood, Abby Grozine. Haley Lipscomb, Andrea Moore

Charleston Office Participates in Red Cross Blood Drive

On July 14, 2015, 22 attorneys and staff of our Charleston, SC office participated in Red Cross's Blood Drive.

Left to Right: Paul Sperry, Patrick Norris, Kent Stair, Robert Hawk, Kristen Thompson, Heather Seyle, Suzanne Hogg, Bob Petit, Chelsea Oliver and David Seifert

We Remain Committed to Regularly Giving Back to Our Community

A number of our Charleston lawyers participated in a Habitat for Humanity project organized by Sarah Wetmore and Tyler Winton on Saturday, June 27, 2015. Members of the firm worked morning and afternoon shifts.

Gary Lovell and his daughter Ali joined Sarah Wetmore and Robin Graham on the afternoon shift. The prospective owner of the unit, and her elderly mother, dropped in as we were working on it.

Seeing the joy on her face as she showed her mother the rooms where she and her young son would live made the day even more special. Thanks to everyone who participated. We will plan for another Habitat day in the near future. Thanks to all who came out!

Morning shift (left to right, top to bottom row): Tyler Winton, Matt Hemingway, Mike Ethridge, Alex Saber, Madison Suttie, Kristen Thompson, Suzanne Hogg and Steve Kropski. Afternoon shift (not pictured): Gary Lovell with his oldest daughter Ali, Sarah Wetmore and Robin Graham.

The Atlanta Office Gives Back to the Community

On Saturday, June 20th, a team of volunteers from the Atlanta office gathered to serve our communities' by participating in the 16th annual ServiceJuris Day.

ServiceJuris Day is an event designed specifically for individuals or groups that work in or support the legal services industry. Each year, these members join forces and volunteer one day of their time for a service project coordinated by Hands On Atlanta. The event was created to foster interest and involvement from the legal community in a non-legal service project.

Attorneys, summer associates, and legal professionals worked side by side tackling extensive renovation projects, helping to revitalize local schools, parks and community centers. Team Carlock helped revitalize a little league baseball field. The team also raised money again this year and had a very strong showing on Saturday.

Pictured: Brian Gedeon, Marcus Brown, Carrie Annis, Claire Sumner, Elizabeth Googe, Andrew Bagley, William Underwood, William Owens and Tyler Wetzel.