



ISSUE #35

Website: <http://www.charlestoncountybar.org>

FALL 2016

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FROM THE PRESIDENT



Music Hall.

Dear Colleagues,

Our County is at once historic and creative. If you aren't convinced, you should amble down Meeting Street by the oldest museum collection in the U.S. and turn onto John Street and take in Charleston's celebration of creativity at Pecha Kucha XXV on November 18 at the Charleston

though, is the roughly \$2,000,000 the program has saved the system since its inception in 2010.

With leadership and dedication from our U.S. District Judges and U.S. Magistrate Judges, our U.S. Probation Office, U.S. Attorney's Office, and the Federal Public Defender's Office (and a great example in Judge Irvin Condon's program in Circuit Court), the BRIDGE Program serves as a model for similar efforts not only in other Divisions of the District of South Carolina, but in other Districts across the country. The BRIDGE Program has hosted interested public officials including United States Attorney General Holder (who spoke at a BRIDGE graduation), the Criminal Law Committee of the United States (whose members are appointed by the Chief Justice), and U.S. Attorneys from twenty other Districts. The program has been featured at recent Federal Judicial Center District Judge Workshops as well as at a United States Sentencing Commission seminar. The BRIDGE Program serves as a "mentor court" for new Veteran Treatment Courts in other parts of the country. The BRIDGE Team also is participating as faculty at a Federal Judicial Center/Harvard Law School workshop this month. As if all of that were not enough, the Program also earned Judge Hendricks a meeting with Vice President Biden to discuss the program and the potential for a much broader application.

Our justice system shares these characteristics. While many of our historical contributions have been celebrated, the developments too new to earn that label often escape our collective attention. Many players in our justice system have created novel ways of addressing significant systemic problems and have devoted incredible energy to make the creative programs successful, to make a difference. I address a few of these programs below and welcome you to submit (to secretary@charlestoncountybar.org) a description of other community programs to be included in our new Spotlight section of the CCBA Newsletter. (Please see page 7 for a description of The Sanctuary for Sober Living.)

Our own U.S. District Judge Bruce Hendricks (on loan to the Upstate) has championed the creation and expansion of a federal drug court program: The BRIDGE Program. The BRIDGE Program reduces recidivism through a rehabilitative regimen for individuals whose substance dependency had led to federal criminal charges. The program uses a blend of treatment and sanction alternatives for individuals on pretrial or post-conviction release who have a substance abuse or addiction problem. For more information on the program go to <http://www.scp.uscourts.gov/DrugCourt/index.html>. Nearly thirty people have graduated from the program and turned their lives around. The impact each transformation has on the participant's family and community is immeasurable. What is measurable,

If you are not yet a believer in the power of this program, you should attend the double graduation set for November 3 at 4:00 p.m. in the J. Waties Waring Judicial Center.

While ordinarily ready to applaud even the most minor actions from our federal bench, the South Carolina Chapter of the Federal Bar Association knew this Bridge Program was a very good thing when we saw it. Under the leadership of Brian Quisenberry, Stephanie Eakes Lewis (another talent we loaned to the Upstate), and now our own Matt Hubbell, the SC FBA created a mentor program to have lawyers help facilitate the recovery process for participants and their re-entry into a productive role in the community. Through the efforts particularly of Jamie Schoen and Powers Price, our SC

FBA has won grants and awards from the national FBA. If you are interested in serving as a mentor, please contact Powers.

Having witnessed the profound impact of the BRIDGE Program, Judge Hendricks is working with a BRIDGE Program graduate to establish a Collegiate Recovery Program. The first edition of this cutting-edge initiative will be at her alma mater: The College of Charleston.

The BRIDGE Team is not alone in its creative efforts. U.S. Magistrate Judge Mary Gordon Baker operates REAL Court (REAL: Re-Entry Able to Lead). REAL Court collaborates with another Charleston original, Amy Barch's Turning Leaf Project. Turning Leaf serves men who have been assessed at a medium to high risk of re-incarceration to change their attitudes, thinking, and behavior so they can adapt successfully to community based living without re-offending. Turning Leaf also has earned national acclaim, attracting visits from Deputy Attorney General Sally Yates and the U.S. Deputy Secretary of Labor and reporting by the Washington Post and the Huffington Post, among others.

Speaking of national attention, the Charleston County Criminal Justice Coordinating Council (CJCC) recently won an award of \$2.25 million from the MacArthur Foundation's Safety and Justice Challenge to invest in a mix of strategies that will further reduce the average daily jail population over the next three years. The CJCC includes dedicated leaders of our criminal justice community. For more information on the Council go to <http://cjcc.charlestoncounty.org/bio.php>. They seek to reduce the jail population safely through, among other things, enhanced police practices; alternatives to jail for people dealing with mental illness, substance abuse issues, and homelessness; expedited indigence screening and improved access to counsel.

Charleston's Chief of Police Greg Mullen's visionary leadership created what should prove to be another national model: the Charleston Illumination Project. With the dedicated support of Mayors Riley and Tecklenburg, the Charleston Police Fund, and Seidler & Associates, Chief Mullen sought the answer to this question he had asked himself: "What can I do as the police chief in Charleston to avoid the conflict, destruction, and violence I have witnessed all across our Country as a result of the deteriorating relationships between citizens and their police departments?" After thirty-three listening sessions with hundreds and hundreds of interested community members generated 2,226 ideas to consider, the Charleston Police Department (with the help of a Citizen Steering Group and a Community Resource Group) has identified the primary goals for strengthening citizen/police relationships, adopted a strategic plan, and established methods for measuring progress. In Chief Mullen's words: "We are at a pivotal moment in our country as it relates to police trust and legitimacy. To do nothing is not an option; to engage in a journey that has been challenging, risky, and has the potential to inform generations to come has been our responsibility and honor."

Getting back to a historical note, I would be remiss not to mention the Trials of the Century approaching in our District and Circuit Courts. While most of us readily appreciate the pressures on the judges and lawyers associated with any trial much less one of national magnitude, we do not easily appreciate the pressures on the Clerks of Court, court staff, court security, and law enforcement. I encourage you to be respectful of all of the players in the legal process as they seek to carry out their professional duties under the watchful eye of history.

Very truly yours,

Brian Duffy

ANNOUNCEMENTS

K&L Gates announces that it will carry out its annual Global Day of Service with a focus on "**Investing Across Generations.**" This is its Fourth Annual Global Day of Service, a week-long volunteer effort by firm lawyers and staff focused on serving the charitable organizations in cities and regions across the five continents in which the firm has offices. This year, approximately 16 firm personnel will work with Habitat for Humanity to help with the ongoing construction of a home for a local family.

McLeod Law Group of Charleston and Columbia is excited to announce that **H. Cooper Wilson, III** has joined their team. Cooper graduated from the University of South Carolina Law School in 2007 and has extensive experience in civil litigation.

Frank McCann, administrator of the **Lowcountry AIDS Services Legal Clinic** since its founding in 1991, is honored to announce **Camryn L. Hays** as its new administrator. Ms. Hays has been dedicated to LAS Legal Clinic since she clerked for the program while attending Charleston School of Law.

Wilkes Law Firm, P.A. is pleased to announce that **Stephen Harrison Williams** has joined the firm's Charleston office. Harrison graduated cum laude from the University of South Carolina School of Law in 2015 and will be representing the firm's clients in a variety of civil matters including professional liability defense, contract claims, construction litigation, product defect litigation, personal injury defense, and intellectual property litigation.

Charleston County Magistrate Court Judge, Kelley Young

By: Andrew T. Smith, Charleston School of Law, Class of 2017

Born: Judge Young was born in Denver, CO, and grew up on Hilton Head Island, SC

Appointed: 2015

Education: B.A., University of Georgia, 2008; J.D., University of Miami, 2011

Career: Judge Young began her career in 2011 as an Assistant Solicitor in the Ninth Circuit Solicitor's Office where she handled drug cases. Judge Young was later asked to be on a federal grant to handle violent crimes cases and large-scale narcotics cases. In 2015, Judge Young was appointed as a Charleston County Magistrate Judge and now presides over the Bond Court.

Family: Husband, Adam Young; Son, Jack.

1. **What the bar would be surprised to learn:** Judge Young studied abroad in Barcelona, Spain while at the University of Georgia.
2. **Personal life away from the bench:** Judge Young is an avid runner and noted that she enjoys any outdoors activities. In fact, she and her husband hike in Virginia when they get the chance.
3. **Best part about being a judge:** Judge Young stated that the best part about being a judge is working towards the administration of justice and serving the community. She also explained that she appreciates now being able to serve in the justice system in a neutral capacity — in contrast to her prior role as an Assistant Solicitor.
4. **Hardest part about being a judge:** Judge Young explained that the most difficult part about being a judge has been explaining the process to individuals who are scared because they are in court for the first time.
5. **In your courtroom, DO:** Judge Young wants everyone in her courtroom to be prepared. In addition, attorneys should be ready to explain exactly what they are seeking in a straightforward manner.
6. **In your courtroom, DON'T:** Judge Young's pet peeves include unpreparedness and the inability to get to the point.

7. **Advice to young lawyers:** "Always come prepared. You cannot research and prepare enough for a case, a trial, an interaction with a client, or whatever it may be. Know your facts, do your research, and you'll go far."
8. **What experience best prepared you for the bench?** Judge Young explained that her experience as an Assistant Solicitor and her interactions with law enforcement served as the best preparation for the bench. On a personal level, her husband's experience as a criminal defense attorney provided her with a balanced perspective of the law. In addition, Judge Young made clear that the support she received from her family helped prepare her for her time on the bench.
9. **What would you change about the American Judicial System?** Judge Young believes that the American Judicial System is the best in the world. Yet, she acknowledged that there is always room for improvement. Judge Young would like to see judges explain what factors they are looking at in a given case and what the attorneys should present to the judge. She also hopes that the general public can become more informed about the American Judicial System so that they know what is going on when they step inside of a courtroom.



*Wendy Keefer
is excited to announce the
opening of
Cellar Experience*

*Learn more about wine in a fun,
relaxing environment. Join us
with friends, family or colleagues
in one of our wine classes!*

*Cellar Experience can also create
an event just for you.*

*Charleston Bar Members receive
a 10% discount
(Use Promo Code ChsBar)*

*For more information:
www.cellarexperience.com
wendy@cellarexperience.com*

Please take a few minutes to log in to the Charleston County Bar website (www.Charlestoncountybar.org) and check to be sure that all of your contact information is correct. We are finding that the information on the South Carolina Bar website and the Charleston County Bar website is not always identical. It is very important that we have correct information from each of you in order to have accurate records. This will only take a few minutes of your time and we would very much appreciate each of you doing this.



The Charleston County Bar Association has always had quality leadership and the Executive Committee was reminded of that at the conclusion of its August 11, 2016 monthly meeting when a dozen or so past Presidents dropped-in to discuss one constant within the association over the span of their collective service. That was the hard-work and commitment to our organization provided by Julie Holzel, who had served as its Executive Secretary for thirty (30) years before her official retirement on July 31, 2016.

Each past President shared personal experiences where Julie was always working hard behind the scenes in order to assist them with achieving the goals set for their administration. Capers Barr commented that "Julie was the institutional memory," when his service began at a time where location of the Courthouse was a huge issue and Julie assisted him in "mobilizing the Bar" during that debate. Bart Daniel, who also dealt with the Courthouse

location debate in the wake of Hugo, reflected that Julie pitched in and helped him send more than 1,000 letters on that topic in one week. After the location of the Courthouse was settled, Dawes Cook recalled that Julie was instrumental in our Bar's fundraising efforts to provide fixtures for the Historic Courthouse. Other past Presidents, such as Frances Cantwell, Jerry Theos, Marvin Infinger and Randall Stoney, commented on how Julie assisted in so many ways to make their jobs more manageable and the experience enjoyable. Those comments were echoed by Frank McCann, who stated that "without Julie the Bar would not be 10% of what it is now," and Carol Ervin, who said "Julie is a wonderful asset to the Bar." Immediate Past-President Jim Myrick expressed his appreciation for Julie's tireless efforts in a period of "tremendous growth," and the personal approach she used in addressing complaints and compliments. Finally, President Brian Duffy recognized Julie for her work, not only in conjunction with the President, but also the Executive Committee and all new members involved in the Bar. In response to the compliments and well-wishes, Julie advised that "I've enjoyed it a lot. I made so many friends in the legal system of Charleston." Julie further stated that "I'm going to miss it!"

Although the services our Bar provides to its members and the public may have changed over the course of the thirty (30) years Julie Holzel served as its Executive Secretary, Julie's tireless efforts and support to its mission never did and for that the Bar is most appreciative of Julie's service and wishes her the best in her retirement.

\$260.00

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COURT SCHEDULES

(Court schedules are changing constantly; please verify current information through S.C. Court Administration or by checking the South Carolina Judicial Department website at <http://www.judicial.state.sc.us/calendar/index.cfm>.)

CIRCUIT COURT - NINTH JUDICIAL CIRCUIT

October 3		October 10		October 17		October 24	
9 th CPNJ	- Russo ⁽⁴⁾	9 th CPNJ	- Toal	9 th CPNJ	- Nicholson	Chas CP/NJ	- Murphy
Chas CP/NJ	- Young, W.	Chas CP/NJ	- Newman	Chas CP/NJ	- Murphy	Chas CP/NJ	- Young, R.
Chas CP/NJ	- Harrington	Chas GS	- Goodstein	Chas CP/NJ	- Hughston	Chas CP/NJ	- Nicholson
Chas CP/NJ	- Macaulay	Chas GS	- Harrington	Chas GS	- Dennis	Berk GS	- Dennis
Berk CP/NJ	- Cole	Chas GS	- Maddox	Chas GS	- Harrington	Berk GS	- Harrington
Berk GS	- Jefferson	Berk CP/NJ	- Young, R.	Chas GS	- Jefferson		
				Admin	- Young, R.		
October 31		November 7		November 14		November 21	
9 th CP	- Jefferson	9 th CPNJ	- Nicholson	Chas CP/NJ	- Jefferson		
9 th GS	- Harrington	Chas GS	- Young, R.	Chas GS	- Newman		
Chas GS	- Newman	Chas GS	- Newman	9 th GSNJ	- Harrington		
Berk CP/NJ	- Mullen	Berk CP/NJ	- Harrington	Berk GS	- Hughston		
November 28		December 5		December 12		December 19	
Chas CP/NJ	- Harrington	9 th CPNJ/PCR	- Cooper, T.	9 th CP/NJ	- Harrington		
Chas CP/NJ	- Young, R.	9 th CPNJ	- Jefferson	Chas CP/NJ	- Dennis		
Berk CP/NJ	- Jefferson	Chas CP/NJ	- Dennis	Chas GS	- Jefferson		
Berk GS	- Dennis	Berk CP/NJ	- Lee	Chas GS	- Young, R.		
		9 th GSNJ	- Harrington	Chas GS	- Nicholson		
		9 th GS/SGJ	- Young, R.	Berk GS	- Stilwell		
		Chas GS	- Nicholson				
December 26							

CIRCUIT COURT - FIRST JUDICIAL CIRCUIT

October 3		October 10		October 17		October 24	
1 st CP/NJ	- Goodstein	Dor GS	- Dickson			1 st CPNJ/PCR	- Goodstein
Dor GS	- Murphy						
October 31		November 7		November 14		November 21	
1 st GSNJ	- Dickson	Dor CP/NJ	- Jefferson	Dor GS	- Goodstein	1 st GSNJ	- Nettles
Dor CP/NJ	- Murphy	Dor GS	- Buckner				
November 28		December 5		December 12		December 19	
		Dor CP/NJ	- Murphy	Dor GS	- Murphy		
		Dor GS	- Dickson	1 st GS/NJ	- Goodstein		
December 26							

FAMILY COURT - NINTH JUDICIAL CIRCUIT

October 3		October 10		October 17		October 24	
Chas	- Martin	Chas	- Creech	Chas	- McGowan	Chas	- Cate
Chas	- Buckhannon	Chas	- Cate	Chas	- Woods	Chas	- Martin
Chas	- McLin ⁽⁴⁻⁷⁾	Chas	- Bromell Holmes	Chas	- Cate	Chas	- Richter
Chas	- Cate ⁽⁶⁻⁷⁾	Chas	- Forsythe	Chas	- Martin	Chas	- Forsythe
Berk	- Creech	Berk	- Landis	Chas	- Richter	Berk	- Smoak
Berk	- Richter	Berk	- Richter	Chas	- Forsythe	Berk	- Jones
				Berk	- Creech		
				Berk	- Landis		
October 31		November 7		November 14		November 21	
Chas	- Cate	Chas	- Cate	Chas	- Cate		
Chas	- Martin	Chas	- Martin	Chas	- Martin		
Chas	- Richter	Chas	- Richter	Chas	- Richter		
Chas	- Forsythe	Chas	- Forsythe	Chas	- Forsythe		
Berk	- Landis	Berk	- Creech	Berk	- Creech		
Berk	- Jenkinson	Berk	- McLin	Berk	- Landis		
Berk	- Sprott	Berk	- Smithdeal				
November 28		September 5		December 12		December 19	
Chas	- Fraley	Chas	- Cate	Chas	- Cate		
Chas	- Kinlaw	Chas	- Martin	Chas	- Martin		
Chas	- Robertson	Chas	- Richter	Chas	- Richter		
Chas	- Martin	Chas	- Forsythe	Chas	- Forsythe		
Berk	- Landis	Berk	- Creech	Berk	- Creech		
Berk	- Sprott	Berk	- McLin	Berk	- Landis		
		Berk	- Landis				
December 26							

FAMILY COURT - FIRST JUDICIAL CIRCUIT

October 3		October 10		October 17		October 24	
Dor	- Wylie	Dor	- Holt	Dor	- McLin	Dor	- Guyton
Dor	- McGee	Dor	- Jones ⁽¹¹⁻¹⁴⁾	Dor	- Guyton ⁽¹⁷⁻²⁰⁾		
October 31		November 7		November 14		November 21	
Dor	- McLin	Dor	- Jones	Dor	- Wylie		
Dor	- Smithdeal ⁽³¹⁻³⁾	Dor	- Guyton	Dor	- McGee		
November 28		December 5		December 12		December 19	
Dor	- McLin	Dor	- Wylie	Dor	- McLin		
Dor	- Wylie	Dor	- Jones	Dor	- Wylie		
December 26							

Spotlight: Sanctuary For Sober Living

By now, you've heard the statistics:

- 129 people die each day from an opioid drug overdose
- 241 people die from alcohol addiction; another 270 people die from alcohol related causes such as drunk driving accidents, falls, fires, and suicides

Before the end of today, over 600 people who woke up this morning will be dead because of drugs and alcohol.

Elected leaders, medical care providers, and law enforcement personnel now recognize addiction as a chronic illness, not a crime. Addicts who are actively abusing drugs or alcohol are now able to access medical treatment quicker and easier than at any other time in history. So, why are so many people still dying from this disease?

Well...that answer is a little more complicated.

Randy's three year odyssey with addiction began the day he came home from the hospital after cancer surgery. He and his bottle of OxyContin went to bed, and I sat on the couch praying to God to not make me a widow. Seven weeks later, he was an addict - when the pills stopped, he switched to alcohol. I was angry, scared. I blamed him for not being happy to be alive. I blamed him for ruining my life. I cried, I begged, and I yelled. His life was simple - all he had to do was drink. I had to do all the work. I had to lie to everyone. I had to hide Randy away, help keep his secret, lest I look bad.

In June 2013, Randy found his sobriety. I wish I could say it was as easy as that sentence sounds, but far from it. All those emotions I had been carrying were now his responsibility. All the damage was his to repair. And, he was certainly never allowed to be weak, unsure, or angry. Randy's whole job was to be happy. Well, and sorry.

Simply removing drugs and alcohol from someone's system doesn't make them happy, healthy, confident, and ready to breeze through life sober. Quite the opposite - detoxification makes an addict cognizant of his/her surroundings; embarrassed, ashamed, afraid.

And, this is when society says, "OK, now, be normal. Don't mess up or you'll go to jail, don't fail or your family will abandon you again - this time forever. Don't look back, and start acting like the rest of us".

Addiction is an overwhelming disease. It is terrifying, and lonely. Recovery is just as terrifying ... it is messy and it is hard. Until we as a society embrace and support recovery - celebrate addicts as they work to live sustainable sober lives - we will continue to lose the battle against addiction. This is why we founded The Sanctuary for Sober Living.

We are committed to providing newly sober addicts a safe and secure facility where they can focus on themselves, adjust to their new reality, mend relationships, receive counseling, and develop healthy habits to support them in their sobriety. We have only one goal - support

and celebrate newly sober addicts as they work to become healthy, productive members of their community. To do this, The Sanctuary for Sober Living will coordinate and collaborate with the amazing cadre of professional counselors, and psychiatrists, and addiction specialists in our community to create a seamless continuum of recovery care. Our program will include admission into the MUSC Center for Drug and Alcohol Programs (CDAP) Intensive Outpatient program, a nationally recognized leader in the addiction recovery industry. Residents at SSL will participate in activities and events in the community; they will attend group support meetings in the area. They will not be hidden away, sheltered from the real world.



After more than a year of searching, we have found the right location to house this unique program. The building is spacious, provides the right balance of privacy and group living, has plenty of green space, and is convenient to professional support programs. Our program is supported by recovery experts at Roper St. Francis and MUSC, and our operational business plan is self-sustaining.

We need your help. The very generous owner has agreed to a sales price that is more than \$50,000 below appraised value; the total funds needed to buy the building and complete the necessary safety features (sprinkler system, fire rated windows, and appropriate exit stairwells from each floor) is \$700,000. Beyond this one time investment, the Sanctuary for Sober Living can sustain operations as a fee based program, as well as provide partial scholarships for qualified applicants. We believe that no one actively working to begin their sobriety should be denied access to proven best practices for long term recovery simply because of their financial situation.

We hope you agree.

For more information about The Sanctuary for Sober Living, a 501(c)3 charitable organization, contact cindybohncoats@gmail.com or 843-819-8205. To support this one-of-a-kind program, please consider donating to "The Sanctuary for Sober Living," 4458 South Rhett Avenue, North Charleston SC 29405.

JURY VERDICTS

CHARLESTON COUNTY COMMON PLEAS

(Information supplied by Clerk of Court's Office)

2014-CP-10-02400 Glenn Wheeler vs. Pelican II, LLC
d/b/a Imaging Specialists

Attorneys:

Plaintiff: Todd Raymond Ellis
Defendant: Mary Agnes Hood Craig

Cause of Action: Medical Malpractice

Verdict: For the Defendant.

2014-CP-10-6553 Christopher Duke Brunson vs. Edgar
Lewis Gresham

Attorneys:

Plaintiff: William Ceth Land
Defendants: T. David Rheney

Cause of Action: Motor Vehicle Accident

Verdict: For the Plaintiff in the amount of \$60,000.00
actual damages.

2014-CP-10-7781 Pamela McNeil vs. Public Storage

Attorneys:

Plaintiff: Elizabeth Fulton and Edward
Pritchard
Defendant: Justin Novak

Cause of Action: Conversion

Verdict: For the Plaintiff in the amount of \$17,500.00.

2015-CP-10-1247 James Donald Dunmeyer vs. Rahsul
Thornton

Attorneys:

Plaintiff: Peter McGrath
Defendant: David Savage

Cause of Action: Motor Vehicle Accident

Verdict: For the Plaintiff in the amount of \$886.71 in
actual damages.

2015-CP-10-1683 Richard John Adolphi vs. National
Dental Systems, LLC

Attorneys:

Plaintiff: William M. McLeod
Defendant: Mark McKnight

Cause of Action: Breach of Contract

Verdict: For the Plaintiff in the amount of \$1,238,962.00 in
actual damages.

2015-CP-10-1972

Jason Anthony Wooten vs. Cynthia L.
Dewild

Attorneys:

Plaintiff: Jeffrey W. Buncher, Jr.
Defendant: Lee C. Weatherly

Cause of Action: Motor Vehicle Accident

Verdict: For the Plaintiffs in the amount of \$250.00 actual
damages.

2015-CP-10-2343

Tanza M. Black vs. Breona J. McNeil

Attorneys:

Plaintiff: J. Kevin Holmes
Defendant: Christopher W. Nickels

Cause of Action: Motor Vehicle Accident

Verdict: For the Plaintiff in the amount of \$11,974.00
actual damages.

2015-CP-10-3104

Loretta F. Gregg vs. Harry L. Small

Attorneys:

Plaintiff: Bradley Parker Green
Defendant: John Andrew Delaney

Cause of Action: Motor Vehicle Accident

Verdict: For the Defendant.

2015-CP-10-3422

Leroy Grimes vs. Raymond Leonard
Dixon

Attorneys:

Plaintiff: Jason Stevens
Defendant: Margaret F. Horn and Vernon Glenn

Cause of Action: Personal Injury

Verdict: For the Plaintiff in the amount of \$15,000.00
actual damages.

FEDERAL DISTRICT COURT - CHARLESTON DIVISION

(Information supplied by Clerk of Court's Office)

9:13-cv-02413-RBH

Michael J. Ferola vs. Officer Fulton, *et al.*

Attorneys:

Plaintiff: William Paul Tinkler
Defendant: Lisa Arlene Thomas

Cause of Action: Prison Conditions

Verdict: For the Defendants.

9:13-cv-01192-DCN Wickersham vs. Ford Motor Company

Cause of Action: Personal Injury - Product Liability

Attorneys:

Plaintiff: Austin Howell Crosby, Kathleen Chewing Barnes, Mark David Ball, Ronnie L. Crosby and Donnie Charles Gibson

Defendant: Carmelo B. Sammataro, Joseph Kenneth Carter, Jr., Nicholas W. Gladd, Andrew William Kunz, and David Christopher Marshall

Verdict: For the Plaintiffs:

\$1,250,000.00 to Estate of JHW for pain and suffering prior to death.
 \$650,000.00 to CW for loss of consortium from the date of the accident to death.
 \$1,375,000.00 to beneficiaries for wrongful death.
 \$1,375,000.00 to CW for loss of consortium following death.

IN THE KNOW

Beginning with this issue, the Newsletter will include a new section designed to update the membership on recent developments in the law while spotlighting a CCBA member who practices in the area. We are calling the new feature "In the Know" and Tom Gressette agreed to provide our inaugural installment by discussing his varied practice and a preparing an update on a recent United States Supreme court case.

After graduating from the University of South Carolina School of Law in 1997, Tom Gressette served as a judicial law clerk to the Honorable C. Weston Houck. Following his clerkship, Tom worked as an assistant federal public defender stationed in his hometown of Florence. In 2001, Tom moved to Charleston and joined the former firm of Ness, Motley, Loadholdt, Richardson & Poole, PA where he worked until the formation of Richardson, Patrick Westbrook & Brickman, LLC.

In the early years of RPWB, Tom represented plaintiffs injured by faulty medical devices and defective pharmaceutical drugs in various forums, including Multi-District Litigation (MDL) consolidations for Rezulin, Phenylpropanolamine, Baycol and Lopid. Later, as a member at Richardson Patrick, Tom handled national products liability litigation representing governmental entities including The State of New Jersey, The Government of the United States Virgin Islands, and The Commonwealth of Puerto Rico to recover for damage to their natural resources. "My time at RPWB required me to work with lawyers from all over the country, some of which practice quite differently than we do here in South Carolina. But, one thing is true everywhere -- all lawyers respect a prepared adversary and a lawyer who is true to his word. I try hard to always be both."

In 2012, Tom joined the firm of Pratt-Thomas Walker, PA where he continues to handle MDL cases involving defective devices like hip implants and pharmaceutical drugs. Tom says the move to Pratt-Thomas was a conscious decision, to put his national litigation experience to work for more local clients. "Trenholm Walker, John Linton, and I work most of our cases together. Each of us brings a slightly different perspective which ultimately benefits our clients. That teamwork also provides each of us the support we need to represent diverse clients in a really broad spectrum of cases."

That diversity in clients and cases is evident when Tom explains that since his move to Pratt-Thomas Walker, he has tried civil and administrative cases while also handling appellate matters before the South Carolina Supreme Court, Court of Appeals, and the Fourth Circuit Court of Appeals. He represents landowners in land use regulatory matters (DHEC permitting) and appears before the Public Service Commission in ratesetting matters for utility companies like water and sewer service providers. Another unique area of Tom's varied practice includes representing brokers and dealers in administrative proceedings before the Securities Division of the Office of the South Carolina Attorney General.

Tom also represents whistleblowers ("qui tam plaintiffs") as well as both individual and corporate defendants in cases brought pursuant to the federal False Claims Act, 31 U.S.C. §§ 3729-3733. When the United States Supreme Court decided *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, in June of this year, Tom kindly agreed to provide the following update and analysis of the case.

Implied Certification Liability Under The False Claims Act

The False Claims Act ("FCA"), 31 U.S.C. §§3729-3733, has quickly become the United States' favorite enforcement tool against federal contractors in South Carolina.¹ The FCA is effective because it "imposes significant financial penalties for 'knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval.'"² Claims can be factually false (a claim bills for charges or services that were not rendered) or legally false (a claim fails to satisfy an underlying legal requirement because of a violation of a statute, regulation, or contract which becomes actionable under the FCA through a certification, which can be either express or implied).³ The FCA also prohibits contractors from making false statements "material to a false or fraudulent claim."⁴

For the past several years, "federal courts have grappled with the issue of whether factually accurate claims submitted to the government for payment can nevertheless be considered false or fraudulent" and therefore a violation of the False Claims Act under an implied theory of liability commonly referred to as "implied certification liability."⁵

The United State Supreme Court's recent decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, ___ U.S. ___, 136 S. Ct. 1989 (2016), addresses implied certification liability, but it has left commentators and counsel wondering if the door has been opened to a brave new world where any potential statutory or regulatory violation by a claimant renders its claim a violation of the FCA.

I suggest that such a result is unlikely because the Court's decision in *Universal Health* rests upon and specifically incorporates the strict pleading and proof requirements of the Federal Rules of Civil Procedure.

Implied Certification Liability

The FCA "creates potential liability for a contractor who expressly certifies compliance with certain requirements that are material to payment when in fact the contractor knows it has not complied with such requirements."⁶ Again, this is factual or express liability. The theory of implied certification liability is premised upon a broad reading of the FCA that imposes liability "where a contractor is out of compliance with a statute, regulation or contract requirement, but the contractor does not expressly certify such compliance."⁷ Contractors are increasingly concerned about the scope of their obligations and/or exposure to additional liability beyond the known parameters of factual or express liability.

On June 16, 2016, the United States Supreme Court issued its decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, and in doing so addressed the split among the Circuit Courts of Appeal as to whether the "implied certification" theory of knowingly fraudulent representations can be a basis for liability under the FCA.

Delivering the opinion of the Court, Justice Thomas succinctly framed the issue: If a claim submitted "fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement..., [has] the defendant...made a misrepresentation that renders the claim 'false or fraudulent'" under the FCA?⁸ The Court answered in the affirmative. Yes, the implied false certification theory can be a basis for liability if the claims submitted for payment includes a specific representation about the goods or services provided yet knowingly excludes the defendant's non-compliance with material statutory, regulatory, or contractual requirements.

The Court's Analysis

Beginning with the plain language of the FCA, the Court referenced the prohibition against "a false or fraudulent claim for payment or approval" and pointed out the FCA itself does not define "false or fraudulent."⁹ Applying traditional legislative intent analysis, the Court looked to common law fraud which "has long encompassed certain misrepresentations by omission, 'false or fraudulent claims' include more than just claims containing express falsehoods."¹⁰ The Court also cited by comparison a "'classic example' of an 'actionable half-truth' in contract law: 'the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property.'"¹¹

In *Universal Health*, a contractor through Universal Health submitted claims seeking payment for therapy and other counseling services. The services were submitted using codes that identified the service

provided. The facts revealed that the individuals performing the services did not meet state and other standards, so they were not qualified to provide the services as coded. Also, the claims used additional job title codes for the employees performing the services, but the employees did not have the requisite training for persons using those codes. The Court held "By using payment and other codes that conveyed this information without disclosing [the contractor's] many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations."¹²

Summarizing, the Court explained:

Accordingly, we hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.¹³

The Government asked the Court to endorse broad application of implied certification liability, contending that "every submission of a claim for payment implicitly represents that the claimant is legally entitled to payment, and that failing to disclose violations of material legal requirements renders the claim misleading [and therefore actionable under the Act]."¹⁴

Universal Health, however, argued that not all claims include a universal representation; instead, Universal Health asserted that in government contracting there is no special duty to disclose such matters and therefore non-disclosure of legal violations is not actionable absent such a special duty.¹⁵

Resolving the matter, the Court held "that not every undisclosed violation of an express condition of payment automatically triggers liability." Instead, "[w]hether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry."¹⁷

Providing guidance for trial court's analysis of materiality, Justice Thomas explained that when evaluating materiality:

1. "[T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive."

2. "[P]roof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement."

3. "[I]f the Government pays a particular claim in full despite its actual knowledge that

certain requirements were violated, that is very strong evidence that those requirements are not material.”¹⁸

4. “[I]f the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.”¹⁸

Conclusion

Following *Universal Health*, we are left with questions like what constitutes a “specific representation” triggering liability under the FCA, “particularly given that implied certification cases generally involve no express representations?” Potential defense counsel are wondering about other practical issues, like how

defendants will obtain facts sufficient to establish a defense that the Government has made payment of claims despite actual knowledge of previous noncompliance.

However, some things remain unchanged. Even though the Court endorsed a fact-intensive review of materiality, it clearly stated that the analysis is not too “intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment.”²⁰ This is arguably the Court’s insurance against a proliferation of unsupported implied certification claims; very specifically, the Court has told us implied false certification liability allegations under the FCA should be examined at the pleadings stage to ensure each case satisfies the pleading requirements of the Federal Rules of Civil Procedure as further refined by *Ashcroft v. Iqbal*²¹ and *Bell Atlantic Corp. v. Twombly*.²²

Notes:

- ¹ In every year since 2010, South Carolina has ranked “near the top among the 93 U.S. districts for financial recoveries from false claims and whistleblower cases. See Nettles Leaving U.S. Attorney’s Office, SCBizNews, June 15, 2016, available at <http://scbiznews.com/news/law/nettles-leaving-us-attorneys-office-plans-to-open-columbia-law-office/>.
- ² C. Joël Van Over, Alexander B. Ginsberg and Danielle Vrabie, Supreme Court Validates “Implied Certification” Liability Under False Claims Act, June 23, 2016, available at <http://www.pillsburylaw.com/publications/supreme-court-validates-implied-certification-liability-under-false-claims-act> (quoting 31 U.S. Code § 3729).
- ³ See 31 U.S. Code § 3729 and Crane, Thomas S. and Dunphy, Brian P., Health Care Enforcement Defense Advisory, October 17, 2011, available at <https://www.mintz.com/newsletter/2011/Advisories/1428-1011-NAT-HCED/web.htm>.
- ⁴ See 31 U.S. Code § 3729(a)(1)(B).
- ⁵ See Crane and Dunphy (internal quotations omitted). See also *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir.2011) (applying implied certification theory) and *United States v. Sanford-Brown, Ltd.*, 788 F. 3d 696, 711-712 (7th Cir. 2015) (rejecting implied false certification theory).
- ⁶ Van Over, Ginsberg and Vrabie at 1.
- ⁷ *Id.*
- ⁸ *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, __ U.S. __, 136 S. Ct. 1989, 1995 (2016) (quoting 31 U.S.C. §3729).
- ⁹ *Id.* at 1998 (quoting 31 U.S.C. §3729).
- ¹⁰ *Id.* (citing *Sekhar v. United States*, 133 S. Ct. 2720, 2724 “[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.”).
- ¹¹ Van Over, Ginsberg and Vrabie at 3 (quoting *Universal Health* Slip Op at 10).
- ¹² *Universal Health*, 136 S. Ct. at 2000.
- ¹³ *Id.*
- ¹⁴ *Universal Health*, 136 S. Ct. at 1999.
- ¹⁵ *Id.* at 2001.
- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ *Universal Health*, 136 S. Ct. at 2003-4.
- ¹⁹ Van Over, Ginsberg and Vrabie at 4.
- ²⁰ *Universal Health* at fn.6 (“False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance pleading facts to support allegations of materiality.”)
- ²¹ 556 U.S. 662 (2009).
- ²² 550 U.S. 544 (2007).

We appreciate Tom’s willingness to be our first “In The Know” contributor. If you would like to provide an update on a recent development within your practice area, please contact David Wolf at david@wolflaw.com. Also, encourage your partners and friends to let us know about new developments so we can keep the CCBA “In The Know” about its members and their insight into new trends in the law.

SAVE THE DATES

December 8, 2016
CCBA Holiday Party
South Carolina Aquarium

February 16, 2017
CCBA Annual Meeting & Reception
Francis Marion Hotel

Times for these events will be provided when determined.

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By: **Alissa C. Lietzow, Esquire**

Director
(Charleston) Pro Bono Legal Services, Inc.



2015 Artwork courtesy of John Michael Hoffman

For seventeen years the popular fundraiser Art on the Beach - Chefs in the Kitchen has drawn hundreds of visitors to Sullivan's Island for an afternoon house tour replete with over twenty-five artists selling their creations

and tasty treats from renowned chefs and food purveyors. This year's event will be on Sunday, November 13, when several Sullivan's Island beach houses will be part of the tour benefitting Charleston Pro Bono Services which provides free civil legal services to hundreds of families in our community each year. With so many situations requiring a lawyer, Charleston Pro Bono ensures that the doors of justice are open to all, regardless of income. In addition to advice, counsel, and document preparation, we match low-income clients with local attorneys to help solve legal problems ranging from custody and adoption to estate planning and landlord/tenant issues.

So far this year, we've helped nearly 500 people with legal issues. To cite just a few of our success stories, we highlight Mr. J., Ms. O., and Mr. A.

Mr. J came to us when the mother of his son began denying visitation, harassing Mr. J at his workplace, filing false reports against him with law enforcement and Social Services, and otherwise making life as difficult as possible for Mr. J to be an involved parent. We assisted in resolving the false reports and DSS action, and helped Mr. J, who wanted nothing more than to be an engaged, supportive parent to his only child and get assured parenting time with his son.

Ms. O initially came to us for a simple will. Upon meeting with Ms. O, we learned that she had advanced stage cancer and very limited time left. Ms. O's main concerns were for her children. We helped preserve her estate for her children and also helped to ensure that guardianship of the minor daughter was placed with her adult brother, instead of reverting to her estranged father. Ms. O. passed shortly after we prepared her will, at which point we helped her adult son to seek legal custody of his sister.

Mr. A, a U.S. Army veteran, was an athlete in the military, served his country honorably, and generally enjoyed good health into his later years. But while having a routine operation through his V.A. medical care, Mr. A. was permanently injured. Our staff attorney, who is accredited to represent veterans before the V.A., assisted Mr. A. to navigate the labyrinthine appeals process and have his injury acknowledged and treated appropriately.

What may be a routine case for the volunteer lawyers is often critically important to the hundreds of clients who seek aid each year since the complexities of the legal system can often be confusing and frustrating. When considering how you can support our organization, remember that we are always in need of volunteer attorneys for direct representation, clinics, and educational seminars. Or, attend our next fundraiser!

We hope you can come out to enjoy a lovely afternoon at the beach while simultaneously supporting our local pro bono initiative. Thirty artists are scheduled to be on site during the tour to engage patrons and sell their creations ranging from wearable art to paintings. We also have an incredible line up of talented chefs who will be treating attendees to delicious samples. During the event, patrons can drive or bicycle around Sullivan's Island using a map provided with their tickets. Tickets for Art on the Beach - Chefs in the Kitchen are \$40 in advance, \$45 the day of the tour. Tickets may be purchased online at <http://artonthebeach.bpt.me>. For more information, please contact Alissa C. Lietzow at ALietzow@charlestonprobono.org, call (843) 853-6456, or visit <http://charlestonprobono.org>.



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Teri Johnson Leinbach, Esquire has been sick with acute Leukemia for almost six months. After several false starts with her treatment, Teri finally found a perfect unrelated bone marrow donor. This wonderful stranger has given Teri a shot at life. Currently in Northside Hospital in Atlanta, Teri is fighting hard to make the most of this gift. As she sent her only child off to college, Teri has had to relocate temporarily to Atlanta and take an apartment for herself and caregivers so that she can receive the proper medical treatment. She will have been out of work for more than a year when she finishes the currently scheduled treatment.

Teri's friends and relatives have asked us to provide information for interested members who can help Teri with her financial burden. In addition to entering Teri's name on www.GoFundMe.com and contributing there, donors can send donations to Teri's church which has set up a tax deductible fund. Checks may be written to: Northbridge Baptist Church. In the reference line please place Agape Fund/Teri Leinbach. The address is 1160 Sam Rittenburg Blvd, Charleston, SC 29407.

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