

## SHOW ME THE MONEY: The Fight Over Access to a Defendant's Financials

A REPORT TO MEMBERS OF THE SOUTH CAROLINA BAR YOUNG LAWYERS DIVISION



By Andrew Johnson

### Discovering the defendant's financial background

Punitive damages play a vital role in our state's legal system by punishing bad actors.<sup>1</sup> According to Judge Anderson's jury charges, the "defendant's wealth or ability to pay" is a relevant factor in the jury's consideration of punitive damages.<sup>2</sup> However, I cannot think of one defendant who would be pleased receiving a discovery request for his/her/its financial information.

Thus creates the tension that plagues a minute—albeit important—part of any punitive-damages case. The request for such information creates a litigation battlefield of motions to quash 30(b)(6) depositions, motions to compel financial information, motions for protection from the discovery of such information, and so on. Regardless, this financial information is an important piece of evidence in most punitive damages cases.

### Why the defendant's financial background is important

Determining the defendant's financial information is key to showing the jury that the defendant is capable of affording a punitive damage verdict.<sup>3</sup> The South Carolina Supreme Court has squarely rejected a defendant's assertion that the defendant's ability to pay a punitive damages award was not a proper consideration for the jury.<sup>4</sup> The jury may refuse to submit a punitive damages award if it believes the defendant could not afford such an award.

### Balancing the timing of the request

South Carolina law requires simply prima facie evidence that supports the

punitive damages claim. For example, if a defendant violates a traffic-code statute (e.g., failing to yield the right-of-way), this is per se recklessness.<sup>5</sup> Therefore, prima facie evidence of a punitive damages claim would exist. In most cases in which the type of damages are still being determined, it would be premature to request the defendant's financial background in initial discovery requests. Typically, once it is determined that punitive damages (1) exist and (2) will be extensive, it is proper to request this evidence.

Attorneys also must balance their required adherence to the Attorney's Oath with their duty of competency to their clients.<sup>6</sup> In some cases, requesting financial disclosures is unnecessary, and in demanding such information, a court may view the request as violative of Rule 26(c), SCRCP.<sup>7</sup> It's all a balancing act. For instance, limiting the scope of the request helps in some cases (e.g., do not request twenty years of financial history). Further, if necessary, the parties may agree to some form of confidentiality as it relates to the information.

### The consequences of failing to make the request

If an attorney fails to make the request—or obtain the financial evidence—prior to the start of trial, two serious issues arise: (1) the inability of counsel to properly analyze the information and (2) the potential for commission of an ethical violation. Presume the following points are true in a hypothetical case:

A commercial truck driver (defendant driver) has three DUIs in the past year. ABC Company (defendant company) hires defendant driver to drive its trucks. Two weeks later, defendant gets drunk and runs a red light while on the job, causing a collision with another



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# Double the dedication, double the award



Joseph Bias and Tommy Preston come from different backgrounds but work towards the same goal—serving their communities and making an impact on future generations. Both young lawyers dedicate their time to improving the profession, completing tasks with positivity and helping those around them. These very characteristics are why Bias and Preston will jointly receive the 2019 Young Lawyer of the Year award.

Managing attorney for the liability department of Vernis & Bowling's Columbia office, Bias displays impressive work inside the courtroom, but he is being honored for the lives he's touched away from the bench.

Bias believes in giving back to his community and has volunteered as an attorney coach for Middle and High School Mock Trial teams since 2008. He started his alma mater Richland Northeast High School's Mock Trial Team and coaches the USC Black Law Student Mock Trial Team. In the YLD, Bias has previously served as co-chair for the Protecting Our Youth Committee. He is also an adjunct professor at the University of South Carolina School of Law.

"On any given Saturday or Sun-

day, high schoolers, their parents and their siblings are spending hours with Joseph learning about the law, and perhaps, more importantly about what being a young lawyer in South Carolina means," says Laura Robinson, a colleague at Vernis & Bowling, who nominated Bias for the award.

That impact is far-reaching, adds Brett Bayne, another colleague.

"Joseph's hard work and diligent effort have seen countless students graduate high school, go to college and even go to law school—accomplishments that are unquestionably driven by the mentorship and compassion he showed to his students," Bayne says.

To the South, Young Lawyer of the Year Tommy Preston serves as director of national strategy and engagement at Boeing in Charleston. Born a leader, Preston quickly worked his way up in any organization he's joined and is now the national chair of the American Bar Association YLD. In 2018, he helped organize the ABA YLD's annual meeting in the Holy City.

Preston also maximized the work of lawyers to impact the community. A founding member of the University of South Carolina literacy outreach program Cocky's Reading Express, he enlisted the help of the SC Bar YLD. Because of Preston's efforts to connect young lawyers to this initiative, each year, dozens of attorneys visit elementary schools across the state to read and distribute books to children. More than 130,000 books have been donated

thanks to this project.

"To make a significant impact on improving child literacy in South Carolina while at the same time introducing many young lawyers to public service epitomizes what the South Carolina Young Lawyer of the Year should represent," says Will Johnson, who nominated Preston for the award.

Preston is a proud Gamecock, a Pickens County native and a Charleston lover. Every day he works, he strives to help those around him and better the profession.

"One often hears the phrase 'he's going places' with respect to talented young professionals," Johnson adds. "In Tommy's case, he has already 'gone places' and has accomplishments that most people would be proud to achieve in a lifetime. However, his work has just begun. I do not know exactly what the future holds for Tommy Preston, but I do know that Tommy will continue making a positive impact in South Carolina and in the legal community for many years to come."

Both of these men truly exemplify what it means to represent the YLD in the most outstanding manner throughout South Carolina and the nation.

"The SC Bar and the YLD congratulate Joseph and Tommy," says YLD President Ashleigh Wilson. "Both of these young men are driven by their passion, and we're very happy to celebrate them."

Bias and Preston were honored at the House of Delegates meeting in May.

## Show Me the Money

(continued from Front Cover)

driver (plaintiff). Plaintiff sustains seven figures in actual damages and is forced to file suit. Plaintiff participates in a bifurcated trial; the jury awards actual damages; and the jury determines punitive damages should be awarded.

In this case, it would be reasonable for plaintiff to have requested defendant company's financial information at the initial litigation stage because the damages are high and punitive exposure exists. If plaintiff fails to request and

obtain defendant company's financial information prior to trial, we see the two main issues:

(1) The jury has no basis to believe defendant company has the ability to pay a high punitive damages award. For the jury to obtain this information, it needs either (a) disclosure of the insurance coverage amount, which will never happen, or (b) proof defendant company's assets/finances put it in a position to pay the award.

Thus, defendant company can now provide the financial information

because it knows the jury is going to award punitive damages. Yet, what if defendant company's finances show a loss for the past ten years? What if defendant company's assets show a net gain lower than the actual damages? Now the plaintiff is forced to hire an economist to review the records. Will the plaintiff have an expert report in time for the jury's punitive damage amount determination? Doubtful.

(2) Let's say the jury awards \$2 million without proof of defendant company's financial information. Then it is determined the basis for



# What's Been Happening



Protecting Our Youth Committee held a panel discussion at West Ashley Middle School with special guest Judge Michele Forsythe.

Brews and News hosted special guests Mayor Knox White and Graham Rich, executive director of Renewable Water in Greenville. Mayor White and Rich spoke about affordable housing needs in Greenville.



The 12<sup>th</sup> Circuit participated in the YLD Reads book drive and donated books to Brockington Elementary School and Johnson Middle School.



Color of Justice held an event in the 15<sup>th</sup> Circuit at Ten Oaks Middle

School. Approximately 37 students had the opportunity to participate in a mock trial presentation.



YLD held Family Day in Columbia at Frankie's Fun Park.



The 14<sup>th</sup> Circuit participated in the YLD Reads Book Drive and donated books to Whale Branch Elementary.



YLD members across the state participated in Cockey's Reading Express.



The Military Support Committee held a Law Day Teach In at C.C. Pickney Elementary School on Fort Jackson. Committee members and Judge Advocates taught a lesson on free speech.



YLD members participated in the Make-A-Wish golf tournament on Kiawah Island.



YLD leadership held its annual retreat at Hilton Head to plan exciting initiatives for the upcoming year!

the lower verdict was a lack of evidence that a larger verdict would not financially ruin defendant company. If counsel for plaintiff had not requested and attempted to compel such financial evidence, he/she may have cost the plaintiff millions. Presumably, this doesn't square well with Rule 407, SCACR.

## Conclusion

A defendant's financial information is an important piece of evidence to discover in most punitive damages cases. Actually obtaining this information is rarely a simple process. Following the law and being civil typically results

in both sides complying with discovery requirements related to these disclosures, and, hopefully, this facilitates justice for the client.

*Andrew Johnson is an associate at the Law Office of Kenneth E. Berger.*

## Endnotes

<sup>1</sup> See *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000) ("The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future. Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." (citation omitted)).

<sup>2</sup> § 13-21 (2005).

<sup>3</sup> See *Gamble v. Stevenson*, 305 S.C. 104, 111 n.3, 406 S.E.2d 350, 354 n.3 (1991) ("[T]he wrongdoer's ability to pay is a relevant factor in assessing punitive damages.").

<sup>4</sup> *Id.*

<sup>5</sup> See *Daniels v. Bernard*, 270 S.C. 51, 55, 240 S.E.2d 518, 520 (1978) ("[T]he violation of a statute is negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury."); see also *Field v. Gregory*, 230 S.C. 39, 46, 94 S.E.2d 15, 19 (1956) ("Causative violation of an applicable statute constitutes actionable negligence and is evidence of recklessness, willfulness[,] and wantonness.").

<sup>6</sup> See Rules 1.1 and 3.4, RPC, Rule 407, SCACR; see also Rule 402, SCACR.

<sup>7</sup> "[T]he court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense."



# South Carolina Bar

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## Letter from the President



Dear Young Lawyers:

Time flies when you're having fun! Sure feels like it as I wrap up my last few months as YLD president! It has been my honor to serve as your president this year. There have been so many wonderful moments that have made me proud to call myself a South Carolina young lawyer. I have had the opportunity to work with and get to know many of the Palmetto State's best and brightest lawyers. I am so hopeful for all the wonderful things that President-Elect Sheila Willis has in store for the YLD next year. I am also happy to be passing the YLD baton to an Executive Committee that is made up of both friends and very competent leaders!

I could have written a much longer letter for this edition of the Young Lawyer, but I decided to keep my musings about life and our profession short and sweet. I will have much more time to share all the things that motivate and inspire me on July 1 when I reclaim my time and my term as President ends. Cheers to a lovely summer!

*Ash R. Wilson*

Ashleigh R. Wilson  
YLD President

## President's Awards Recipients

**Taylor Davis Gilliam**, S.C. Commission on Indigent Defense, Columbia  
**Sutania Alicia Fuller**, Eleventh Circuit Solicitor's Office, Lexington  
**Sara Leslie McIntosh**, McIntosh, Sheard, Sullivan & Brousseau, Anderson  
**Patrick James Cleary**, Bowman & Brooke, LLP, Columbia



## Stars of the Quarter

**Blair Streitenberger**  
**Toria D. Smith**  
**Kara Hamilton**  
**William Buyck**  
**AJ Holloway**  
**Patrick Wooten**  
**Abigail Kobrovsky**  
**Henry McMaster Jr.**  
**Kaitlin Beck**  
**Jeff Gurney**  
**Grady Anthony**  
**Ryne "Josh" Kochan**