

When the Sky Did Fall: Argument Before the United States Supreme Court

By David E. Hudson

PERHAPS A PARALLEL WOULD be the anxiety before a first parachute jump. Only when safe on the ground would you say how exciting and challenging it all had been.

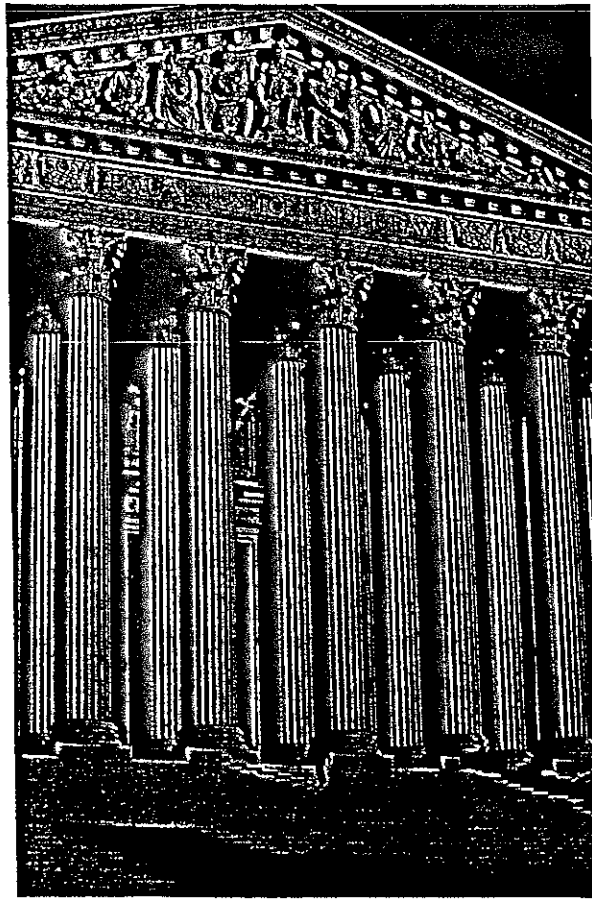
I told my partner Bill Keogh that it was futile to apply for certiorari. The United States Supreme Court takes so few cases out of hundreds of petitions it receives, plus it has decided enough preemption cases in the last few years such that it surely had nothing new to opine. But if he wanted to try, I would edit and sign the petition, and if the sky should fall and the case did get accepted, I agreed to argue.

Background

In June 1993, an exceptional young woman who was a college pre-med student was thrown from the front of a speed boat at Strom Thurmond Lake near Augusta, and was chopped to death by the boat's propeller. The family lawyer referred the case to us, and we were able to obtain a settlement from the boat operator's homeowner liability policy.

We were also aware of product liability suits challenging design of recreation boat motors without

propeller guards. Augusta lawyer John Bell referred us to R. Ben Hogan III of Birmingham. Ben had successfully tried unguarded propel-



ler cases to million dollar verdicts only to lose on appeal to manufacturers' preemption argument: state law liability claims for boat design defects are preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306. Bill and I thought that since there were no extant federal regula-

tions on propeller design pursuant to that Act, perhaps the Supreme Court's 1995 decision in *Freightliner Corp. v. Myrick*¹ would make a propeller case viable again. So, Bill, Ben and I sued Brunswick Corporation for the wrongful death of Kathee Lewis.

Brunswick was represented by Tommy Tucker of Augusta and Ron Reid of Atlanta. They removed the case to federal court and asserted a preemption defense. In other cases where a legal issue could be controlling, Tommy and I have stipulated the necessary record for the trial court to rule, and we agreed to do so in this case. The idea is to save both sides the expense of discovery and preparation if a point of law will decide the case. The facts of the incident, Coast Guard letters regarding the Act, a Coast Guard Advisory Committee study on propeller strikes (favorable to manufacturers), and a Johns Hopkins University study (unfavorable to manufacturers), were put in the record.

Brunswick then moved for summary judgment on the preemption defense. The District Court agreed with Brunswick and dismissed the case. *Lewis v. Brunswick Corp.*, 922 F. Supp. 613. (S.D. Ga. 1996). The Eleventh Circuit affirmed. 107 F.3d 1494 (1997).

So we filed the cert petition in

August 1997, and forgot about it. The inevitable notice of petition denied would come soon enough.

The Sky Did Fall

In mid-November, I returned to the office on a Friday afternoon after depositions out of town. Faxes are often placed in my desk chair so they won't be overlooked. Included in the stack was one with the cover sheet of the United States Supreme Court. Probably something to do with proposed rule changes, I thought. I occasionally receive such things due to past service on our district's Civil Justice Reform Committee. Instead, the second page had a statement that certiorari had been granted in the following three cases and briefing was being expedited. The third one was *Lewis v. Brunswick!*

It caused something of a stir in our 20-lawyer firm. On occasion over the years, we have applied for or opposed certiorari at the Supreme Court, but not one of us has argued a case there since the firm was founded in 1914. The last Augusta lawyer to do so was Mont Miller in 1979.² Still, one of my partners (a commercial lawyer) grumbled: "Which of those judges have you been playing golf with?"

Within the next few days, we learned the due dates for the briefs and that argument would likely be an open slot in the Court's calendar in early March, 1998. We also learned that Brunswick Corporation had retained a Washington, D.C., firm with an experienced Supreme Court practice group. Its attorney of record, Ken Geller, is a former classmate of mine (he was law review; I was not) who had a distinguished record with the Watergate prosecutor's office and then with the office of the Solicitor General of the United States. He has argued a score or more times before the high court. (OK, but he's never

argued a jury case in Burke County).

Then we caught a great break on our side. Among those who called with offers of amicus and other support was Brian Wolfman, a lawyer with Public Citizen Litigation Group in Washington, D.C. Brian

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and colleagues had worked on the 1996 preemption case, *Medtronics*³, and are committed to the preservation of state tort remedies as a vehicle for enhancing public safety. Brian suggested that I come to Washington and watch a day of arguments, and he would meet me for lunch at the Court cafeteria.

So while my partner Bill worked on the opening brief, I was off to Washington. Another good omen occurred when I called the Court to arrange entry into the seating area for Supreme Court bar members. When I called and introduced myself as a lawyer from Augusta, the Court's Docket Clerk, Sandy Nelson, said: "I'm from Augusta, too." She had

been a legal secretary at the Nixon, Yow firm in Augusta before moving to Washington 15 years or so ago. She was most helpful then and throughout the case in letting us know where to be and at what time, and how to arrange guest passes.

On a Monday in December, I heard three cases argued. Bar members sit in rows of straight chairs inside the rail and just behind the tables for counsel who are arguing. It is as if our Georgia Supreme Court had chairs inside the rail and just behind the lawyer tables and lectern. The advocates I heard that day were very able, and the Court was rapid-fire with questions. That is all except Justice Thomas who did not speak, and is said to prefer to listen rather than spar with counsel. And yes, it did make me somewhat anxious to think I would be doing this in three months.

Brian was at the appointed spot in the entry hall when the Court recessed for lunch after the first two cases. Brian is Ivy League law school, a Yankee, wiry with a beard, professorial in dress, and smart as a whip. And we found we had more in common than fighting preemption. Brian spent a year as a law clerk to Judge Lanier Anderson of the Eleventh Circuit and lived that year in Macon (home of my college alma mater). His wife clerked for Judge Phyllis Kravitch of the same court. Then Brian practiced for several years with Legal Aid in Arkansas. So he is thoroughly acclimated to Southerners and quite willing to treat us as colleagues.

Brian had two significant suggestions. First we should see what position the Solicitor General had about our case. Since it potentially impacted the United States Coast Guard, the Government might seek leave to file a brief on our side. Secondly, he offered to help with my "moot courts" if we had not already

made other arrangements.

Now after 26 years of practice, I consider myself a fairly experienced lawyer arguing appeals. On some 40 or more occasions, I've argued before the Supreme Court and Court of Appeals of Georgia, and before the Second, Fifth and Eleventh Circuits — once even *en banc*. And I have never had a "moot court" in advance. Yet from the way Brian put it, moot court sounded *de rigueur* for the Supreme Court. So to his inquiry about having arranged moot courts, I said, "not yet."

Brian co-teaches a seminar in appellate practice at American University Law School. He suggested that I argue a moot court the Thursday before the Supreme Court argument as a part of his class before a panel made up of him, Leslie Brueckner of Trial Lawyers for Public Justice, and law school colleagues. I agreed. A couple of weeks later, he called and suggested that I argue a second moot court on Sunday afternoon before the real thing on Monday. This panel would include University of Mississippi law professor George Cochran (his class, which was studying our case, would also attend), Brian and his colleagues Tara Cream and Allan Morrison at Public Citizen Litigation Group.

Through Brian's introductions, my partner Bill engaged in telephone conferences and an exchange of information with lawyers in the Solicitor General's office. We learned that Brunswick also was attempting to convince the Solicitor General's office to file a brief on its side. After Bill made his presentation to the Solicitor General's staff, he was thanked for his input, but no indication was given on the position the Solicitor General would take. If the Solicitor was to come in on our side ("on the top side," as they say), the Solicitor's brief would have to be

filed at the same time our brief was due on Monday, Dec. 29. When we heard nothing from the Solicitor, we assumed that the Government would be coming in on the "bottom" side.

However, at around 3:00 p.m. on that Monday, we received a fax of the Solicitor's brief, and it was in support of the petitioner. The Solicitor General agreed that there should be no preemption because the Coast Guard had not issued any regulations concerning how a motor boat propeller should or should not be manufactured. We agreed to cede 10 minutes of our 30 minutes argument time to the Government. The lawyer assigned by the Solicitor General to make the Government's argument was David Fredericks, a native of Texas. He only reenforced the reputation of the Solicitor General's office for superb brief writing and eloquent advocacy. Taxpayers can take comfort that they are obtaining the very best legal talent and representation from the Solicitor General.

Preparation

As Bill worked on the reply brief in February, I began outlining issues and cases. More than 30 Supreme Court cases were cited by the parties and are relevant in varying degrees to the arguments. None of the cases are short; many have concurrences and dissents. The Boat Safety Act has 40 sections. Then there were pages and pages of legislative history in small print in the Congressional Record. And so it went most every night at home and on weekends (I had to practice law by day).

At our Augusta Rotary Club the Monday preceding argument, someone mentioned to the Club president that the following week I would miss the Club meeting due to arguing a case in the United States Supreme Court. I was asked to stand and receive the Club's best wishes

and applause. As the clapping subsided, Neal Dickert, my close friend and 20 year law partner before he became Judge of Superior Court, loudly announced, "The only reason he's going there is because he's lost everywhere else!"

Argument was set for Monday, March 2, 1998. I went to Washington the Thursday before for moot court with Brian's seminar on appellate practice. The session took place in the law school's ceremonial courtroom. I had a notebook with dividers for summaries of the Act, legislative history, cases, arguments of the parties, and notes on the half dozen amicus briefs for and against us.⁴ And on one page, I had the outline for the argument I wanted to present. It was agreed that David Fredericks of the Solicitor General's office would preside as "Chief Justice." Brian and his four colleagues were the remainder of the Court. A signal would be given when my opening 15 minutes of argument expired.

So I began with "May it please the Court" and stated that the starting place with a question of Congressional intent is the text of the Act. Then "wham" came the first interruption and questions; then another and another. The 15 minute signal was given, yet the questions kept coming until a "recess" was called after an hour and a half. Then it was time for critique. David said I needed a planned opening of no more than a minute that summarized our three main points. If lucky, I might get that much in uninterrupted by questions. Then he offered that he organized notes by topics on what he thought the Justices might ask. A concise, quick and convincing response should be planned for each. Someone described it as argument by "sound bite."

David also related that at the Solicitor General's office, there is a routine for preparing for oral argu-

ment at the Supreme Court. Ten days are blocked off in advance for the oralist to work on the case to be argued. Two moot courts are conducted and critiqued. The last one is videotaped for detailed study.

Well it was back to the drawing board for me with only three days left. As fate would have it, Delta cancelled my 6:00 p.m. flight from D.C. to Atlanta. Instead of getting home to Augusta at 9:30, it was 1:00 a.m. It was the start of four nights of little or fitful sleep. Evening is a quiet time to study, but with such an event looming so near, there was no way to shut down the thinking process just because it was bedtime. It reminded me of first year law school exams and the 1971 bar exam. Hadn't I suffered enough back then? And by the way, Saturday afternoon and Sunday morning, I had to be in Chicago to represent Georgia at a session on grading the Multi-State Performance Test portion of the just completed February bar exam. It's not good to be idle.

Sunday afternoon, Bill, Ben and I met at the hotel in Washington and set out by cab to meet Brian, the Ole Miss crowd, *et. al.*, at Brian's office in the DuPont Circle area of Washington. The cab driver pointed out our address. We were quite impressed with the lovely, restored Georgian brick mansion. Only when we walked around to the front door did we see that it was the Columbian Embassy. Brian's offices were across the street.

I felt the second moot court went better. On Friday, I had reorganized my notes and backup material in the format David Fredericks had suggested. Review and more review had given me a better recall and command of the arguments. The second moot court was as hard hitting as the first, and the critique and collaboration afterwards proved to be right on the mark.

Argument Monday

As directed in instructions we received from the Court, we reported to the lawyers' lounge in the Supreme Court building at 9:15 a.m. Monday morning. We wore our best business suits; only the Clerk, the Marshal and lawyers for the United States wear formal attire. The Clerk of Court, Bill Suter, made all the lawyers at ease as much as possible with his genuine welcome and helpful instructions. The lounge itself is a gracious room with 20 foot ceilings, impressive portraits and a statue of Daniel Webster, one of the greatest orators in American history. There are closets to store coats and suitcases, restrooms for the lawyers, and a speaker system to follow what is transpiring in the courtroom.

We were also welcome in the third floor law library which alone is worth a visit to the building. The bookshelves are two stories high, and along with the molding and other woodwork, are so striking as to bring to mind a movie scene of Oxford University set in the 1800s. Yet it is a working library with every resource a lawyer or Justice might need. It even has a "lite reading" section that includes paperback novels and current best sellers.

The Clerk instructed us that when a case is argued, the lawyers in the next case sit at ready tables just behind the tables for counsel in the case that is underway. After two cases, the Court recesses one hour for lunch and the third case begins promptly at 1:00 p.m. The Clerk advised that rarely if ever does the third case start before lunch. We were the third and last case of the day.

When we moved to the ready table for the start of case number two, we made our first snafu. From my December visit, I knew that petitioners took the tables on the left. So we took the ready table on that

side when we went in. Shortly after we settled in, a deputy marshal came over and whispered we were at the wrong table. Yet, I wasn't about to get up, not 15 feet from the Justices, and change ready tables while argument was underway. So we just stayed where we were waiting for the lunch recess. We learned later that since the Solicitor General was arguing on our side, we were to sit where the Government sits — always on the right.

Lo and behold, the respondent's attorney in the second case took only 15 minutes of his allotted 30. Also, the first case had ended 10 minutes ahead of schedule. So at 11:35 a.m., the Chief Justice intoned, "Now we will hear case number 97-288, Mr. Hudson for petitioner."

"Wait!" I wanted to say. "I was going to use the lunch hour for one more review of my notes! Plus, I told my wife and mother to be here at 1:00 p.m. They'll miss my opening." Fat chance. At least the stage fright was confined to just a minute or two. Then there I was saying: "Thank you, Mr. Chief Justice, and may it please the Court."

I did get in 30 seconds to summarize the three main points, and then it was out of my control. Questions came from eight Justices, one after the other. They probed the limits of our argument to see how it might impact other situations. And how did our arguments square with the text of the Act? Then, snafu two. The Chief Justice said, "Mr. Hudson, our sound system is very good. You need not speak so loudly." I apologized, and then the questions rained down again. How does your argument square with this case and that case? Haven't we held thus and so before? Then the white light flashed on; my 15 minutes of opening were over. I yielded to the Assistant Solicitor General for his ten minutes, and *then* the Chief Justice recessed for lunch.

For counsel in the case, a marshal provides an escort the back way down to the cafeteria where we were put at the head of the line. Even though five minutes of rebuttal remained for me, an enormous load had already been lifted. Over lunch, we all planned together as much as we could how I would use the last five minutes when respondent finished.

After lunch, respondent got the same treatment from the Court as had we — non-stop questioning. Considering that each Justice had at some time authored an opinion on preemption, and that the Court had been seriously divided in its *Cippolone* (1992)⁵ and *Medtronic* (1996) decisions, probing inquiry was not unexpected by either side. In my rebuttal, there were some specific targets to attack, but little time. I took on a couple, fielded more questions, and got in a word of summary. It seemed just an instant before the red light came on, and the Chief Justice announced, "The case is submitted," and adjourned the Court.

There was a decided sense of relief when it was over. Unlike a jury trial, counsel do not have to stay at the courthouse with stomachs in knots waiting on the verdict. There is nothing more to do until the Court renders its decision in a couple of months. We did participate in a debriefing session with the Mississippi law school class in the ornate East Conference Room at the Supreme Court building. Also, there was a small group of reporters and cameramen at the base of the front steps with questions for our client and for counsel.

Reflections

With the benefit of the passage of time and a measure of hindsight, here are some overall reflections.

The argument was more challenging than any I've experienced

before. Just having nine jurists rather than three (courts of appeal) or seven (Georgia Supreme Court) makes a critical difference. Each of the Justices was thoroughly familiar with this area of the law, and to the extent there might have been any

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gap, they have the assistance of the brightest law clerks in the land. Also, the stakes, the grandeur of the surroundings and the glare of attention add to the burden on counsel.

As for me, I was much more defensive in the argument than would ordinarily be my approach. And, characteristically, on the way home I thought of several things I wish I had said. On the other hand, I don't recall anything that I would take back. I also now know it would be sheer folly to argue at the Supreme Court without the practice moot courts. There was no question from the Justices that I had not heard before. For the "coaches" who made up my practice panels, I am profoundly grateful. Furthermore, the briefs of the parties and the amici are more than thorough. So I feel counsel have done their job of putting before the Court everything that might be relevant to its decision.

I also pondered the responsibil-

ity my co-counsel and I have to the family of Kathee Lewis who have pursued the case in hopes of making recreational boating safer. They believe that if her death leads to safer boating, it will be a fitting memorial to a young lady who wanted to spend her life relieving the physical suffering of others. Indeed, this case may make such a difference.⁶

The entire experience also brought home to me again the magnificence of a legal system and the fabric of a people that allow nine jurists to interpret laws, and according to some, even make policy that governs the lives of the other 250 million of us. The rule of law is to be more cherished than the vast resources of our nation, its immense wealth, and its global power. While we may disagree with and debate the outcome of Supreme Court decisions, few of us would trade the Constitutional framework and the rule of law under which they are rendered.

Observing the event and the process from the place of an advocate, I felt proud to be an American. I felt proud to be an American lawyer. ■

David E. Hudson is a partner with Hull, Towill, Norman and Barrett in Augusta.

Endnotes

1. 115 S.Ct. 1483 (1995).
2. *Parham v. Hughes*, 441 U.S. 347 (1979).
3. *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996).
4. Ken Starr filed an amicus brief for an automobile manufacturer on the side of Brunswick.
5. *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).
6. Alas, the difference will have to be made in some other case. On the eve of the Court's decision, the parties settled this case whereupon it was dismissed by the Supreme Court on May 15, 1998.