The Defense Line

S.C. Defense Trial Attorneys' Association

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Introduction to Mediation

South Carolina Defense Trial Attorneys' Association
3008 Millwood Avenue
Columbia, SC 29205

Address Correction Requested

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TEN YEARS AGO

President SAUNDERS M. (BAGGY) BRIDGES (Florence) reported that JIM PRESSLEY (Greenville) accepted the Chairmanship of our Legislative Liaison Committee for 1984. HUGH McANGUS, BILL DAVIES and CARL EPPS, (all of Columbia) jointly were working together on the Joint Meeting with the Claims Manager and the Annual Meeting late in 1984. JOE BRAKEBILL, Southern General, was elected President of the Atlanta Claims Association. DAVE RAYMOND, of the Columbia Claims Association, invited the South Carolina Defense Trial Attorneys to their Annual Mid-Winter Dance, Friday, February 24, 1984. A survey of our members in January of 1984, indicated that Kiawah and The Cloister were selected as the best meeting sites.

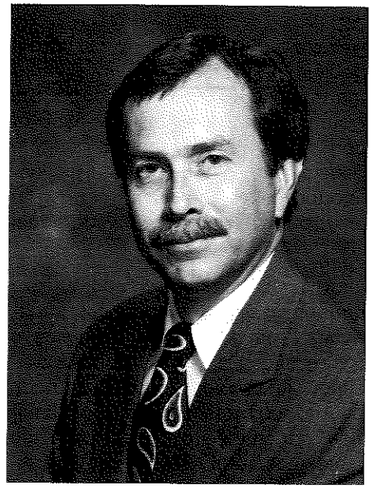
TWENTY YEARS AGO

In the Spring of 1974, President G. DEWEY OXNER (Greenville) reminded our Association of the Annual Meeting of the South Carolina Bar and dedication of the USC Law Center scheduled for May 2, 3, & 4, 1974, in Columbia. The Joint Meeting with the Claims Managers was set for August 16, 17, 1974 at Myrtle Beach Hilton, Myrtle Beach.

The Sixth Annual Meeting of our association was held at Hilton Head Inn, Hilton Head, November 16, 17, 1973. HONORABLE PAGE KEETON, Dean of the University of Texas Law School, and author of many papers regarding products liability, gave an overview. WALTER E. WORKMAN, Esquire, of Houston, appeared on the program along with PAUL W. FAGER, Vice-President of Liberty Mutual. The late FRANCIS P. NICHOLSON, Judge of the Eighth Circuit from Greenwood, gave an interesting presentation as to the proper use of demonstrative evidence in products liability cases. The Friday morning session began with J. D. TODD (Greenville), introducing The Honorable BRUCE LITTLEJOHN, Associate Justice of the Supreme Court. He discussed the Mickle case. The Eminent Professor WALTER REISER and DAVE ROBINSON discussed the new Federal Rules of evidence. SPENCER KING (Spartanburg) and ERNIE NAUFUL (Columbia) were responsible for the fine program at the Annual Meeting.

The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

THE PRESIDENT'S PAGE



William A. Coates

As many of you know, our Supreme Court is planning to adopt a rule relating to mandatory, but non-binding, mediation and arbitration. It is expected that this rule will go into effect on a trial basis in Greenville, Charleston, Richland, and Horry counties late this spring. In recognition of this, our Joint Meeting with the claims' managers at Asheville will have a substantial focus on mediation. Program Chairman, Bill Davies, and his Vice-Chairman, John O'Rourke, are putting together a program which will be both interesting and informative. Presently planned are three hours on mediation issues, including an overview of the new rules; advice and tips on how to prepare your client for a mediation; and how to participate in a mediation. Finally, it is anticipated that experienced attorneys and mediators will present a demonstration of how a mediation is actually conducted. Another anticipated topic of discussion will be the changing relationship between insurers and defense counsel, as well as the effect and interaction between insurance and employment-related legal issues. As always, our social program at Asheville will be a wonderful one, utilizing the hospitality of our headquarters at the Grove Park Inn. The Joint Meeting will be held July 28-30, so please keep your calendars open for what will be an exciting and informative event.

Elsewhere in this issue, you will see an announcement for our Fourth Annual Trial Academy. The academy will be held July 13-15 at the USC Law School. Joel Collins and Clarke McCants are in charge of this year's academy. As before, attendance will be limited to not more than 24 students. The academy will utilize an actual products liability case tried in federal court in South Carolina as a teaching tool. This will be an excellent opportunity for younger lawyers to improve their trial skills in a three-day intensive course. Each year the students at the academy have found the experience to be most rewarding, as they have an opportunity to be guided by experienced practitioners and receive suggestions from members of the trial bench here in South Carolina. This is one of the most outstanding services our Association offers, and I would urge you to consider sending one or more younger attorneys to the academy. Also, please be willing to assist Joel and Clarke in helping serve as faculty and mentors for the students.

I am proud to announce that Walter Dellinger, Assistant Attorney General and head of the Office of Legal Counsel of the Justice Department has accepted our invitation to be our keynote speaker at our annual meeting. Professor Dellinger, formerly Associate Dean of Duke University School of Law, is a noted constitutional scholar, who is frequently mentioned as a candidate for the Supreme Court. He has written extensively on the constitutionality of punitive damages and is a much sought-after speaker. His presence will enhance a well-rounded and informative convention. John Wilkerson is in charge of the educational program and Frankie Marion, the social agenda.

Also contained in this issue is a nomination form for the 1994 Hemphill Award. This award, named after the late Judge Robert W. Hemphill, Jr., is given for distinguished and meritorious service to the legal profession and to the public. It is the highest honor and recognition given by this Association. I encourage each of you to think of those members of the Association who meet the criteria for this noteworthy award and to nominate them.

The Defense Research Institute Leadership Conference will be held in New Orleans April 21-23. Traditionally our President-Elect represents the Association at this conference, and Mike Wilkes, along with Hugh McAngus, our SLDO representative, will be attending. Entitled "The Changing World of the Defense Lawyer", this conference follows last year's meeting in San Francisco in presenting a full and frank discussion of the changes and challenges which are confronting defense attorneys across the United States. We look forward to hearing their report.

I am pleased to announce that our Association will be hosting the 1995 DRI Leadership Conference, to be held at the Omni Hotel in Charleston in March, 1995. We will provide you further information as we get closer to this event. Needless to say, it is a singular honor for our Association to be selected to host this important annual gathering.

Through your legislative committee, this Association continues to oppose a proposed constitutional amendment changing the number of jurors from 12 to 6. As of this date, no action has been taken on this bill in the Senate. Thanks to each of you for contacting your legislators and expressing your opposition. Please continue to communicate your opposition as the legislative session continues. Nothing is more important to your legislators than your input and opinions. We continue to support legislation which would reestablish voter registration lists as the criteria for selecting jurors, as well as legislation to change the legal rate of interest on judgments by tying the interest rate to prime, or some other factor. The workers' compensation reform bill has passed the Senate, but not the House. Finally, you should be aware

Amicus Committee
CLARKE McCANTS

In Cramer v. Balcour Property Management Inc., et al., Op. No. 24004 (S.C.Sup.Ct. filed Jan. 7, 1994) (Davis Adv.Sh. No. 4), the Supreme Court ruled that a landlord does not owe a duty to a tenant to provide security in and around leased premises to protect the tenant from criminal activity of third parties. This case was presented to the Supreme Court on Certification from the U.S. District Court for the District of South Carolina.

Mitch Brown, on behalf of the South Carolina Defense Trial Attorneys' Association, presented an Amicus Curiae Brief to the Supreme Court as part of this case supporting the ruling ultimately adopted by the Court. The Amicus Curiae Committee would like to thank Mitch for his hard work and efforts in presenting the Association's position in this matter, and congratulate him on the successful outcome.

The Amicus Curiae Committee welcomes requests to participate in pending matters. The following general guidelines should be considered by individuals interested in submitting a request to the Committee:

1. The issue presented should be of general interest to the Defense Bar in South Carolina.
2. The issue presented should be squarely before the Court, and primary to the appeal.
3. The issue presented should have a sound logical answer when viewed objectively and not merely from a defense standpoint.
4. The issue should be one of novel impression dealing with a point of law as opposed to a particular set of factual circumstances.
5. The facts in the case should be such that they do not cloud the legal issue.

If you have a matter that you feel deserves that attention of the Amicus Committee, and meets the above guidelines, please contact Clarke McCants at P.O. Box 519, Aiken, SC 29802, (803) 643-4110.

President's Page continued

that legislation has just been introduced which would amend §41-1-80 to allow assessment of punitive damages against an employer for a workers' compensation-related discharge or demotion. We will oppose this legislation; however, again, you need to express your opposition on a personal basis.

One of the concerns expressed by many is the increasing lack of civility among attorneys. This has traditionally not been a problem in our state; however, more and more concerns have been expressed, and it seems to be a growing problem. We have tentatively decided to include a serious discussion about this issue at our CLE seminar, which we will sponsor jointly with the South Carolina Bar. This seminar will be held November 11 at the USC School of Law. Mills Gallivan and Sid Connor are coordinating the program. If you have any suggestions for additional seminar topics, or have any feelings regarding this proposed topic, please contact Mills or Sid.

As you can see, the year is young, but it has already been a very busy one. Your Executive Committee is working hard on your behalf. Please support them in their endeavors and respond to them when they request assistance. All of you have been very responsive and are doing a great job. Keep it up!

OPINIONS AND STORIES

OF AND FROM
THE GEORGIA COURTS AND BAR
COLLECTED AND ARRANGED by BERTO ROGERS
Member of the Georgia and New York Bars

THE AUTOMOBILE

Judge ARTHUR G. POWELL, In Lewis v. Amorous, 3 Ga. App. 50, 59 S.E. 338.

Facts: In an action by Mrs. R. M. Lewis against F. M. Amorous and others for the homicide of her minor son the plaintiff brought error from a judgment dismissing the action. Affirmed. The plaintiff's son was killed by an automobile operated by a youth of nineteen years of age and it was alleged that the defendant negligently so kept said automobile, that the youth was given an opportunity to operate the machine and run it about the streets of Atlanta.

Opinion: It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While by reason of the rate of pay allotted to judges in this state few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines, not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil disposed mules, and the like.

AN INTRODUCTION TO MEDIATION

C. Stuart Mauney
Gibbes & Clarkson, P.A.
Greenville, SC

The plaintiff's attorney or an insurance adjuster calls and says, "Let's mediate this case." Or, more likely, the attorney is notified by the court that the case has been ordered to mediation. The defense attorney's incredulous response: "Uh? Mediate? What?"

The defense counsel then scrambles around the office, looking for Black's Law Dictionary for a definition of "mediation." Scramble around no more; attorneys will find herein a definition of mediation, a discussion of the role of mediator, an overview of the mediation process and the attorney's role in that process, and a brief discussion of the possible future of mediation in South Carolina.

I. What is Mediation?

The Mediation Committee of the Joint Commission on ADR [hereinafter "Commission"], appointed by the South Carolina Supreme Court, has recently drafted rules governing court-ordered mediation for submission to the South Carolina Supreme Court sometime in 1994. These proposed rules define mediation as "an informal process in which a third-party mediator facilitates settlement discussions between parties." The rules further state that any settlement is voluntary, and in the absence of settlement, the parties lose none of their rights to trial by a judge or jury.

The mediation process calls for the parties to voluntarily work out their own agreement in an informal setting, with the mediator facilitating this collaboration. The mediator is neutral and impartial, acting to encourage the resolution of the dispute without prescribing what the solution should be. The object of the mediation process is to allow the parties to reach a mutually acceptable agreement. The mediator has no decision-making power. The parties are given the opportunity to make the decision for themselves.

By comparison, arbitration occurs when a dispute is submitted to a third party to render a decision. The mediator has no such authority to make a decision or offer an opinion. Arbitration is usually more formal, including the presentation of witnesses before the arbitrator. Unless the arbitration is court-ordered, the arbitration is usually binding on the parties, with only limited review.

II. Role of Mediator

The mediator, as defined by the proposed rules, is a "neutral person who acts to encourage and facilitate" a resolution. In helping the parties reach a resolution, the mediator should encourage open discussion, help improve communication, and move the parties toward a negotiated settlement of their own making. In this role, the mediator will respect the confidentiality of the process and educate the parties about the process, explaining the procedures and focusing the parties on the issues to be resolved.

The mediator may guide the parties through a variety of options and facilitate communication between the parties to encourage understanding of all points of view. Further, the mediator will assist the parties in problem-solving by helping the parties explore possible solutions. Finally, the mediator will facilitate the preparation of a written settlement agreement at the conclusion of the mediation.

Typically, the mediation will begin with a brief statement by the mediator. The proposed rules require the mediator to define and describe the following to the parties at the beginning of the conference:

(1) The process of mediation;

(2) The difference between mediation and other forms of conflict resolution;

(3) The costs of the mediated settlement conference;

(4) The fact that the mediated conference is not a trial, the mediator is not a judge, and the parties retain the right to trial if they do not reach a settlement;

(5) The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(6) Whether and under what circumstances communications with the mediator will be held in confidence during the conference;

(7) The inadmissibility of conduct and statements as evidence in any arbitral, judicial, or other proceeding;

(8) The duties and responsibilities of the mediator and the parties; and

(9) The fact that any agreement will be reached by mutual consent of the parties.

If the mediator fails to explain any of these issues at the beginning of the conference, the attorney should insist upon clarification and should not go forward without full understanding of these areas. An understanding of these issues at the beginning of the mediation reduces the chance for confusion and enhance the opportunity for success.

The rules further provide that the mediator has the authority to control the conference and the procedures to be followed. As a part of this duty, the mediator must determine in a timely manner when the mediation is not

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viable, that an impasse exists, or that the mediation should end.

In some respects it is almost easier to describe what a mediator does **not** do than it is to describe what a mediator does in a conference. The mediator does not dictate the settlement terms and does not impose his opinion or values on the process. In fact, the proposed rules clearly state that the mediator "has no authority to make a decision or impose a settlement on the parties." Further, the mediator does not give advice, especially legal advice. The mediator has an obligation to maintain impartiality and must advise all parties of any circumstances bearing on possible bias, prejudice, or partiality.

One of the mediator's most important functions is to serve as a trustworthy listener for each party's confidence. The mediation process allows each side to tell its story, first in the presence of all parties. However, it is often necessary and desirable for the mediator to meet with each party and their counsel privately. In these circumstances, the mediator can help each side understand the other's perspective.[1]

III. Role of Attorneys in Mediation

The first rule for attorneys representing parties in mediation is the same as in litigation: BE PREPARED. The attorney should not attend a mediation without thorough advance preparation. Attorneys should be aware that some mediators will request a brief written statement of the issues involved prior to the mediation conference. The proposed rules state that any such memorandum is limited to five (5) pages in length. The rules further provide that with the consent of all parties, such memoranda may be mutually exchanged by the parties.

When preparing for the mediation conference, attorneys should anticipate the role which the client or client representative will play in the mediation. Under the proposed rules, all individual parties, their counsel of record, and the insurance company representatives, if any, must attend the mediation. The insurance company representative must have "full authority to settle the claim." Attorneys should decide prior to the mediation what roles these individuals should play:

> As a rule of thumb, there are four roles that client representatives must play in mediation: (1) deal maker, with authority to settle; (2) lead spokesperson for the client; (3) factual encyclopedia, who knows the relevant events and transactions; and (4) perceived "heavy" at whom your client's adversary may vent bad feelings. Depending on the circumstances of the case, one individual may assume more than one role. Probably the only player you need to coach is the heavy, who must understand at minimum that a small show of contrition or humility can greatly reduce the adversary's financial demand.[2]

In discussing the case with the client, the attorney may determine that there is an individual with the other party with whom the client would like to speak at the mediation. Attorneys should encourage the opponent to bring that person to the mediation. Moreover, attorneys may also want to consider who should be present from the other party to make the mediation meaningful and potentially successful. "You may or may not be able to prevent the other side from bringing whom they want, but you can condition the mediation on the presence of someone you want. For instance, if the person with deal-making authority from your side will attend, be reluctant to go forward unless the other side promises to bring someone with comparable authority."[3]

After the mediator has completed his opening statement, there is usually a conference of all parties during which each side presents a statement of its position in the case. Attorneys should discuss this portion of the mediation with the client prior to the mediation conference, and decide who will make the statement. The attorney may want to make the initial statement and the client may want to add any additional necessary details. The attorney will also want to discuss the content of this statement with the client prior to the mediation so that there is no misunderstanding of the stated position once the mediation begins.

Mediation is specifically designed to encourage the clients to participate personally. The client must be told what to expect and should receive a review of strategy, including which points or issues the attorney expects the client to address. If the attorney decides it is appropriate for the client to actively participate in the process, "a thorough preparation session is imperative."[4]

Since mediation is informal and flexible by its nature, many litigators may initially be ill-equipped to handle mediation:

> The free form nature of mediation is unsettling to many litigators used to the technicalities of the judicial process. By mediating, lawyers relinquish their superior knowledge of ordinary litigation; concomitantly, clients gain greater control. Lawyers must prepare themselves, and their clients for this shift.[5]

Despite the free form of mediation and the flexibility of the process, advocacy is nevertheless a central element of mediation. In that regard, advocacy is certainly present in these initial preparation and planning sessions with the client. The attorney must be prepared to state his case concisely, emphasizing its strengths and also pointing out any weaknesses in the other side's case.

Once the opening statements have been made by the parties, the attorney's job is to "observe and advise." The attorney needs to listen to the other party's opening statement, "listening for more than factual distortions. What are the major themes? What issues are missing? Are there psychological or emotional concerns - suspicions about motive, claims of disappointment, and so on - to which you should respond? The resolution of these concerns may provide the linchpin to the resolution of the dispute."[6]

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In addition to observing the other side, attorneys should be "especially sensitive to the mediator's reactions." These reactions may be a clue to weaknesses in the other party's case or perhaps a weakness in the attorney's own case.

Attorneys should remember that mediation is a flexible process and is not a scripted play. Some facts or situations may be to complicated and will need simplification. Particular parties may prove to hinder the process. If possible, it may be necessary to curtail their participation. The mediation may reach an impasse, a point at which the attorney senses that the process is "going nowhere fast." If this occurs, the attorney may want to ask the mediator to consult with the attorney and client in private.

The attorney must be prepared when the mediator requests to meet with an attorney and client in private. Specifically, attorneys should have met with their client prior to the mediation to determine "what information should be disclosed (and under what circumstances) to the other parties and to the mediator."[7]

If the mediation results in a settlement, the mediator will ask the parties to reduce their agreement to writing. The proposed rules state that the parties shall reduce the agreement to writing, and that both attorneys and parties shall sign the agreement, before the mediation can be adjourned. The rules further state that if the agreement executed by the parties and their attorneys in the mediation envisions the execution of a more formal agreement, then any such formal agreement shall be executed by the parties within ten (10) days of the date of the mediated conference.

In order to prepare for the drafting of any such settlement agreement, attorneys may want to refer to sample settlement agreements prior to attending the mediation. It has been suggested that postponing documentation of the settlement agreement to another day, after the mediation, has many pitfalls:

> Most annoyingly, the momentum toward resolution developed during the mediation dissipates when the lawyers return days later to the task of writing the agreement. Sometimes clients (and lawyers) find ways to raise new issues or alter agreements; the process can then falter, often taking weeks to conclude.[8]

Where mediation fails and the case must proceed in court, the mediation nevertheless may provide information on the strengths and weaknesses of the case, as well as the strengths and weaknesses of the other party's case. Moreover, the attorney will know the themes the other side is likely to use at trial "and can structure [the] case to counter them more effectively."[9]

IV. Future of Mediation in South Carolina

The Commission, appointed by the South Carolina Supreme Court, has been studying the use of mediation and arbitration in South Carolina state courts. The Mediation Committee of the Commission has drafted proposed rules, referred to above, governing court-ordered mediation. According to a member of the Commission, Rob Hassold of Nexsen, Pruet, Jacobs and Pollard in Greenville, the Commission intends to have pilot programs for court-ordered mediation and arbitration this year in Greenville, Richland, Charleston, and Horry County.

Mr. Hassold commented that there is a separate committee of the Commission studying arbitration, which plans to issue rules governing court-ordered arbitration. Both of these committees of the Commission are moving toward finalization of these rules and will submit them to the South Carolina Supreme Court for approval sometime this year.

As currently drafted, the Commission's proposal provides that civil cases involving damages of $25,000.00 or less will be referred to an arbitrator for a brief hearing, to last not more than two (2) hours. Within forty-eight (48) hours of the hearing or subsequent submission of briefs, the arbitrator will file an award with the court. Any party that fails to do better in any subsequent trial than they did in the arbitration may be charged for court costs. The proposed rules provide that the parties will split the arbitrator's fee of $200.00.

The proposed rules for court-ordered mediation state that all cases not referred to court-ordered arbitration will be ordered to mediation. The parties then have 134 days from the filing of the complaint to notify the court that they have selected a mediator by agreement. If the parties have failed to select a mediator during that time, the court will appoint a mediator from a roster of certified mediators. The mediation must then be held within 60 days of the appointment of the mediator and completed within 30 days of the first mediation session, if more than one session is held. The proposed rules provide for compensation of $125.00 per hour for court-appointed mediators. The compensation for mediators selected by agreement of the parties is negotiable.

Particular types of cases may be exempt from mediation. For example, cases involving habeas corpus and "other actions for extraordinary relief" are exempt from mediation under the proposed rules.

For those cases which are not exempt from mediation under the rules, any party may move within 10 days after the court's order for mediation to dispense with or defer the mediation or to refer the case to an alternative dispute resolution [hereinafter "ADR"] process other than mediation. The administrative judge may grant such motion for "good cause."

The proposed rules do not prevent parties from mediating cases not included within the pilot programs or within the rules governing court-ordered arbitration and mediation. Indeed, the proposed rules state that parties may petition the administrative judge to order such mediation, stating the reasons why the order shall be allowed. This procedure would be followed in those counties which are not a part of the original pilot program.

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One of the important issues in any mediation is the confidentiality of the process. The proposed rules state that the court shall issue an approved order "protecting communication during the mediated settlement." Additionally, the parties and their attorneys are required by the rules to execute an "Approved Agreement to Mediate" that protects the confidentiality of the process.

V. Training for Mediators

The author attended civil mediator training March 7-11, 1994, sponsored by the South Carolina Council for Mediation and Alternative Dispute Resolution [hereinafter "SCCMADR"] in cooperation with the ADR Section of the South Carolina Bar and the USC Law School. The course meets the 40-hour training requirement in South Carolina proposed by the Commission.

Ms. Nancy Yeend of Alternative Dispute Resolution Associates, Palo Alto, California, and Mr. John Paul Jones, a full-time Florida state and federal court certified mediator and arbitrator from St. Petersburg, Florida, conducted the seminar. The SCCMADR provided additional faculty assistance. The faculty included Professor James F. Flanagan of the USC Law School, Mr. Larry Kimel, an attorney and professional mediator from Asheville, North Carolina, and Ms. Zena Zumeta of Ann Arbor, Michigan.

There were 33 participants in the training program. Various professions were represented, including attorneys, educators, insurance company representatives, and real estate brokers.

The course included a comprehensive workbook, extensive reference and resource materials, and intensive practical exercises, including role play exercises in which the participants assumed the roles of various parties in the process, including mediator, attorney, and client. Training included an explanation of the mediation process, the role of the mediator, confidentiality and ethical considerations, communication and negotiation techniques, problem-solving, and settlement agreements.

VI. Mediation Resources

For further information concerning mediation in South Carolina, attorneys may contact SCCMADR at the following address:

South Carolina Counsel for Mediation and Alternative Dispute Resolution
Debi Miller Moore
Executive Director
P. O. Box 2625
Sullivan's Island, SC 29482
(803) 886-9812

The SCCMADR is a non-profit organization established to create a state-wide forum to provide mediation education to the public, the courts, and professionals. The organization is currently funded through IOLTA and SCCMADR program revenues. The SCCMADR maintains a current list of its members and a registry of mediators certified in this state.

Attorneys requesting additional information on mediation, or ADR in general, should contact the ADR Section of the South Carolina Bar, the Committee on Dispute Resolution of the American Bar Association, or the Society of Professionals in Dispute Resolution (SPIDR) in Washington, DC.

VII. Conclusion

This article may be just the beginning for many attorneys. Answers to some questions have been offered, but perhaps more questions have been raised in the process. "Is mediation appropriate for my case?" "Has mediation been successful in settling cases or in clearing the trial docket?" "Why not just arbitrate or litigate?" These are questions best left for other commentators and future articles. But, consider this admonition:

> Agree with thine adversary quickly, whiles thou art in the way with him; lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison.

1. LaMothe, Thinking About Mediation, LITIGATION, Summer 1993, at 1 [hereinafter "LaMothe"].
2. Kichaven and Stone, Preparing for Mediation, LITIGATION, Fall 1991, at 40, 42 [hereinafter "Kichaven and Stone"].
3. Kichaven and Stone, supra note 2, at 42.
4. LaMothe, supra note 1, at 3.
5. LaMothe, supra note 1, at 3.
6. Kichaven and Stone, supra note 2, at 42.
7. LaMothe, supra note 1, at 3.
8. LaMothe, supra note 1, at 3.
9. Kichaven and Stone, supra note 2, at 42.
10. Matthew 5:25.

Mr. Mauney is a partner in Gibbes & Clarkson, P.A., Greenville, South Carolina, practicing in the area of civil litigation. He has completed 40 hours of civil mediation training.

RECENT DECISIONS

IN THE COURT OF COMMON PLEAS
C.A. No. 93-CP-44-126

State of South Carolina
County of Union

State Farm Mutual Automobile Insurance Company,

Plaintiff

vs.

Tracy Beacham, Johnny Thompson and Phillip Danny Poole,

Defendants.

ORDER

State Farm Mutual Automobile Insurance Company (State Farm) brought this declaratory judgment action to determine whether coverage existed for an incident in which its insured, Phillip Danny Poole, intentionally shot at two strangers, Tracy Beacham and Johnny Thompson. Because this Court finds that the incident did not arise out of the ownership, maintenance or use of Poole's vehicle, judgment is granted for State Farm.

I. Facts

On November 11, 1992, Mr. Poole left his home in Union driving a 1986 Mazda truck that was registered in his name, and carrying an automatic handgun. At his deposition, he said that he was so drunk he didn't "know how [he] was driving," but he eventually noticed two strangers walking along a sidewalk on Perrin Street. (Depos., Mr. Poole, p. 14). For no reason, he explained he "pulled up, stepped out of the truck and...just started shooting" at them. (Depos., Mr. Poole, p. 18). Ms. Beacham was struck by one of the three shots fired. She testified at her deposition that Poole was getting out of the truck but that he still had one foot inside when he started shooting at them over the front of the truck. (Depos., Ms. Beacham, pp. 22-23). Mr. Poole says he was "two steps out of the truck...about at the back wheel" when he started shooting over the back of the truck. (Depos., Mr. Poole, pp. 18-19). Mr. Thompson did not notice where Poole was. (Depos. Mr. Thompson, pp. 12-13).

After the shooting Mr. Poole returned to his truck and drove from the scene but was later apprehended by police and pled guilty to numerous criminal charges. Ms. Beacham and Mr. Thompson brought this civil suit for damages, claiming that Poole's auto insurance policy had to pay for their injuries.

II. Discussion

Poole's policy with State Farm includes standard, statutorily-mandated coverage, stating that it will "pay damages...resulting from the ownership, maintenance or use" of the motor vehicle. See S.C. Code Ann § 38-77-140 (1989). "Thus, the issue presented is whether [the victims'] injuries arose out of the ownership, maintenance or use of the assailant's vehicle." Wausau Underwriters Insurance Co. v. Howser, __ S.C. __, __, 422 S.E.2d 106, 108 (1991).

In Howser, the victim sought uninsured motorist coverage when she was shot by an unknown assailant while both were driving vehicles. In deciding to grant coverage in Howser, our Supreme Court adopted the analysis of the Minnesota Supreme Court in Continental Western Insurance Co. v. Klug, 415 N.W. 2d 876 (Minn. 1987). The only reported case in our state on this issue since Howser is Home Insurance Co. v. Towe, __ S.C. __, 425 S.E. 2d 784 (Ct.App. 1992), which granted coverage where a passenger threw a beer bottle out of a moving car and injured a man who was driving a tractor on the highway.

The first question in this analysis is the extent of a causal connection between the vehicle and the injury. Howser, supra, __ S.C. at __, 422 S.E.2d at 108. "The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury." Id. Stated differently, the assailant's vehicle must be "an active accessory" to the acts that caused the injury. Towe, supra, __ S.C. __, 425 S.E.2d at 786. For example, in Towe, the vehicle's speed contributed to the velocity of the bottle and therefore contributed to the severity of the injuries. Id. In Howser, the vehicle "played an essential and integral part" in the assault because it allowed the assailant to closely pursue the victim. Howser, supra, __ S.C. at __, 422 S.E.2d at 108. Were it not for the vehicle, the victim would have been able to escape. In the case at hand, however, Poole did not pursue his victims after he shot at them and they ran; he simply returned to his truck and drove away. In short, Poole "merely used the vehicle to provide transportation to the situs of the shooting," which Howser specifically found to be insufficient for the causal connection. Id.

A jury trial was not demanded to determine issues of fact in this action, so factual issues will be determined by the Court. See S.C. Code Ann. § 15-53-90 (1977). The Court finds that Poole was standing beside the truck when he started firing, which is the most reasonable conclusion in light of the undisputed evidence that the shots were fired over the truck. However, even if this Court took the facts in the light most favorable to the defendant and found that Poole was stepping out of the vehicle when he started shooting, the outcome would be the same. Howser states that an assailant incidentally sitting in a stationary vehicle at the time of his attack is insufficient for the causal connection. Howser, supra, __ S.C. at __, 422 S.E.2d at 108. Thus, even if Poole had started shooting while he was sitting in the vehicle, rather than while he was stepping out of it as one

(Continued on page 12)

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of the victims claims, the causal connection would still not be established.

The second question is whether an act of independent significance broke the causal link. [1]Id. Although it is not necessary to reach this prong, the fact that it also fails is illustrative of the lack of causation. The Klug case illuminated this prong by citing various Minnesota opinions that denied coverage because the assailant left his vehicle before committing the act. E.g., Holm v. Mutual Service Casualty Insurance Co., 261 N.W.2d 598 (Minn. 1977) (police officer, after pursuing a motorcycle, left his squad car to make an arrest and then assaulted the cyclist). This Court found as fact that the assailant had left his vehicle before committing the act. However, even if this Court had found that the assailant was stepping out of his vehicle when he started shooting, this fact would not have provided a causal link. "The battery could as easily have occurred had [the assailant] come upon [the victims] while [he was] on foot." Klug, supra, 415 N.W.2d at 878, citing Holm, supra, 261 N.W.2d at 603. The vehicle simply played no separate role in the attack. Getting out of the truck, or at least attempting to, broke any causal link that may have existed between the vehicle and the shooting. Therefore, the incident did not arise out of the ownership, maintenance or use of Poole's vehicle.

A careful reading of our appellate cases does not grant coverage under the facts of this case. In fact, providing coverage here would abandon the fundamental requirement that there be a causal connection between the vehicle and the incident. Ideally, the perpetrator of any heinous crime would maintain sufficient assets to compensate his victims for their injuries. Although one may feel sympathy for the innocent victims of a senseless crime, this Court cannot use an automobile insurance policy to create a monetary reserve fund that does not exist in our imperfect world. Judgment is accordingly rendered for State Farm.

AND IT IS SO ORDERED.

Larry R. Patterson
Presiding Judge
Sixteenth Judicial Circuit

February 23, 1994
Union, South Carolina

[1]The third prong of the Klug analysis states that the use of the vehicle must be limited to providing transportation. South Carolina has not considered whether it will adopt the third prong because in both Howser and Towe – as in the case at hand– the vehicle was being used for transportation. See Howser, supra, __ S.C. at __ n.2, 422 S.E.2d at 109 n.2.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No. 3:93-2241-17
CASE SUMMARY

Jefferson-Pilot Fire & Casualty Company,

Plaintiff.

vs.

Sunbelt Beer Distributors, Inc., and Deana Pressley,

Defendant.

SUMMARY OF FACTS

Deana Pressley brought an action against her former employer, Sunbelt Beer Distributors, Inc., for racial discrimination and violation of 42 USC §1981 (civil rights). Pressley, who was an account representative for Sunbelt, alleges that she was fired for dancing with black males at a social gathering after a marketing function. She also included in her complaint a cause of action for violations of the Equal Pay Act, 29 USC §206(d), for unequal pay based upon gender. Sunbelt demanded that Jefferson Pilot Fire & Casualty Co. provide a defense and indemnify it under Jefferson Pilot's general commercial liability policy, thus Reynolds Williams of Willcox, McLeod, Buyck & Williams successfully prosecuted a declaratory judgment action on behalf of Jefferson Pilot.

KEY HOLDINGS

In the course of holding that Jefferson Pilot need neither defend nor indemnify Sunbelt, United States District Judge Joe Anderson covered a number of points in a way which should be helpful to the resolution of future coverage disputes.

- Lost earnings, lost benefits, lost earning capacity, and lost reputation do not constitute property damage within the meaning of a liability policy.
- Strictly economic losses do not constitute damage or injury to tangible property covered by a comprehensive general liability policy.
- Even though Pressley alleges some form of mental suffering as part of her damages, her complaint contained no allegation of physical damage. The court was not prepared to extend the interpretation of "bodily injury" to include purely emotional damage absent some objective indication of physical symptoms.
- The "course of employment" exclusion precludes coverage for damages resulting from an allegedly wrongful discharge.
- Since 42 USC §1981 can be violated only by purposeful discrimination, the "intentional act" exclusion bars coverage.
- The discrimination of which Pressley complains is not the type of conduct against which an employer should be able to insure.
- The Jefferson Pilot policy defines personal injury as one arising out of any of five enumerated offenses. There is no call for the insurer to list exclusions from a category of coverage that would not have embraced the excluded item in the first place. What is plainly *not included* within the coverage is by definition *excluded.*

1994 HEMPHILL AWARD
Call for Nominations

CRITERIA

1. **Eligibility.**
   (a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.
   (b) The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.
2. **Criteria/Basis for Selection.**
   (a) The award should be based upon distinguished and meritorious service to the legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.
   (b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.
   (c) The candidate may be honored for recent conduct or for service in the past.
3. **Procedure.**
   (a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community and the reasons why the nominee is being put forward. Nominations should be directed to the President of the Association prior to the joint meeting each year.
   (b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association at its meeting immediately preceding the Annual Meeting of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."
   (c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee deems an award appropriate, but not more frequently than annually.
4. **Form of Award.**
   (a) The recipient shall receive an appropriately engraved plaque commemorating the award at the annual meeting.
   (b) The family of the late beloved Robert W. Hemphill; in the person of Harriet Hemphill Crowder of Mt. Pleasant, has consented to having the award named for the late United States District Judge, Robert W. Hemphill. When possible, the Association shall have a member of the Hemphill family present whenever this award is presented.

By Noon on Wednesday, July 27, 1994
Clip and Send to: SCDTAA, 3008 Millwood Avenue,
Columbia, SC 29205 or FAX 803-765-0860

I NOMINATE _____

OF THE FIRM OF _____

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CITY AND STATE _____

BECAUSE _____

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(ATTACH A SHEET OF PAPER IF NECESSARY)

_____

BELE CHERE
Asheville
July 29, 30, 31

Bele chere is a community celebration held every year in Downtown Asheville. Since 1979, it has been a three-day extravaganza of music, food, fun, architecture, events, and children's activities; fun for the whole family!

Loosely translated into modern French, "Bele Chere" means "Beautiful Living." In this city where treasures abound, quality living is celebrated.

The historic fabric of Asheville's Downtown sets the scene for this unique celebration as nearly 300,000 people celebrate beautiful living–Asheville style!

▲ Music: From Beethoven to bluegrass, from Joplin to jazz, all the way to rock n' roll and country, music pours from every corner of Downtown Asheville. This music is combined with children's entertainment in an exciting children's area. Drama, poetry reading, dance, and other performers, a veritable showcase of local and regional talent, complimented by a few national acts, round out five stages of entertainment throughout the days and evenings.

▲ Food: Approximately 70 food booths featuring Greek, Italian, Scottish, Chinese, Mexican, and other delicacies all contribute to a truly international food extravaganza. A special "Taste of Asheville" foods area features specialties from Asheville area restaurants.

▲ Events: Bike races, road races, 3-on-3 basketball, a belly flop contest, a human maze, fountain raft rides, a parade, and skydivers are part of a multitude of events at Bele Chere. These events provide great entertainment–join in as a participant or have a great time watching from the sideline!

▲ Arts & Crafts: Local and regional artisans use this festival as an outlet to display and sell their art. Some of the finest examples of mountain crafts can be found at Bele Chere.

TENTATIVE AGENDA
SCDTAA & SC CLAIMS MANAGERS' JOINT MEETING
ASHEVILLE, N.C.
JULY 28-30, 1994

THURSDAY, JULY 28

REGISTRATION

SOCIAL PROGRAM

FRIDAY, JULY 29

8:45-9:00 WELCOME (BILL COATES & RAY WESSINGER)

9:00-12:15 **ARBITRATION, MEDIATION, SUMMARY TRIALS AND OTHER ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES – Moderator Bob Erwin**

(1) Current Trends and Topics in ADR – John Van Winkle, Chair, ABA ADR Practice Session

(2) Panel Discussion: ADR Practice in South Carolina (including new mandatory arbitration and mediation rules)

(3) Summary Jury Trials and Mini Trials – Honorable William L. Howard, Sr., Judge, Ninth Judicial Circuit

(4) Mock Jury Trial – Honorable William L. Howard, Sr., Judge, Ninth Judicial Circuit

10:30-10:45 **COFFEE BREAK**

10:00-12:15 **WORKERS' COMPENSATION BREAKOUT**
Moderator – Mills Gallivan
Comments – Commissioner Vernon F. Dunbar, Chairman, South Carolina Workers' Compensation Commission

(1) Fraud in the Application – McDevitt & Street v. the APA, Drake Rogers

(2) Pshrinks & Pstress Claims, Darryl Smalls

(3) The Claims Manager's Perspective – Where is the compensation practice going and what claims managers want from defense attorneys, Mary Teague

(4) Burden of Proof in Unexplained Death Claims, Jeff Ezell

SOCIAL AND ATHLETIC EVENTS

SATURDAY, JULY 30

8:30-9:00 **BUSINESS MEETINGS**

9:00-10:00 **ETHICS – Topic to be announced**

10:00-10:15 **COFFEE BREAK**

10:00-12:15 **WORKERS' COMPENSATION BREAKOUT**
Moderator – Mills Gallivan
Comments – Commissioner Vernon F. Dunbar, Chairman, South Carolina Workers' Compensation Commission

(1) Opt Out and the Benefits of Workers' Compensation (Bill Shaughnessy)

(2) Loss of Vision – Contacts, Lens Implants, and Related Matters (Roy Howell)

(3) General v. Specific Disability (Earl Ellis)

(4) Case Law & Legislative Update (Jay Courie)

10:15-11:15 **DIFFERENT INDUSTRY APPROACHES TO THE USE OF OUTSIDE COUNSEL**
Lee Plumblee
Jay Rogers
Representatives from Aetna, USF&G, Canal, S.C. Farm Bureau

11:15-12:15 **LABOR/EMPLOYMENT LAW AND THE INSURANCE INDUSTRY**
Hank Knight
Ken Childs
Jed Suddeth (Claims Manager)

(1) Insurer's Duty to Defend in General – Scope of Duty, Conflicts of Interest, Insurer's Duty to Settle, Insured's Duty to Cooperate

(2) Insurer's Duty to Defend Employee Claims Against Employers and Managers – Employment Discrimination and Other Employment Related Cases

TRIAL "TRIFURCATION"?: THE PUNITIVE DAMAGE ISSUE IN FEDERAL COURT

Sandra J. Senn
Stuckey & Kobrovsky
Charleston, S.C.

The recent practice by some federal judges in South Carolina has been to trifurcate trials when there is a jury determination that punitive damages should be awarded. During the final phase of trial a jury is told not only that there is insurance coverage but the policy limits. Currently two district judges are using the trifurcation method[1] and three have indicated their willingness to conduct trials in that same manner.[2]

Insurance has become an issue because federal judges are now having to reconcile the "defendant's ability to pay" limitation as enunciated in Mattison v. Dallas Carrier Corp.[3] (discussed infra) with the knowledge that the defendant's insurance carrier has the actual ability to pay most punitive verdicts.

During trifurcation, a jury is asked to make a determination of liability and award actual damages if appropriate. The jury is also instructed to determine whether it believes punitive damages should be awarded in an amount later to be determined.

Absent a defense verdict or the jury's indication that punitive damages are not appropriate, the jury then hears wealth testimony and is given damage instructions in accordance with Mattison and, in state court, Gamble[4] (discussed infra). A second set of closing arguments are then directed toward whether the defendant should be punished and what punitive damage award would be proper.

The third phase of trial is the most perplexing. If the jury returns a punitive award it is then told the exact amount of insurance coverage and asked whether that knowledge would have affected their punitive verdict. A third round of closing arguments are heard, this time with the insurance company's flesh on the table.

This article will address problems associated with the trifurcated trial method and will review the only South Carolina case to date in which the jury actually increased their punitive award based on knowledge of insurance coverage.

THE LAW

The judges' reasoning with respect to trifurcation is evident. No court wants to retry a case. Pending definitive guidelines from the Fourth Circuit,[5] the judges have determined that if two verdicts are received, with and without the insurance information, then either way the Fourth Circuit decides they will have a proper verdict, making retrial unnecessary.

In order to understand why the district judges are struggling with this issue one must first examine case law as it has recently evolved.

The law in South Carolina has long been that evidence of liability insurance cannot be introduced in an action for damages for personal injury.[6] However, when the United States Court of Appeals for the Fourth Circuit decided Mattison they determined that South Carolina's law concerning punitive damages denied defendants due process. The reasoning was that there were no discretionary standards to guide a jury in awarding punitive damages prior to permitting it to deprive defendants of their property.[7]

It is puzzling that a case which was designed to protect South Carolina defendants from unbridled jury verdicts has now led to much confusion and justified fear concerning punitive damages from a defense viewpoint. The confusion only exists in federal district courts because state courts must steadfastly apply the mandated reasoning that evidence of insurance coverage unduly influences juries and carries them away from the real issue of damages.

Prior to Mattison, the United States Supreme Court decided Pacific Mutual Life Insurance Co. v. Haslip.[8] In a seven to one decision it determined that Alabama's system for imposing punitive damages met the due process requirements of the fourteenth amendment. The Court did not mandate set requirements for imposing punitives, but did, however, specifically approve Alabama's three-stage approach.[9]

The three steps in Alabama's process which was adjudged procedurally correct include: (1) adequate instruction that punitive damages were not to compensate but to punish and deter, (2) the trial court's review of punitive damage awards for excessiveness, and (3) appellate court review that the first two steps were followed, with a determination that the award was rational.[10] The Haslip court then enunciated (not mandated) what are now known as the Hammond[11] factors. They are:

(a) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

(b) The degree of reprehensibility of the defendant's conduct, duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

(c) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss;

(d) The 'financial position' of the defendant;

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(e) All the costs of litigation;

(f) The imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and

(g) The existence of other civil awards against the defendant for the same conduct these also to be taken into mitigation .[12]

In Haslip Alabama's scheme for assessing punitive damages did not include evidence of the defendant's wealth, for that was contra to Alabama state law.[13] However, the court stated that since Alabama provided adequate post-trial review of punitive damages that its system was not constitutionally incorrect.[14]

Therefore, the Supreme Court has expressly ruled that addressing the defendant's ability to pay in a post-trial procedure is constitutionally adequate, at least as far as Alabama's system is concerned. However, district courts sitting in diversity jurisdiction are a different matter.

South Carolina's answer to both Haslip and Hammond came in the case of Gamble v. Stevenson which mandates post-trial review of the following factors:

(1) Defendant's degree of culpability;

(2) Duration of the conduct;

(3) Defendant's awareness or concealment;

(4) The existence of similar past conduct;

(5) Likelihood the award will deter defendant or others from like conduct;

(6) Whether the award is reasonably related to the harm likely to result from such conduct;

(7) Defendant's ability to pay; and

(8) As noted in Haslip, 'other factors' deemed appropriate.[15]

It is Mattison which has baffled South Carolina district judges attempting to reconcile Federal Rules of Civil Procedure 50(b) and 59 with the South Carolina Gamble factors. The Mattison court made abundantly clear that federal courts sitting in diversity jurisdiction must ultimately be controlled by the federal rules.[16]

Rather than allowing federal courts to apply post-verdict Gamble factors, district courts must instruct a jury regarding those factors combined with the four Haslip factors of (1) harm caused, (2) mitigating penalties, (3) profits resulting from poor conduct, and (4) ability of the defendant to pay the award.[17]

Guided by the Erie doctrine[18] federal courts apply federal rules along with safeguards so that "state based rights in federal court not yield results materially different from those obtained in state courts."[19] If state law is unclear, federal courts are to attempt to predict the ruling of the state's highest court.[20]

With those principles in mind, it appears that the judges are specifically grappling with Haslip factor number four and Gamble factor number seven, both concerning the defendant's ability to pay. Obviously, it would be unfair to suggest to a jury that a defendant will be forced into bankruptcy and/or cannot pay a punitive award if indeed there is insurance that would cover such award.

TRIFURCATION TRIBULATIONS

Aside from the obvious strain a three tier trial places on the participants and the jurors, trifurcation poses at least nine defense concerns. First, it appears that the language in Gamble could easily be reconciled by interpreting the "defendant's ability to pay" language to substantially mean the "wealth of the defendant" or "defendant's financial net worth" which has been used in other jurisdictions and in Haslip.[21]

If a federal court leaps the verbiage hurdle and concludes that the defendant's ability to pay and net worth are substantially the same,[22] then insurance coverage should not properly be made known to a jury. Obviously liability insurance coverage is not an asset to be used at will by the defendant, and hence should not be treated as such in determining wealth.

However, the second hurdle exists and was produced in Mattison when the Fourth Circuit mandated that a jury (not judge) is to decide the limiting factors and that it "cannot affect economic bankruptcy."[23] How then is a judge to inform a jury that bankruptcy will not be a concern unless the coverage amount is afforded the jury for their consideration?

Second, if a jury in the third phase of trial exceeds the policy limits, can one determine whether it is excessive? It appears that exceeding the policy might be the only way a jury can do exactly what they are supposed to do with punitive damages and that is to punish the actual defendant.

Third, the debate over whether insurance companies should ever be allowed to cover punitive damages continues.[24] At least in South Carolina state courts the answer is clear. Carroway v. Johnson, [25] holds that insurance policies which have language tending to cover all sums legally obligated to be paid by the insured includes exemplary or punitive damages.

If one of the intentions of awarding punitives is to deter like conduct by making an example, how is an insurance company supposed to protect itself? What obligations must a carrier incur regarding screening their insureds, preparing inquiries, policy exclusions and reservations of rights?

Logically, an insurance company cannot contact all of its insureds to determine whether they are behaving appropriately. It is a contractual status, not agency.

Who, then, is deterred? Who has been made an example? Certainly not the actual defendant who loses nothing more than a few days in trial. It seems that the purpose of the punitive damages is lost.[26]

Fourth, if the Fourth Circuit rules that insurance coverage should properly be presented to the jury in accordance with the defendant's ability to pay, trial strategy for any defense attorney would likely differ. Evidence of the defendant's penniless status might not be introduced in the same

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manner. A jury may become infuriated when they learn that the defendant is supported by more than his meager assets after they have already deliberated about his wealth. A vindictive verdict might be the product in the three phase system, and an appellate court will then have to decide if the third phase was prejudicial.

Fifth, if a punitive verdict is rendered in a higher amount during the third phase, could there be a judicial determination of whether the verdict was justified to punish the defendant or that it was simply a random act of vindictiveness against an insurer? Wealth distribution has long been a concern in punitive context, especially when jurors have the power to convey wealth at a whim, be it insurance or otherwise.[27]

Sixth, if state courts will not allow insurance coverage to be disclosed to a jury, yet federal courts will afford them that knowledge, battles over jurisdiction and forum shopping will undoubtedly ensue. This is precisely the activity that the Mattison court stated should not occur.[28]

Seventh, what happens if the state's insurer is the carrier? Might federal courts then allow jurors to learn the policy limits of taxpayers' money? The Honorable Henry M. Herlong, Jr., United States District Court Judge for the District of South Carolina, has followed the recent Fourth Circuit case of Bockes v. Fields,[29] and held that if there is an action in federal court seeking damages to be satisfied by state insurance funds, it may not be maintained pursuant to the Eleventh Amendment. The district court followed Bockes even though South Carolina pays only forty percent of the state's Insurance Reserve Fund premiums.[30]

Eighth, if a plaintiff's attorney offers to settle within policy limits after the third phase of trial and before the verdict is rendered, what happens if the verdict is in excess of coverage? Possible Tyger River[31] problems will exist.

Finally, what happens if coverage is later denied? If a jury has been charged that there was insurance coverage, it certainly would not be appropriate to assess the higher award against the defendant if indeed he is not covered. Regardless of whether the jury is told during the third phase that there "may or may not be coverage," there will be no way to determine whether the jury was poisoned in the belief that there was an effective policy.

ADKINSON v. McNEILL

4: 90-1769-2

Less than three weeks after the Mattison decision was handed down, Saunders M. Bridges, Sr., and James C. Rushton, III, tried the case of Adkinson v. McNeill.[32] To date, the Adkinson case is the only case in South Carolina in which a jury has actually changed its punitive award based upon liability insurance coverage.[23]

Bridges defended the Adkinson case. Its factual background included a seventeen year old defendant who was driving a borrowed vehicle after consuming alcohol. The defendant struck and severely injured the fifteen year old plaintiff who was attempting to cross a busy street in Myrtle Beach, South Carolina.

The plaintiff introduced evidence that he was blessed with great athletic ability and undoubtedly bound to become a professional basketball player. The defendant, while trying to minimize his culpability and show that the likelihood of the plaintiff to achieve success in professional sports was minimal, nevertheless had a verdict rendered against him in the amount of $350,000 actual damages.

Initially the Honorable C. Weston Houck submitted actual damages to the jury along with an option for the jury to render punitive damages. Those damages, according to the form, would be determined at a later time.[34]

After the actual verdict and indication by the jury that punitives were appropriate, the second phase of the Adkinson case began. Testimony was introduced that the defendant owned only his clothing, and that he was solely supported by his parents.[35]

Nonetheless, the jury returned with a question regarding what would happen if the defendant cannot pay the verdict. This question came after Judge Houck charged the jury three of the four factors listed in Mattison which he deemed appropriate in that particular case, including the limitations on the defendant's ability to pay.[36]

In response to their query, Judge Houck explained to the jury that in South Carolina the plaintiff's option was to file a judgment against the defendant, said judgment being valid for ten years.[37] He did not define (nor was he requested to define) bankruptcy or economic bankruptcy. The jury deliberated an additional two hours and ten minutes before returning a $5,000 punitive damage award.

Obviously the fact finders intended to punish the seventeen year old regardless of his pauper status. It appeared that any punitive award in that case would affect economic bankruptcy, yet the jury punished the defendant notwithstanding the Mattison charge.

Realizing that the jury must be tired of continued deliberations, Judge Houck told the jury before asking them to retire a third time, "I don't want you to think that by doing this the way I am doing it that I am playing games with you, because I am not."[38] He then proceeded to tell the jury, "I am at this time, however, going to advise you that he [the defendant] is protected by liability insurance, that there was a policy of insurance on the vehicle that he was operating...The amount of that policy is $1,100,000. Any judgment up to that figure, any combined judgment for actual and punitive damages up to that figure of $1,100,000 rendered by you in this case against the defendant...will be paid by that insurance carrier."[39]

Sixty-five minutes later the jury returned for its third and final time with a punitive damages award in the amount of $150,000.

Notwithstanding the larger verdict, defense counsel breathed relief. He had reasoned that the only logical

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verdict for a jury so inclined to actually punish a seventeen year old, would be to ensure that the policy limits were exceeded.

Immediate questions were raised by the increased verdict. What logical reason could the jury have had for awarding $145,000 more in punitive damages although realizing that the defendant would not have to pay out of his pocket? Two conclusions are apparent. Either the jury wanted to punish the insurance company for whatever their biases may be, or it was actually a supplement to the actual damage verdict based on the knowledge of the coverage.

This case would have been perfect testing ground for the Fourth Circuit's opinion as to whether insurance coverage should be included as part of "the defendant's ability to pay." Judge Houck safely entered the original $5,000 punitive verdict. The plaintiff, under what must have been financial stress, settled the case for the amount of actual damages plus the $5,000 punitive award.

CONCLUSION

Since 1989 the issue of punitive damages has been addressed by the United States Supreme Court three times.[40] The confusion of having no bright line rule and relatively little guidance with respect to applying the due process clause has led to disparity between readings of the Supreme Court's opinions which now vary from circuit to circuit.[41] It is safe to conclude that since federal courts have stepped into state court procedures governing exemplary damages under the guise of due process there will be a host of petitions for review on a case by case basis unless more definitive guidelines are established.

While our district judges are grappling with the issue, perhaps Justice Scalia put it best when he stated, "We have expended much ink upon the due process implications of punitive damages, and the fact specific nature of the court's opinion guarantees that we and other courts will expend much more in the years to come."[42] For now, the trifurcated method is a part of district court trials with punitive implications, at least until a higher court decides that it will "expend more ink."

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1. Judges who have already trifurcated trials are the Honorable C. Weston Houck and David C. Norton.

2. Judges indicating their willingness to conduct trifurcated trials are the Honorable Sol Blatt, Jr., G. Ross Anderson, Jr., and Charles E. Simons, Jr. Specifically declining to adopt the trifurcated method are the Honorable Falcon B. Hawkins and Joseph F. Anderson, Jr.

3. Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991).

4. Gamble v. Stevenson, et al, 305 S.C. 104, 406 S.E.2d at 350 (1991).

5. Access to computer data by topic is difficult, but to date the Fourth Circuit clerk is unaware of any pending case which addresses this issue per Patricia Connor, Chief Deputy Clerk, United States Court of Appeals.

6. Horsford v. Glass Co., 92 S.C. 236, 75 S.E. 533 (1912); compare to F.R.C.P. 411 which indicates that evidence of insurance is not admissible in determining negligence.

7. Mattison, supra, at 96.

8. 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991).

9. Id. at 16-18, 111 S.Ct. 1044-46.

10. Id. at 17, 111 S.Ct. 1045.

11. Hammond v. City of Gadsden, 493 So.2d 1374, 1379 (Ala. 1986).

12. Haslip, supra, at 17, 111 S.Ct. 1045.

13. Id. at 8.

14. Id. at 8-9.

15. Gamble, supra, at 354.

16. Mattison, supra, at 107, 109.

17. Id. at 110, specifically stating: "Limitation based on ability to pay: any penalty must be limited to punishment and thus may not affect economic bankruptcy. To this end, the ability of a defendant to pay any punitive award should be considered."

18. Erie RR Co. v. Tomkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

19. Johnson v. Hugo's Skateway, 974 F.2d 1408 at 1416 (4th Cir. 1992), citing United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 21 (1966).

20. Id. at 1417, citing Liberty Mutual Ins. Co. v. Triangle Industries Inc., 957 F.2d 1153, 1156 (4th Cir. 1992); Browning-Ferris Industries of Vermont Inc., v. Kelco Disposable Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d. 219 (1989).

21. Haslip, supra, at 9; 87 ALR 4th 141, 157, citing Fopay v. Noveroske, 31 Ill.App.3d 182, 334 N.E.2d 79 (1975).

22. 87 ALR 4th 141, 157 defining net worth as "assets minus liabilities."

23. Mattison, supra, at 110.

24. Haslip, supra, at 13 (for argument, both pro and contra) F.N. 4.

25. Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965).

26. It is important to note that the Supreme Court's upholding of punitives in Haslip against an insurance carrier is distinguished because there the wrongful conduct was committed by an insurance agent under the control of the company.

27. TXO Production Corp. v. Alliance Resources Corp., __ U.S. __, 113 S.Ct. 2711, 125 L.Ed.2d 366, 400 (1933), O'Connor's dissent.

28. Id. at 109.

29. 999 F.2d 788, 791 (4th Cir. 1993), cert. denied, 114 S.Ct. 922 (1994).

30. Cromer v. Brown, C/A No. 6:92-3555-20AK.

31. Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933).

32. Case number was 4:90-1749-2 tried before the Honorable C. Weston Houck on October 30, 1991.

33. The writer inquired of every district judge in South Carolina and the Adkinson case was the only case brought to the writer's attention.

34. The bifurcated method used by Judge Houck is promoted by Mattison, supra, at 110.

35. The attorneys in the Adkinson case waived closing arguments after the second and third phases.

36. Taken from transcript of court's charge to jury and further proceedings, pp. 47-48.

37. Id. at 57.

38. Id. at 59.

39. Id. at 60.

40. Jean H. Toal and Jennifer Aldrich, **"Recent Developments in Punitive Damages and Expert Witness Testimony,"** The Defense Line, Vol. 22, No. 1 at 7 (Winter 1994) addressing Browning-Ferris Industries of Vermont Inc. v. Kelco Disposable Inc., supra; Pacific Mutual Life Ins. Co. v. Haslip, supra; TXO Production Corp., supra.

41. Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993), acknowledging review discrepancies between the Second, Fourth, Tenth and Eleventh Circuits.

42. Haslip, supra, at 33.

DEFENSE TRIAL ACADEMY

The Fourth Annual South Carolina Defense Trial Attorneys' Association Trial Academy is scheduled to be held July 13 through July 15, 1994 at the USC School of Law. As in the past, the Academy should provide participants with a great opportunity for a hands-on practical trial experience to sharpen their advocacy skills.

In 1991, the SCDTAA initiated the Trial Academy. The purpose was to give young SCDTAA members an opportunity to gain courtroom experience through instruction by more experienced members. By design, the program gave students the opportunity to be on their feet, presenting their positions in front of a critical audience – their peers. Previous programs have been big successes, and much was learned by both the students and the instructors.

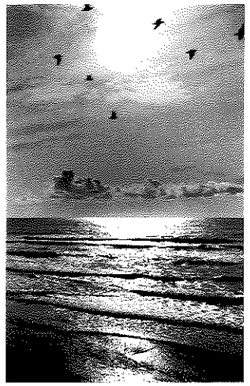
This year's program will provide three full days of nuts-and-bolts trial techniques. During the first two days of the program, students will be given instruction by more experienced Association trial attorneys and will meet in break-out sessions to practice their skills.

The third day of the program is reserved for the actual trial of a case before a judge and jury, and at the conclusion of the trial, we anticipate that the juries will deliberate in open court. The Association has invited Federal Judges to participate in the Academy and preside during the mock trials. There will also be a social gathering Thursday evening.

In order to maintain a high instructor-to-student ratio, attendance will be limited to 24 participants. The Academy is designed for SCDTAA members who have been in practice for less than five years and have very limited trial experience (some trial experience is recommended). The cost for the Academy is $500.00. Each participant is responsible for his or her own lodging and meals. In the past, the Academy has qualified for CLE Credit.

Anyone interested in participating in the Academy, either as a student or an instructor, should call the Association at 1 (800) 445-8629, Joel Collins at (803) 256-2660 or Clarke McCants at (803) 643-4110.

SCDTAA Annual Meeting
October 20-23, 1994
Kiawah Island, South Carolina



Walter Dellinger To Speak at Annual Meeting in October

Walter Dellinger, Assistant Attorney General of the United States, and head of the Office of Legal Counsel of the Department of Justice has accepted an invitation to speak at our annual convention, to be held at Kiawah Island, October 20-23. As head of the Office of Legal Counsel, he is the lawyer for the Attorney General of the United States. He is a noted scholar, teacher, and practitioner who has written and spoken extensively on a number of constitutional and other issues.

Professor Dellinger is an honor graduate of the University of North Carolina and a graduate of Yale Law School. He was a law clerk to late Justice Hugo L. Black of the United States Supreme Court. He joined the faculty at Duke Law School in 1969, and served as Associate and as Acting Dean from 1974 to 1978. Additionally, from 1970 to 1977, he served as the Reporter and Draftsman for the North Carolina Criminal Code Commission, which produced a modern criminal procedure system, ultimately adopted by the General Assembly of North Carolina.

He served as Professor in Residence at the Department of Justice in 1980-81 and has briefed and argued many cases before the Courts of Appeals and the United States Supreme Court. He has advised the Senate Judiciary Committee on judicial nominations, and has testified before the Senate Budget Committee, the Senate Committee on Labor and Human Relations, the Senate Appropriations Committee, the Senate Judiciary Committee, and the House Judiciary Committee, all on a variety of constitutional issues.

Professor Dellinger has published articles in the Yale Law Journal, the Harvard Law Review and other scholarly journals. He has also written for the New York Times, The Washington Post, The London Times, Newsweek, The New Republic, and the American Prospect. He spent the 1988-89 academic year as a Fellow at the National Humanities Center.

From 1981 to 1983, he served as outside counsel to the state of Alaska, defending the constitutionality of that state's taxation of oil revenues. In 1991 and 1992, he represented defendants in mass tort litigation, filing arguments in several courts and before the Federal Multidistrict Litigation Panel, regarding the constitutionality of the repetitive award of punitive damages.

He has lectured throughout the world in such centers of learning as the University of Siana in Italy, the University of Copenhagen, Denmark, Nuremburg University in Germany, the National University of Mexico, Tilburg Universities in the Netherlands, Catholic University in Leuven, Belgium, and at international conferences in Rio de Janeiro and Rome. He has also addressed the annual meetings of the American Bar Association, the Association of American Law Schools, the American Political Science Association, the Federalist Society and other groups. He served as a member of the Board of Editors of The American Prospect, and as a member of the Executive Committee of the Yale Law School Association.

Professor Dellinger holds a position of immense importance in the judicial system of our country and is a renowned scholar and much sought-after speaker. We are honored by his acceptance of our invitation.

1994 Committee Chair Appointments

Membership
George James, Jr.
P.O. Box 1716
Sumter, SC 29151
775-5381

Legislative Committee
Susan Lipscomb
P.O. Drawer 2426
Columbia, SC 29202
771-8900

Defense Line Committee
William H. Davidson, II
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Columbia, SC 29202
254-4190

Lawrence B. Orr
318 W. Palmetto St.
Florence, SC 29501
662-1418

Amicus Curie
Clarke W. McCants
P.O. Box 519
Aiken, SC 29802
643-4110

Conventions Joint Meeting
H. Michael Bowers
P.O. Box 993
Charleston, SC 29402
577-4000

Conventions Annual Meeting
W. Frances Marion, Jr.
P.O. Box 2048
Greenville, SC 29602
240-3200

Joint Meeting Program
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799-2000

John M. O'Rourke
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224-7111

Annual Meeting Program
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Long Range Planning
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Kay G. Crowe
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Seminars
H. Mills Galivan
P.O. Box 10589
Greenville, SC 29603
271-9580

L Sidney Connor, IV
P.O. Box 3939
Myrtle Beach, SC 29578-3939
448-3500

Joint Meeting

July 28-30, 1994

Grove Park Inn
Asheville, NC

Annual Meeting

October 20-23, 1994

Kiawah Island
South Carolina

Deadline for Hemphill Award Nominations

Wednesday, July 27, 1994

See page 12 for information.