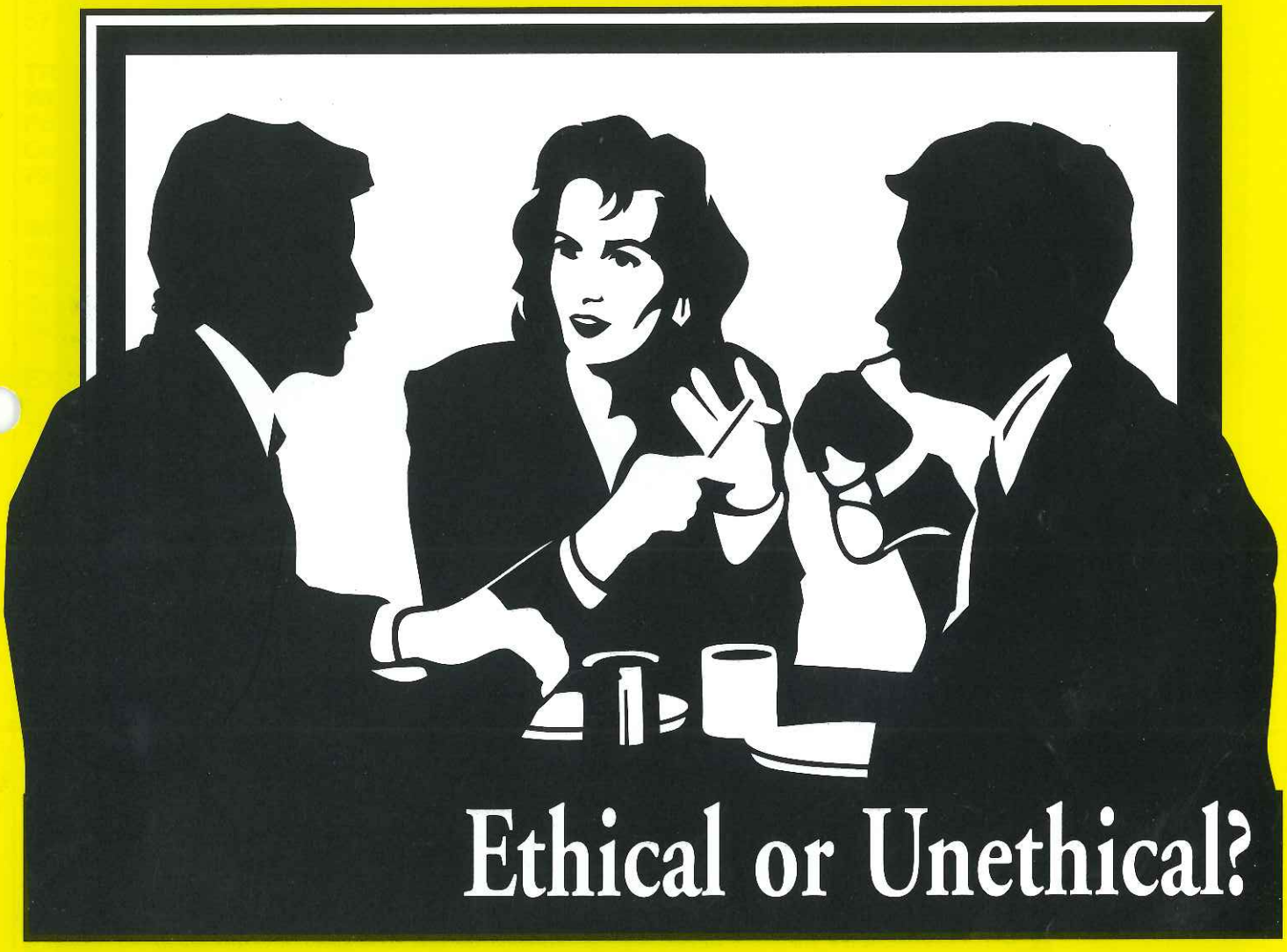
The Defense Line

S.C. Defense Trial Attorneys' Association

Fall, 1994
Volume 22 Number 4



Ethical or Unethical?

South Carolina Defense Trial Attorneys' Association
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VOLUME 22, NO. 4 Fall 1994

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TEN YEARS AGO

President SAUNDERS M. (BAGGY) BRIDGES (Florence) accepted the "Exceptional Performance Citation" awarded our Association by the Defense Research Institute. CARL EPPS attended the DRI Conference.

ALEX SANDERS, Chief Judge of the Court of Appeals accepted our Association's invitation to the Joint Meeting with the Claims Managers in Asheville July 26-29. Our old friend, CARL DUNN, Vice President of Claims Canal left Canal to become associated with the Miami, Florida law firm of Virgin & Kray.

Our Association had a strong presence at the IAIC Meeting July 2. ED MULLINS; President of DRI led the contingent. DEWEY OXNER participated in the open forum. Members attending were BEVO ARNOLD, JACK BARWICK, BILLY HAYGOOD, BOBBY HOOD, DAVE HOUSER, WELDON JOHNSON and BEN MOORE. DONNA McINTOSH ROBINSON, American States Claims Manager was elected President of the Columbia Claims Association.

TWENTY YEARS AGO

South Carolina Defense Trial Attorneys was host to the Seventh National Conference of DEFENSE ATTORNEYS ASSOCIATION April 11-14 at the Mills-Hyatt House in Charleston. Some 70 delegates attended from various states. Immediate past President ED MULLINS, JR. was chairman of National Conference and DANA SINKLER was our Association's Chairman. Some 50 wives accompanied their husband delegates and were left with a lasting impression of Charleston's True Southern Hospitality.

GOVERNOR JOHN WEST welcomed the group to South Carolina. One phase of the program was Attorney vs. News Media, then a panel discussing Modified No-Fault.

JIM ALFORD began compiling a list of expert witnesses. Plans were made for the Seventh Annual Meeting of our Association for November 7-9 at Hilton Head Inn, Hilton Head Island, South Carolina.

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

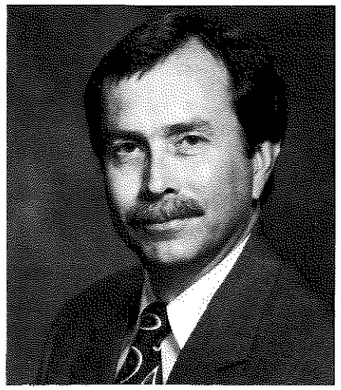
It has been a distinct honor and privilege to have served as your president during this past year. I hope each of you will accept my heartfelt thanks for the support you have given. Each of you responded enthusiastically and wholeheartedly to any request for advice or assistance. It is no wonder our Association is considered one of the premier state associations in the country.

I also want to express my deep gratitude and appreciation to the officers and members of the Executive Committee for all of their hard work. Everyone has been most cooperative and has given of their time and their talent to make this a most successful year. Never was any request met with even reluctance, much less a refusal. Their willingness to devote long hours to this Association made this year a most pleasurable one for me and a most productive one for the Association.

We had a hectic year in the legislature, beginning with the passage by the House of the six-man jury bill in January. Through your hard work, and through a liaison with the various chambers of commerce, the Textile Manufacturers' Association, and other business groups, we were able to defeat this ill-advised legislation in the Senate.

The SCDTAA tradition of national leadership continued at the DRI Leadership Conference. Steve Morrison will be the incoming president of the DRI; Hugh McAngus is the secretary of the SLDO; and David Dukes was named the Outstanding State Chairperson for the Mid-Atlantic Region. Please remember the 1995 Leadership Conference will be held in March at the Omni in Charleston.

Bill Davies, John O'Rourke, and Mike Bowers put together an outstanding educational and social program for our Joint Meeting at the Grove Park. Those in attendance learned more about our upcoming ADR program and generally enjoyed a cool respite from the summertime heat of South Carolina.



William A. Coates

Throughout the year, the Amicus Committee, chaired by Clarke McCants, has been busy. The committee was successful in presenting our position in the case of Cramer v. Balcour Property Management, and is presently in the process of filing another brief, and petitioning for permission to file a third.

In July, Joel Collins and Clarke McCants chaired the Fourth Annual Trial Academy. Attended by twenty-one students, the Academy was again a smashing success. Your Executive Committee feels that this is an important service to render to our membership, and one which will continue with your support.

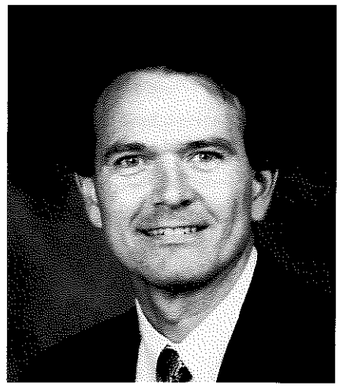
John Wilkerson, Steve Darling, and Frankie Marion chaired the educational and social programs at our Annual Convention at Kiawah Island. An outstanding group of speakers, led by Assistant United States Attorney General Walter Dellinger, discussed timely topics such as the constitutionality of punitive damages; unique and innovative ways to deal with factual presentations; as well as a view of presidential power from Washington. Another area of focus was the changing economics of defense practice. This was an excellent meeting, and one which I feel was most informative. As usual, everyone enjoyed the social agenda featuring the charm of the lowcountry.

Please join me in congratulating Ben Moore, who received the 1994 Hemphill Award. Ben was instrumental in the founding of this Association and served as its first president. Since that time he has remained active in defense affairs nationally, and served the bar on a statewide level and as president of the Charleston Bar Association.

Please remember to attend our CLE seminar on November 11. Mills Gallivan has put together an excellent program concerning the issue of civility among lawyers. We will be hearing from the federal and state bench, from the plaintiff's bar, and from the defense perspective. This is a timely topic that needs to be addressed. I look forward to seeing you at the USC Law School.

Mike Wilkes is your new president, and he will do an excellent job. Mike has been a great source of support and counsel during this past year. He has some very innovative ideas, all of which will be to the betterment of our Association.

In closing, let me again express my thanks to each of you for your participation and your support during this past year. It has been a wonderful experience for me, and I thank you for the opportunity to have served as your president.



Michael B.T. Wilkes

RECENT DECISIONS

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 9321904
(Synopsis of Full Commission Order)

Christopher A. Kyber, Deceased, Employee,

Claimant,

vs.

Southern International Fireworks, Employer, and Insurance Company of North America, Insurance Carrier,

Defendants.

Defendants/Appellants
Represented By
Jeffrey D. Ezell,
Gibbes & Clarkson, P.A.,
P.O. Box 10589,
Greenville, S.C. 29603

FACTS

This claim arises out of an admitted accident which occurred on June 25, 1993, in which the claimant died while working for the defendant, So. nt. Fireworks. The claimant was an unmarried college student with no dependents, and it was agreed by all parties that the only beneficiaries under the South Carolina Workers' Compensation Act were his parents. The only contested issue in the case related to the claimant's average weekly wage and compensation rate. Based upon the Form 20 submitted by the defendants, the Commission calculated the claimant's average weekly wage as being $359.17 with an applicable compensation rate of $239.45.

The single commissioner, however, had found that the deceased claimant was entitled to the maximum compensation rate, $393.06, based upon the "exceptional circumstances" provision of S.C. Code Section 42-1-40. More specifically, the single commissioner found that the claimant, who had a very commendable scholastic and extracurricular record, would have probably earned more nce he had finished college, graduate school, and found a job in his chosen profession.

The claimant's estate presented expert testimony from Dr. Oliver Wood, a Professor of Economics. The single commissioner's Order was based, at least in part, upon this testimony, as well as the testimony of the claimant's father with regard to the claimant's plans for future employment, and his earning potential.

The defendants' appeal from the single commissioner's Order was based upon the following issue:

> Whether the Hearing Commissioner's finding that the claimant was entitled to the maximum compensation rate was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; was erroneous as a matter of law; and/or was an abuse of discretion.

Defendants also contended that the single commissioner erred in relying upon the testimony of the claimant's expert economist, to which they had objected at the hearing.

Furthermore, defendants contended that the South Carolina Workers' Compensation Act did not contemplate employees such as the claimant as being entitled to the maximum compensation rate based upon potential future earning capacity at an entirely different vocation. The defendants argued that such employees did not constitute the "exceptional circumstances" contemplated by S.C. Code Section 42-1-40.

The defendants further argued that while Workers' Compensation Acts from various other jurisdictions have made specific provisions for employees such as the claimant, our Legislature made no such provision. Therefore, by implication, the Legislature intended that the average weekly wage at the time of death be controlling.

DISCUSSION

It is clear in South Carolina that a claimant seeking to recover compensation "must establish by the preponderance of the evidence the facts that would entitle him or her to an award under the Act and such award must not be based on surmise, conjecture, or speculation." Poke v. E. I. duPont de Nemoirs Co., Inc., 158 S.E.2d 765 (S.C. 1968) (emphasis added).

Furthermore, findings of fact, inferences, and conclusions drawn by the single commissioner may be disturbed on appeal if they are "clearly erroneous in view of the reliable probative, and substantial evidence on the whole of the record." Lark v. Bi-Lo, Inc., 276 S.E.2d 304 (S.C. 1981). Additionally, in situations such as the instant case, the final determination of such matters is reserved to the Full Commission. Ross v. American Red Cross, 381 S.E.2d 728 (S.C. 1989).

The claimant's estate relied heavily upon the portion of S.C. Code Section 42-1-40 which provides:

> When for exceptional circumstances the foregoing would be unfair, either to the employer or the employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount the injured employee would be earning were it not for the injury.

It was the majority opinion of the appellate panel, however, that the instant case did not constitute "exceptional circumstances." While the Act is to be liberally construed in favor of the claimant, "it must not be construed so as to work a hardship on the employer and/or carrier by the interpolation of words or conditions not found in the act." Hill v. Skinner, 11 S.E.2d 386 (S.C. 1940) (emphasis added); See also; Benbow v. Edmunds High School, 67 S.E.2d 680 (S.C. 1951).

The claimant in the instant case was a summer employee working while he also attended college. The panel found that there was nothing "exceptional" about this arrangement and took judicial notice of the fact that countless college students are similarly employed each year in South Carolina. To hold their employers and/or insurance carriers responsible for benefits based upon what these individuals might one day earn, in

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an entirely different field or vocation, would be unfair to the employer and carrier.

Insurance carriers can not collect premiums for summer employees based upon what their future earnings potential might ultimately be after completing college, graduate school, and the like. The panel found that such efforts would be very speculative. The Order of the single commissioner would have imposed such a requirement and thus work the very hardship upon the employer and carrier which was forbidden by the Court in Hill, supra.

Furthermore, if insurance carriers were forced to carry risks in the manner prescribed by the single commissioner, it would make it most difficult, from a public policy perspective, for employers to hire college or high school students for summer work. Employers would be responsible for workers' compensation benefits not at the level of their regular full-time employees, but rather at some arbitrary and speculative level based solely upon what the summer employees might one day be capable of earning in an entirely different, unrelated, and potentially unknown field.

The Act makes very specific provisions for the calculation of a claimant's average weekly wage. See; S.C. Workers Comp. Reg. 67-1603 & 67-1604. To adopt the reasoning urged by the claimant's estate would have circumvented the very purpose of these Regulations, and made the current practice involving the Form 20 difficult and futile.

It is well settled that the South Carolina Act was modeled after the North Carolina Act. See; 1949-50 Op. Atty. Gen. 288. It should therefore be noted that the North Carolina Act, at G.S.97-2(5), made specific provision for the computation of average weekly wages and/or compensation rates in situations such as the instant case.[1]

The North Carolina statute allows that such employees shall be given the compensation rate of a similar full-time employee in a position, at the same employer, to which it could be reasonably assumed that the claimant would have ascended but for the injury. It does not provide that such claimant's are entitled to wages to which they might have ascended, given the completion of numerous contingencies, in a different field or occupation.

Had our Legislature intended to make special provisions for summer or minor employees, it could have very well adopted N. C. G.S.97-2(5) when our Act was originally enacted. The Legislature did not do this and therefore, by implication, intended no special treatment for such employees. It should also be noted that the North Carolina act does contain a provision which is the same as the "exceptional circumstances" provision relied upon by the claimant's estate in the instant case. In Liles v. Faulkner Neon & Electric Company, 94 S.E.2d 790 (N.C. 1956), the Court examined a situation involving an employee who was employed part time while attending college. Despite the fact that the Court specifically noted that the "exceptional circumstances" provision existed in the North Carolina act, the Court chose to calculate the claimant's average weekly wage by dividing the total wages earned by the claimant by the number of weeks worked. As such, the North Carolina Court clearly chose not to apply the "exceptional circumstances" provision in situations such as the instant case.

Our Court of Appeals in Booth v. Midland Trane Heating and Air Conditioning, 379 S.E.2d 730 (S.C.App. 1989) examined the "exceptional circumstances" provision of Section 42-1-40 and found that it should apply to the specific facts of that case. Booth involved a situation where the claimant's earnings had increased 63% during the 52 weeks prior to his injury, and he would have thus been penalized by his previous low wages.

The Booth decision was clearly distinguishable from the instant case. The claimant in Booth had already demonstrated a verifiable capacity to earn a wage higher than that from which his compensation rate would have been calculated, in the very vocation at which his injury occurred. In the instant case, no such showing could be made. As of the date of his death, the claimant had demonstrated an ability to earn only $5.50 per hour.

The standard treatise on workers' compensation law, Larson's Workers' Compensation Law, recognizes that some states, by statute, have made specific provisions for summer and/or minor employees. The treatise also notes, however, that "evidence that claimant later greatly increased his wage level by changing to a more skilled occupation cannot be taken as proof of the probable increase". Larson, Workers' Compensation Law, Section 60.12(c), pp. 10-674 through 10-676 (emphasis added). See also; Bursey's Case, 92 N.E.2d 583 (Mass. 1950).

FINDINGS OF FACT (Summarized)

– That the claimant's average weekly wage was $359.17, with an applicable compensation rate of $239.45.

–That as of the date of his death, the claimant had not demonstrated the present ability to earn weekly wages higher than $359.17 per week. The wages earned by the claimant prior to the accident constituted the best evidence of his earning capacity as of the date of his death.

– That the claimant's status of a summer employee did not establish "exceptional circumstances" such as to warrant any different calculation of the claimant's average weekly wage and/or compensation rate.

– That the purpose of the "exceptional circumstances" provision of Section 42-1-40 is to promote fairness in the calculation of the compensation rate. The compensation rate of $239.45 was not unfair to the claimant as it reflects his earning capacity at the time of his death. To calculate the compensation rate based upon potential future earnings would be grossly unfair to the defendants.

– That the Full Commission took judicial notice of the fact that numerous college and high school students are employed in part-time and/or "summer job" capacities, and to find "exceptional circumstances" in this or any other similar situation would be against public policy, and would work an undue hardship and/or unfairness upon the employers and insurance carriers.

– That in view of the fact that the Panel found that no exceptional cir-

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cumstances exist to change the aforementioned calculation, the Panel found that the testimony of Dr. Oliver Wood was not relevant.

RULINGS OF LAW (Summarized)

– That the Workers Compensation Act "must not be construed so as to work a hardship on the employer and/or carrier by the interpolation of words or conditions not found in the act". Hill v. Skinner, 11 S.E.2d 386 (S.C. 1940); See also; Benbow v. Edmunds High School, 67 S.E.2d 680 (S.C. 1951).

– Under Section 42-1-40, the claimant's compensation rate was properly calculated by the Commission, and no exceptional circumstances existed to warrant any different calculation.

– That the single commissioner's interpretation of Section 42-1-40 was erroneous as a matter of law and unfair to the defendants.

IT IS SO ORDERED.

Thomas M Marchant III, Commissioner
South Carolina Workers'
Compensation Commission
Commissioner Vernon Dunbar
Concurred.
Commissioner Sherry S. Martschink
Voted to Affirm.

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[1]See; North Carolina G.S.97-2(5); See also; Hensley v. Caswell Action Committee, Inc., 251 S.E.2d 399 (N.C. 1979); Martin v. Bonclarken Assembly, 241 S.E.2d 848 (N.C. 1978).

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON
IN THE COURT OF
COMMON PLEAS

ANDERSON MEMORIAL HOSPITAL
on behalf of itself and others
similarly situated

Plaintiff

v.

W. R. GRACE & COMPANY; W. R. GRACE & COMPANY-CONNECTICUT; USG CORPORATION; UNITED STATES GYPSUM COMPANY; UNITED STATES MINERAL PRODUCTS COMPANY; DANA CORPORATION; KEENE CORPORATION; ASBESTOS PRODUCT MANUFACTURING CORPORATION; ASBESTOSPRAY CORPORATION; H & A CONSTRUCTION CORPORATION formerly SPRAYCRAFT; T&N, plc, formerly TURNER & NEWALL, PLC, and TURNER & NEWALL, LTD.,

Defendants

MEMORANDUM ORDER

This matter is before the court on Certain Defendants' Motion To Strike Class Action Allegations As To Non-Residents Whose Causes Of Action Are Foreign To South Carolina. The court has carefully considered the briefs submitted by the parties, the authorities cited therein, and the oral arguments of counsel as presumed at a hearing on July 6, 1994.[1] At the conclusion of that hearing, the court decided to grant defendants' motion. This Memorandum Order memorializes the court's ruling from the bench on July 6, 1994.[2]

Background

Anderson Memorial Hospital ("Anderson"), a South Carolina resident, originally filed this action on December 23, 1992 against various former manufacturers of asbestos-containing products.[3] Anderson subsequently filed its First Amended Class Action Complaint ("Amended Complaint") on January 14, 1993. The Amended Complaint asserts claims for damage to its property in Anderson County due to the alleged presence in its buildings of asbestos-containing construction products allegedly manufactured, sold, or distributed by one or more of the defendants.

Apart from the claims of Anderson, the Amended Complaint also describes claims of class[4] of "all persons, corporations, partnerships, unincorporated associations or other entities which own in whole or in part any building which contains friable asbestos-containing acoustical plaster and/or fireproofing manufactured, sold, and/or distributed by defendants," with certain exceptions. Amended Complaint, ¶ 10. Anderson's proposed class would include claims by purported class members who are not residents of South Carolina and whose buildings at issue are not located in South Carolina.

The action was originally filed in state court in Hampton County, but was removed to federal court on the basis of diversity of citizenship. On July 12, 1993, Magistrate Judge Robert Carr granted the plaintiff's motion to remand the action to the South Carolina state court system, because of plaintiff's allegation that members of its proposed class have claims below the $50,000 amount necessary for diversity jurisdiction.

On March 31, 1994, several defendants[5] filed a Motion to Strike Class Action Allegations As To Non-Residents Whose Causes Of Action Are Foreign To South Carolina. The basis for defendants' motion was S.C. Code Ann. § 15-5-150 (Law. Co.-Op. 1976), commonly referred to as the "door closing" statute. The South Carolina door closing statute, which was enacted in 1870, provides as follows:

> An action against a corporation created by or under the laws of any other state, government, or country may be brought in the circuit court: (1) by any resident of this State for any cause of action; or (2) by a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

S.C. Code Ann. § 15-5-150.

Defendants argue, and the court agrees, that based upon the clear mandate of the door closing statute, this court cannot assert jurisdiction over the claims of non-resident potential class members under Rule 23, SCRCP, whose claims do not arise in South Carolina or whose property at issue is not situated within this state.

S.C. Code Ann. § 15-5-150 Deprives The Court Of Subject Matter Jurisdiction Over Certain Claims Of Non-Residents.

Plaintiff's proposed class presents an obvious application of the door closing statute. As a purported class representative, plaintiff seeks to present and litigate the claims of non-residents with foreign causes of action against foreign corporate defendants. The General Assembly, through the door closing statute, has made it clear that South Carolina courts are not available to resolve

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such foreign causes of action.

Failure to meet the requirements of the door closing statute deprives the court of subject matter jurisdiction over the claims of non-resident putative class members. E.g., Eagle v. Global Assoc., 292 S.C. 354, 356 S.E.2d 417 (Ct. App. 1987). As the court noted in Eagle, subject matter jurisdiction over claims against foreign corporations is to be determined by reference to "the law of this State as declared by the legislature," and that in the door closing statute, the legislature has "clearly limited the availability of South Carolina courts." Id. at 419. In cases which involve foreign parties and foreign causes of action, such as the case at hand, the court "need go no further than the plain language of § 15-5-150 to see that the circuit court clearly lacks subject jurisdiction over the action." Parsons v. Uniroyal-Goodrich Tire Corp., 438 S.E.2d 238, 239 (S.C. 1993).[6]

The door closing statute divests this court of subject matter jurisdiction over foreign claims by non-resident plaintiffs against defendants organized or existing under the laws of a state other than South Carolina. It is undisputed that the defendants in this action are corporations created by or under the laws of states other than South Carolina. Therefore, the unambiguous language of S.C. Code Ann. § 15-5-150 requires this court to strike from plaintiff's First Amended Complaint claims of non-residents whose causes of action are foreign to South Carolina.

There Exists No "Class Action" Exception To The Door Closing Statute.

Plaintiff's hope of pursuing this action as a class action under Rule 23, SCRCP, does not allow this court to ignore the plain language of S.C. Code Ann. § 15-5-150. Anderson argues that because it is a South Carolina resident, the language of S.C. Code Ann. § 15-5-150(1) allowing a resident to bring "any cause of action," when combined with the language of Rule 23, SCRCP, allowing a class representative to sue "on behalf of all," entitles it to represent the claims of non-residents, despite the language of S.C. Code Ann. § 15-5-150(2). The court disagrees.

If plaintiff's interpretation were correct, any non-resident could simply evade the jurisdictional strictures of the door closing statute by bootstrapping its cause of action to the cause of action of a resident willing to act as the non-resident's representative. Such an expansive reading of subsection (1) of the statute would eviscerate subsection (2) and conflict with settled South Carolina Supreme Court precedent. The South Carolina Supreme Court has repeatedly construed the door closing statute as narrowing the courts' jurisdiction, not expanding it. See, e.g., Cox v. Lunsford, 272 S.C. 527, 531-32, 252 S.E.2d 918, 920 (1979) (door closing statute "limits the availability of South Carolina courts"); Central Railroad & Banking Co. v. Georgia Constr. Co., 38 S.C. 319, 11 S.E. 192, 203 (1890), (it is "very manifest that the object" of the statute "was not to...extend the jurisdiction of the courts of this State").

The court is persuaded that the rationale found in the South Carolina Supreme Court's holding in Nix v. Mercury Motor Express, Inc.,[7] requires this court to reject the core component of plaintiff's position–that a resident plaintiff can represent the interests of a non-resident and thereby circumvent S.C. Code Ann. § 15-5-150(2). In Nix, a resident administrator brought a wrongful death action against a non-resident corporation on behalf of the estate of a non-resident decedent. While the named plaintiff was a resident, the court looked to the residence of the decedent and found that a suit by the decedent would have been barred by the door closing statute. Id. The Supreme Court held that since the administrator had no greater rights than the decedent whom he sought to represent, his claim on behalf of the decedent's estate was also barred by the statute. Nix, in short, holds that a circuit court must look to the residence of the person(s) on whose behalf the claims are being asserted, and cannot stop its inquiry by simply ascertaining the named plaintiff's residence.

The Nix court also recognized that, if the individual for whom the action was asserted had no right to maintain it in her own right in South Carolina courts, the assignment of that right to a South Carolina resident would be insufficient to create subject matter jurisdiction. Id. at 483, 242 S.E.2d at 685. Since an actual assignment of a claim by a non-resident to a resident is insufficient to invoke the jurisdiction of this court, the court rejects plaintiff's argument that a different result is warranted, in the absence of an assignment, where Anderson purports to represent a virtually unlimited class consisting of numerous out-of-state plaintiffs. Cf. South Carolina Tax Commission v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d 72, 76 (Ct. App. 1988) (permissive intervenors under Rule 24(b), SCRCP, must show an independent basis for subject matter jurisdiction, and cannot piggyback on the named plaintiff's jurisdiction).

Anderson has no authority to assert legal control over or take possession of the constitutionally protected property rights of others. The language of Section 15-5-150 and Rule 23, SCRCP, does not transfer the rights of absent class members to the named plaintiff. The claims that are the subject of the instant motion simply are not Anderson's to bring.

To hold otherwise would allow plaintiff's invocation of Rule 23 to open doors S.C. Code Ann. § 15-5-150 has already closed. This result would be improper, because Rules 81 and 82, SCRCP, limit the scope of the Rules, including Rule 23:

> These rules, or any of them, shall apply...within the limits of the jurisdiction and powers of the court provided by law.
>
> * * *
>
> These rules shall not be construed to extend or limit the jurisdiction of any court of this State.

Rules 81, 82(a), SCRCP.

Additionally, the South Carolina Constitution makes clear that procedural rules, such as Rule 23, must yield to statutory constraints such as S.C. Code Ann. § 15-5-150. "Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts." South Carolina Constitution, Art. V, § 4 (emphasis added). Further,

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the General Assembly, in the enabling statute for the South Carolina Rules of Civil Procedure, admonished that "neither the promulgation of the rules nor this act may be construed to affect the substantive legal rights of any party to any civil litigation the court of this State but shall affect only matters of practice and procedure." 1985 S.C. Acts No. 100 § 3 ("Act 100") (emphasis added).

Plaintiff's argument, that it be permitted as a representative to sue on behalf "of all," merely begs the question as to whom drafters of the rules intended to be included within the term "all." The language of Rule 23(a), SCRCP, makes clear that "all" refers only to members of a proper class over whose claims the court would otherwise have jurisdiction. A representative plaintiff may maintain an action only on behalf of all class members who meet the requirements of the underlying jurisdictional statutes, such as S.C. Code Ann. § 15-5-150. Accord 7A Wright, Miller & Kane, Federal Practice and Procedure, Civil 2nd § 1755 (1986) (under Fed. R. Civ. P. 82, a Rule 23 class action cannot be maintained unless it complies with the jurisdictional statute under which it is brought).[8]

Federal Court Considerations

Plaintiff, in its response to defendants' motion to strike, places heavy reliance upon the decisions of the Federal District Court and the Fourth Circuit Court of Appeals in the Central Wesleyan case.[9] Central Wesleyan is not applicable here.

The only clear holding the court can glean from the Central Wesleyan opinions – a case in which federal subject matter jurisdiction was based upon diversity of citizenship under 28 U.S.C. § 1332 – is that those courts elected not to apply the door closing statute as a limit on that jurisdiction. The opinions recognize a "countervailing" federal policy to centralize Federal Claims in one federal court. Although plaintiff argues that the Central Wesleyan opinions were premised on a basis other than countervailing federal considerations, the court does not agree with plaintiff's interpretation of the holdings.The analysis of the Fourth Circuit and the district court in Central Wesleyan was driven by the courts' evaluation of the door closing statute in light of the federal diversity jurisdiction statute, 28 U.S.C. § 1332, for which there exists no state law analogue. Moreover, it is now clear that, under South Carolina law, the door closing statute is a limit on the subject matter jurisdiction of South Carolina courts. See Parsons, 438 S.E.2d at 239.

This court must evaluate the door closing statute, not as it might impact federal diversity jurisdiction, but as it impacts the subject matter jurisdiction of this court. The Central Wesleyan opinions cannot and do not abrogate the statutory limitations the South Carolina General Assembly, through S.C. Code Ann. § 15-5-150, has placed upon the subject matter jurisdiction of the South Carolina circuit courts. Indeed, the Fourth Circuit, in an earlier decision, conceded that a South Carolina state court could not ignore the plain language of the door closing statute as could a federal court. See Szantay v. Beech Aircraft Corp., 349F.2d 60, 63 (4th Cir. 1965) ("South Carolina state courts do not have jurisdiction over a suit brought by a non-resident against a foreign corporation on a foreign cause of action").

Plaintiff's Interpretation Of S.C. Code Ann. § 15-5-150 Would Defeat Important State Interests.

The Central Wesleyan courts based their conclusion on their perception of a judicially created "federal policy in favor of consolidating asbestos litigation" that they found to be "current" in the federal system. See, e.g., Central Wesleyan, 6F.3d at 187, n.3. A federal court, supported by federal resources, may view such matters from a national perspective. This court is not called upon to re-examine whether such a federal policy exists or is advisable.

Nevertheless, just as the application of S.C. Code Ann. § 15-5-150 raised policy considerations for the federal courts in Central Wesleyan, the application of the statute in this case likewise raises policy implications for South Carolina and the South Carolina judicial system. The South Carolina Supreme Court has recognized that South Carolina's door closing statute promotes several important state interests:

> The "door closing statute" has been noted to accomplish several legislative objectives rationally related to the State's interest. It favors resident plaintiffs over non-resident plaintiffs. ...The statute provides a forum for wrongs connected with the State while avoiding the resolution of wrongs in which the State has little interest. ...It encourages activity and investment within the State by foreign corporations without subjecting [them] to actions unrelated to [their] activity within the State.

Rosenthal v. UNARCO Indus., Inc., 278 S.C. 420, 297 S.E.2d 638, 641 (1982) (citations omitted); see also, Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 n.8 (4th Cir. 1965) ("there are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the courts concerned").

South Carolina's courts are established and funded to provide a forum for residents of this State to seek redress. Plaintiff asks that this court divert scarce resources and time to adjudicate claims apparently to be pursued by residents of other states, countries, kingdoms and territories rather than those of South Carolinians. Plaintiff's attempt to broaden the jurisdiction of this court simply ignores the state's considerable interest in protecting the limited resources of the South Carolina court system as embodied in the door closing statute. This court's order protects the limited judicial resources of this State, advances South Carolina's economic development and comports with the plain and ordinary meaning of S.C. Code Ann. § 15-5-150. See First Baptist Church v. City of Mauldin, 417 S.E.2d 592 (S.C. 1992) (statutes should "be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation").

Conclusion

This court has a duty to apply state law and, accordingly, has no discretion to ignore the jurisdictional dic-

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tates of the door closing statute. Claims of non-resident putative class members against these foreign defendants for claims which arise outside of South Carolina are prohibited by the door closing statute. Therefore, this court grants the defendants' motion and strikes from plaintiff's First Amended Complaint claims of non-residents where the claims do not arise in South Carolina or whose property at issue is not situated in South Carolina.

AND IT IS SO ORDERED.

The Honorable William L. Howard, Sr.
Circuit Court Judge
Charleston, South Carolina
August 8th, 1994

[1]The court, in its discretion, did not, at the hearing, consider the brief submitted on behalf of Amicus Curiae, South Carolina Chamber of Commerce. As of the date of the hearing, plaintiff's time to respond to the amicus brief had not yet expired.

[2]The court's order shall become effective as of the date of entry of this written order.

[3]As to defendant Dana Corporation, Anderson has stipulated that Dana, a manufacturer of automotive and transportation components, did not manufacture and sell asbestos-containing building products. Second Stipulation entered as an Order on March 15, 1994, ¶ 5.

[4]Plaintiff has not yet filed a motion for class certification.

[5]United States Gypsum Company, W. R. Grace & Co., W. R. Grace & Co.-Conn., United States Mineral Products Company, and Dana Corporation. None of these corporations are incorporated in South Carolina.

[6]Our Supreme Court has repeatedly affirmed the validity and constitutionality of S.C. Code Ann. § 15-5-150. See, e.g., Rosenthal v. UNARCO Indus., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982); Central R.R. and Banking Co. v. Georgia Constr. Co., 32 S.C. 319, 11 S.E. 192 (1880).

[7]270 S.C. 477, 242 S.E.2d 683 (1978).

[8]Plaintiff has not yet filed a motion for class certification and the full range of certification issues has not been addressed by either the plaintiff or the defendants. The court, therefore, does not address any other issues concerning the appropriateness of any class at this time.

[9]Central Wesleyan College v. W. R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992), aff'd, 6 F.3d 177 (4th Cir. 1993).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

C/A NO. 6:92-2651-21
O-R-D-E-R

FILED
AUG 11 1993
ANN A. BIRCH, CLERK
U.S. DISTRICT COURT

Judith Ann Rabb and
Ernest Rabb,
Plaintiffs,
v.
American Shelter Company, Inc.,
d/b/a La Vista Apartments,
Defendant.

This case is before the court on the motion of the defendant American Shelter Company, Inc. ("American Shelter") for summary judgment as to all claims of the plaintiffs Judith Ann Rabb and Ernest Rabb. After reviewing the memoranda and accompanying affidavits submitted by the parties; and after considering the oral arguments of counsel, I grant the motion for summary judgment.

SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. Id. at 324. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

Summary judgment serves the useful purpose of disposing of meritless claims before the court and the parties become entrenched in frivolous litigation. Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2nd Cir. 1987). Although summary judgment is an extreme remedy, the courts should not be reluctant to grant summary judgment in appropriate cases; indeed, summary judgment is mandated where appropriate. Herman v. City of Chicago, 870 F.2d 400, 404 (7th Cir. 1989); Mieri v. Dacon, 759 F.2d 989, 998 (2nd Cir. 1985), cert. denied, 474 U.S.829 (1985); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Estate of Detwiler v. Offenbecher, 728 F.Supp. 103, 134 (S.D.N.Y. 1989); Burleson v. Illinois Farmers Ins., 725 F.Supp. 1489, 1490 (S.D. Ind. 1989). In a recent trilogy of decisions – Celotex Corp.v. Catrett 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. v. Zenith Radio

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Corp., 475 U.S. 574 (1986) – the Supreme Court has consistently reaffirmed its endorsement of pretrial resolution and summary disposition of baseless actions. These decisions reflect the mandatory nature of Rule 56. In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'...Rule 56 must be construed with due regard not only for the rights of person asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327 (citations omitted).

FACTS

The facts, which are undisputed, are as follows. The Rabbs were tenants of the La Vista Apartments (the "apartments") located in Greenville, South Carolina. The apartments are managed by American Shelter. On September 17, 1990, while attempting to discard some trash into the apartments' dumpsters, Mrs. Rabb was repeatedly stung on the right foot by yellow jackets. The yellow jacket stings ultimately necessitated the amputation of her foot.

The apartments' two dumpsters are surrounded by a fence. Mrs. Rabb was stung when she stepped inside the fence. Before attacking Mrs. Rabb, the yellow jackets had been feeding on a slice of watermelon. The watermelon slice was outside of the dumpsters, but inside the fence surrounding the dumpsters. There is no evidence as to how long the watermelon slice had been lying on the ground beside the dumpsters.

The apartments' policy required the maintenance men to check the dumpster area at least once a day and to place any trash found outside the dumpsters into the dumpsters.[1] Prior to the yellow jacket incident, the Rabbs had complained occasionally to the management of the apartments about trash existing around the dumpsters, but the evidence is undisputed that prior to the incident no one had complained to the apartments' management about the presence of yellow jackets or bees or watermelons around the dumpsters.

On September 22, 1992, the Rabbs filed suit against American Shelter. Essentially, the Rabbs contend that American Shelter violated the South Carolina Residential Landlord and Tenant Act ("RLTA"), S.C. Code Ann. §§ 27-40-10 to -940 (Law. Co-op. 1991 & Cum. Supp. 1992), as well as the common law of South Carolina, by failing to keep the apartments' dumpsters free of yellow jackets.

DISCUSSION

In their first claim, the Rabbs contend that American Shelter failed to keep the common areas of the apartments, in particular the dumpsters, in a clean, safe, and habitable condition; and this failure, which constituted a violation of the RLTA, resulted in Mrs. Rabb's injuries. The applicable section of the RLTA provides that:

> (a) A landlord shall:
>
> ...
>
> (3) keep all common areas of the premises in a reasonably safe condition, and, for premises containing more than four dwelling units, keep in a reasonable clean condition;

S.C. Code Ann § 27-40-440. The dumpsters are a part of the apartments' common areas. Thus, under the RLTA, American Shelter has an obligation to keep the area surrounding the dumpsters reasonably safe and clean.

Mrs. Rabb contends American Shelter breached this obligation and is liable for her injuries. This court disagrees. Under the RLTA, a landlord breaches his duty to keep the common areas reasonably clean and safe when he fails, after notice, to do what is reasonably necessary to keep such areas clean and safe. Watson v. Sellers, 299 S.C. 426, 385 S.E.2d 369, 373 (Ct. App. 1989) ("we hold that the RLTA...creates a cause of action in tort in favor of a tenant of residential property against his landlord for failure, after notice, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition") (emphasis added).[2] American Shelter's policy of requiring its maintenance men to check the dumpster at least once a day for trash left outside satisfies its statutory duty to keep the dumpsters reasonably clean and safe.[3]

The Rabbs also contend that American Shelter's alleged failure to keep the dumpsters in a reasonably clean manner constitutes actionable negligence under the common law of South Carolina. This claim is without merit.

> Traditionally, under the law of South Carolina, a landlord owes no duty to maintain leased premises in a safe condition. Absent an express warranty or fraudulent concealment, he is not liable for any defect in the leased premises. A landlord may, however, enter into a binding agreement to keep the demised premises in repair, but even then the landlord is entitled to notice of any existing defects before becoming obligated to repair.

Young v. Morrisey, 285 S.C. 236, 329 S.E.2d 426, 428 (1985). In this case, there are no allegations of the existence of an express warranty or of a fraudulent concealment. Accordingly, American Shelter owed no common law duty to its tenants to maintain the dumpsters in a safe, much less clean, condition. Even if a common law duty did exist, the Rabbs have failed to produce any evidence that American Shelter had notice of the unsafe condition before the incident but failed to remedy the situation.

A narrow exception to the common law rule places a duty upon a landlord to keep the common areas that are

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under his control and maintenance in good repair. Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329, 333 (1932); Daniels v. Timmons, 216 S.C. 539, 59 S.E.2d 149, 154, cert. denied, 340 U.S. 841 (1950). The "common areas" exception applies to the physical soundness of the premises, and imposes upon a landlord a duty to keep such areas–typically halls, stairways, and elevators–in good condition. Here there is no allegation or evidence that the dumpsters were not in good repair. As such, there is no evidence that American Shelter breached its common law duty with regard to the condition of the common areas. See Cooke v. Allstate Management Corp., 741 F.Supp. 1205, 1211 (D.S.C. 1990) (noting that the "common areas" exception "has never been applied in South Carolina to anything except physical injuries resulting directly from the condition of the premises themselves" and therefore refusing to extend exception to include protection against criminal activity).

Essentially, the Rabbs are asserting a premises liability claim against American Shelter. If Mrs. Rabb were considered an invitee, American Shelter would owe her the highest degree of care in maintaining the dumpsters. Restatement (Second) of Torts § 343 cmt. b (1965); see Bryant v. City of North Charleston, 304 S.C. 123, 403 S.E.2d 159, 161 (Ct. App. 1991) (distinguishing between standard of care owed an invitee and a licensee). Even if she is considered an invitee, Mrs. Rabb has failed to demonstrate any actionable negligence on the part of American Shelter. The standard of care owed a business invitee under South Carolina law is well established:

> [T]o recover damages for injuries caused by a dangerous or defective condition on [defendant's] premises, [plaintiff] must show either (1) that the injury was caused by a specific act of the [defendant] which created the dangerous condition; or (2) that the [defendant] had actual or constructive knowledge of the dangerous condition and failed to remedy it.

Dennis v. Wal-Mart Stores, Inc., 301 S.C. 529, 392 S.E.2d 810, 810-811 (Ct. App. 1990) (quoting Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 371 S.E.2d 530, 531 (1988)). A plaintiff can establish a defendant's constructive knowledge of a dangerous condition by showing that the condition had existed for such a length of time prior to the plaintiff's injury that the defendant "would or should have discovered and removed [the condition] had the [defendant] used ordinary care." Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 394 S.E.2d 24, 24-25 Ct. App. 1990); Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 184 S.E.2d 77 (1971).

Here there is no allegation or evidence that American Shelter created the dangerous condition (a watermelon slice covered with yellow jackets) or had knowledge of its existence. Therefore, under the applicable principles of premises liability law, to hold American Shelter liable for Mrs. Rabb's injuries, the Rabbs must produce some evidence that the watermelon had been lying outside the dumpsters for such a length of time prior to her injury that American Shelter, in the exercise of due care, should have discovered it. No evidence has been presented concerning how long the watermelon had been lying outside of the dumpsters. As a result, there is no evidence from which a reasonable jury could infer that the discarded watermelon was outside of the dumpsters for a sufficient length of time to charge American Shelter with constructive knowledge of the dangerous condition. As a result, American Shelter's motion for summary judgment must be granted. To hold otherwise, would place a duty upon a landlord to insure the safety of all tenants who enter the common areas. Such a duty, however, neither exists at common law or can be inferred from the RLTA.

The final claim is brought by Ernest Rabb for loss of consortium. The loss of consortium claim is dependent upon the success of the underlying substantive claims which have been dismissed. Accordingly, Mr. Rabb's loss of consortium claim must also fail. Caddel v. Gates, 284 S.C. 481, 327 S.E.2d 351, 353 (Ct. App. 1984).

THEREFORE, IT IS ORDERED that the motion of the defendant American Shelter for summary judgment as to all claims of the plaintiffs Judith Ann Rabb and Ernest Rabb is granted.

IT IS SO ORDERED.

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
August 11, 1993

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[1]Some tenants were placing their trash beside the dumpsters instead of throwing the trash into the dumpsters.

[2]In Watson, the court of appeals considered a landlord's obligations under § 27-40-440(a)(2). Thus, the court's holding is couched in terms of a landlord's duty to make necessary repairs. This court is unaware of any South Carolina case which construes a landlord's obligations under § 27-40-440(a)(3); however, this court cannot imagine any logical reason for imposing a different standard of care upon a landlord for a claim brought pursuant to (a)(3) instead of (a)(2). This is especially true in light of the court's statement in Watson that § 27-40-440 is the principle RLTA statute which creates a cause of action against a landlord. Watson at 374.

[3]Firth v. Marhoefer, 406 So.2d 521 (Fla. Dist. Ct. App. 1981), is of no help to the Rabbs. In Firth, the plaintiff/tenant was injured when she slipped and fell in an uncarpeted apartment elevator. Both the beach and the pool were readily accessible to the elevator. The trial judge struck the testimony of a former apartment manager who testified that prior to the accident the apartment's management knew that water often collected on the elevator's floor, but despite this knowledge, management removed the elevator's carpeting.

The Florida Court of Appeal reversed. In the court of appeal's view, the stricken testimony was relevant on the issue of notice, i.e., whether management had actual or constructive knowledge of the elevator's slippery condition but failed to take reasonable steps to remedy a recurring problem. In Florida, a landlord has a statutory duty to keep the common areas in a safe and clean condition, but "[b]efore a landlord can be held liable for a breach of this duty...it is necessary to prove that the landlord had actual or constructive knowledge...of the dangerous condition for a time sufficient for it to be

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"THE LECTURE" - ETHICAL OR UNETHICAL?

Neil T. Shayne

Mr. Shayne is a name partner of Shayne, Dachs, Stanisci, Corker & Sauer. Mr. Shayne was formerly Chair of the Trial Techniques Committee, Chair of the Professional Ethics Committee, the Nassau County Bar Association. He presently serves as a member of the Character and Fitness Committee of the Appellate Division, New York.

Most attorneys have a serious problem with the ethical problems involved when the attorney attempts to discuss the facts of a case prior to listening to the client's version of the occurrence. The following opinion was rendered by the Nassau County Bar Association[1]. I must point out that I disagreed vehemently with this decision.

DESCRIBED FACTS:

Inquiring counsel asks whether the following state of facts would be ethical: a client came into the office of the inquiring attorney and the following conversation took place:

Client: Mr. Jones, I was shopping in my local supermarket when I fell and broke my leg...

Attorney: Before you tell me what happened, let me tell you what the law is in the State of New York. You need three things before my firm will handle this type of a case:

1. You need a large obvious defect;
2. You need some excuse, such as a distraction, to explain why you did not see it, and;
3. You need to prove notice. Either actual or constructive.
   A. Actual notice would be something like the manager saying to the employee after you had fallen, "I told you to clean that up before someone was hurt."
   B. Constructive notice means that the condition existed for such a long period of time that the defendant knew or should have known about it.

INQUIRY:

Would this be ethical conduct on the part of an attorney?

DETERMINATION:

The proposed conduct does not violate the Code of Professional Responsibility.

ANALYSIS:

The relevant portions of the Code provide:

DR 1-102(A)(4) - Misconduct

A lawyer shall not: engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

DR 7-102(A)(6) - Representing a client within the bounds of the law.

In his representation of a client, a lawyer shall not: (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

EC 7-1

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.

EC 7-5

A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.

It is the obligation of an attorney to disclose to his client and inform him of the applicable rules of evidence and facts required.

The proposed conduct does not violate the Code.

The subject of the "lecture" gained in prominence following the publication of the 1958 book, The Anatomy of a Murder. In that story, the defendant came home and found that his wife had been raped by the town drunk. He proceeded to the local bar and shot the drunk in the back. He was referred to James Stewart, who played the defense counsel. By using a "lecture," James Stewart was able to convey to Ben Gazzara that in order to have a legal defense to the crime of murder, it would be necessary for him to plead temporary insanity. It was apparent during this scene that counsel was leading the defendant into a story that could sustain a verdict of "not guilty." In fact, defendant did adopt these facts and was acquitted of a crime that he committed, based upon the expert preparation by defense counsel.

Despite the opinion, the fact pattern that is outlined above, in my opinion, is unethical. There are instances where you would be entitled and, perhaps, obligated to reveal the law to a potential client. In the set of facts involving the supermarket case, it is apparent that the attorney's clear intention was to put words in his witness' mouth. The proper procedure is simply to ask the client what happened before laying out a fact pattern that would be the basis for a lawsuit:

Canon 7 New York State Code of Professional Responsibility.

EC 7-6: Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is

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remedied." Id. at 522. Moreover, "[c]onstructive knowledge of a dangerous condition can be imputed to a landlord where it can be shown that the condition recurred with regularity and, consequently, [harm] was foreseeable." Id, (emphasis added)

Here the evidence is uncontradicted that American Shelter did not have actual knowledge of the existence of yellow jackets around the dumpsters (the dangerous condition). Under Firth, constructive notice of the yellow jackets cannot be imputed to American Shelter because there is no evidence that the dangerous condition "recurred with such regularity" that harm to a tenant was foreseeable. In fact, prior to Mrs. Rabb's injury, no tenant has ever complained about yellow jackets or other flying insects around the dumpsters. Without notice of the dangerous condition, American Shelter cannot be charged with a breach of its duty to maintain the common areas in a reasonably clean and safe condition. Finally, the harm was not foreseeable (in contrast, water on an uncarpeted floor presents an obvious foreseeable danger).

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contemplating a course of conduct having legal consequences that vary according to the client's intent, motive or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases, a lawyer may not be certain as to the state of mind of his client, and in those situations, he should resolve reasonable doubts in favor of his client.

Another dilemma, which is closely related to "The Lecture," arises when the lawyer finds that a witness or even his client may be committing perjury. Under both the ABA and the New York Code of Professional Responsibility, if a lawyer knows that his client is going to commit perjury, then the lawyer is under an obligation to report this to the court.

Unfortunately, in most cases, the client becomes aware that the attorney is concerned over any potential perjured testimony and the client begins to back off and it becomes difficult for an attorney to "know" that a client is going to perjure himself.

An interesting situation arose when I was Chair of the Professional Ethics Committee of the Nassau County Bar Association. An attorney called me and stated that he did not know how to handle this problem. Approximately three weeks prior to his call to me, he was handling a matrimonial matter before a judge in our Supreme Court. The fact pattern was simple. His client, the husband, authorized him to offer $75.00 per week for support of his wife. The wife's attorney stated that he "would like about $150.00" in settlement of the dispute. The attorney informed me that he knew the case would be settled for in the neighborhood of $100.00. The lawyer was convinced that settlement was a sure thing because it was his policy to charge $2,500.00 per day for matrimonial trials. Inasmuch as the difference between the offer and the demand was so small, it would not have paid for the client to insist upon a trial.

He met the client in the morning and intended to explain the necessity of settling this matter for the best figure he could negotiate. During the discussion with the client, the client produced a briefcase, opened it, and to the lawyer's dismay, displayed tens of thousands of dollars in this briefcase.

The client whipped out $5,000.00 in cash for this possible two day trial. The lawyer was shaking and started to perspire. The client wanted to know why he was upset. The lawyer informed me that he was, of course upset at seeing all that cash sitting on the table, but was more upset because he not only didn't prepare the case, he hadn't even bothered to read his file before coming to court.

It was inconceivable to him that the client would spend $5,000.00 for trial rather than pay a few dollars more a week to his wife. He then asked the client where the money came from, and the client stated that he had a Swiss bank account which only two people in the world know about – himself, and now his lawyer. The client said that he knew his wife would ultimately leave him, the marriage was never a good one. He hid $15,000.00 or $20,000.00 a year in cash for approximately fifteen years or so. The lawyer told me that he probably should have withdrawn, however, he didn't think about it at the time. He instructed the client that it was the client's obligation to tell the truth about his assets. The client told the lawyer to relax and the client assured him that he would do the right thing.

During the trial, the client denied upon cross-examination that he had any other assets aside from $85.00 in a local bank account.

The judge rendered a decision that the husband must pay $110.00 per week. The attorney wanted to know what was his obligation.

Under the ABA code, it would be the obligation of the attorney to ask the client to recant and if the client does not recant, then it would be his responsibility to inform the judge of the perjured testimony.

This is not the rule in many of the non-ABA states. In New York State for example, the attorney would have the same responsibility to attempt to get the client to recant. However, if the attorney does not know and only has reason to believe that the client may perjure himself and the client ultimately does perjure himself, the New York code does not require the

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SOUTH CAROLINA REPRESENTED AT 67TH IADC MEETING

Our association was well represented at the 67th Annual Meeting of the IADC at the Broadmoore and Colorado Springs in Colorado on July 10-17, 1994. The attendees were JACK and NAN BARWICK of Columbia, WILL and ANN CLEVELAND, Charleston, STEVE and DENISE DARLING, Charleston, BOBBY and KAREN DUKES, Columbia, ALLEN and WENDY GIBSON, Charleston, BOBBY and BURNIE HOOD, Charleston, DAVE and POLLY HOUSER, Columbia, SPENCER and ELLEN KING, Spartanburg, BEN and ELEANOR MOORE, Charleston, STEVE and GAIL MORRISON, Columbia, VAL and SANDRA STIEGLITZ, Columbia.

Wednesday, July 13, the program was "The Law Firm Practice and Revolution Form, Substance and Economics." They opened up on Thursday, Friday and Saturday, keeping a lid on the liability of the case."

L to R: Nan and Jack Barwick, Denise and Steve Darling, Spencer and Ellen King.

ATTORNEY EX PARTE INTERVIEW OF THE FORMER EMPLOYEES OF AN OPPOSING PARTY: A TWO-HAT PERSPECTIVE

Kathleen Chancler and Wendy Cherner Maneval

Ms. Chancler is a partner with the Philadelphia, Pennsylvania firm, Post & Schell, P.C., specializing in the defense of medical malpractice and directors and officers' liability cases. Ms. Maneval is an associate with the firm.

Today, despite numerous cases and commentaries on the subject, the ethical and legal responsibilities of attorneys regarding ex parte contacts[1] with former employees of an opposing party remain unclear. Litigators of both the plaintiff's and defense bars grapple with both sides of this problem. They frequently wear both "hats" (sometimes, even in the same case): the hat of counsel seeking information ex parte from former employees of an opposing party and the hat of counsel for the former employer seeking to block any damaging information provided in such contacts.

EXAMPLE

HAT 1: Counsel Seeking Information from Former Employee

Your client is a woman who has sued her company for sexual discrimination.[2] You have heard that a number of your client's former co-workers (some managers, some clerical workers), have left employment with the defendant. Your client tells you that these witnesses have information pertinent to her case. In order to access this information, must you (A) prepare a notice of deposition, coordinate the schedules of all counsel involved, incur the expense of hiring a court stenographer, prepare in depth for a full deposition, participate in a formal deposition, and review the transcript or can you (B) pick up the phone and call the witness?

HAT 2: Counsel of Former Employer

Now, change hats. You represent the company that is a defendant in a sexual discrimination case. You get a call from the corporate personnel manager who informs you that she just learned that the plaintiff's attorney has been calling around and conducting ex parte interviews with various former employees, many of whom have material evidence in the case. She is afraid that they will disclose damaging confidential information or change their stories after talking with the plaintiff's attorney. Do you have any recourse?

ETHICAL REQUIREMENTS

This dilemma is based upon the ethical rules in the codes of professional conduct of attorneys adopted by the courts in each state.[3] For example, Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, which has been adopted or used as a paradigm for the ethical rules in at least 40 states and the District of Columbia,[4] provides in pertinent part:[5]

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The official ABA comment on this rule states in pertinent part:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

This rule specifically prohibits ex parte communications with certain employees of an opposing party. It does not explicitly apply to former employees of a party.

Importantly, the ABA Standing Committee on Ethics and Professional Responsibility, in a solely advisory opinion, has determined that the rule does not cover former employees. The Committee emphasized.[6]

> While the committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employees, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially, where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is

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attorney to inform the court of the deception. There are many disclosure rules in court proceedings and this would of course result in perhaps different problems and different solutions.

It is critical for lawyers to be aware of the fact that their state may not have adopted the ABA code. It is incredible to me how many attorneys come into my office to consult on an ethical problem and produce a copy of the American Bar Association code.

I would like to take this opportunity to remind readers to make sure their state is an ABA state and if not, keep a Code of Professional Responsibility handy which describes their ethical obligations and responsibilities in their state.

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Footnotes

1. *Opinion 91-23.*

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loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.

Accordingly, it is the Opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

The ABA Committee's opinion is merely advisory and does not constitute law.

JUDICIAL OPINIONS

Despite the language of the Rule and the advisory opinion of the ABA Standing Committee, some courts have extended the application of Rule 4.2 of its counterpart to ex parte communications with former employees of a party.[7] The courts dealing with this issue have taken three approaches. A minority of courts have prohibited such contacts outright.[8] Some courts have validated all such contacts.[9] Other courts, however, have validated such contacts only under certain conditions: (1) when the attorney does not inquire into privileged matters;[10] (2) when the attorney abides by rules of professional conduct regarding contacts with unrepresented parties;[11] (3) when the acts or omissions of the former employee did not give rise to the matter at issue and cannot be used to impute liability to the former employer.[12]

Courts' interpretation of the rule, rather than being simply inconsistent, appear to be based upon the factual context in which the issue arises. Courts tend to interpret the rule expansively when the former employees contacted were high-level or confidential employees or had an active role in the subject matter of the litigation. Courts tend to narrowly interpret this provision when the ex parte interviews were conducted with lower-level former employees who primarily constitute fact witnesses.[13]

Due to the wide range of factual contexts in which these issues arise, some courts have articulated a number of factors to be considered in determining whether such ex parte communications violate the ethical rules. These courts have considered:[14] (1) the positions of the former employees (especially whether they were managerial); (2) whether the former employee was privy to communications between the former employer and its counsel concerning the subject matter of the litigation or issues involved in the lawsuit; (3) whether the former employee could impute liability on the corporations; (4) whether the employee could make statements that would constitute admissions on the part of the organization; (5) the nature of the inquiry by opposing counsel; and, (6) the time that has elapsed between the end of the employment and the ex parte interview. One court has suggested that, when this analysis indicates a substantial risk of disclosure of privileged matters, the attorney should carefully instruct the employee not to divulge attorney-client confidences and, in certain circumstances, should notify counsel for the former employer prior to conducting any ex parte interviews.[15]

Courts also face formidable problems in attempting to fashion a suitable remedy for the damage caused by ex parte contacts (e.g., the disclosure of information protected by the attorney-client privilege and/or the imputation of liability to the former employer). Courts and affected parties may have difficulty ascertaining what information was actually provided during such a contact. Courts may require the offending attorney to provide to opposing counsel all notes of the interviews or statements obtained during the interviews.[16] Courts will be reluctant to do so, however, if such documents contain trial strategies or other attorney work product information. Thus, it may be difficult for a court to craft an appropriate order precluding evidence (and the fruits of the evidence) obtained through ex parte communications from being introduced at trial. Some courts have imposed the draconian penalty of attorney disqualification;[17] this punishment, however, may not remedy the harm inflicted to the opposing party (e.g., new counsel may obtain the same information from the file or discussions with the disqualified attorney).

COMPETING POLICY CONSIDERATIONS

A primary reason for this continuing dilemma is that there are competing policy considerations at issue. Courts and commentators have had difficulty harmonizing these important values through a workable rule.

The extension of this rule to former employees is based upon five primary policy objectives: (1) to protect parties and witnesses from overreaching by attorneys, (e.g., the prevention of harassment, intimidation and manipulation of witnesses);[18] (2) to preserve the integrity of the attorney-client relationship;[19] (3) to avoid the disclosure of privileged information;[20] (4) to help facilitate settlement by channeling disputes through lawyers accustomed to the negotiation process;[21] and (5) to avoid uncertainty with regard to the legal and ethical responsibilities of lawyers.[22]

In contrast, the allowance of such ex parte contacts enables the parties to reduce the cost and burden of the discovery process (and often to prosecute their rights)[23] and furthers the litigation objective of permitting equal access to information.[24]

STRATEGIES FOR DEALING WITH THE UNCERTAINTY

As a general rule, courts will permit such contracts as long as privileged matters are protected and the attorney making the ex parte contact abides by the ethics rules on contacts with unrepresented persons. Nevertheless, litigators of both "hats" need to consider available strategies to deal with the uncertainty in this area.

Attorneys seeking information need not subject their clients to the expense involved in taking depositions of each witness previously employed by a party or risk disqualification.

First, an attorney seeking to interview former employees may seek court approval prior to the interviews.[25] While this may be the safest approach, it does have detrimental side effects; the attorney must apprise opposing counsel of the witnesses to be interviewed. Of course, opposing counsel may quickly conduct his or her own interviews and gain a tactical advantage. In addition, such information may be tantamount to a disclosure of trial strategy.

Second, litigators should engage in a risk analysis to determine the likelihood that an ex parte contact will pose an ethical violation. The attorney should consider the following factors: (1) whether the person is likely to be represented by corporate counsel; (2) the person's position with the former employer; (3) the level and nature of the person's participation in the incidents that gave rise to the litigation; (4) the nature of the inquiry and the type of information that person is likely to possess; and, (5) the time interval from the end of employment to the interview.

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Third, if the risk presented by the ex parte communications appears to be too great, the attorney may request permissions from opposing counsel to conduct an informal interview in opposing counsel's presence. Opposing counsel may agree to this interview if the only alternative is a deposition of the witness.

Fourth, at the inception of the interview, the attorney should clearly disclose to the person being interviewed the following information: (1) the attorney's name and firm; (2) the client who is represented; (3) the basic controversy; and, (4) the purpose of the interview. In addition, the attorney should inquire as to whether the person is represented by counsel in connection with the matter. The person should be informed that the interview is completely voluntary and that they may choose to have their own attorney present during the interview. The person interviewed should be instructed not to disclose any information regarding advice from or communication with corporate counsel.

Attorneys representing the former employer may also take certain steps to protect their clients against the adverse effects of ex parte interviews of former employees.

First, as soon as practicable after the inception of a lawsuit, the attorney should identify all current and former employees who may have relevant information regarding the subject matter of the lawsuit.

Second, the attorney should, as soon as practicable, conduct interviews of all pertinent individuals. The attorney should provide the witness with basic information regarding the litigation and identify the attorney's role in the litigation (as attorney for the employer). The attorney may offer to present the witness, if necessary, at a deposition. Further, the attorney should explain that the corporation intends to keep the information derived from the interview confidential.

Third, during the interview, the attorney should inform witnesses that they are under no obligation to discuss any matters with opposing counsel except under subpoena. Also, the attorney may ask witnesses to permit the attorney to represent them at any interview with opposing counsel.

Fourth, the attorney should consider obtaining formal statements from these witnesses. Such statements would be admissible in a trial, for example, to impeach the credibility of witnesses who decide to change their stories after speaking with opposing counsel.

Fifth, the attorney should request copies of any and all statements made by such witnesses to opposing counsel in ex parte interviews.

Sixth, if there are certain witnesses who cannot be interviewed without impairing the employer's position or the attorney-client relationship, the attorney should seek a protective order to prevent opposing counsel from conducting ex parte interviews

In sum, the ethical and legal responsibilities of attorneys with regard to ex parte contacts with former employees of an opposing party remains uncertain. The competing policy considerations and the failure of the courts to develop a workable rule indicate that this dilemma will not be resolved in the near future. The above strategies, while admittedly imperfect, may assist litigators in determining what course of conduct should be pursued to assure that they observe their ethical and legal responsibilities in this situation.

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Footnotes

1. *The ex parte contacts discussed in this article are communications between counsel and the former employees outside of the presence, and likely without the prior notice, of counsel for the former employer.*
2. *The type of case is not important to this issue. The problem arises whenever one of the parties to a lawsuit is an organization. The counsel for the opposing party may conduct ex parte interviews of the former employees of the other party whether the former employer is the plaintiff, defendant or both.*
3. *The federal courts look to the applicable state rule concerning this issue. See, e.g., Branham v. Norfolk & Western Rwy Co., 151 F.R.D. 67 (S.D.W.V. 1993); Cram v. The Lamson & Sessions Co., 148 F.R.D. 259 (S.D. Iowa 1993).*
4. *Gladden, JP, Courts reject corporate efforts to bar ex parte contacts with former employees, 8 Individual Employment Rights (Special Supplement) (August 17, 1993); Iole JE, Goetz JD, Ethics or procedure? A discovery based approach to ex parte contacts with former employees of a corporate adversary, 68 Notre Dame L. Rev. 81 (1992).*
5. *American Bar Association, Model Rules of Professional Conduct, Rule 4.2.*
6. *ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 91-359.*
7. *Courts that have analyzed the issue have justified extending Rule 4.2 to former employees by asserting that these persons are included within the purview of the term "party," in Rule 4.2. See e.g., Upjohn v. United States, 449 U.S. 383 (1981); Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992); Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988).*
8. *Public Service Electric & Gas Co. v. Associated Electric & Gas Ins. Services Ltd., 745 F. Supp. 258 (D.N.J. 1990). The only two other courts that have similarly proscribed any ex parte contacts with former employees were vacated and withdrawn. See American Protective Ins. Co. v. MGM Grand Hotel-Las Vegas, 748 F.2d 1293 (9th Cir. 1984); Sperber v. Mental Health Council, Inc., No. 82 Civ. 7428 (S.D.N.Y. Nov. 21, 1983).*
9. *See e.g., Cram v. Lamson & Sessions Co., 148 F.R.D. 259 (S.D. Iowa 1993); Goff v. Wheaton Industries, Inc., 145 F.R.D. 351 (D.N.J. 1992); Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991); Sherson Lehman Bros v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991).*
10. *Polycast Technology v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990); Bobele v. Superior Court of State of California, 199 Cal. App. 3d 708, 245 Cal. Rptr. 144 (1988). See also Alaska Bar Association, Ethics Committee, Opinion 91-1 (Jan. 18, 1991).*
11. *Branham v. Norfolk & Western Rwy Co., 151 F.D.R. 67 (S.D.W.V. 1993).*
12. *See, e.g., Rentclub Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992); Curley v. Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J. 1991); University Patents, Inc. v. Kligman, 737 F. Supp. 325 (E.D. Pa. 1990); Rentclub Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992); Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988) (court prohibited ex parte interviews of former employees whose acts or omissions may be imputed to the corporation).*
    As one court noted, however, it may be difficult to determine at the time of the ex parte contact whether the communications of the former employee will satisfy this requirement. See Public Service Electric & Gas Co. v. Associated Electric & Gas Ins. Services Ltd., 745 F. Supp. 258 (D.N.J. 1990).
13. *Dillon Companies v. SICO, Co., 1993 U.S. Dist. LEXIS 17450 (Nov. 24, 1993). Compare Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899 (E.D. Pa. 1991) and Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991).*
14. *See, e.g., Dillon Companies v. The Sico Company, 1993 U.S. Dist. LEXIS 17450 (E.D. Pa. Nov. 23, 1993); Curley v. Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J. 1991).*

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15. *Dillon Companies v. The Sisco Company, 1993 U.S. Dist. LEXIS 17450 (E.D. Pa. Nov. 26, 1993); Stabilus v. Haynsworth, 1992 U.S. Dist. LEXIS 4980 (E.D. Pa. March 31, 1992).*
16. *Stabilus v. Haynsworth, 1992 U.S. Dist. LEXIS 4980 (E.D. Pa. March 31, 1992); Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988).*
17. *See Rentclub Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992); Papanicolaou v. Chase Manhattan Bank, N.A., 720 F. Supp. 1080 (S.D.N.Y. 1989) (court disqualified individual attorneys and law firm after attorneys discussed merits of case with plaintiff for one and a half hours outside presence of counsel); American Protection Insurance Co. v. MGM Grand Hotel, No. CV-LV-82-86 HDM, slip op. withdrawn (D. Nev. March 13, 1986) (disqualification of attorney who had ex parte communication with former employee and current consultant to corporation); Mills Land and Water Co. v. Golden West Refining Co., 186 Cal. App. 3d 116, 230 Cal. Rptr. 461 (1986) (court disqualified attorney who had interviewed former employee of a corporation who was potentially privy to privileged information of the corporation).*
18. *See Valassis v. Samuelson, 143 F.R.D. 118 (E.D. Mich. 1992); Goff v. Wheaton Industries, 145 F.R.D. 351 (D.N.J. 1992); Shearson Lehman Brothers, Inc. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991); Polycast Technology Corp. v. Uniroyal Inc., 129 F.R.D. 621 (S.D.N.Y. 1990).*

Some courts have questioned the applicability of this policy consideration to former employees because they have no stake in the litigation. See e.g., Goff v. Wheaton Industries, 145 F.R.D. 351 (D.N.J. 1992); Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991). In addition, while the ethical rule is based, in part, on a policy that a corporate party should not be legally bound by statements of former employees likewise, the policy considerations demand that a former employee's statements should not bind the employer. See e.g., Goff v. Wheaton Industries, 145 F.R.D. 351 (D.N.J. 1992); Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991).

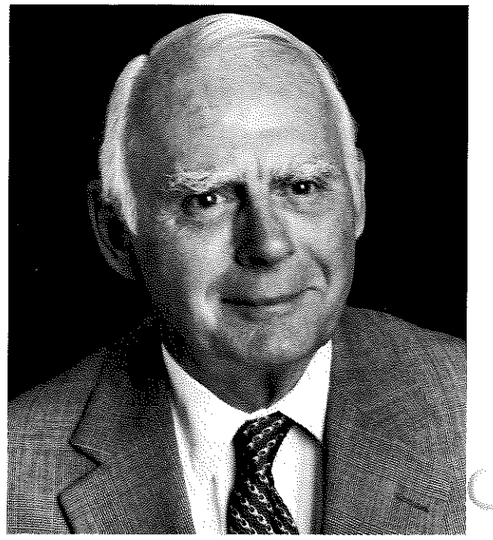
19. *Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991); Polycast Technology Corp. v. Uniroyal Inc., 129 F.D.R. 621 (S.D.N.Y. 1990); Public Service Electric & Gas Co. v. Associated Electric & Gas Ins., Services, Ltd., 745 F. Supp. 1037 (D.N.J. 1990).*
20. *Polycast Technology Corp. v. Uniroyal Inc., 129 F.R.D. 621 (S.D.N.Y. 1990).*
21. *Polycast Technology v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990); Papanicolaou v. Chase Manhattan Bank, N.A., 720 F. Supp. 1080 (S.D.N.Y. 1989). But see Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991) (former employees are not in position to settle case.)*
22. *See Public Service Electric & Gas Co. v. Associated Electric & Gas Ins. Services, Ltd., 745 F. Supp. 1037 (D.N.J. 1990). Cf. Goff v. Wheaton Industries, 145 F.R.D. 351 (D.N.J. 1992).*
23. *Cram v. The Lamson & Sessions Co., 148 F.R.D. 259 (S.D. Iowa 1993). Requiring formal discovery of a large number of potential witnesses may frustrate the right of a plaintiff with limited resources to a fair trial. See Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988); Frey v. Dept. of Health & Human Services, 106 F.R.D. 32 (E.D.N.Y. 1985).*
24. *Cram v. The Lamson & Sessions Co., 148 F.R.D. 259 (S.D. Iowa 1993); Hanntz v. Shiley, Inc., 766 F. Supp 1037 (D.N.J. 1990); International Business Machines Corp. v. Edelstein, 526 F.2d 37 (2d Cir. 1975).*
Importantly, the Federal Rules of Civil Procedure were recently amended to only permit a litigant to obtain ten depositions without leave of court. Fed. R. Civ. P. 30. Requiring a party to obtain discovery from former employees through deposition could conceivably interfere with the party's ability to depose other witnesses with pertinent information.
25. *See Shearson Lehman Bros. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991); Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988); Niesig v. Team I., 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (Ct. App. 1990); Bobele v. Superior Court of the State of California, 199 Cal. App. 3d 708, 245 Cal. Rptr. 144 (1988).*
See also Curley v. Cumberland Farms, 134 F.R.D. 77 (D.N.J. 1991), in which the court approved the plaintiff's waiver of attorney work product privilege, required the plaintiff to keep log of its attempts to contact defendants' former employees and notes of all ex parte meetings with those employees, and required plaintiff to make these documents available to defendants upon demand.

HEMPHILL AWARD 1994 WINNER: BEN MOORE

Benjamin Allston Moore, Jr., a senior shareholder with the Charleston law firm of Buist, Moore, Smythe & McGee, P.A., was recently awarded the 1994 Robert W. Hemphill Award, at the annual meeting of the South Carolina Defense Trial Attorney's Association.

The Hemphill Award is named for the late Senior United States District Judge, Robert W. Hemphill. The Award is given by the SCDTAA to a member of the Association "In Recognition of Distinguished and Meritorious Service to the Legal Profession and the Public." Moore was instrumental in the creation of the Association and served as its first President in 1968-69. He played a similar role in the formation of the Southeastern Admiralty Law Institute, an organization which provides a forum for discussion and education in admiralty and maritime law, an area in which he has specialized for many years.

A graduate of Princeton University and the University of Virginia Law School, Moore was admitted to the bar in 1957 and joined his father's firm, Moore & Mouzon. In 1970, that firm which had become Moore, Mouzon and McGee, merged with the Charleston firm of Buist, Buist, Smythe & Smythe to become Buist, Moore, Smythe & McGee, P.A. Moore is a former president of the Charleston County Bar Association, and has been on the Executive Committees of the Maritime Law Association of the United States and the International Association of Defense Counsel.



Benjamin Allston Moore, Jr.

DRI HOSTS REGIONAL PROGRAM ON LAW FIRM ECONOMICS

Carl Epps, the DRI regional vice-president for the mid-Atlantic Region, recently hosted a regional program on law firm economics for the leadership of the local defense associations. The regional program took place in Greensboro on August 19-20 in conjunction with the North Carolina Association of Defense Attorneys board meeting.

The program was attended by officers and board members of the local defense organizations from South Carolina, North Carolina, Virginia, West Virginia, Maryland, and the District of Columbia. Participants in the program included Joseph B. Altonji, who is a director of Hildebrandt, Inc.; Stuart E. Rickerson, who is President of Peregrine Solutions, a division of the Keene Corporation; and John D. Cole, Executive Vice President, Legal Services Division, Zurich-American Insurance Group. The speakers addressed some of the most significant issues affecting defense firms including marketplace conditions, the insurance industry's view, what self-insureds expect from their counsel, forecasts of future market conditions, and how defense trial attorneys can become proactive in controlling our practices.

This program is one of the services DRI offers its membership. DRI is the only organization able to represent the defense trial attorney on a national basis. DRI membership costs only $125 for lawyers in practice more than five years, and only $85 for lawyers in practice less than five years. For membership information contact DED, (803) 733-9451.

David E. Dukes is the DRI State Representative for South Carolina.

Fourth Annual S.C. Defense Trial Attorney's Association Trial Academy

The Fourth Annual S.C. Defense Trial Attorney's Association Trial Academy was held July 13, 14 and 15, 1994 at the USC School of Law.

Joel Collins, Chairman of the Academy this year, announced that this year's program was a huge success. Twenty-two students participated in the Academy and gained valuable courtroom experience by participating in the three-day course.

As in the past, the first two days of the Academy were dedicated to group instruction as to the nuts and bolts of trial techniques. Students also had the opportunity to break out into smaller groups to practice their skills in such areas as opening statements, closing arguments and direct and cross examination of lay and expert witnesses.

The third day of the program was dedicated to a mock trial of a products liability case. The Academy was very fortunate to have The Honorable G. Ross Anderson, Jr. and Joseph F. Anderson, Jr. take time to preside over two of the mock trials.

The Trial Academy Committee wants to express its sincere thanks to all of those who helped organize and carry out the program this year. The success of the Academy depended heavily upon the willingness of many Association members to contribute their time and efforts and their help is greatly appreciated.