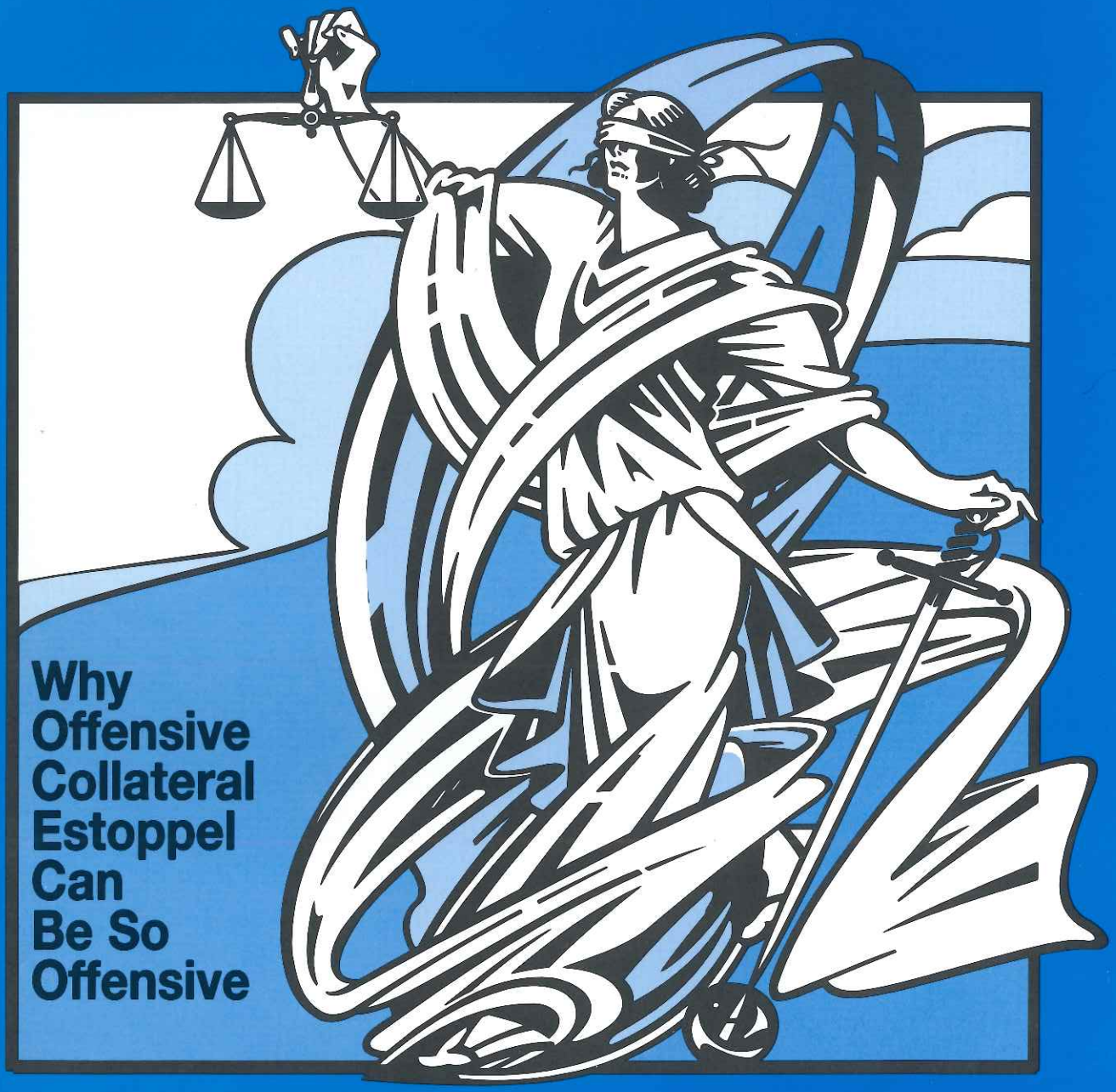
# The Defense Line

S.C. Defense Trial Attorneys' Association

Winter, 1995
Volume 23 Number 1



## Why Offensive Collateral Estoppel Can Be So Offensive

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

Address Correction Requested

FIRST CLASS
U.S. Postage
PAID
Columbia, SC
29201
Permit No. 535

**VOLUME 23, NO. 1 Winter 1995**

**CONTENTS**



**TEN YEARS AGO**

President **WAYNE H. LOGAN, III** of Charleston reported on a very successful Annual Meeting at Sea Island. He reported that the 1985 Annual Meeting would be at Kiawah Island and in 1986 we would be back at Sea Island. He commended **BILL DAVIES** for his work as Convention Chairman and **CARL EPPS** at CLE Chairman.

The Claims Managers reported that **GARY WAYNE ANTHONY** was Claims Manager of the year and the new officers for 1985 for the State Claims Association were **JOHN JONES** of SCE&G, President; **BERNIE MORRIS**, State Farm, Vice President; **JIM CLARK**, Crawford & Company, Secretary; and **TOM RUSSO**, Seibels Bruce, Treasurer.

The Independent Insurance Adjusters of South Carolina at their Annual Meeting elected **SID FOSTER**, Foster & Associates, President; **J. HAROLD THOMAS**, Orangeburg, Vice President; **HAROLD L. DILLARD**, Greenville, Secretary/Treasurer. The Independent Insurance Agents of South Carolina reported **FELIX McCLELLAN** had been elected as president, **ROBERT LIVINGSTON**, President Elect and **ROBERT C. HEFFRON**, Jr. Vice President.

President **LOGAN** announced the Joint Meeting in Asheville would be August 8-11 and the Annual Meeting at Kiawah. **GLENN BOWERS,** Membership Chairman, reported we had a total of 33 firms and 632 individual members of the Association.

The Defense Line reported from the IIASC that the Nations Property and Casualty Insurers had their worst year ever and did post the industry's first net loss since 1906, the year of the San Francisco earthquake and fire. The Insurance Institute reported $3.55 Billion pre-tax operating loss. Reasons for the insurers 1984 performance included heavy weather related claims and the lingering effects of the 6-year price war in commercial insurance.

**TWENTY YEARS AGO**

The Association enjoyed its Seventh Annual meeting at Hilton Head Inn, Hilton Head, South Carolina in November 1974. Friday's program dealt with professional liability claims addressed by **VERNON BROWN,** St. Paul, Senior Claims Examiner, **BURR MARKHAM,** Minneapolis attorney and our own **MORRIS D. ROSEN**, Charleston. Saturday **DEAN FIGG** gave a presentation on Comparative Negligence and Strict Liability, followed by **JUDGE JULIUS B. NESS**, Resident Judge Second Circuit and **HONORABLE SOL BLATT, JR.,** United States District Judge, on a panel moderated by **J.D. TODD**, Greenville.

The Eighth National Conference of Local Defense Associations was held in Monterey, California with our Association receiving another exceptional performance award. The Eighth Annual Defense Conference was planned for Myrtle Beach July of 1975 by President **JIM ALFORD** of the Defense Attorneys and President **WILLIAM R. CALAMAS** of the Claims Management Association.

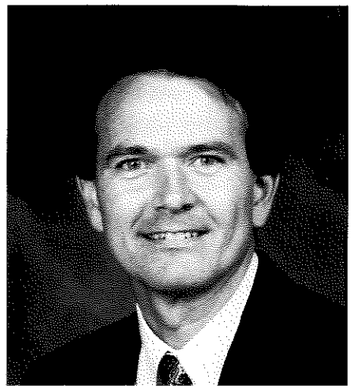
*The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.*

# THE PRESIDENT'S PAGE:
## TWELVE APOSTLES, TWELVE TRIBES, TWELVE JURORS

Why twelve jurors? Why any jurors? Answers to these questions are discussed in depth and in delightfully entertaining style by Richard S. Arnold, Chief Judge, United States Court of Appeals for the Eighth Circuit, in his article, *Trial By Jury: The Constitutional Right to A Jury of Twelve In Civil Trials.* 22 Hofstra Law Review No. 1, 1 (Fall 1993). I commend this article to you and will draw liberally from it in my comments.

Civil trials by twelve jurors in South Carolina Circuit Courts are once again under attack by proposed legislation to amend Section 22, Article V of the Constitution of South Carolina to eliminate the requirement of twelve jurors and provide that the petit jury shall consist of a number of jurors "as provided by law" (S.150). This same bill was proposed in 1994, but substantial effort by a number of organizations, including our Association, caused the bill to be defeated. This and similar efforts to modify our state civil jury trial system are cause for our deep concern.

**TWELVE JURORS:** You may pick your historical precedent for twelve jurors: twelve apostles; twelve tribes of Israel; twelve patriarchs; twelve officers of Solomon; twelve witnesses under the reigns of Edgar the Peaceful (959-975) and Edward the Confessor (1042-1066); twelve tables of Rome; twelve thanes - or knights - under the laws of King Aethelred the Unready (circa 997). The beginning of the civil jury was in England where the constitutional right to a jury trial was guaranteed by the Magna Charta, signed at Runnymede by King John on June 15, 1215. A unanimous verdict of twelve became the law of England during the reign of Edward IV (1461-1483). Judge Arnold observed: "If the number twelve was settled on five hundred years ago and was



**Michael B.T. Wilkes**

used without interruption until twenty years ago, it carries with it a certain presumption of regularity, a certain entitlement to respect, no matter what the origin may have been. The origin of the number itself... does (not) diminish the fact that the Founders believed a 'jury' to be twelve when they drafted the Seventh Amendment." *Id.*at 12.

Long but interesting arguments can be made concerning "the intention of the Framers." The failure to include a right to civil jury trials in Federal Courts led to some of the most stringent opposition to the Constitution's acceptance. South Carolina adopted the right to a civil jury trial in its courts in 1712. It is noteworthy that two days before the adjournment of the Philadelphia Convention, a South Carolina delegate proposed that the phrase "And a trial by jury shall be preserved as usual in civil cases," be added to the end of Article III. This motion was defeated because the "usual" jury trial differed from state to state. *Id.* at 14-15. The failure to provide for jury trials forced the Federalists to explain that the Constitution did not eliminate the right to a jury trial. The Anti-Federalists' arguments were the driving force behind the adoption of the Seventh Amendment: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." There is persuasive history that there was little disparity among the states concerning whether a civil jury was comprised of twelve members and that the Framers intended juries to be comprised of twelve people. However, this history did not persuade the United States Supreme Court, which held, 5-4, that a jury of six satisfies the Seventh Amendment guarantee of trial by jury in civil cases. *Colgrove v. Battin,* 413 US. 149 (1973).

**TWELVE JURORS IN SOUTH CAROLINA:** Fortunately, the South Carolina Constitution explicitly preserves the well-founded right to a civil trial by a jury of twelve; so we need not debate intention. However, we still face attacks on the use of twelve jurors and must answer the question: "Why twelve?" Most of us South Carolinians would answer the question by stating: "If it ain't broke don't fix it." There are no compelling reasons to reduce the size of South Carolina juries in civil cases.

The reduction in size of Federal Court juries has not produced measurable efficiencies or improvements. One can delve into slippery science of statistics for compelling evidence that reducing the number of jurors results in less minority representation. Empirical study of minority representation on six and twelve-person juries demonstrated that, rather than the statistically predicted contrast of 72% to 47%, minorities were represented or

*Continued on page 5*





twelve-person juries 82% of the time and on six-person juries only 32% of the time. Women constitute only 30% of all six-person juries, but they comprise 57% of twelve-person juries.

Other studies indicate three additional areas of concern. First, six-person jury results are less predictable, variability in awards increases by 41%, resulting in more of what one judge termed "Haywire" verdicts. Second, a six-person jury is far more likely to fall under the influence of an aggressive juror. Third, the quality of the jury's discussion and deliberation is better in larger groups than in smaller ones.

Judge Arnold believes that "the empirical evidence now available demonstrates unequivocally that there are significant differences between six and twelve-member juries. These differences affect the nature of civil verdicts, the ability to obtain an adequate cross section of the population, the ability of minority jurors to hold fast their opinions, and the quality of the decision-making process." *Trial by Jury,* at 32.

**TEACHING CITIZENS TO PRACTICE EQUITY:** One can argue studies and statistics, but perhaps the most compelling argument for not reducing jury size is simply that more citizens will serve as jurors. Alexis de Tocqueville observed:

> The institution of the jury, if confined to criminal causes, is always in danger; but when once it is introduced into civil proceedings, it defies the aggressions of time and man... The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. **It teaches men to practice equity;** every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil cases; for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit... It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private self-ishness which is the rust of society.

Alexis De Tocqueville, *Democracy in America,* 284-85 (Alfred A. Knopf 1945) (1835) (emphasis added).

**FIFTEEN EXECUTIVE COMMITTEE MEMBERS:** Well, no organization is perfect. Our Association's work requires fifteen diligent Executive Committee members, not twelve, and certainly not just six! **Will Davidson** and **Bill Doar**, our **Legislative Committee** Chairmen, are leading the fight against attempts to modify our civil jury trial system, and they may call on you for your support.

**Larry Orr** is the Editor of *The Defense Line,* with **Susan Lipscomb, Charlie Ridley, Buck James** and **John O'Rourke** serving as issue editors. If you wish to contribute an article or advise of particular topics of interest to you, please let them know. **Susan Lipscomb** also is serving as Chairperson of the **Convention Committee** for our meeting with the Claims Managers in Asheville (July 27-29, 1995), and she would welcome any recommendations you have for our social program. **Charlie Ridley** also is Chairman of our **Judiciary Committee** which will review proposed legislation revising the judicial selection process (S. 218).

**Joel Collins** and **Frankie Marion** are Co-Chairmen of our **Joint Meeting Program Committee**. **Mike Bowers** and **Mills Gallivan** are Co-Chairmen of our **Annual Meeting Program Committee.** Plans for the programs are well underway, but please advise them of any topics or speakers which you find of interest.

**Clarke McCants** and **Steve Darling** will plan and conduct our **Trial Academy** in July. **John Bell** with the Nelson, Mullins firm has generously offered to serve as Co-Chairman of this Committee, and his assistance is greatly appreciated. The **Trial Academy** is one of our finest programs, judges and experienced litigators in our Association having generously given their time to make it a success.

**John Wilkerson** has served this Association tirelessly for years, and this year he is Chairman of the **Amicus Curiae Committee.** Where John appears important issues arise, and this year is no exception. Briefs will be filed in at least two cases already.

Our year will end with the Annual Meeting at The Cloister on Sea Island, November 9-12, 1995. If you've already been to The Cloister, I suspect you'll return this year; if you have not, please join us and treat yourself to an informative meeting in the best of locales. **Sam Outten** is Chairman of our **Annual Meeting Convention Committee** - enough said!

It is my honor and pleasure to serve with the Association's other officers: **Kay Crowe,** President-Elect; **Tom Wills,** Secretary; **Bill Davies,** Treasurer; and **Bill Coates**, Immediate Past President. I must give thanks to **Hugh McAngus** and **Bill Coates** for their leadership in 1993 and 1994, and especially for their continuing work on DRI and legislative matters this year.

# WHY OFFENSIVE COLLATERAL ESTOPPEL CAN BE SO OFFENSIVE

By: Russell T. Burke
and
Wm. Leighton Lord III[1]

## I. INTRODUCTION

Judge Shaw's recent opinion in Roberts v. Recovery Bureau, Inc.[2], does the South Carolina Bar a great service by clearly laying out the law in South Carolina for non-mutual defensive and offensive collateral estoppel. The holding, however, does the defense bar no service at all by allowing a plaintiff to take advantage of offensive non-mutual collateral estoppel and not suffer the consequences of defensive non-mutual collateral estoppel. In this article, we will attempt to explain and add to Judge Shaw's effort.

## II. A PRIMER ON COLLATERAL ESTOPPEL AND RES JUDICATA

Some definitions are in order at the outset. Res judicata is claim preclusion. Res judicata precludes parties and their privies from litigating in a second action the same claim that was, or could have been, litigated in the first action. Collateral estoppel is issue preclusion. Collateral estoppel precludes parties and their privies from litigating a second action based on a different claim that involves issues actually and necessarily litigated in the first action.[3] Although the Roberts decision dealt only with collateral estoppel, its analysis of questions involving privity should apply equally to cases involving res judicata.

For most of its history, the doctrine of collateral estoppel required "mutuality": that all of the parties to the first action had to be the same or in privity with all of the parties to the second action. The United States Supreme Court first dropped the mutuality requirement in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.[4] Blonder-Tongue approved the use of "non-mutual defensive collateral estoppel" by allowing the defendant in a second action to invoke collateral estoppel against a plaintiff who had litigated and lost the same issue in a first action, even though the defendant in the second action had not been a party, or in privity with a party, to the first action.

The Supreme Court then approved "non-mutual offensive collateral estoppel" in Parklane Hosiery Co. v. Shore.[5] In Parklane, the Court allowed a plaintiff in a second action to bind a defendant to a determination in a first action to which the plaintiff had not been a party. Parklane, however, contains a great deal of cautionary language with regard to the applicability of offensive collateral estoppel. The Court stated that offensive collateral estoppel should not be allowed where a plaintiff could easily join the earlier action. In other words, the Court rightly feared that liberal use of offensive collateral estoppel would encourage "wait and see" plaintiffs. In expressing its reluctance about non-mutual offensive collateral estoppel, the Court compared the incentives underlying defensive and offensive use of non-mutual collateral estoppel as follows:

> Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope the first action by another plaintiff will result in a favorable judgment.

South Carolina followed the lead of the United States Supreme Court by first adopting non-mutual defensive collateral estoppel in 1982, in the Graham v. State Farm & Casualty Insurance Co.[6] Unfortunately, the Court did not provide detailed analysis of its holding, and appears to have confused its terminology. The Graham decision stated that the modern trend was to drop the privity requirement, when in fact the trend was to drop the mutuality requirement. In other words, the whole idea of non-mutual collateral estoppel is that the parties in both actions do not have to be identical; however, the party on the receiving end of the doctrine must still be at least in privity with the loser of the first case. Despite the wording of Graham, non-mutual collateral estoppel cannot be used against one who was not in privity with a party in the first case. Privity, on the other hand, is not an issue with regard to who can use non-mutual collateral estoppel.

Non-mutual offensive collateral estoppel was first approved by the Court of Appeals in Beall v. Doe,[7] and later confirmed by the South Carolina Supreme Court in S.C. Property and Casualty Insurance Guarantee Association v. Wal-Mart Stores, Inc.[8] Beall lays out in great detail the analysis underlying South Carolina's adoption of offensive non-mutual collateral estoppel. In essence, Beall adopts the position of the Restatement (Second) of Judgments, §29 (1982), and gives the trial courts broad discretion in deciding the issue.

## III. ROBERTS v. RECOVERY BUREAU, INC.[9]

Roberts involves the common factual scenario of two plaintiffs w

*Continued on page 7*




*Continued from page 6*

the same action against the same group of defendants. As is also common, the same attorney brought two separate actions, and consolidated discovery.

Plaintiff Windal Roberts was a passenger in a car driven by plaintiff Thomas Lovern. Roberts and Lovern were stopped behind another car when a car driven by Michael Smith, the alleged agent of defendant Recovery Bureau, struck them in the rear. The car behind Smith was driven by defendant Edwin Worrell. It was unclear whether Worrell first hit Smith causing him to hit Roberts and Lovern or whether Worrell ran into Smith after Smith hit Roberts and Lovern.

Lovern's action was tried first with a verdict against Smith but not against Recovery Bureau. In the second action, Roberts moved for summary judgment under the doctrine of non-mutual offensive collateral estoppel against Smith based on the Lovern verdict. Recovery Bureau in turn moved for summary judgment on the basis of defensive non-mutual collateral estoppel also based on the Lovern verdict in its favor. Judge Bristow granted Recovery Bureau summary judgment on the grounds that Lovern and Roberts were in privity; but denied Roberts motion against Smith on the grounds that Roberts could have, and should have, participated in the first trial.

The Court of Appeals reversed both decisions, holding that Roberts could use offensive non-mutual collateral estoppel to preclude Smith from re-litigating liability, and also that Recovery Bureau could not preclude Roberts' suit against it via defensive non-mutual collateral estoppel. In short, Roberts could have his cake and eat it, too. Especially surprising is that the Court of Appeals held that the lower Court had abused its admittedly broad discretion.

### A. Non-Mutual Offensive Collateral Estoppel

Regarding offensive non-mutual collateral estoppel, the Court held that there was no evidence that Roberts had avoided joining the first suit in order to have the option of taking advantage of a favorable judgment in a later action. Roberts' reason for not joining the first action was that she had not concluded her medical treatment.

The Court's holding presents two problems. First, by holding that the plaintiff could avail herself of non-mutual offensive collateral estoppel just because there was no evidence that plaintiff had a "wait and see" attitude suggests that as long as a plaintiff has some arguable reason for not joining, the appellate court will allow, in effect, two bites at the apple.[10] There is little cautionary language in the opinion to discourage the plaintiff's bar from trying essentially identical cases in the same action. Second, the result frankly encourages "judge-shopping" by the plaintiff's bar.

### B. Non-Mutual Defensive Collateral Estoppel

The Roberts Court denied Recovery Bureau the use of defensive non-mutual collateral estoppel against Roberts on due process grounds. The Court found that since Roberts was not a party or in privity with Lovern, Roberts did not have a "full and fair" opportunity to litigate Recovery Bureau's liability.

The Court's discussion of the privity is of special interest. Relying heavily on the South Carolina Supreme Court's opinion in Richburg v. Baughman,[11] the Court stated that regarding judgments, privity does not embrace relationships between individuals but rather embraces an individual's relationship to the litigation. In other words, Roberts was not in privity with Lovern just because their interests were identical as was the handling of much of their litigation.

As for future guidance, the Court's discussion of privity is a disappointment since it merely states what privity is not. This could partly be a result of the fact that Richburg states that there is no bright line test to determine whether one is in privity with another. Richburg does, however, state that privy "when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right."[12] The definition of privity in South Carolina, even when stated in the affirmative, is narrow. Such a narrow definition, in fact situations akin to Roberts, better enables plaintiffs to avoid defensive non-mutual collateral estoppel.

## IV. CONCLUSION

Roberts is not favorable to the defense bar because it allows a plaintiff to avoid joining an identical action and then take advantage of a favorable judgment while at the same time avoiding an unfavorable judgment. The plaintiff is allowed to make his bed but is only required to sleep in the part that he wishes to sleep in.

---

[1]Mr. Burke is a partner and Mr. Lord is an associate with Nexsen Pruet Jacobs & Pollard, LLP.

[2]Op. 2244 (Ct. App. October 24, 1994).

[3]See Price v. City of Georgetown, 297 S.C. 185, 375 S.E. 2d 334 (Ct. App. 1988).

[4]402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

[5]439 U.S. 322, 99 S.Ct. 645, __ L.Ed.2d __ (1979).

[6]277 S.C. 389, 287 S.E.2d 495 (S.C. 1982).

[7]___ S.C. ___, 315 S.E.2d 186 (S.C. App. 1984).

[8]304 S.C. 210, 403 S.E.2d 625 (1991).

[9]All facts are taken from Roberts v. Recovery Bureau, Inc., Op. 2244 (Ct. App. October 24, 1994).

[10]An obvious defense strategy in these situations will be to obtain medical testimony (or medical records) to the effect that both plaintiffs have obtained maximum medical improvement.

[11]290 S.C. 431, 351 S.E.2d 164 (1986).

[12]290 S.C. at 293, 351 S.E.2d at 434.

## SOUTH CAROLINA ADR UPDATE

Two groups have been very busy with plans to incorporate Alternative Dispute Resolution (ADR) into the practice of law in South Carolina.

The South Carolina Supreme Court Joint Commission on ADR drafted Pilot Mediation Rules for Circuit Court and Family Court, as well as non-binding Pilot Arbitration Rules for Circuit Court. A brief synopsis of the Circuit Court Pilot Mediation and Arbitration Rules follows.

The Joint Commission on ADR also drafted Standards of Conduct for Arbitrators and Mediators, as well as established procedures for their certification, recertification and decertification.

Although no formal action has been taken by the Supreme Court as of January 1, 1995, a Public Hearing was held before the Court on December 8, 1994, at which time predominantly favorable oral and written comments were made.

It is hoped that the Supreme Court and Legislature will take action on the proposed Rules so that they may be implemented on a pilot basis in selected Circuits prior to the end of 1995.

The South Carolina Bar's ADR Section has also been busy encouraging those Circuits that have not already had a Settlement Week to do so. At this time, the Honorable William P. Keesley has tentatively approved plans to implement voluntary mediation and arbitration (both binding and nonbinding) programs in Lexington County for the month of April, 1995. Other Circuits are also under consideration to implement ADR programs.

The ADR Section is also considering developing and establishing a state-wide pre-lawsuit mediation and arbitration program, and has assisted Professor Jim Flanagan in developing an ADR course at the Law School.

Anyone interested in joining the Bar's ADR Section or obtaining additional information regarding ADR developments in the State should contact the ADR Section's Chair, Rob Hassold (370-2211).

# CIRCUIT COURT PILOT ARBITRATION AND MEDIATION RULES

### ARBITRATION

- Applies to civil actions where claims for money relief do not exceed $25,000, exclusive of interest, costs and attorneys' fees.
- Arbitration is non-binding and either party may demand a trial de novo within 30 days after notice of award.
- Unless stated in the pleadings, cases presumed not to exceed $25,000 unless counsel certifies to the contrary.
- Certain types of cases exempt from arbitration (class actions, injunctive or declaratory relief, title to real estate, wills, trusts, mortgage foreclosures, petitions, mandamus, post-conviction relief, forfeiture, contempt, etc.).
- Arbitration hearing set within 60 days after the filing of the last responsive pleading or the expiration of the time allowed for the filing of such pleadings.
- Court shall appoint an arbitrator if the parties fail to do so.
- Arbitrator to be paid $200 by the parties who will share the fee equally.
- LImited discovery and a prehearing exchange of information required.
- Witnesses may be compelled to testify and Rule 45 SCRCP applies to the Subpoena of witnesses and the production of documentary evidence.
- The law of evidence does not apply, except to privilege, but shall be considered as a guide for development of the facts.
- Provides for sanctions for failing or refusing to participate.
- Arbitration hearings shall be limited to two hours unless arbitrator determines otherwise or by Order of Court.
- No findings of fact or conclusions of law are required to support an award.
- Requires arbitrator to file award with the Court within 48 hours after the close of the hearing.
- Award may exceed $25,000 if arbitrator provides reasons in writing.
- No evidence of arbitration admissible at trial de novo without consent of parties and Court's approval.
- If party demanding de novo trial does not improve their position, the trial judge may require that party to pay $100 and costs.
- Provides for immunity of arbitrator.
- Provides Rules for certification and decertification of arbitrators.

### MEDIATION

- Applies to civil actions not ordered to arbitration.
- An informal process by which a mediator facilitates settlement discussion between the parties - settlement is voluntary.
- Certain types of cases exempt (special proceedings or actions seeking extraordinary relief, cases which are appellate in nature, post-conviction relief, forfeiture or contempt).
- Case is also exempt from civil court mediation if parties have earlier submitted case to voluntary mediation with a certified mediator prior to filing of action.
- Parties must select mediator within 120 days after the civil action is filed; the Court shall appoint a mediator if the parties fail to do so.
- Mediation conference held within 60 days of selection of mediator and completed within 30 days of initial mediation conference.
- When parties choose mediator, mediator's fee is negotiable, when Court appoints mediator, mediator

*Continued on p...*



# RECENT DECISIONS

**STATE OF SOUTH CAROLINA**
**COUNTY OF SPARTANBURG**

J. Greg Harrison,
Plaintiff,
v.
Ingles Markets, Inc.
Defendant

**IN THE COURT OF COMMON PLEAS**
**ORDER**
**C.A. No. 93-CP-42-2492**

Plaintiff has moved to compel Defendant to produce copies of four statements taken by Defendant's insurer and a General Liability Loss Notice filled out by the manager of one of Defendant's grocery stores. Defendant has asserted that the requested documents are protected by the work product doctrine governed by S.C.R. Civ. P. 26(b)(3). Briefs of law were submitted to me and oral arguments were heard on August 9, 1994. For the reasons stated below, Plaintiff's motion to compel is denied.

This action arises from an accident which allegedly occurred in Defendant's U.S. Highway 176 location on March 9, 1993. Plaintiff claims he slipped and fell on a slippery substance and injured his knee. He filed his action on December 29, 1993.

On the day of the alleged accident, the Ingles store manager, Randy Forrester, filled out a General Liability Loss Notice and sent it to Crum & Forster Commercial Insurance Company ("Crum & Forster"), Ingles' liability insurer. Soon afterward, a Crum and Forster claims representative recorded statements from store employees who were witnesses to events just before and after Plaintiff's alleged slip and fall.

S.C.R. Civ. P. 26(b)(3) in pertinent part provides that a party may obtain discovery of documents "prepared in anticipation of litigation...by or for (the) other party's representative (including his attorney...insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials...and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." This language is identical to that of Fed. R. Civ. P. 26(b)(3), and in interpreting the South Carolina rule, our courts look to the interpretations of the Federal rule by federal courts. State Highway Dept. v. Booker, 260 S.C. 245, 195 S.E.2d 615 (S.C. 1973).

Fed. R. Civ. P. 26(b)(3) has been held not to require production of statements taken by an insurer shortly after an automobile accident and before litigation began. Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89 (E.D. Mo. 1980). Although the present case does not involve an automobile accident, the rationale behind the holding is persuasive. While it is true that it is in the ordinary course of business for a liability insurer to take statements following an accident when one of its insureds is involved, "the anticipation of the filing of a claim is undeniable once an accident has occurred and a person injured...This is especially true in today's litigious society. Documents prepared at that time, therefore, are clearly prepared 'in anticipation of litigation' and 'by or for another party's representative.' " Id. at 92. I therefore conclude that

*Continued on page 10*

**CIRCUIT COURT PILOT**

*Continued from page 8*

shall be compensated at $125 per hour.

- No mediator fee in the event of indigence - application for indigence must be made after completion of mediation conference.
- Case will not be called for trial during the period allotted for mediation; however, mediation conference will not be a cause of delay or other proceedings in the case, except by Order of the Court.
- Mediation conferences are private and reserved for parties and representatives. No others may attend without permission of the parties and the mediator.
- Persons who are required to physically attend the mediation conference include the individual parties, counsel and in the event of insured, a representative of the insurance carrier.
- Parties and representatives in attendance are required to have full authority to settle the claim.
- Provides for sanctions for failure to attend.
- Provides for confidentiality and non-admissibility of statements and documents submitted during mediation.
- Requires mediator to report to Court within 10 days of conclusion of mediation conference whether or not an agreement was reached by the parties.
- Provides for immunity of the mediator.
- Provides Rules for certification and decertification of mediators and criteria for mediation training programs.

*Continued from page 9*

the statements taken shortly after the accident by Ingles' insurer were prepared "in anticipation of litigation" and are thus protected from discovery by S.C.R. Civ. P. 26(b)(3) unless Plaintiff shows substantial need and undue hardship in obtaining the substantial equivalent of the statements.

The General Liability Loss Notice which Forrester prepared is a document which was prepared in anticipation of litigation. The Loss Notice is a Crum & Forster form, with the insurance company's name at the top and entitled: "Customer Accidents General Liability Loss Notice." The purpose for filling out such a form is to assist the liability insurer in future litigation.

Plaintiff has not made the required showing that he cannot, without undue hardship, obtain the substantial equivalent of the material in the statements and Loss Notice by other means. The Defendant's witnesses are available, and there is no evidence of any special circumstances which might create undue hardship in obtaining their statements through deposition. If, for some reason, there is a change in the status of the availability of the witnesses, such that an undue hardship would exist, Plaintiff may have cause to renew his motion.

Fully satisfied that the materials requested by Plaintiff in his Motion to Compel were prepared in anticipation of litigation, and finding no evidence that obtaining equivalent material would impose undue hardship on Plaintiff, I find that such material is protected by the work product doctrine and undiscoverable at this time. Plaintiff's Motion to Compel is therefore denied.

IT IS SO ORDERED.

**Honorable Thomas J. Ervin**
**Presiding Judge**
**August 15, 1994**

**Submitted by Mike Wilkes**

## MEMORANDUM

RE: **Synopsises of Recent South Carolina Cases of Potential Interest to the Defense Bar**

The following recent South Carolina opinions raise issues of interest to the defense bar.

Ellis v. Niles, Opinion No. 2240 (Ct. App. October 31, 1994). This medical malpractice action involves a unique factual situation. The plaintiff alleged that he received negligent treatment while under the care of the Richland Memorial Trauma Team. The nature and organizational structure of the Trauma Team brought two issues of novel impression before the Court. The first issue was whether a physician and patient relationship existed which would thereby impose a duty to act with reasonable care. The second issue involved a determination of the duty of care by a supervising physician within the factual context at issue.

An additional matter of interest, addressed in Footnote 5 of the Opinion, is whether or not a trial judge has the authority to direct a verdict sua sponte in a civil case. The Court appears to have concluded that Rule 50(a) SCRP does not give a trial judge the authority to direct a verdict sua sponte although Rule 19, S.Crim.P. does give the trial court the authority to direct a verdict on its own motion in the criminal context. The Court draws its conclusion from the simple fact that the criminal rules specifically give the Court the power to direct a verdict while the civil rules do not.

Hansen v. DHL Laboratories, Inc., Opinion No. 2251 (Ct. App. October 31, 1994). The defendant had alleged fraud as an affirmative defense. The Court held that the defendant's defense of fraud was fatally defective. The Court held that fraud, when it is raised as a defense, must be specifically alleged in the same manner as it must be specifically alleged when it is raised as a means of affirmative recovery. Fraud therefore, must be properly plead in order to be a viable affirmative defense.

Miller v. City of Camden, Opinion No. 2253 (Ct. App. October 31, 1994). This negligence action for wrongful death and personal injury arose out of a flood. The Court reversed the granting of summary judgment in favor of the previous owner of the reservoir and dam that was the source of the flood. Although the previous owner had inadvertently retained an insignificant strip of land upon which a small portion of the reservoir's dam is located, the Court did not find this "incidental and inadvertent" ownership to impose any duty on the previous owner. The Court did find, however, that the previous owners continued involvement with the reservoir and dam at issue to be enough to impose a duty of care on the previous owner. The previous owner continued to utilize the reservoir and additionally undertook to monitor the reservoir's water level. The Court held that, "one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." (p. 37)

City of York, South Carolina v. Turner-Murphy Company, Inc., Opinion No. 2264 (Ct. App. December 12, 1994). The issue was whether the plaintiff could rely on the common knowledge exception to avoid a directed verdict. The plaintiff's expert had testified as to the standard of care, but had not affirmatively testified that the defendant had breached that standard. The trial court apparently accepted the City's argument regarding the common knowledge exception and the Court of Appeals reversed. After acknowledging that the common knowledge exception depends upon the facts of each case, the Court reviewed the facts of the case at issue and found that the facts were "antithetical" to the common knowledge exception.

Wright v. Marlboro County School Dist., Opinion No. 2266 (Ct.

*Continued on page 11*




*Continued from page 10*

App. December 12, 1994). This opinion held that res judicata and collateral estoppel did not bar the plaintiff from bringing an action against his former employee under the South Carolina Whistleblower Statute S.C. Code Ann. §8-27-30 (Supp. 1993), even though the plaintiff had not raised the Whistleblower issue in his previous grievance proceeding. A Circuit Court granted the defendant's motion for summary judgment on res judicata and collateral estoppel and the Court of Appeals reversed. The Court held that due to public policy considerations, the doctrine of res judicata does not apply in the case at issue, where an administrative tribunal is asked to adjudge allegations of its own wrongdoing and its own retaliation in response to a report of that wrongdoing.

Soil Remediation Co. v. Nu-Way Envtl., Inc., Opinion No. 2267 (Ct. App. December 12, 1994). The issue before the Court of Appeals was whether a notice of arbitration that appears at the top of the first page of the contract satisfies the requirement of the S.C. Code Ann. §15-48-10(a) (Supp. 1993). Although the South Carolina Code requires that such notice "shall be typed and underlined in capital letters, or rubber-stamped prominently" the Court of Appeals held that the notice at issue was sufficient even though it was not rubber-stamped and was not underlined. The Court essentially held that the word "underlined" does not necessarily mean "to draw a line under." The Court creatively utilizes South Carolina rules of statutory construction to arrive at its conclusions.

**Submitted by William Leighton Lord III**

## JOINT MEETING OF SCDTAA AND S.C. CLAIMS MANAGERS ASSOCIATION

The joint meeting of SCDTAA and the S.C. Claims Managers Association will be held July 27, 1995 - July 29, 1995 at Grove Park in Asheville, North Carolina. This year we are trying to arrange a return to Deerpark for Friday night dinner, to be followed by a Candlelight Tour of the Biltmore and cordials in the "Stable." We had this type of social event several years ago with great success. The current plan is to provide a supervised children's program - party at Grove Park while the adults go to Deerpark. This will include games, pizza, videos, etc. The age appropriate activities will be determined based on registration. Further, it is felt that there is so much to do and see in Asheville that a spouse's program would not be well attended or even desired. As a change, there will be packet of information available at registration that provides information on shopping, museums, and other places of interest in the area. More information on the CLE program and the social programs will be forthcoming.

## JUST PLAIN TIRED

M. Neil Andrews, LaFayette

Old man Simpson, on being asked how he got so bruised and skinned up, said: "Well, for several years I've been sort of fussing and feuding with that rascally old Morton who lives in my community.

"This morning I met him over near White's store and we got to arguing. Then we jumped to fighting.

"Well, he finally got me down in a ditch by the side of the road and got up on top of me and just sat on top of me and beat me for what seemed like two or three hours.

"I'll tell you now, I never got so tired of anything in all my living life."

# SCDTAA Joint Meeting

July 27-29, 1995
Grove Park
Asheville, North Carolina

# SCDTAA Annual Meeting

November 9-12, 1995
The Cloister
Sea Island, Georgia