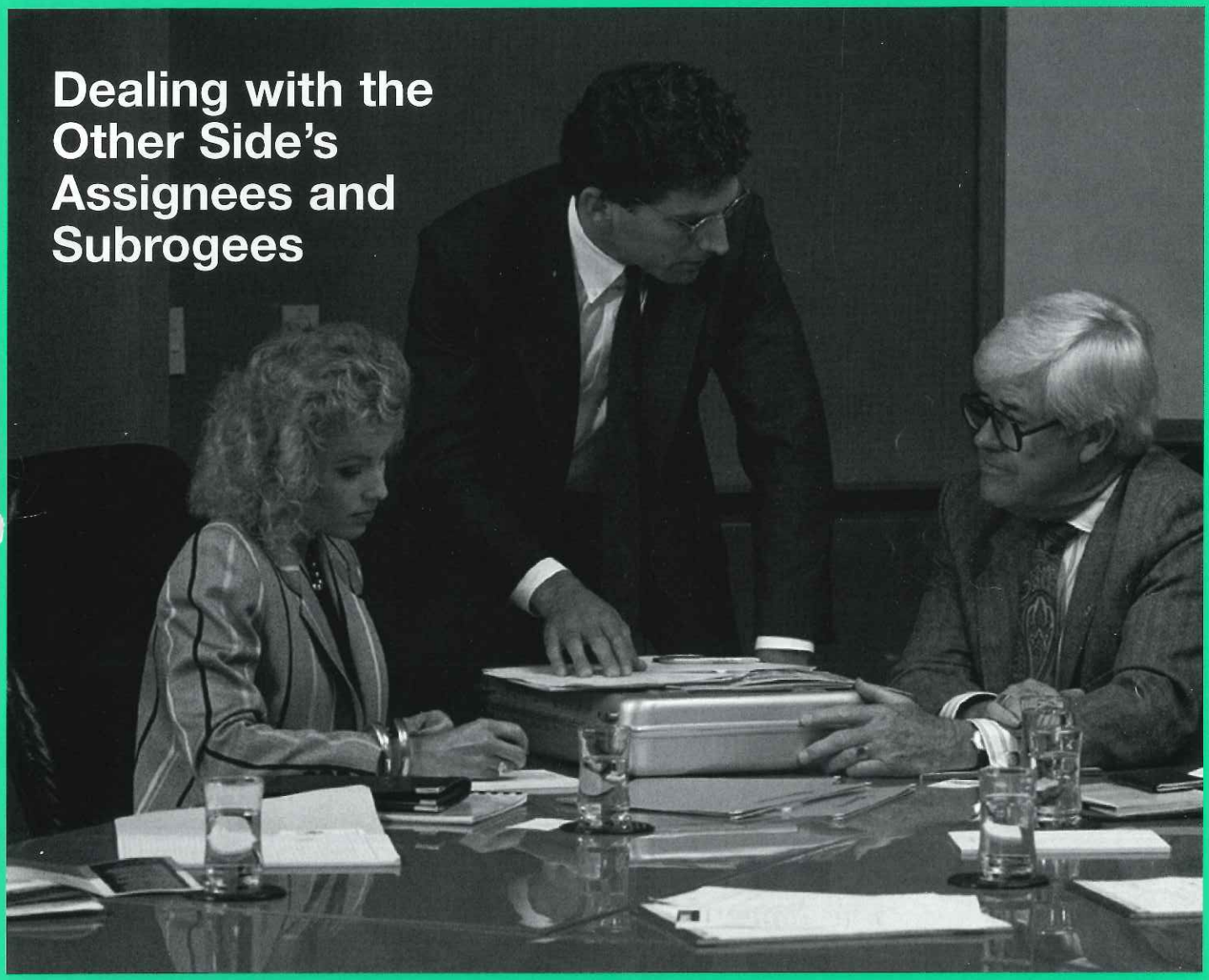
The Defense Line

S.C. Defense Trial Attorneys' Association

Volume 23 Number 2

Dealing with the Other Side's Assignees and Subrogees



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TEN YEARS AGO

EUGENE ALLEN attended the National Conference of State and Local Defense Attorneys' Associations at which he represented South Carolina. **ED MULLINS** was in attendance as President of DRI. Again, our Association received the award as an outstanding organization. President **WADE LOGAN, III** of Charleston advised that **THERON COCHRAN,** Treasurer, had given our Association a "clean" report. We were in good financial health. Our Association was active in Legislative matters with a committee chaired by **ED POLIAKOFF** with **J.D. TODD** as Executive Committee Liaison.

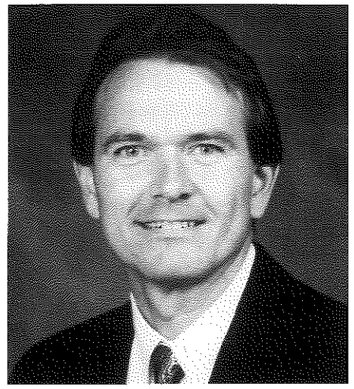
TWENTY YEARS AGO

Preparation was continuing for the Eighth Joint Meeting of the South Carolina Defense Attorneys' Association and the Claims Managers Association of South Carolina scheduled for July 25 through July 27 at Myrtle Beach Hilton, Myrtle Beach, South Carolina.

Workers' Compensation was on everyone's mind as **ALBERT CRENSHAW,** Director of the Georgia State Board of Workers' Compensation, was to speak on Federalization and Workers' Compensation. New practice and new procedures brought about by Rules changes in the Workers' Compensation Act were discussed by a panel headed by **HONORABLE PAUL J. McMILLAN, JR.**, Commissioner of South Carolina Industrial Commission, **PROFESSOR ARTHUR B. CUSTY,** U.S.C. Law Center, and **DANA SINKLER,** attorney of Charleston.

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



Michael B.T. Wilkes

HEMPHILL AWARD: The success of our Association is directly attributable to those outstanding members of the defense bar who established the Association in 1968. **Ben Moore** is one of those founders, and his contributions to our Association and the South Carolina Bar were recognized by his receipt of the Hemphill Award last year. On the back cover of this issue is the Call for Nominations for the Hemphill Award. The Award recognizes members of our Association who have been instrumental in developing and implementing the objectives of the Association and who have provided distinguished and meritorious service to the legal profession. The following have received the Hemphill Award: **Jackson L. Barwick, Jr., Harold W. Jacobs, B. Allston Moore, Jr., Edward W. Mullins, Jr., G. Dewey Oxner, Jr.,** and **R. Bruce Shaw**. With this history in mind, I ask that you consider whether you wish to nominate a member or past member for the Hemphill Award. The deadline for submission of nominations is July 26, 1995, the Wednesday before the Executive Committee meets at the Joint Meeting.

LEGISLATIVE COMMITTEE: The South Carolina Legislature has made the first five months of this year very exciting for the Legislative Committee. **Will Davidson** and **Bill Doar** have diligently represented the interests of the Association, with Will having to bear a substantial portion of the load because of his proximity to the Capitol. **Kay Crowe** has also served tirelessly, and usually on short notice, by making necessary contacts and testifying before various sub-committees. Participating in the legislative process has become one of the very important functions of the Association. In our last issue I wrote about proposed legislation to amend the Constitution of South Carolina to eliminate the requirement of 12 jurors, and I am pleased to report that the proposed legislation has been withdrawn. We have also worked against legislation to eliminate the requirement of a unanimous verdict in civil actions. Legislation is pending which would modify our long standing venue law requiring generally that the defendant be sued in the county of the defendant's residence by allowing actions to be filed where the cause of action arises. The Legislative Committee in concert with numerous other organizations was able to slow down this legislation this year, but there is a real threat that the legislation will be passed in some form next year. I have file folders for more than 20 other bills of interest to our Association. Because of the seriousness of the issues raised by legislation proposed each year and the time required to effectively respond to that legislation, we are considering whether to hire an active lobbyist.

JOINT MEETING: I hope you have registered to attend the 28th Annual Joint Meeting of the South Carolina Defense Trial Attorneys' Association and the Claims Management Association of South Carolina at the Grove Park Inn, July 27-29, 1995. **Frankie Marion** and **Joel Collins** have worked closely with the Claims Management Association in the development of the educational program which will address issues in the following areas: Litigation Management; Medical Tests & Procedures; Mediation-Arbitration; Bad Faith Claims; Business Interruption Insurance Claims; the Insurer's Chinese Wall between the claims representative handling the underlying action against the insured and the representative handling the related coverage issues; and Workers' Compensation. **Susan Lipscomb** and the Convention Committee have planned a wonderful evening at the Deerpark Restaurant at Biltmore Estate on Friday night, followed by an optional candlelight tour of the Biltmore House. Our usual Welcome Cocktail Reception Thursday night and "athletic" activities Friday afternoon will provide us with the opportunity to relax and enjoy ourselves.

ANNUAL MEETING: I am very pleased to tell you that **United States Supreme Court Justice Anthony M. Kennedy** has accepted our invitation to speak to us at the Annual Meeting at Sea Island, November 9-12, 1995. Justice Kennedy was a professor of Constitutional Law at McGeorge School of Law, University of the Pacific, from 1965 until 1988 when he began his service on the United States Supreme Court. Former United States Attorney **Griffin Bell** will speak to us concerning legislative limits on punitive damages. **Dr. Rick Fuentes**, Managing Director of Litigation Sciences, Inc., Atlanta, Georgia, will address jury selection issues. As usual, our State and Federal Court judges will serve on panels to address the latest issues in trial and appellate advocacy. Because of the rare privilege of having a United States Supreme Court Justice address our membership and considering the ambiance of The Cloister, I believe it is reasonable to expect one of our best attended Annual Meetings ever; so please put this on your calendars at work **and** home. Special thanks go to **Bill Coates**, **Mike Bowers** and **Mills Gallivan** for their work in arranging the outstanding program which we will enjoy this year.

JUDICIARY COMMITTEE: There has hardly been a hotter topic in the State than Judicial Selection. **Charlie Ridley** and his Committee have met to consider the various legislation which has been proposed. The Committee has made the following recommendations: (1) If a candidate is found to be "not qualified," that candidate cannot be

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nominated by a selection panel. (2) The selection panel should only have two labels for candidates - "Qualified" and "Not Qualified." (3) No person currently in the Legislature may be a candidate and must have been out of the Legislature for at least one year. (4) There must be adequate representation by the South Carolina Bar on the selection panel. (5) The selection panel must receive the recommendations of the South Carolina Bar. (6) No lobbying for support in any manner or form can be done until after that candidate is properly nominated. Our Association will be communicating these recommendations to the Legislature, which will continue to consider the judicial selection process next year. If you have any comments or suggestions, please direct them to **Charlie Ridley**.

DEFENSE RESEARCH INSTITUTE NATIONAL CONFERENCE OF DEFENSE BAR LEADERS: It was my pleasure to attend this conference in Charleston this year, especially since one of our members, **Steve Morrison,** is now the President of DRI. Steve has been one of the leaders in DRI's move toward "Democratization." DRI will hold its first Annual Membership Meeting October 9-12, 1996 at Chicago's Fairmont Hotel. The Defense Bar Leaders Conference in Charleston was a wonderful opportunity to learn of the experiences of defense attorneys across the nation concerning a range of topics from legislation to plaintiff's attorney's tactics to defense law firm economics. **Carl Epps**, our DRI Regional Vice President, will lead a regional meeting in Greensboro this August which will allow our defense organizations from our region to exchange ideas and experiences important in our practices.

NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS: The North Carolina Association of Defense Attorneys invited me to attend their Annual Meeting at Hilton Head this year. I enjoyed the opportunity to learn from the activities of their Association and to renew old acquaintances and make new acquaintances. Our Association is reciprocating by inviting **Ronald Baker**, President of the North Carolina Association, to attend our Joint Meeting this year.

SOUTH CAROLINA BAR ASSOCIATION ANNUAL MEETING: Rutledge Young, the President of the South Carolina Bar Association, extended an invitation to me as President of our Association to attend the South Carolina Bar Meeting in Asheville this year. It is important for our Association to maintain a close relationship with the South Carolina Bar and for our membership to continue to be active in it. I applaud the efforts of **Elaine Fowler, Rutledge Young** and **Wilburn Brewer,** the current President of the South Carolina Bar, for their leadership in the State Bar.

TRIAL ACADEMY: Finally, I wish to advise you that the Trial Academy has been scheduled for August 9, 10 and 11, 1995 at the USC Law School. **Clarke McCants, Steve Darling** and **John Bell** have worked tirelessly to plan the 1995 Trial Academy. The response to the Trial Academy has continued to be outstanding. The younger lawyers have enjoyed the Academy experience and you more experienced lawyers have generously volunteered your time to make the Academy an outstanding educational opportunity.

I hope to see you at the Joint Meeting in Asheville.

Mercy and Moderation

Chief Justice LOGAN E. BLECKLEY, in Colbert v. State, 91 Ga. 705. 17 S.E. 840.

Opinion: Within the limits of his legal discretion, the right and power of the trial judge to be more or less tender in every case, according to its actual facts and circumstances, cannot be doubted. But in no case can the dictates of mercy be overlooked or forgotten. Mercy has always been a judicial attribute. Its function is not to withdraw justice or withhold it, but to measure it. Certainly of punishment, rather than severity, is the most potent factor in the repression of crime. Whether tested by principle of practice, discreet moderation is better than extreme rigor. The temper of government, as manifested through the judiciary, should always be firm, but never fierce. Judicial ferocity has been rare in modern times, and, we are glad to say, is unknown by experience in Georgia. Society demands protection, but does not thirst for vengeance. The vicious are to be restrained, but suffering should never be inflicted by the public authority beyond what is necessary for this purpose. If society could be safe and prosperous without chastising its unruly members, it would have no right to punish at all. In so far has human punishment is without necessity, it is without justification, no matter who may be its author or its minister.

Trial Academy

August 9, 10 and 11

REGISTRATION INFORMATION HAS BEEN MAILED!

DEALING WITH THE OTHER SIDE'S ASSIGNEES AND SUBROGEES ©1995

BY JOHN FREEMAN

Background

Plaintiffs' lawyers are coming to recognize that valid assignments made by clients in favor of medical care providers must be honored when recovered funds are disbursed. There is not much choice. Rule of Professional Conduct 1.15(b) is explicit:

> Upon receiving funds or other property in which a...third person has an interest, a lawyer shall promptly notify the...third person. [A] lawyer shall promptly deliver to the...third person any funds... that the...third person is entitled to receive and, upon request by the...third person, shall promptly render a full accounting regarding such property.

South Carolina Bar Ethics Opinion 94-20 holds: "A lawyer who knows his or her client has made a valid assignment of litigation proceeds to a medical care provider may not ethically ignore the assignee's rights and pay the assigned funds to the assignor-client."

Recent cases show that an ethics charge, or even civil liability, awaits the plaintiff's lawyer who disburses to his or her assignor-client with knowledge of a valid assignment. Matter of Edwards, ___ S.C. ___, 448 S.E.2d 547, (1994) (lawyer disciplined for violating 1.15 in connection with a doctor's lien, due to "failing to notify medical providers of the receipt of funds in cases and by failing to deliver those funds as agreed"); Solon Family Physicians, Inc. v. Buckles, 1994 WL 422286 (Ohio App. 1994) (lawyer who signed doctor's lien viewed as surety); Leon v. Martinez, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.2d 972 (1994); Freeman, Payments to Medical Care Providers: What are the Lawyer's Obligations?, 6 South Carolina Lawyer 39 (Sept.-Oct. 1994); Smith, Letters of Protection and Third Party Interests in Trust Account Funds, Wisconsin Lawyer July 1994, at 54 ("It is clear that the lawyer is no longer obligated only to the client.").

This article examines assignees' rights from the other side of the table. What rules govern defendants and their counsel and insurers in resolving disputes with injured parties' assignees or subrogees?

Defining the Problem

Analyzing the legal and ethical obligations of defense counsel and insurers to honor the rights of adverse parties' assignees and subrogees is akin to playing three-dimensional chess. Numerous concepts intersect. Regulating the conduct of defendants and those on the defense team are ethical constraints, statutory law and the common law of contracts, assignments, and subrogation, not to mention equitable principles. Running throughout the topic is an increasingly visible and important thread of developing public policy: the need to keep health costs down by allocating resources efficiently.

Reconciling Competing Duties

Amidst the cluttered landscape of legal theories and concepts, we find some hard practical realities. For one thing, let's face it, no sensible clients are looking for reasons to make their cases more complex, expensive, or risky. Few, if any, defendants (or their insurance carriers) would readily embrace the concept that they owe the other side anything short of compliance with the rules of procedure. After all, people generally are entitled not to speak to others. If tort law is viewed as setting the substantive law standard, the defense would have limited obligations to the other side. Familiar fraud law prohibits affirmative misrepresentation, but does not sanction nondisclosure absent a duty to speak arising out of special facts, like a fiduciary relationship. Defendants, their insurers, and defense counsel are not fiduciaries to personal injury claimants.

Unlike their clients and their clients' insurers, defense counsel face the added burden of ethical requirements. For the most part, however, ethical rules require no generosity to adverse parties. Ethical standards generally do not require affirmative disclosure to adverse parties of potential problems that may arise if assignment or subrogation rights subsequently are asserted. Thus, Rule 4.1 bars lawyers from knowingly making false factual statements, but does not mandate full disclosure to adversaries. Rule 4.1's first comment states that "A lawyer is generally required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." See also Rule 4.3 (prohibiting lawyers from stating or implying that they are disinterested in dealing with unrepresented parties).

Given that litigation is an adversary system, it seems counter-intuitive, almost downright un-American, to posit that a defendant has a duty to worry about obligations created by the plaintiff in favor of subrogees and assignees, obligations which the plaintiff may not even begin to understand. After all, defense counsel's obligations flow exclusively to his or her own client, right? This simple, neat view of the litigation world, however, is myopic, dangerous, and just plain wrong. After all, the command of client loyalty is the same basic argument that has been used when pleading that plaintiffs' lawyers may properly ignore the interests of their clients' subrogees and assignees. As we shall see, it is substantive law, not ethical maxims, that defines those third-parties' rights and neither may safely ignore those rights, period. A case in point is

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Hospital Service Corp. v. Pennsylvania Inc. Co., 101 R.I. 708, 227 A.2d 105 (1967).

Understanding Subrogees' and Assignees' Rights

The plaintiff in Hospital Service was Rhode Island's Blue Cross insurer. Blue Cross sued three defendants: its insured, the alleged tortfeasor, and the tortfeasor's insurer. Blue Cross had paid its insured's hospital bills to the tune of $521.50, and had promptly notified the alleged tortfeasor, and her insurer of the payment and of its subrogation right under its insurance contract with the insured. The tortfeasor and her insurer then settled with the insured, paying a sum of money exceeding Blue Cross' claim. Blue Cross then brought suit against all three parties to recover on its subrogation right. The court held that a cause of action was stated as to all defendants, though Blue Cross was required to elect between seeking recovery from its insured or the other defendants. Along the way, the court made the following observations:

> "[A] release procured by a tortfeasor, who is aware that the insurer claims to be subrogated to the rights of its insured, will not constitute a defense to the insurer's actions against the wrongdoer to enforce its rights of subrogation. . . . In Wolverine Insurance Company v. Klomparens, 273 Mich. 493, 263 N.W. 724, under facts quite similar to the instant cause, the court held that the tortfeasor's action in obtaining the release while having full knowledge of the insurer's subrogation rights amounted to a fraud on the insurer. By settling the insured's claim with knowledge of the insurer's interest, the tort-feasor was held to have consented to a separation of the cause of action. These principles which we apply in this case were endorsed in Calvert Fire Insurance Co. v. James, 236 S.C. 431, 114 S.E.2d 832, 92 A.L.R. 97.

Id. 718, 227 A.2d at 112.

Subrogation in South Carolina

Pay close attention to the last line of the above quotation. Note that the Blue Cross subrogation right upheld in Hospital Service was premised on a legal principle announced by South Carolina's Supreme Court. The Calvert case involved a subrogated insurer's claim back against the tortfeasor following settlement with the insured. Notice of the subrogee's interest had been given prior to settlement. Our Supreme Court upheld the subrogee's claim, citing authority holding that "the release amounts to a fraud on the insurer's rights," Calvert, 236 S.C. at 437, 114 S.E.2d at 836, and ruling that allowing the subrogee to sue is a result "more consistent with principles of equity and fair dealing." Id. at 438, 114 S.E.2d at 836. The party who obtained the release in Calvert was the actual tortfeasor. Subsequently, in Travelers Indem. Co. v. Canal Ins. Co., 254 S.C. 92, 173 S.E.2d 656 (1970), the Supreme Court announced its willingness to extend Calvert to protect subrogees from releases procured by the tortfeasor's insurer.

Allowing subrogees or assignees to maintain direct causes of action against the adverse party's insurer requires some innovative reasoning. After all, subrogees basically stand in the shoes of their subrogors, and the general rule is that, in the absence of a contractual or statutory provision to the contrary, an injured person has no direct cause of action against a tortfeasor's insurance company. Annot., 16 A.L.R.2d 881, § 1 (1951). Thus, if a subrogor/assignor cannot sue the tortfeasor's insurer, why should his or her assignee or subrogee? On the other hand, in Calvert, our Supreme Court indicated a willingness to brush aside releases taken with notice of third parties' vested rights. Nothing stops a court from viewing actions by the defense that prejudice subrogees or assignees as interfering with those parties' contractual rights or, Calvert suggests, as fraudulent.

More recently, the Court of Appeals held in Provident Accident and Life Ins. Co. v. Driver, ___ S.C. ___, 451 S.E.2d 924 (Ct. App. 1994), that a medical insurer may sue for settlement proceeds where its insured settles a claim after receiving notice of the insurer's subrogation interest. Both Calvert and the Provident case recognize that the insurer's subrogation right rests on equitable principles, and hence is subject to defenses such as waiver, laches, estoppel. Provident, 451 S.E.2d at 928; Calvert, 236 S.E.2d at 438, 114 S.E.2d at 836. Likewise, South Carolina's courts have repeatedly recognized that the subrogee's rights depend on payment prior to its insured's settlement, and that the tortfeasor's lack of notice of the subrogee's rights at the time of settlement will bar the subrogee's later suit. Johnson v. Wright, 280 S.C. 535, 539, 313 S.E.2d 343, 346 (Ct. App. 1984); Calvert, 236 S.E.2d at 439, 114 S.E.2d at 836.

To put it mildly, insurers and their counsel need to be leery of entering into any settlement once they are on notice that a subrogation right exists. Language in Calvert suggests that secret settlements with a subrogor may be viewed as a fraud on the subrogee. Life is short, and no reasonable lawyer wants to be accused of counselling or assisting a client in conduct the lawyer knows is fraudulent. Besides exposing the lawyer to liability as an aider and abettor or co-conspirator, such conduct directly violates Rule of Professional Conduct 1.2(d). This indicates that, normally, notice of an impending settlement should be given to any known subrogee or assignee.

South Carolina Bar Ethics Opinion 93-31 held that the subrogor's counsel does not have an ethical obligation to notify the subrogee that a tort suit had been brought. The opinion implicitly held it sometimes was ethical for the subrogor's lawyer to settle the case without informing the subrogee. The opinion differentiated between instances where the subrogee simply had latent right of subrogation, as opposed to where it had further affirmatively taken the position it would assert its claim. In the first case, the lawyer was viewed as privileged to disburse the settlement proceeds to the client, provided the client was first informed that "if the insurer later asserts its subrogation rights it may have a right to reimbursement from the client." On the other hand, the Ethics Committee held that:

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> "If the insurance company has notified the attorney of its subrogation claim, then, pursuant to Rule 1.15, the lawyer is required to keep any disputed funds in trust until the dispute is resolved."

It is important to note that the Ethics Advisory Committee did not give plaintiffs' lawyers the right to ignore subrogees' interests; the holding was only that there was no affirmative duty to alert the subrogee to the availability of funds. The Committee did insist that the plaintiff's lawyer advise his or her client that the subrogee was entitled to assert an interest in the recovery.

Once the defense is on notice of the subrogee's rights, case law suggests that those rights will be hard to extinguish and need to be reckoned with. Ignoring them in the hope they will never be asserted may be viewed as constituting a fraud on the subrogee, with any resulting releases being disregarded. Candor is counsel's best protection against a charge of unethical conduct or a claim by the subrogee that a release is invalid.

Assignments differ somewhat from subrogation interests. A subrogation arises automatically in this state whenever an insurer pays its insured for a loss resulting from the tortious conduct of a third party. Hall & Co. v. Vic Bailey Lincoln-Mercury, 298 S.C. 282, 284, 379 S.E.2d 892, 894 (1989); Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638 (1950). Subrogation involves the substitution of an insurer by operation of law to the rights of the insured because of the insurer's pre-existing duty to pay the insured for the loss. In contrast, an assignment involves a transfer of a legal claim for an injured party to a volunteer (such as a doctor or chiropractor) who was under no pre-existing duty to compensate the injured party. Moreover, under subrogation, an insurer's recovery is limited to the amount paid to the insured, whereas there is no such limitation on an assignee's recovery. In general, subrogation secures contribution and indemnity, and impresses an equitable lien upon the proceeds of any settlement. Subrogation thus is a restitutionary doctrine that gives rise to an equitable right.

An assignment of rights, in contrast, is an outright transfer which occurs by action of the transferor or by operation of statute. A right of recovery in a personal injury action is a "chose in action." The law of South Carolina has long recognized that a chose in action can be validly assigned in either law or equity. Forrest v. Warrington, 2 Desaus. Eq. 254 (1804). Language of assignment need not be formal; rather, it need only manifest an intention on part of owner to transfer a right or interest in property. E.g., S&W Trucks, Inc. v. Nelson Auction Serv., Inc., 80 N.M. 423, 457 P.2d 220 (Ct. App. 1969); 4 A. Corbin, Corbin on Contracts § 879 (1951). Rights in a chose in action can be transferred by parol in South Carolina. Aperm of South Carolina v. Roof, 290 S.C. 442, 351 S.E.2d 171 (1986).

If anything, assignees' rights are more potent than those of subrogees. This view was embraced implicitly by the South Carolina Bar's Ethics Advisory Committee when it held that all known assignees' rights must be fully protected under Rule 1.15(b) whereas, as noted above, only subrogees who have notified subrogors' counsel of their intent to assert their subrogation claim are covered by Rule 1.15(b). Compare S.C. Bar Ethics Advisory Committee Opinion 93-31 (dealing with subrogees) with Opinion 94-20 (lawyers' ethical obligation to assignees where the lawyer did not sign the doctor's lien).

What Constitutes Notice?

In many cases, rights of assignees, subrogors and the duties of counsel and others will turn on the concept of notice. "It is settled law in South Carolina that when a person has notice of facts sufficient to put him on inquiry, and those facts, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts." Multimedia Publishing of South Carolina, Inc. v. Mullins, ___ S.C. ___, 431 S.E.2d 569, 572 (1993), citing, Norris v. Greenville S. & A. Ry. Co., 111 S.C. 322, 330, 97 S.E. 848, 850 (1919). Because inquiry notice is all that is needed to constitute effective notification, and because no special formalities need be followed to make a valid assignment in favor of a health care provider, a defendant's receipt of a form HCFA 1500 merely stamped "BENEFITS ASSIGNED" would suffice to put the defendant and the defendant's insurer on notice that an assignment has been made in favor of a health care provider. The assignee's rights cannot be extinguished by paying the assignor after notice of the assignment. E.g., Christmas v. Russell, 81 U.S. (14 Wall.) 69 (1972). On the other hand, payment to the assignor after the assignment, but prior to notice will bar the assignee from recovery. Restatement (Second) of Contracts § 338 (1981) (noting that, in general, "the assignor retains his power to discharge or modify the duty of the obligor . . . until but not after the obligor receives notification that the contract has been assigned").

Statutory Rights

Subrogation and assignment rights can arise by statute. In this category are statutes giving assignment and subrogation rights where medical assistance is paid for through Medicaid, see South Carolina Code Ann. § 43-7-420, -430, -440 (Supp. 1994), and statutes giving lien and assignment rights to carriers in workers' compensation cases, see South Carolina Code Ann. § 42-1-560 (1976). Notice of statutory subrogation rights is automatic since, after all, everyone is presumed to know the law.

George Burnett, Assistant General Counsel of the Health and Human Services Finance Commission has announced that his agency "operates the Medicaid program in South Carolina, vigorously pursues its assignments, and does not hesitate to create a receivable and bring suit against any attorney who fails to withhold from any settlement the amount assigned to the agency and pay it over to us." Letter to the Editor, South Carolina Lawyer, Nov.-Dec. 1994, at 6. Code section 43-7-440(A)(6) expressly conditions a Medicaid recipient's lawyer's liability for improper disbursement of funds upon the lawyer's prior receipt via certified

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mail of the State's assignment and subrogation rights. No statute expressly creates liability on defense counsel who disburse without protecting the State's right to reimbursement for Medicaid payments. Mr. Burnett advises, however, that he views any purported release given by the Medicaid recipient not to bar his agency's statutory rights.

Public Policy's Influence

It was noted at the outset that public policy plays a role in deciding what duties are owed to whom when personal injury proceeds are being doled out. A reality of life today is a pervasive concern over rising health care costs. It is a safe bet that courts will find ways to get health care providers paid. Consider this language from the Hospital Service case written nearly 30 years ago:

> * "The cost of illness or disability is a matter which concerns each of us no matter what his status in life might be." Hospital Service, 101 R.I. at 715, 227 A.2d at 110.
>
> * "All of us are aware today that Blue Cross serves a most important beneficial, social and economic purpose in our state." Id.
>
> * "[T]he [subrogation] contract fosters a type of coverage in this case that provides protection for the injured without creating a windfall for those few who may be greedy or overreaching. It assists subscribers to discharge their legal obligation for the payment of their hospital bills while all the time affording an opportunity to both Blue Cross and its subscribers to insure that wrongdoers bear the burdens which have been occasioned by their negligence. **It is to be hoped that this policy of recovery from tort-feasors may tend to reduce rates charged the subscribers.**" Id. (Emphasis added.)

Practice Pointers

Once the defense is on inquiry notice of third parties' subrogation or assignment rights, those rights cannot be ignored. There are different ways to deal with the problem.

One way is simply to put everybody's name on the settlement check. Blake v. Cannon, ___ S.C. ___, 439 S.E.2d 302 (Ct. App. 1993), offers some guidance here. Blake involved an attorney named Clarke who represented property owners (the Blakes) who had assigned all of their rights to insurance proceeds to a third party (Cannon). Lawyer Clarke negotiated a settlement with the insurer without consulting the assignee. The insurer, nonetheless, had notice of the assignment. We know this because the settlement check for $75,000 was made out to lawyer Clarke, assignee Cannon and the Blakes. (Lawyer Clarke had specifically asked that the check be made out only to himself and the Blakes, his clients). Held: the full $75,000 was payable to Cannon, the assignee. Zero proceeds went to the Blakes or their lawyer, Clarke. The insurer's prescience in putting Cannon's name on the check probably saved it from getting dragged into a dispute with the assignee.

Another way of dealing with assignors' or subrogees' interests is to make plaintiffs' counsel warrant that settlement proceeds will be held in trust until those interests are satisfied. Plaintiff's counsel's breach of that express warranty would be unethical under Rule 1.15(b), and could be redressed through a contract suit. An interpleader action or a call for mediation are other ways of resolving contentions between competing claimants. In some cases, of course, the defense may simply decide to make a business decision to pay the tort claimant while ignoring the assignee's or subrogee's interests, figuring that those interests are not likely to be asserted or, if asserted, that they can be compromised on advantageous terms. In this case, defense counsel needs carefully to spell out, preferably in writing, that settlement will not result in the assignee's or subrogee's rights being terminated.

Conclusion

A release that fails to account for the valid interests of the injured party's assignees or subrogees is a recipe for disaster. These days everyone involved in personal injury litigation is facing an irresistible public policy movement in favor of seeing that medical care providers are paid out of the proceeds of personal injury claims. Counsel can count on courts being very creative in finding ways to pay health care providers' bills.

Standard rules like the one barring the splitting of causes of action can be expected to fall by the wayside. Said one court: "It is generally held that the tortfeasor waives his or her right to invoke the rule against splitting a single cause of action where the tortfeasor has notice of the insurer's subrogation claim prior to settling with the insured." Travelers Indemnity Co. v. Vaccari, 310 Minn. 97, 101, 245 N.W.2d 844, 846 (1976). Alternatively, a court bent on procuring payment for a health insurer need only view a subrogee insurer and its insured as owning separate parts of a single claim against a tortfeasor. See Milbank Ins. Co. v. Henry, 232 Neb. 418, 424, 441 N.W.2d 143, 147 (1989).

No reasonable lawyer may ignore intimations in the cases, including our own Supreme Court's opinion in Calvert, that an attempt to disregard the valid interests of known subrogees amounts to a fraud upon the insurer's right. Calvert, 431 S.C. at 437, 114 S.E.2d at 835-36. Rule of Professional Conduct 8.4(d) prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." Probably the court's use of the term "fraud" in Calvert was just a shorthand means of connoting that insurer's right of payment was unimpaired by payment to the subrogor, since no fraud in the classic tort sense arises simply by paying the assignor and not the assignee. However, the phraseology is troublesome. If nothing else, defense counsels' clients should be warned that disregarding assignees' and subrogees' rights may not be economical in the long run.

Tort victims want their injuries fully redressed. Medical care providers want to be paid for their efforts. Defendants and their insurers want to buy their peace at the lowest possible cost. Plaintiffs' lawyers cannot properly encourage their clients to "take the

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DOES THE SUBSEQUENT ALTERATION OF A PRODUCT GET A MANUFACTURER OFF THE HOOK?

By Linda A. Wohlbruck

I. Introduction

Your client is the manufacturer of a piece of textile equipment. A worker in a textile plant was severely injured when his hand was caught in the equipment. Prior to the accident, the worker's employer had intentionally removed a safety device from the equipment in order to increase production. If the device had been in place, the worker would not have been injured. The worker collects from his employer's workers' compensation carrier and sues your client. Your client calls you and says "we cannot possibly be held liable for this accident, can we?" Since a manufacturer cannot be held strictly liable for an injury caused by its product unless the product is "expected to and does reach the consumer without substantial change," you may be thinking that your client is automatically off the hook. See S.C. Code Ann. § 15-73-10 (1976). This article briefly explores the answer to that question.

II. The Foreseeability Rule

A difficult issue arising in many products liability actions involves the extent of a manufacturer's liability for accidents resulting from a third party's subsequent material alteration of the manufacturer's product. Some jurisdictions have held that if a third party materially alters the product, and the material alteration is the proximate cause of the accident, then the manufacturer is automatically absolved from liability. See e.g., Jones v. Ryobi Ltd., 37 F.3d 423 (5th Cir. 1995); Branther v. Black and Decker Mfg., 831 F.Supp. 454, 457 (W.D. Pa. 1993); Gomez v. Clark Equipment Co., 743 S.W.2d 429, 432 (Mo. Ct. App. 1987). Courts in other jurisdictions, including South Carolina, require an inquiry into whether the material alteration was foreseeable by the manufacturer. The question then becomes — when is something foreseeable?

One of the first cases in South Carolina to address this issue was Kennedy v. Custom Ice Equipment Co., Inc., 271 S.C. 171, 246 S.E.2d 176 (1978). In Kennedy, the plaintiff worked for a company that made and sold crushed ice. The storage bins for the ice were fed by an overhead conveyor. The ice in the bins would commonly freeze up or solidify and have to be physically dislodged. The plaintiff's employer had constructed a catwalk alongside the bins so that its employees could break up the frozen ice with a garden hoe. At the time of the accident, the plaintiff was on the catwalk attempting to dislodge the ice. He got his left arm torn off when the hoe got caught in the overhead conveyor.

The plaintiff sued the manufacturer of the ice-making machine on the grounds that the overhead conveyor should have had protective shields. The case was submitted to the jury and a verdict was returned for the plaintiff against the manufacturer of the equipment. The Supreme Court affirmed the verdict holding that "[t]he test of whether a product is defective when sold is whether the product is unreasonably dangerous to the user or consumer given the conditions and circumstances that will foreseeably attend the use of the product." 246 S.E.2d at 178. In light of evidence that the manufacturer was aware of the propensity of the ice to freeze and the need to come in close contact with the conveyor to dislodge the ice, the Supreme Court held that the case was properly submitted to the jury.

Recently, the South Carolina Supreme Court in Fleming v. Borden, Inc., Opinion No. 24158 (filed October 24, 1994) addressed this issue again. In Fleming, the plaintiff worked with a maintenance group responsible for cleaning a plant. The plaintiff was

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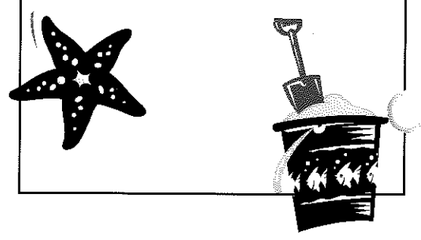

DEALING WITH THE OTHER SIDE
Continued from page 9

money and run," leaving medical care providers in the lurch. By the same token, defendants and their insurers cannot fully discharge their payment obligations without addressing the legitimate interests of the injured party's assignees and subrogees. Like the plaintiffs' lawyers, defense counsel are caught in the middle. These days, a permanent peace is only achievable if the legitimate interests of the injured parties' subrogees and assignees are identified and accommodated forthrightly. Failure to do so can breed more litigation, greater costs for all, and, just possibly, a charge of ethical misconduct.

SUBSEQUENT ALTERATION
Continued from page 10

responsible for cleaning the top of some machines which had been manufactured and installed by the defendant. The defendant also had manufactured a platform to be used when cleaning the top of the machines.

Sometime after the installation of the machines, the platform was removed and a ladder was put in its place. The plaintiff argued that the platform originally supplied was removed because the machines were installed so close together that the top of the machine in question could not be reached with the defendant's platform. The plaintiff fell off the ladder while cleaning the machine and sustained injuries.

The plaintiff brought a strict liability action against the manufacturer of the machine pursuant to S.C. Code Ann. §15-73-10 (1976). The trial court granted a directed verdict for the defense finding that 1) the plaintiff had failed to prove the product was defective, 2) the machine was substantially modified after delivery, and 3) the plaintiff was aware of the risks in cleaning the machine.

The South Carolina Supreme Court reversed the trial court's decision and remanded for further proceedings on the rationale that the foreseeability of the alteration was never examined. The Court held that a manufacturer may be liable for a subsequent alteration of a product if it is shown that "such alteration could have been anticipated by the manufacturer or seller. . . ." Id. at 5. The Court further held that "it was for the jury to decide whether the removal of the . . . platform was a foreseeable alteration of the machine since there was evidence that the defendant installed the machine in such a manner as to prevent the use of the platform it supplied with the machine." Id.

It should be noted that the defendant had also argued that the plaintiff assumed the risk of injury because she had witnessed other workers fall from the ladder while cleaning the top of the machine and had also fallen from the ladder herself on a prior occasion. The defendant relied on section 15-73-20 of the Defective Products Act which provides that a consumer is barred from recovering "[i]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it. . . ." The Supreme Court held that "[w]hether Fleming's continued use of the product after discovering the defect was reasonable was [also] a jury question." Id. at 6.

III. Is the Foreseeability Rule Fair?

The practical result of the foreseeability requirement has been criticized harshly on the grounds that it makes the manufacturer an "insurer" of its products. See Michael B. Gallub, "Limiting the Manufacturer's Duty for Subsequent Product Alteration: Three steps to a Rational Approach," 16 Hofstra L. Rev. 361 (Winter 1988). In other words, it is almost impossible for a manufacturer to anticipate and guard against all possible alterations or misuses of its product.

Furthermore, the problem is intensified when the accident occurs in the workplace since the employer is usually responsible for the alteration but is shielded from liability by the workers' compensation laws. Id. at 365. As a result, the manufacturer becomes the sole target for recovery. Id.

At a minimum, the foreseeability requirement may be a giant "loophole" that allows a plaintiff to get his or her case to the jury. However, in South Carolina, the loophole is still fairly small. In both Fleming and Kennedy, the manufacturer had actual notice of the need for the alteration or modification of its product. For example, in Kennedy, the manufacturer had knowledge that the ice would freeze and that the company's employees would have to dislodge the ice. Similarly, in Fleming, the manufacturer had actual knowledge that the equipment had been altered and had actually created the need for the alteration by installing the machines too closely together. Therefore, it still remains to be seen whether the foreseeability loophole is large enough to get most cases to the jury including the case involving the textile manufacturer whose safety bar had been removed. Each case will no doubt be evaluated based on its own facts and circumstances.

IV. Conclusion

In light of the foregoing, the best advice you can give the manufacturer of that piece of textile equipment, or any other product manufacturer, is to not ignore information regarding product alteration or misuse. Once the manufacturer is aware or has notice that an alteration is necessary or likely, it may be on the hook when an accident occurs. Furthermore, in cases involving on-the-job injuries, the employer will be protected by workers' compensation laws and the manufacturer may be left holding the bag alone.

RECENT DECISION CASES

By William Bee Ravenel Lewis

1. Workers' Compensation

In a workers' compensation case, Bull v. Owens-Corning Fiberglass, Unpublished Op. No. 95-UP-033 (S.C. Ct. App. Feb. 9, 1995), the South Carolina Court of Appeals addressed the issue of the exclusivity of a scheduled loss when not accompanied by additional complications affecting another part of the body. Bull, a diabetic, suffered a work-place injury when a bottle of windshield wiper fluid fell from his truck striking his big toe and causing a recurrence of an ulcer. The toe was initially ulcerated about one year earlier when a fiberglass bead fell on his toe.

The single commissioner found the injury in question affected only Bull's great toe and caused neither an impairment to any other part of Bull's body nor any superadded injury or disease. The single commissioner, affirmed by the full commission, therefore declined to grant Bull total and permanent disability and instead awarded him a 90 percent disability to the right great toe. The circuit court reversed, finding the testimony of Bull's physician showed the toe injury and diabetic condition affected other parts of Bull's body, and Owens-Corning appealed.

Bull's physician had testified that Bull had some swelling in his leg and foot besides the ulceration on his toe and that the leg swelling might have resulted from some chronic venous changes which he did not think played a big part in the injury to the toe. The physician also noted that Bull's diabetes might affect the injury to the toe but the injury to the toe would not affect his diabetes.

The court of appeals noted that "[w]hen a workplace injury concerns a scheduled member and there is no impairment of any other part of the body resulting from the injury, the claimant is limited to the scheduled compensation under S.C. Code Ann. §42-9-30 (1985 and Supp. 1993)." Id. at 2. (citing Singleton v. Young Lumbar Co., 236 S.C. 454, 114 S.E.2d 837 (1960)). The court further noted that "[t]o obtain compensation besides that for the scheduled member, the employee must show the injury affects another part of his body as well." Id.

The court then held that the physician's statements constituted substantial evidence to support the commission's finding that (1) Bull's injury was limited to the right great toe, and (2) although Bull's diabetes did affect the healing of the toe, the injury to the toe did not aggravate the diabetic condition itself. Accordingly, the court reversed the circuit court's decision.

2. Dead Man's Statute.

In Fann v. Attaway, Unpublished Op. No. 95-UP-028 (S.C. Ct. App. Feb. 6, 1995), the South Carolina Court of Appeals, in part, reviewed a personal representative's allegation that the trial court violated the Dead Man's Statute, S.C. Code Ann. § 19-11-20 (1985). This case involved wrongful death and survival claims against Dean Attaway, M.D., and Columbia East Emergency Care Center, d/b/a Doctor's Care Columbia East.

At trial, the court admitted the testimony of Michael Stout, M.D., a physician and stockholder in Doctor's Care, concerning a "transaction or communication" involving a telephone conversation Stout had with the deceased in March of 1988. The personal representative argued that Stout was disqualified from testifying about the conversation because, as a stockholder of Doctor's Care, he had an interest that may be affected by the trial and was testifying about a communication with the deceased against the personal representative. During the personal representative's testimony, however, the personal representative "published . . . for the jury" a note from an employee of Doctor's Care which reflected a conversation between the hospital and the deceased and reflected that the deceased would be contacted by telephone later that day by Stout.

The court noted that:

> The Dead Man's Statute must be strictly construed because it is in derogation of the general rule that a person's interest in the action does not disqualify him as a witness. The restrictions placed upon this rather narrow form of incompetency, however, can be waived, such as when a personal representative offers evidence about the transaction or communication in question. Id. at 2 (citations omitted).

The court then held that the personal representative opened the door to Stout's testimony concerning his telephone conversation with the deceased when, during the personal representative's testimony, the message from the deceased that prompted the conversation was published. Thus, the court found no merit in the personal representative's argument that the trial court violated S.C. Code Ann. § 19-11-20 (1985).

3. Medical Malpractice — Actual Agency / Apparent Agency / Non-Delegable Duty

In Starnes v. Upstate Carolina Medical Center, Unpublished Op. No. 95-UP-025 (S.C. Ct. App. 1995), Starnes sued a hospital for the alleged malpractice of an emergency room doctor. The trial judge granted summary judgment to the hospital, holding that the ER doctor was an independent contractor and rejecting the patient's liability theories of actual agency, apparent or ostensible agency, agency by estoppel, and non-delegable duty.

The actual authority issue focused on the testimony of the ER doctor and the contract between the hospital and Upstate Carolina Emergency Physicians (contractor) through which the contractor provided the hospital all doctors needed for the emergency room. The contract specifically provided that the contractor was an independent contractor in performing the services and duties required by the agreement. It stated: "[e]ach party hereby indemnifies and holds the other harmless from and against any and all liability, losses, damages, claims or causes of action and expenses connected therewith...caused or asserted to have been caused, directly or indirectly, by or as a result of performance

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of the party's duties hereunder."

The doctor testified that he was an "independent subcontractor" and the contractor hired him, arranged his schedule and paid his hourly wages. He did not receive any hospital employee benefits. He also did not recall any hospital instructions on the treatment of a dislocated elbow.

The court of appeals held:

> When the terms of the agreement and the testimony of the treating ER doctor establish that the ER doctor was an independent contractor at the time of the alleged malpractice, rather than an employee or servant of the hospital, the hospital operating the emergency room is entitled to summary judgment on the issue of actual agency, unless the patient presents evidence to the contrary. Id. at 3.

The court of appeals found no evidence refuting the contract's term or the ER doctor's testimony and affirmed the summary judgment on the issue of actual agency.

With regard to the apparent agency issue, the court noted that the plaintiff must prove: (1) a conscious or implied representation by the purported principal that another is his agent; (2) reliance upon this representation by the plaintiff; and (3) a change in position to the plaintiff's detriment. Id. (citing Shuler v. Tuomey Regional Medical Center, Inc. 437 S.E.2d 128 (S.C. Ct. App. 1993)). In her affidavit, the patient's grandmother stated that she assumed the physician was employed by the hospital. However, the court found that there was no evidence that the grandmother initially took the patient to the hospital based upon any assumption, belief, or representation that the doctors in the emergency room were employees of the hospital. The court focused on the absence of evidence showing that had the grandmother known the doctor was not an employee of the hospital, she would not have taken the patient there. Thus, the court held there was no detrimental change of position in reliance upon any representation made by the hospital. Accordingly, it affirmed the grant of summary judgment on the issues of ostensible or apparent authority and agency by estoppel.

The final issue, a novel one to South Carolina, was whether a hospital has a non-delegable duty in providing medical services in its emergency room. The court held that "emergency room services are not inherently or intrinsically dangerous, and there are no other circumstances present which would so give rise to a nondelegable duty." Id. at 4.

4. Intentional Interference with Contractual Relations/Intentional Interference with Prospective Contractual Relations

In Consolidated Foodservice Co., L.P. v. Hayes, Consolidated brought suit to enjoin its former employer Hugh Hayes from continuing to violate a non-compete clause after Hayes left the company and went to work for Brigman Foods. Hayes had been soliciting customers from his former route in direct violation of the clause. Hayes filed a counterclaim denominated "Tortious Interference with a Contract," but the trial court granted a Rule 12(b)(6) motion to dismiss the counterclaims, holding that they failed to state either a cause of action for intentional interference with a contractual relationship or a cause of action for intentional interference with prospective contractual relations. Hayes then appealed.

Hayes argued that Consolidated wrote to the president of Brigman Foods and interfered with his business relationship with Brigman by notifying its president of the non-compete agreement. He also alleged Consolidated interfered with his contractual relationship with Brigman Foods and with the contractual relationship between Brigman Foods and its customers by telling former customers he had overcharged them for products while he was working for Consolidated Foodservice.

The court of appeals first affirmed the trial court's holding that Hayes failed to state a cause of action for intentional interference with contractual relations because he failed to allege a breach of the contract between Hayes and Brigman. The court stated that "[t]he elements of a cause of action for tortious interference with contractual relations are: (1) the existence of a valid contract; (2) the wrongdoer's knowledge of the contract; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom. Id. at 3. The court held that while Hayes alleged the company's action placed his relationship with Brigman in jeopardy, he did not allege Brigman Foods breached its contract with him as a result. Thus, he failed to allege an essential element of the cause of action.

The court of appeals then affirmed the trial court's finding that Hayes failed to state a cause of action for intentional interference with prospective contractual relations because he failed to allege a breach of the contract between Hayes and Brigman. The court stated that "[t]he elements of a cause of action for tortious interference with contractual relations are: (1) the existence of a valid contract; (2) the wrongdoer's knowledge of the contract; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom. Id. at 3. The court held that while Hayes alleged the company's action placed his relationship with Brigman in jeopardy, he did not allege Brigman Foods breached its contract with him as a result. Thus, he failed to allege an essential element of the cause of action.

The court of appeals then affirmed the trial court's finding that Hayes failed to state a cause of action for intentional interference with prospective contractual relations. The court noted that the elements of the common law cause of action of intentional interference with prospective contractual relations are: (1) the intentional interference by the defendant with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff. Id. citing Crandall Corp. v. Navistar Int. Transportation Corp., 395 S.E.2d 179 (1990).

Hayes argued that Consolidated interfered by improper methods with his potential contract relations with Brigman Foods and improperly interfered with potential contractual relations between Brigman Foods and its customers. The court of appeals pointed out, however, that Hayes alleged no potential contractual relation between himself and Brigman Foods' customers. Thus, the court held

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because Hayes had failed to allege a necessary element for this cause of action, it was not necessary to consider his other allegations. Accordingly, it affirmed the trial court's decision to dismiss the counterclaims.

THE STATE OF SOUTH CAROLINA In the Court of Appeals

Linda White, Appellant,
v.
Owens Corning Fiberglas, Employer, and Standard Fire Insurance Company, Carrier, Respondents.
Appeal from Anderson County
Ellis B. Drew, Jr.,
Special Circuit Court Judge
Unpublished Opinion No. 93-UP-232
Submitted June 7, 1993 -
Filed August 25, 1993

AFFIRMED

Joseph G. Wright, III, of Wright & Trammell, of Anderson, for appellant.
John M. O'Rourke, of Doyle and O'Rourke, of Anderson, for respondents.

PER CURIAM: In this workers' compensation case, the commissioner awarded the claimant compensation for 25% permanent partial disability to her right leg caused by claimant's injury to her knee when she stepped on an air hose at work. The commissioner found that claimant's mental and/or emotional problems were not caused, exacerbated or aggravated by the injury, and that claimant had not met her burden of proving those problems were compensable. The full commission, by a vote of three to three, affirmed the commissioner's order. Claimant appealed to the circuit court. It affirmed. Claimant now appeals to this court. We also affirm.[1]

The commissioner specifically found:

It is impossible to ignore the numerous sources which lead the undersigned to the conclusion that the Claimant has been noncompliant, uncooperative, hostile and unmotivated to comply with her treating physician's requests for treatment and attempts to return to work. This certainly calls into question the Claimant's credibility not only as to her mental impairment but as to many other factors in this case. These may well be the manifestations of a basic personality problem as noted in the MMPI; however, the claimant has failed to come forward with any credible evidence that her alleged mental or emotional problems have been caused, aggravated or in any way rendered symptomatic by her injury and it's [sic] sequelae. The only evidence attempting to relate to the claimant's alleged mental or emotional problems to her accident are the unverified statements of the claimant and the reiteration of these statements by Dr. Cox. As the undersigned does not find credible the claimant's testimony in this regard, likewise reiteration of these comments by Dr. Cox is no more credible.

(Transcript of Record at 11-12).

The claimant argues that the commissioner's finding was an unsupported medical conclusion that her mental and/or emotional problems were not caused by her work-related injury. We agree with the commissioner that the major issues in this case were credibility and the weight to be given the evidence. We find there was substantial evidence that the various reports included the subjective complaints of the claimant. There is also substantial evidence from the claimant's own testimony to support the commissioner's finding that she lacked creditibility. The claimant depends to a large extent on the evidence of Dr. Cox, but he admitted that his findings were based on his observations of the claimant, on the reports (which as can be seen from the Record were based to a large extent on the claimant's allegations of pain), and on the subjective comments of the claimant to Dr. Cox.

Additionally, although Dr. Cox connects a psychiatric impairment with the knee injury, there is sufficient other medical evidence from treating physicians to support the commissioner's findings: e.g., (1) Dr. Evins diagnosed reflex sympathetic dystrophy, gave her a 15% impairment rating for the knee, and found she had reached maximum medical improvement, could return to work, be on her feet extended periods, and lift 40-50 pounds; (2) Dr. Schwartz gave her a 15% impairment rating and said she could return to work; and (3) Dr. Moran said her complaints of pain were subjective.

An appellate court shall not substitute its judgment for that of the commission on questions of fact, and shall not disturb the commission's decision unless the decision is "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. §1-23-380(g)(5)(1986). The appellate court will not disturb the commission's findings unless the findings lack substantial evidentiary support. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Even where inconsistent conclusions are possible, if reasonable minds could reach the same conclusion as the commission based on substantial evidence in the record, the commission's conclusion will be upheld. Id. Substantial evidence is something less than the weight of the evidence, but is such that would allow reasonable minds to reach the conclusion the commission reached. Camp v. Spartan Mills, 302 S.C. 348, 396 S.E.2d 121 (Ct. App. 1990).

The weight to be given a physician's opinion is to be determined by the commission, but if the commission disregards the opinion, there must be other competent evidence on which the decision is based. Baker v. Graniteville Co., 197 S.C. 21, 14 S.E.2d 367 (1941) (wherein commission ignored medical opinion stating there was no causal connection and that other evidence was insufficient to support a causal connection between a blow to the claimant's arm and resulting erysipelas and death). The trier of fact is not requried to believe uncontradicted testimony — questions of inherent probability, credibility, and interests are also to be considered. Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991), cert. denied, (1992); see also Anderson v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104 (1943) (In compensation proceedings, ordinarily a medical expert's opinion is not conclusive, although uncontradicted, and where uncontroverted medical opinions are merely deductions drawn from certain symptoms, the final conclusion remains with the

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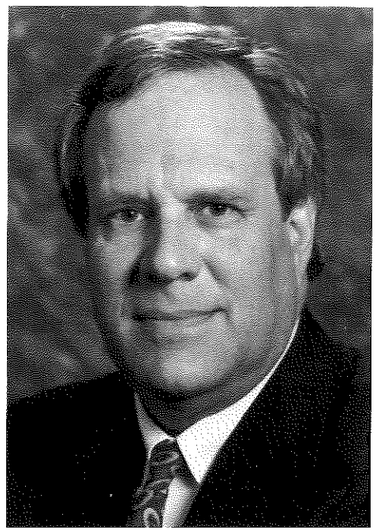
SCDTAA MEMBER ELECTED PRESIDENT OF DEFENSE RESEARCH INSTITUTE



Stephen G. Morrison

Stephen G. Morrison was recently elected President of the 19,500-member Defense Research Institute (DRI), the nation's largest association of civil litigation defense lawyers. A partner in the Columbia, SC-based, law firm of Nelson Mullins Riley & Scarborough, L.L.P., he also serves as General Counsel to Policy Management Systems Corporation (PMSC), the leading supplier of computer software and services to the worldwide insurance industry.

Morrison specializes in business litigation, computer and technology law, automobile design claims and product liability law. His experience as a litigator includes service as lead trial counsel in 23 states. He also has maintained an active trial practice in the State and Federal courts of South Carolina.

Morrison is an accomplished appellate lawyer and has made frequent appearances before the South Carolina Supreme Court, the United States Court of Appeals for the Fourth Circuit, the South Carolina Court of Appeals and also has appeared before the United States Courts of Appeals for the Fifth and Eleventh Circuits.

He brings to DRI a distinguished record of service to the legal profession. He is a former chairman of the South Carolina Bar House of Delegates and an active member of the Richland County and American Bar Associations and the International Association of Defense Counsel.

Active in the South Carolina Bar, he has served as chairman of the Trial and Appellate Advocacy Section, chairman of the Law-Related Education Committee (a community education outreach committee) a vice chairman of the Continuing Legal Education Committee. Long an advocate of merit selection of judges, he was an original member of the South Carolina Bar's Independent Judicial Selection and Evaluation Process. He currently serves as co-chair of the Task Force for Justice for All. In addition, he is past chairman of the Amicus Curiae Committee and has served on the Executive Board of the South Carolina Defense Trial Attorney's Association. He is a founding member and Master Bencher of the John Belton O'Neall Inn of Court, a past president of the University of South Carolina School of Law Alumni Association, and currently serves on the Partnership Board of the University of South Carolina School of Law.

Morrison has written and lectured extensively on a wide variety of legal subjects and has served on seminar faculties in 30 states. He currently is an adjunct professor of Trial Advocacy at the University of South Carolina School of Law, where he also lectures regularly on product liability law, evidence and civil procedure. A 1971 graduate of the University of Michigan, he earned his Juris Doctor from the University of South Carolina in 1975.

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triers of the fact.). Witness credibility and the weight to be accorded the evidence is reserved to the commission. DeBruhl v. Kershaw County Sheriff's Department, 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990).

AFFIRMED.

[1] Because oral argument would not aid the Court in resolving the issues, we decide this case without oral argument.

Submitted by John M. O'Rourke

"A DOZEN REASONS TO JOIN THE DRI"

As the SCDTAA is South Carolina's membership organization for all lawyers involved in the defense of civil litigation, the Defense Research Institute (DRI) is the national membership organization for all lawyers involved in the defense of civil litigation. The SCDTAA, and its members, has cooperated with the DRI, has benefited from the services of the DRI and has received many DRI awards. Many SCDTAA members are also members of the DRI. Others are not. However, the DRI has grown to over 19,000 members nationally.

To those SCDTAA members who are not members of the DRI, consider the following twelve good reasons why you should join the SCDTAA membership:

Reason 1

DRI is the nation's largest insurance defense association, with over 19,000 members.

Reason 2

DRI puts on outstanding continuing legal education seminars throughout the country, with over 20 seminars per year on all practical aspects of the defense practice. Upcoming seminars include "Insurance Fraud and Suspicious Claims," "Insurance Coverage for Environmental Claims," "Asbestos Medicine," "Employment Law," and "Defense and Evaluation of Psychological and Neuropsychological Claims."

Reason 3

"For The Defense," DRI's monthly defense bar magazine, continues a tradition of broad and pragmatic coverage of timely defense-related issues. "For The Defense" has a total circulation of over 30,000 including attorneys in private practice, corporate and insurance counsel and judges in state and federal courts.

Reason 4

The opportunity to participate in DRI's national substantive law committees in all relevant and specialty areas of the defense practice.

Reason 5

A national resource center for the defense trial lawyer.

1) 40,000 witnesses on file in the DRI Expert Witness Bank

2) Practical, comprehensive and concise defense monographs in all areas of the defense practice. (You should not defend a difficult case without getting the DRI educational materials that apply to your case.)

3) Up-to-date information on national and regional legislative issues.

4) Up-to-date information on federal court matters including federal court discovery.

Reason 6

The National Conference of Defense Bar Leaders...the DRI's annual conference of defense bar leaders from throughout America

Reason 7

A network with your clients in the insurance industry. The DRI has insurance industry members with associate memberships, and the DRI works closely and cooperatively with the insurance industry.

Reason 8

A network with the judiciary. Judges in South Carolina and elsewhere receive the DRI's "For The Defense" and are kept current regarding legal issues involved in civil litigation. If your judge reads this publication, so should you!

Reason 9

A national network with your state defense bar association. The DRI supports and works in cooperation with the SCDTAA and other state defense bars. It works to be complimentary and supplementary, on a national level, with regard to what the SCDTAA and other state defense bar associations are doing locally. The DRI assists state defense bars with their development and annually honors state defense bar associations.

Reason 10

The bottom line: It's good for business! The DRI provides you with the greatest opportunity for nationally networking with defense bar leaders and the insurance industry . . . all available for a mere $125.00 in annual dues ($85.00 in annual dues for admittees to the bar with fewer than five years who will also receive a complimentary certificate for a DRI seminar of their choice [a $400.00 value] that can be used within a two year period of time). When you join the DRI, your name is published nationally in DRI's "For The Defense." If you are not currently a member, I hope to read your name soon in this DRI publication.

Reason 11

It's Free! The new DRI free membership program offers a free DRI membership for one year to anyone who is currently not a member of DRI or a State Defense Association but who joins a state association and meets DRI qualifications. THIS FREE MEMBERSHIP PERIOD extends until April 1, 1996.

Reason 12

It's Half-Price! DRI is offering a half-price DRI membership for one year to all current members of State Associations who qualify but are not yet members of DRI. THIS HALF-PRICE membership period also extends to April 1, 1996.

(Applications for DRI membership are available through David Dukes; SC DRI State Representative, Keith Bauer; or DRI at 750 N. Lake Shore Drive, Chicago, IL 60611).

Joint Meeting Schedule

SCDTAA AND CMASC
1995 JOINT MEETING SCHEDULE OF EVENTS

THURSDAY, JULY 27

3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 7:00 p.m.	Registration
6:30 to 8:00 p.m.	Welcome Cocktail Reception
	DINNER ON YOUR OWN

FRIDAY, JULY 28

8:00 a.m. to 12 noon	Registration
8:15 to 8:45 a.m.	Coffee Service
8:15 to 8:30 a.m.	***Welcome***
	SCDTAA President and CMASC President
8:30 to 9:00 a.m.	***Ethics - Bad Faith Update***
9:00 to 10:15 a.m.	***Medical Diagnostic Study***
	Dr. Dayton Riddle, a Greenville orthopedist, will conduct a class on the different types of tests ordered or performed by orthopedists, neurologists, and radiologists. He will explain: why the tests are given; what each test means; and the pros and cons of each test.
10:15 to 10:30 a.m.	Coffee Break
10:30 to 11:15 a.m.	***Publications Useful to Understanding Medical Terminology and Testimony***
	Jim Hudgens, with the Ward Law Firm in Spartanburg, will discuss the publications and tools he uses to understand medical records and to effectively cross examine medical experts.
11:15 a.m. to 12:15 p.m.	***Business Owners Property Claims***
	A presentation on insurance claims involving business interruptions where services are involved rather than product.
11:15 a.m. to 12:15 p.m.	***Workers Compensation Breakout***
	A one hour breakout updating changes in the law over the past year.
12:15 to 1:15 p.m.	Beverage Break
12:30 to 6:00 p.m.	White Water Rafting Trip
12:30 p.m.	Golf Tournament, *David Rheney, Chair*
2:15 p.m.	Tennis Tournament, *Jeff Ezell and Phil Reeves, Chairs*
6:30 to 10:00 p.m.	Children's Program and Dinner at Grove Park
6:30 to 7:00 p.m.	Cocktail Reception - Deerpark Restaurant
7:00 to 8:00 p.m.	Buffet Dinner - Deerpark Restaurant
8:00 to 9:30 p.m.	Entertainment at Deerpark Restaurant
8:00 to 9:30 p.m.	Optional Candlelight Tour of Biltmore Estate

SATURDAY, JULY 29

8:00 to 8:30 a.m.	Coffee Service
8:00 to 8:30 a.m.	***SCDTAA Business Meeting***
8:00 to 8:30 a.m.	***CMASC Business Meeting***
8:30 to 9:00 a.m.	***Ethics - Chinese Wall***
	The Insurer's dilemma of having tort and coverages issues on the same file.
9:00 to 10:00 a.m.	***Insurance Fraud***
	Catherine Christophlis, the Enforcement Officer Insurance Fraud Division of the SC Attorney Generals Office, will discuss what her job entails.
10:00 to 10:15 a.m.	Coffee Break
10:15 to 11:15 a.m.	***Mediation and Arbitration***
	Les Hill will discuss recent developments and individual case studies and give his view of what is effective in mediation and arbitration.
11:15 a.m. to 12:15 p.m.	***Managing Litigation***
	A panel discussion by attorneys and claims managers of various methods insurance companies and law firms are using to manage litigation costs and expenses, including new technology for more efficient communication between insurers and their attorneys.
10:15 a.m. to 12:15 p.m.	***Workers Compensation Breakout***
	How to terminate benefits
12:15 to 1:15 p.m.	Beverage Break

SCDTAA Joint Meeting in Asheville Same Date as Bele Chere

Bele Chere is a community celebration held the last full weekend in July.

Since 1979, it has been a three-day extravaganza of music, food, fun, architecture events, and children's activities. Fun for the entire family!

You only have to visit Asheville, North Carolina, to realize why the festival was named "BELE CHERE."

Loosely translated into modern French, "Bele Chere" means "Beautiful Living."

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

JULY 28 & 29, 1995

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

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

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

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

For more information call the Bele Chere Information Line at (704) 253-1009.

Produced by: Community Volunteers, Downtown Development, and The City of Asheville.

JOINT MEETINGS OF SCDTAA AND S.C. CLAIMS MANAGERS ASSOCIATION

The joint meeting of SCDTAA and the Claims Management Association of SC will be held July 27, 1995 - July 29, 1995 at the Grove Park Inn in Asheville, North Carolina. This year we have arranged a return to Deerpark for Friday night dinner, to be followed by an optional Candlelight Tour of the Biltmore. We had this type of social event several years ago with great success. We are planning 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 is included on page 17.

SCDTAA Joint Meeting

July 27-29, 1995

Grove Park
Asheville,
North Carolina

1995 HEMPHILL AWARD
Call for Nominations

CRITERIA

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

By Noon on Wednesday, July 26, 1995
Clip and Send to: SCDTAA, 3008 Millwood Avenue, Columbia, SC 29205 or FAX 803-765-0860

I NOMINATE _____

OF THE FIRM OF _____

_____

_____

CITY AND STATE _____

BECAUSE _____

_____

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_____

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_____

(ATTACH A SHEET OF PAPER IF NECESSARY)