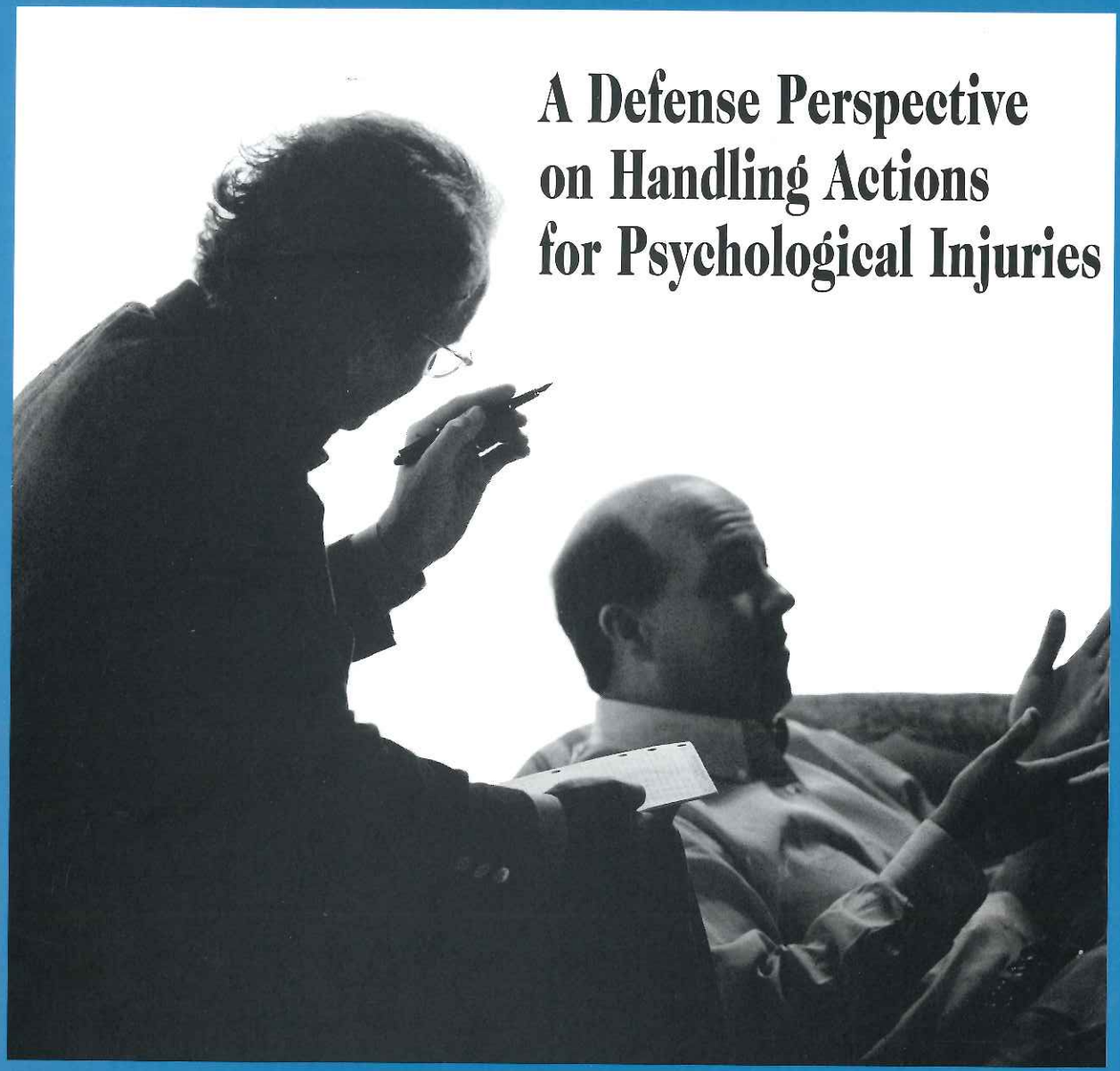
S.C. Defense Trial Attorneys' Association

Volume 24 Number 4 • Fall, 1996

The DefenseLine



A Defense Perspective on Handling Actions for Psychological Injuries

Also Inside:

- Removal and the "Sham Defendant"
- Bad Faith Follow-Up
- Annual Meeting Update

The DefenseLine

Ten Years Ago

The Defense Line reported on the outstanding joint meeting in Asheville from July 24-26. The EDDIE BYRD TRIO from the Summit Club entertained the group at the Grove Park Thursday evening for dinner and dancing. The group enjoyed a special treat at the Biltmore Estate on Friday. After dining at the Deer Park Restaurant, there was a candlelight tour of the Biltmore House with musical presentations in various rooms.

The 1986 Annual Meeting was being planned for October 30-November 2 at the Cloister, Sea Island, Georgia.

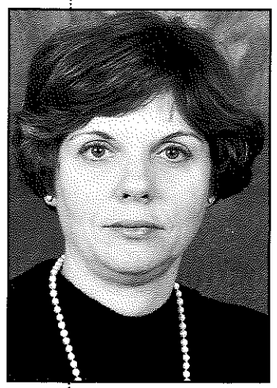
President GENE ALLEN reported that the Executive Committee was considering a proposal to offer membership in the Association to a large number of labor lawyers in South Carolina. He also pointed out that South Carolina Defense Attorneys' Association was an active member of the South Carolina Civil Justice Coalition.

GLEN ABERNATHY, Chairman of the Dean Search Committee for the Department of Government and International Studies, University of South Carolina, was seeking recommendations for a law school dean to replace HARRY M. LIGHTSEY, JR. who had resigned to serve as president of the College of Charleston.

Twenty Years Ago

JACKSON L. BARWICK, JR., President Elect of the South Carolina Defense Attorneys Trial Association was the delegate representing our association at the Ninth National Defense Conference of Local Defense Associations sponsored by the Texas Association of Defense Counsel in San Antonio, Texas in March, 1976. Our association was again honored for outstanding performance by the Defense Research Institute. The annual joint meeting of the South Carolina Defense Attorneys' and South Carolina Association of Claims Managers was held August 20-21 at the Landmark Hotel at Myrtle Beach, South Carolina. DEXTER POWERS, President of Defense Attorneys and J.W. DERRICK, President of the Claims Managers Association, reported an excellent turn out and a most instructive educational program.

President's Letter



The Annual Meeting of the South Carolina Defense Trial Attorneys' Association will be November 7-10 at the Ritz Carlton, Buckhead in Atlanta, Georgia. Mills Gallivan and Mark Phillips have worked very hard on both the meeting program and an excellent complement of social and recreational activities. The eyes of the world focused on Atlanta this summer, and I am looking forward to enjoying this exciting city in the company of my favorite people, South Carolina's lawyers and judges. Please come join us in Atlanta.

I attended, along with many of the officers and members of the Executive Committee, the DRI annual Defense Leaders Regional Meeting. The focus of the morning session was technology. DRI has developed a web page and entered into a contract with a company to offer its services to DRI member firms. The technology consultant, William Ives, impressed all of us with the realities of communication by way of the Internet. David Dukes spoke on technology in the courtroom, and we were able to see some computer tools actually used in a case. For many of us the technology demonstrations in the past have been very abstract. This setting provided a great opportunity for the asking of questions and the actual chance to see the computer tools used by both sides.

Much of the seminar in Atlanta will focus on technology. For those of us who have depended upon our children for programming our VCRs and operating our computers, this seminar will hopefully introduce the concept of computerization as a tool rather than a solution. For those of us already communicating using the Internet and using a computer in our day to day practice, this program will open new approaches to using this practice tool on which we have grown to depend. I enjoy the luxury of being able to communicate via E-mail from my home computer or from a laptop no matter where I am. I know that computer generating is faster for me than dictating and proofing most documents. I am convinced that we all are going to be practicing with a PC on our desk. Our clients are going to demand it, and the restraints imposed upon us by the insurance industry are going to require it. Several other defense attorneys' associations have an annual technology seminar. They invite a wide range of vendors and consultants and require them to provide hands-on demonstrations. We are going to look at this issue and would appreciate your opinions whether this would be of interest to you.

I have enjoyed the opportunity to serve as your President this year. It has been wonderful serving as the president of a group of people who are intelligent, hard working, and committed. I have worked very hard to counteract the negative image the media portrays of lawyers. When I became an officer for this group, one of the circuit court judges was heard to say that he was not surprised that our group was willing to elect a woman to serve as an officer but was surprised to learn that they had elected someone from Cherokee County. I do not see myself as a trailblazer, but rather as someone who has managed to locate a group of peers who deal with others in a professional matter.

Annual Meeting Update

The Twenty-Ninth Annual Meeting of our Association will be held during the weekend of November 7-10 at the Ritz Carlton Buckhead Hotel in Atlanta. As always, South Carolina's state and federal judiciary will be invited to join us.

Some special entertainment plans have been arranged for this year's meeting. We will all enjoy the elegance of the Ritz Carlton, the entertainment and dining opportunities in Atlanta, the cocktail receptions, and the golf and tennis tournaments. We will be serenaded by Bill Pinckney and the Original Drifters during the dinner-dance on Saturday night, November 9.

The educational program is particularly exciting. Charles M. Shaffer, Jr., a King & Spaulding partner, will speak on his role as a member of the Olympic Organization Committee. Much of Friday's program will be devoted to the use of technology in court rooms and in litigation management. Chief Justice Finney is scheduled to address the group as well as panels of state and federal judges. Dean Harry Lightsey will be giving the ethics presentation. This year's program will include break-out sessions for workers' compensation and employment law specialties. Also this year, we will offer a seventh CLE hour via videotape.

The Ritz Carlton's reservation deadline is October 14, 1996. We look forward to having you at the annual meeting.

South Carolina Defense Trial Attorneys' Association Annual Meeting

November 7-10, 1996
Ritz Carlton, Atlanta, Georgia

Tentative Agenda

Thursday, November 7, 1996

3:00 to 5:00 pm	Executive Committee Meeting
3:00 to 6:30 pm	Registration
4:00 to 6:00 pm	Overtime-Video Replays of Joint Meeting Ethics Program
5:00 to 6:00 pm	Nominating Committee Meeting
7:00 to 8:00 pm	Welcome Reception
	DINNER ON YOUR OWN

Friday, November 8, 1996

8:00 amto 12 noon	Late Registration
8:00 to 9:00 am	Coffee Service
8:30 to 8:45 am	Welcome and Announcements - *Kay Crowe, SCDTAA President*
8:45 to 9:15 am	*Charles M. Shaffer, Esq.* - Olympic Organizer
9:15 to 9:30 a.m.	State of the Judiciary - *Chief Justice Finney*
9:30 to 9:45 am	Coffee Break
9:45 to 11:45 am	Computer and Technology Presentations
9:45 to 11:00 am	A. Computerized Case Management *Daniel B. White, Esq.; David K. Whatley, Esq.; A. Lynn Schefsky, Esq. - Dow Chemical Company; Paul Johnston, ELF Systems; Scott Lloyd, Esq. - ELS Systems*
11:00 to 11:45 am	B. Computers in the Courtroom *David Dukes, Esq.*
10:00 to 11:30 am	Spouses' Program - "Christmas Book" Gift Giving Presentation by Neiman Marcus
11:45 am to 12noon	Judicial Panel - Computer Integrated Courtroom
1:30 pm	Golf Tournament - Southerness Golf Club *Buses depart at 12:30 p.m.*
2:00 pm	Tennis Tournament *Buses depart at 1:15 p.m.*
7:00 to 8:00 pm	Reception
	DINNER ON YOUR OWN

Saturday, November 9, 1996

8:00 to 9:00 am	Coffee Service
8:30 to 8:50 am	SCDTAA Annual Business Meeting
8:50 to 9:00 am	DRI Report
9:00 to 10:00 am	Ethics - Topic to be Announced *Dean Lightsey*
10:00 to 10:15 am	Coffee Break
10:15 to 11:00 am	CLE - Topic Speaker - TBA
11:00 to 11:15 am	Judicial Panel
10:15 to 11:15 am	Workers Compensation and Employment Law Breakout
11:15 am to 12:15 pm	Keynote Speaker - TBA
	AFTERNOON ON YOUR OWN
7:00 to 8:00 pm	Cocktail Reception
8:00 pm to 1:00 am	Banquet and Entertainment by *Bill Pinckney and the Original Drifters*

Sunday, November 10, 1996

8:30 to 10:30 am	Overtime - Video Replays of Joint Meeting Ethics Program
10:30 am to 12 noon	Farewell Reception Honoring *President Kay G. Crowe*

A Defense Perspective on Handling Actions for Psychological Injuries

Darryl D. Smalls
Nelson, Mullins, Riley & Scarborough

A. Introduction

Psychological injury is an abstract phenomenon, and one that can be difficult to defend. Yet claims that allege anxiety, depression, memory loss, personality disorder and other psychological injuries are becoming more and more common, as plaintiffs and claimants expand the technical bases on which they seek legal redress in personal injury actions and workers' compensation claims. It should come as no surprise that claims of psychological damages are a common, and often major, element in nearly every legal action involving a physical injury, and in many cases in which there is no bodily impact.[1]

The trend toward recognition of these mental-mental cases in workers' compensation cases began in South Carolina with *Stokes v. First Nat'l Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991). In *Stokes*, the court extended the reasoning of the heart attack and stroke cases to include mental injuries caused by purely mental or psychological stimuli if it results from an unusual and extraordinary condition of employment. The South Carolina General Assembly recently enacted legislation that defines stress in workers' compensation cases. That statue provides:

> "Stress arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury is not a personal injury unless it is established that the stressful employment conditions causing the mental injury were extraordinary and unusual in comparison to the normal conditions of the employment."

S.C. Code Ann.§ 42-1-160 (1996).

The enhanced recognition of psychological harm as a legitimate injury is demonstrated by the growing number of awards for emotional distress in a wide variety of cases. These claims have achieved dizzying numbers and factual scope. Psychological disorders have become one of the fastest growing illnesses in recent years[2]. For example, the National Council on Compensation Insurance reported that of 100,000 occupational disease claims filed in 1985, 15 percent were purely stress related[3]. This figure represents an increase of more than 30 percent over the previous year. The Council also reported that stress claims accounted for 14% of all claims by the end of the 1980's[4].

Examples of the wide array of claims and civil actions include emotional distress resulting from a job transfer[5], demotion owing to poor performance[6] and suicide conceivably related to a work-related mental disorder[7]. Significant compensation has also been awarded in personal injury cases for a variety of "injuries," including a landlord's failure to address repeated health-related violations,[8] a First Amendment claim based on a high school teacher's exposure to prayers in two school holiday assemblies[9] and racial jokes, slurs and comments in the workplace.[10] A final area of litigation in which significant damage awards for purely psychological injuries are beginning to be seen is toxic torts. A variety of current and future "fear"-related claims associated with exposure and possible exposure have been brought with varying levels of success.[11]

B. Classifications of Psychological Injury

Broadly speaking, there are two general areas of psychological injuries, so far as legal claims are concerned: organically-based injuries that are the result of some damage to the body, and emotional illnesses with no observable change in the organic structure of the brain.

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-R) which is the compendium of psychological diagnoses, identifies more than 200 illnesses grouped into more than 15 major classifications. Although there are dozens of emotional illness diagnoses, there are two families of disorders that account for a majority of litigation claims. They are the same illnesses that occur with the highest frequency in the non-injured population. The first of these is the anxiety group of disorders, such as phobic disorders, anxiety neuroses and Post-Traumatic Stress Disorder.

The second family of emotional illnesses that are commonly found in litigation are known as the affective or depressive disorders. Defense counsel will most frequently encounter two diagnoses: major depressive episodes and dysthymia. Major depression is generally a transient state of deep sadness and despair which can be life threatening. Dysthymia is chronic, on-going loss of happiness. It is this neurotic sadness that appears in many wrongful death cases.

All legitimate diagnoses of psychological conditions or disorders must meet the diagnostic criteria of the DSM-IV-R. There must be sufficient and reliable evidence of symptoms that meet the requirements of a particular diagnosis identified in the DSM-IV-R.

C. Defending Psychological Injury Claims

Defending claims of psychological injury has a positive and negative side. The negative side is that claims of psychological injury have the potential to add tens, sometimes hundreds of thousands of dollars to the cost of compensating a plaintiff with, at best, moderate physical injuries or disabilities. The positive side is that no matter how horrible the injury or vague and overwhelming the emotional complaints, psychological injury claims nearly always are defendable to some degree.

First, plaintiffs and claimants rarely cover all of the relevant injury factors when formulating their proof of damages. Second, there are usually mitigating factors. Third, the plaintiff and claimant's psychological and neuropsychological injury experts almost always commit omissions and errors in assessing causation and damages.

1. Challenging Claimant's Proof of Damages

First of all, the defense should approach every claim of psychological injury with a healthy amount of skepticism, challenging every assertion of damages and causation by closely and competently scrutinizing the reliability, admissibility and legal sufficiency of the asserted proof of evidence. A plaintiff's case for damages usually rides solely on a treating therapist. If one neutralizes or discredits the expert, the claim for damages is seriously jeopardized, if not completely lost. There may be aspects of an expert's qualifications that are vulnerable. If this information can be effectively exposed, the expert's testimony may be barred or severely restricted by the court. At the very least, effective exposure of weaknesses or questionable aspects of an expert's background will raise questions in the mind of the court about competency and creditability.

The two primary means of attacking the claimant's experts are: (1) assessing their credibility and foundation, and (2) asking the right questions during depositions.

a. Assess Credibility and Foundation

The first method of attacking the claimant's expert is to thoroughly analyze the written documents representative of or produced by the expert in order to assess credibility and foundation.[12] This objective can be accomplished by closely scrutinizing the expert's vitae and any work product, including but not limited to reports, correspondence, psychological test data (score sheets, interpretive summaries), billing statements, and treatment notes. In the case of a treating professional, this analysis is particularly important because many mental health therapists become so involved in the treatment of their patients that they develop an excessively subjective bias.

Evaluating the expert's foundations for conclusions and recommendations regarding claims of psychological injury is a critical part of the defense's strategy. If the expert's methods, theoretical assumptions or assessment interpretations can be effectively criticized, the opinions and conclusions typically fall like a house of cards.

Defense counsel should assume that there are errors and omissions committed by the claimant's experts. Often the issue for the defense is not, "Are there gaps or weaknesses in the claimant's expert opinion?" but, "What are they and how seriously do they affect the claimant's proof of damages?"

b. Deposition Questions

The second method of attacking the plaintiff's expert is through deposition questioning, the

"In the field of workers' compensation, emotional distress claims have achieved dizzying numbers and factual scope. Psychological disorders have become one of the fastest growing illnesses in recent years."

Continued on page 8

Continued from page 7

value of which cannot be overestimated.[13] The defense will maximize the deposition process if a percentage of questions are reserved for five standard areas of inquiry. These are (1) specific attention to exploring the qualifications of the witness as they relate to the expert's role in the case or the methods that have been employed; (2) careful scrutiny of the expert's assessment procedures and methods, if any; (3) identification of any other bases for opinions; (4) a thorough investigation of the expert's knowledge of the cause of action, the claimant's history, and (5) a complete analysis of the expert's findings and conclusions.[14]

The last area is probably the most important since it entails careful exploration of the expert's diagnosis, prognosis, statement of causation, any disability rating, and sometimes any recommendations for future health care needs. The defense should press the expert for a complete description of the diagnosis using the five part multi-axial system of the DSM-IV-R. A common error among claimant's experts is to provide only a diagnosis on Axis I, which covers developmental and psychological disorder, and to omit consideration of the other four axes. In fact, many times the expert cannot provide a full multi-axial diagnosis even when challenged to do so in a deposition, because the expert has failed to obtain enough information about the claimant's life and functioning. Effective deposition questioning will inevitably reveal that the expert has failed to consider and rule out numerous alternative causes or factors in the claimant's life that could account for the complaints.

2. Independent Psychiatric-Psychological Examination

A final key element in the successful defense and limitation of a claimant's claim of psychological damages is recognizing those cases in which an independent psychiatric, psychological or neuropsychological examination (IPE) is required.[15] An independent examination usually is needed when an analysis of the claimant's proof of damages is erroneous or substandard or other causes or potential causes for the claimant's complaints have not been explored and identified. The purpose of the IPE should be to develop two essential types of information: diagnostic data and causal data.

Practioners in this area also need to be aware that the Court or the Commission may not allow such examinations when the plaintiff or the claimant won't voluntarily agree to one.

a. Diagnostic Data

Diagnostic data is the current and past life history information and functioning that describes signs, symptoms and behaviors characteristic of diagnosable psychiatric disorders.[16] This information should be presented in the form of a diagnosis or diagnoses utilizing the multi-axial systems of the DSM-IV-R. A multi-axial evaluation requires that a cause be assessed on each of five "axes", each of which refers to a different class of information.

It is not uncommon for reports containing a diagnosis on Axis I only and little information that, when compared to the criteria in the DSM-IV-R, would meet the requirements for the diagnosis stated. Probably the most common example of this substandard practice is the diagnosis of Post-Traumatic Stress Disorder (PTSD) in almost any personal injury case involving physical injury. Not only do many reports not contain sufficient information to meet the criteria of PTSD on its face, but often the information that is purported to support the diagnosis is unreliable or poorly developed.

b. Causal Data

Too often mental health experts are somewhat loose in adhering to both the evidentiary basis and form of their conclusions. For example, it is not uncommon for a psychiatric examination report of an expert to consist of two to three pages, half of which is devoted to the claimant's mental status and selected history, and concluding with a single diagnosis on Axis I. This is unacceptable and unreliable. Any IPE assessment of a claim of psychological injury should provide reliable information regarding or supporting four essential areas: pre-existing history, post cause of action history, alternative causes for the claimant's claims, and a multi-axial description or diagnosis of the claimant's condition (diagnosis)[17].

One of the most common errors or omissions found in the evaluation of claims of psychological injury is the lack of essential information about a claimant's history and level of functioning. Without this information, any conclusion is likely to be unreliable with regard to questions of diagnosis and causation. An objective of any defense IPE should be to develop an accurate, comprehensive understanding of the claimant's history and functioning from two perspectives: prior to and since the cause of action.

Experts must also identify potential alternative causes of mental problems. All alternative causes must be ruled out before an expert can testify to a reasonable degree of professional certainty that a given event caused the plaintiff's psychological problems.

The following is a sample of the potential causes of psychological illness or symptoms that an expert should consider and, where appropriate, rule-out before rendering an opinion about causation[18]:

- Pre-existing medical problems (personal and familial)
- Pre-existing psychiatric problems (personal and familial)
- Pre-existing exposure to chemical fumes and household toxins
- Personality disorders
- Genetic history
- Medication effects
- Stress (academic, employment, financial, interpersonal, etc.)
- Cultural factors
- Environmental conditions
- Family dysfunction
- Malingering and/or symptom exaggeration
- Personal habits, such as diet or nutritional factors, obesity, smoking, alcohol and substance abuse, caffeine
- Infections
- Litigation stress

The final part of any defense IPE is the diagnostic statement that answers the question: Do the claimant's complaints rise to the level of a cognizable psychological condition or disorder?

D. Conclusion

Psychological injury claims often are misunderstood, and the defense sometimes does not prepare to meet them properly. Yet they are defendable. Most symptoms of emotional harm are subjectively reported by the plaintiff and are then molded to fit a broad system of diagnostic categories. The abstract quality of mental processes and the limited number of objective measurement techniques have transformed an element of damages to the basis for primary financial recovery. The successful challenge to claims of psychological injury is an aggressive procedure that requires defense counsel to be informed and active during all phases of the litigation.

FOOTNOTES

1. *See* Steven B. Bisbing, "Challenging Psychological Damages Claims in Civil Litigation, "*Defense Counsel Journal*, July 1992-(Herein after Challenging Psychological Damages).
2. Michael J. McCarthy, "Stressed Employees Look for Relief in Workers' Compensation Claims," *Wall Street Journal*, April 7, 1988, at 31.
3. Dentzer, McCormick & Tsurouka, "A Cure for Job Stress," *NEWSWEEK*, June 2, 1986, at 45-47.
4. Michael J. McCarthy, "Stressed Employees Look for Relief in Workers' Compensation Claims," *Wall Street Journal*, April 7, 1988, at 31.
5. *Kelly's Case*, 17 Mass. App. Ct. 727, 462 N.E.2d 348 (Mass.App.Ct. 1984).
6. *Graves v. Utah Power & Light Co.*, 713 P.2d 187 (Wyo. 1986).
7. *Hall v. State Workmen's Compensation Comm'r*, 172 W.Va. 87, 303 S.E.2d 726, 730 (W.Va. 1983).
8. *Simon v. Solomon*, 385 Mass. 91, 431 N.E.2d 556 (Mass. 1982).
9. *Abramson v. Anderson*, No. 81-27W (D. Iowa 1982).
10. *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 F.2d 1173 (Wash. 1977).
11. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982).
12. See "Challenging Psychological Damages", at 362.
13. An excellent collection of deposition questions are found in Peter B. Silvain, *THE DEFENSE DEPOSITION ATLAS*(a compendium of deposition questions developed from the analysis of over 500 psychological and neurological injury cases).
14. See "Challenging Psychological Damages", at 362.
15. See "Challenging Psychological Damages", at 363.
16. See "Challenging Psychological Damages", at 363.
17. See "Challenging Psychological Damages", at 364.
18. See "Challenging Psychological Damages", at 365.

"The successful challenge to claims of psychological injury is an aggressive procedure that requires defense counsel to be informed and active during all phases of the litigation."

BAD FAITH FOLLOW-UP:
Tort Action Not Dependent On Contract Action

Henry J. White
Sinkler & Boyd

In the last issue of *The Defense Line*, I discussed the relationship between claim coverage and claim handling in bad faith cases. After the last issue was published, our Supreme Court decided *Tadlock Painting Co. v. Maryland Casualty Co.*, Op. No. 24465 (S.C. Sup. Ct. Filed July 15, 1996) (Davis Adv. Sh. No. 19 at 13). The case presented a certified question from the Fourth Circuit Court of Appeals. In *Tadlock* the Supreme Court held that an insured can bring a bad faith action even if the insurance company has not breached any terms of the policy. Thus, the insurance company can be right that it owes no insurance benefits under the policy, but still lose the bad faith action.

In *Tadlock*, Maryland Casualty issued a commercial general liability policy to Tadlock Painting Company. Tadlock had damaged approximately ninety cars with paint overspray while performing an industrial painting job at a site owned by Cargill, Inc. The overspray had fallen on the cars of the employees of Cargill. Tadlock notified Maryland Casualty of the claims, and there followed discussions about whether the claims were covered under the policy. Maryland Casualty then sent a letter "exercising its discretionary right to negotiate and settle the claims under a reservation of rights and would seek reimbursement for the deductible after negotiations were completed." *Id. at 14.*

A dispute arose about whether the deductible applied to each claim or was a one-time-only charge. The District Court found that the deductible applied to each claim, and Tadlock did not appeal that issue. As a result of the deductible dispute, Maryland Casualty refused to "proceed further negotiating and settling the claim until [Tadlock] acknowledged its interpretation of the deductible provision as correct." *Id.* Tadlock refused to accept Maryland Casualty's interpretation; thus, Maryland Casualty refused to process the claims. Tadlock then proceeded to settle each of the claims for under the deductible amount. Tadlock then brought a bad faith action. The District Court granted summary judgment on the deductible issue, agreeing with Maryland Casualty that the deductible applied to each claim. *Id. at 14.*

The jury returned a verdict for actual and punitive damages against Maryland Casualty, which appealed to the Fourth Circuit. The Fourth Circuit certified a question to the South Carolina Supreme Court. The Court held that Maryland Casualty had a clear obligation under South Carolina law to process third party claims in good faith. But more significantly, the Court held that an insured can bring a bad faith action even if the insurance company did not breach any of the express provisions in the policy. The court noted that it has "consistently explain[ed] that a bad faith action exists separately from an action in contract." *Id. at 16.*

Our Supreme Court agreed with the reasoning of the Arizona Supreme Court that "the benefits due an insured are not limited solely by those expressly set out in the contract." *Id. at 17. Tadlock*, however, does not discuss what was done in bad faith. It does not articulate what the insurance company did wrong. In contrast, the Arizona Supreme Court in *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P. 2d 1265 (Ariz. 1992) clearly stated that the alleged faith was that the insurance company had set up a sham claim review procedure. 838 P. 2d at 1267. Maryland Casualty was ultimately proven correct that it had no contractual obligation to process the Cargill claims because they were all under the deductible that applied to each claim. Maryland Casualty, however, did attempt to coerce its insured into adopting its interpretation of the deductible provision, an interpretation that was ultimately correct. If it had simply stated its position, would that have been acting in bad faith?

Tadlock makes defending bad faith cases more difficult. Defense counsel will not be able to breathe a sigh of relief when the jury returns a defense verdict on the contract cause of action. Plaintiffs can have no policy coverage and still convince a jury that the claim was not processed in good faith. Bad faith claim handling may be so ill-defined that any delay or irregularity in claim handling may support a finding of bad faith.

In bad faith claims where there has been no breach of contract the real battleground will probably be the area of damages. In *Tadlock,* the plaintiff convinced the jury that it lost business as a result of the delay that resulted from the dispute with the insurance company. If defense counsel prevails on the contract issue, he or she should focus on showing that no or little damage resulted form the alleged bad faith.

Counsel defending bad faith claims will have to analyze the contract and bad faith claims independently. While they can, and usually will, overlap, plaintiffs in South Carolina need not prevail in the contract claim in order to prevail in the bad faith claim. However, most bad faith cases will involve clearly covered claims that were poorly processed.

"In *Tadlock* the Supreme Court held that an insured can bring a bad faith action even if the insurance company has not breached any terms of the policy."

South Carolina Well Represented at IADC

Attending the 1996 Annual Meeting of the International Association of Defense Counsel held at the Greenbrier June 27th were the following South Carolinians: From Columbia, JACK and NAN BARWICK, GLENN and ANN BOWERS, DAVID and KAREN DUKE, CARL and DIANNA EPPS, DAVE and POLLY HOWSER, LANA and ANNE SIMS, STEVE and GAIL MORRISON, and GEORGE and PHYLLIS BEIGHLEY. From Charleston, MIKE and JUDY BOWERS, WILL and ANN CLEVELAND, ALLEN and WENDY GIBSON, BEN and ELEANOR MOORE, and STEVE and DENISE DARLING. From Greenville, BILL and BETH HAYGOOD and from Spartanburg, SPENCER and ALLENE KING.

WILL CLEVELAND was co-chairman for the program. STEVE MORRISON was one of the speakers.

Trial Academy a Success

The Sixth Annual SCDTAA Trial Academy was held at the University of South Carolina School of Law August 14 through 16, 1996. The program was well attended by 24 eager, enthusiastic and energetic young lawyers. The Association was fortunate to have fine lawyers from throughout the state serving as speakers and breakout session leaders. A program highlight was Associate Justice Jean Toal's presentation on "Preserving the Appellate Record." The Academy concluded with six mock trials on Friday presided over by Judges David Norton, Joe McCrorey, Bill Howard, Don Rushing, Tommy Cooper and Henry Floyd.

Once again the Academy was graced with full participation and a maximum quota of students. Serving as chairs for the Academy this year were Steve Darling of Sinkler & Boyd in Charleston, Sam Outten of Leatherwood, Walker, Todd & Mann in Greenville and John Bell of Nelson, Mullins, Riley & Scarborough in Columbia. Special thanks to Chris Malseed of John Bell's office and Pat Horn of the Association staff who spearheaded many of the logistical and administrative tasks. Plans are already underway for next year's Academy.

Removal to Federal Court and the "Sham Defendant"

James F. Rogers
Nelson, Mullins, Riley & Scarborough

I. Introduction

When a defense practitioner receives a case, one initial consideration is whether to litigate in federal or state court. If a defense practitioner is representing an out-of-state defendant, it may be advantageous to remove the case to federal court. In many instances, the plaintiff will have included an in-state party as a co-defendant. At first, a defense practitioner may determine that the case cannot be removed because the presence of the in-state defendant destroys complete diversity among the parties. Defense practitioners, however, should take a second look at removal, and not end their analysis of whether to remove a case merely because of the presence of a non-diverse co-defendant. The non-diverse party may be a "sham defendant" who was "fraudulently joined" so that the presence of the co-defendant will not bar removal.

This article analyzes how the sham defendant or fraudulent joinder doctrine may be used to remove an action when a non-diverse co-defendant is present. The article first sets forth the law regarding the sham defendant or fraudulent joinder doctrine, and then analyzes the two types of situations to which the doctrine has been applied. The article then examines what a district court may consider in making a determination of whether a non-diverse defendant was fraudulently joined. If a practitioner can successfully demonstrate to the court that a non-diverse co-defendant is nothing more than a sham defendant, the door to removal may be opened.

"The non-diverse party may be a "sham defendant" who was "fraudulently joined" so that the presence of the co-defendant will not bar removal."

II. The "Sham Defendant" or "Fraudulent Joinder" Doctrine

If a case is brought in state court and does not contain a federal question, it cannot be removed unless there is complete diversity among the plaintiff and all of the defendants.[1] A plaintiff wishing to litigate in state court often includes a resident defendant as a party in a lawsuit, thereby destroying complete diversity of the parties. The "sham defendant" or "fraudulent joinder"[2] doctrine provides an exception to this rule:

> "Fraudulent joinder" is a term of art, it does not reflect on the integrity of plaintiff or counsel, but is merely the rubric applied when a court finds that either no cause of action is stated against the non-diverse defendant, or *in fact* no cause of action exists.[3]

As noted in the above quotation, fraudulent joinder exists in two situations.[4] The first type of fraudulent joinder occurs when the plaintiff has no intention of pursuing a judgment against a resident defendant.[5] The second type of fraudulent joinder occurs when the plaintiff cannot prove any cause of action against the non-diverse defendant.[6] Each of these types of fraudulent joinder will be discussed below.

III. Plaintiff has No Intention of Pursuing a Judgment Against a Resident Defendant

This type of fraudulent joinder primarily encompasses two situations: (1) the plaintiff fraudulently pleads jurisdictional facts in order to subject the non-diverse defendant to the jurisdiction of the state court[7] or (2) the plaintiff simply does not intend to pursue a judgment against the non-diverse defendant.[8] Fraudulently pleading jurisdictional facts primarily has arisen in instances in which the plaintiff named various fictitious in-state defendants, such as "John Doe" defendants, to defeat diversity.[9] The 1988 Amendment to the removal statute requiring federal courts to disregard the citizenship of fictitiously named defendants[10] should render the practice of naming fictitious parties to defeat diversity obsolete.[11] This type of fraudulent joinder also has been applied to situations in which the plaintiff has no intention of pursuing a judgment against a viable in-state defendant, but names that party as a defendant to defeat diversity.[12] Fraudulent joinder of this nature is particularly flagrant if a "deal" has been struck between the plaintiff and the co-defendant.[13]

IV. Plaintiff Cannot Prove any Cause of Action Against the Non-Diverse Defendant

The second type of fraudulent joinder occurs when the plaintiff simply cannot recover against the in-state defendant based on the plaintiff's allegations. To determine whether a plaintiff has not stated a cause of action against a sham defendant, a federal court must find that "there is no arguably reasonable basis for predicting that state law might impose liability on the resident defendant under the facts alleged."[14] If a possibility exists that the plaintiff is entitled to relief under any theory alleged, the doctrine of fraudulent joinder is precluded.[15] The standard for finding fraudulent joinder has been held to be greater than the standard for a Rule 12(b)(6) motion to dismiss.[16]

This type of fraudulent joinder has been applied in cases in which the plaintiff simply cannot recover against in-state defendant under the theories alleged.[17] This type of fraudulent joinder could also be applied to cases in which the applicable statute of limitations or statute of repose would bar an action against the non-diverse co-defendant.

V. Proving Fraudulent Joinder

The petitioning defendant has the burden of proving that the plaintiff fraudulently joined a resident defendant.[18] Indeed, this burden is a "heavy" one.[19] Satisfying this burden of proof may be difficult, but it is not an insurmountable task if a practitioner properly prepares and supports a petition for removal.[20] The materials that a practitioner can include in a removal petition vary from jurisdiction to jurisdiction.[21] The Fourth circuit has adopted an approach which allows a district court to "pierce the pleadings", *i.e.,* to consider the entire record set forth before the court, in determining whether a cause of action exists against a non-diverse defendant.[22] In the circuits which allow "piercing the pleadings," courts have reviewed both affidavits and deposition testimony in determining if a cause of action exists against a resident defendant.[23]

VI. Conclusion

Practitioners representing an out-of-state defendant should evaluate the possibility of removing a case in which a non-diverse co-defendant is present. If a practitioner can demonstrate that the plaintiff has no intention of recovering against that defendant or no cause of action exists against the non-diverse defendant, the door to removal may be opened under the sham defendant doctrine. Although removing a case pursuant to this theory requires the removing party to satisfy a heavy burden, a practitioner may be successful in defeating a motion to remand if the applicable laws and facts are properly analyzed in the brief window in which removal decisions must be made.

---

[1] *See* 28 U.S.C. §1441(b)(1988); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

[2] The sham defendant doctrine has been recognized by all federal circuits. *See Brusseau v. Electronic Data Sys. Corp.*, 694 F. Supp. 331 (E.D. Mich. 1988); *Cocot v. Alliance Mach. Co.*, 651 F. Supp. 226 (S.D. Ill. 1986); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3rd Cir. 1990) *cert. denied*, 111 S.Ct. 959 (1991); *Aids Counseling and Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000 (4th Cir. 1990); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981); *Scientific Computers, Inc. v. Educata Corp.*, 596 F. Supp. 1290 (D. Minn. 1984); *Quinn v. Post*, 262 F. Supp. 598 (S.D.N.Y. 1967); *El Gran Video Club Corp. v. E.T.D.,*

Continued on page 14

Continued from page 13

Inc., 757 F. Supp. 151 (1991); *Anderson v. Home Ins. Co.*, 724 F.2d 82 (8th Cir. 1983); *Saylor v. General Motor Corp.*, 416 F. Supp. 1173 (E.D. Ky. 1976); *Dodd v. Fawcett Publications, Inc.*, 320 F.2d 82 (10th Cir. 1964); and *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir. 1989).

[3] *AIDS Counseling and Testing Centers*, 903 F.2d at 1003 (citing *Lewis v. Time, Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979)).

[4] *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993) (discussing two types of fraudulent joinder); *Katz v. Costa Arnatori, S.P.A.*, 718 F. Supp. 1508, 1510 (S.D. Fla. 1989) (same); Note, James F. Archibald, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 Va. L. Rev. 1377, 1378 (1992) (same).

[5] *See generally* 1A J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice*, ¶ 161 [2] (3d. ed. 1989) ("whether the joinder is fraudulent or not is said to depend on whether the plaintiff really intended to obtain a judgment against [the resident] defendants.").

[6] *See, e.g., Auto Ins. Agency v. Interstate Agency, Inc.*, 525 F. Supp. 1104, 1106 (D.S.C. 1981) (a defendant is fraudulently joined if "there is no arguably reasonable basis for predicting that state law might impose liability on the resident defendant under the facts alleged."); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3723 (2d ed. 1985) ("a [resident] party will be considered fraudulently joined when plaintiff had not stated a claim for relief [against that party]....").

[7] *See, e.g., Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440 (11th Cir. 1983) (fraudulent joinder alleged to have existed when plaintiff alleged various causes of action against fictitious resident defendant in his complaint).

[8] *See, e.g., Draper v. Castle Home Sales, Inc.*, 711 F. Supp. 1501 (E.D. Ark. 1989) (removal allowed when non-diverse defendant was in Chapter 11 bankruptcy and all claims against it were discharged).

[9] *See, e.g., Moore's Federal Practice*, ¶ 0.161[2], at 272; *Johnson v. Mutual Benefit Life Ins. Co.*, 847 F.2d 600 (9th Cir. 1988); *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812 (5th Cir. 1993).

[10] 28 U.S.C.A. § 1411 (a) ("For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.")

[11] *See Krusco v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1424-1425 (9th Cir. 1989).

[12] *Rose v. Giamatti*, 721 F. Supp. 906 (D.C. Ohio 1989) (joinder of the Cincinnati Reds in a dispute with their field manager and the baseball commissioner was fraudulent when the plaintiff's complaint specifically stated there had been no wrongdoing on the part of the Reds); *Heniford v. American Motor Sales Corp.*, 471 F. Supp. 328, 333 (D.S.C. 1979).

[13] *Dinatale v. Subaru of Am.*, 624 F. Supp. 340 (E.D. Mich. 1985) (fraudulent joinder found when the plaintiffs entered into an agreement with a resident defendant to keep that defendant in a case, but not to collect any judgment from it).

[14] *Auto Ins. Agency*, 525 F. Supp. at 1106 (D.S.C. 1981). *See also Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 60 (1990) (a party is fraudulently joined if under applicable state law, the plaintiff could not possibly recover against the party whose joinder is questioned); *Krusco v. International Tel. & Tel. Corp.*, 872 F.2d 1416 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990); *Bodine's Inc. v. Fed. Ins. Co.*, 601 F. Supp. 47 (N.D. Ill. 1984) (joinder is fraudulent when there is no "reasonable basis" to predict that state law might impose liability on the non-diverse defendant).

[15] *See Marshall*, 6 F.3d at 233 ("A claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted."); 14 Wright & Miller, § 3723, at 353 ("there need only be a possibility that a right to relief exists to avoid [fraudulent joinder]...."); *Workman v. National Supaflu Sys.*, 676 F. Supp. 690, 693 (D.S.C. 1987).

[16] *Brantley v. Vaughn*, 835 F. Supp. 258, 261-62 (D.S.C. 993) ("it is possible that a party is not fraudulently joined, but that the claim against that party ultimately is dismissed for failure to state a claim upon which relief may be granted.") (*citing Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3rd. Cir. 1992)).

[17] *See, e.g., Carriere*, 893 F.2d at 98 (removal allowed because plaintiff could not recover against co-employee, who was entitled to tort immunity under the applicable state workers' compensation scheme); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69 (7th Cir. 1992) (removal allowed because plaintiff could not establish any claim against non-diverse defendant); *Haines v. National Union Fire Insurance Company*, 812 F. Supp. 93 (S.D. Tex. 1993) (removal allowed because plaintiff's claim against non-diverse insurance adjuster for breach of good faith and fair dealing could not succeed since under Texas law, an insurer's duty of good faith and fair dealings does not extend to individual employees); *Wiacek v. Equitable Life Assurance Society*, 795 F. Supp. 223 (E.D. Mich. 1992) (removal allowed where non-diverse defendants were immune from tort liability under state law).

[18] *See generally Moore's Federal Practice* ¶0.161 [2], at 276 (3d ed. 1989); Wright & Miller, §3641, at 129 (2d ed. 1985).

[19] *Marshall*, 6 F.3d at 232 ("the burden on the defendant claiming fraudulent joinder is heavy"); *B., Inc.*, 663 F.2d at 549 ("the burden of persuasion placed upon those who cry fraudulent joinder is indeed a heavy one").

[20] *Moore's Federal Practice*, ¶0.161[2] at 272. Naturally, if the petitioning defendant fails to meet its burden of proof, a federal district court is required to remand the case, and has express statutory authority to grant attorneys' fees incurred as a result of an improper removal. *See* 28 U.S.C. §1447(c).

[21] Archibald, 78 Va. L. Rev. at 1378-79.

[22] *See Aids Counseling & Testing Centers*, 903 F.2d at 1004 (4th Cir. 1990). For other jurisdictions applying a "piercing the pleadings" approach, *see B., Inc.*, 663 F.2d at 549; *Dodd*, 329 F.2d at 85 *Lewis*, 83 F.R.D. at 460; *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989).

[23] *See, e.g., Brantley*, 835 F. Supp. at 262 (court considered affidavit of witness); *Beasley v. Goodyear Tire and Rubber Co.*, 835 F. Supp. 269, 270-71 (D.S.C. 1993) (court considered affidavit testimony of expert witness); *Heniford v. American Motors Sales Corp.*, 471 F. Supp. 328, 333 (D.S.C. 1979) (court considered affidavit of counsel); *Carriere*, 893 F.2d at 100 (court considered affidavit of witness); and *Le Blanc v. Chevron U.S.A.*, 715 F. Supp. 735, 736-37 (E.D. La. 1989) (court considered deposition testimony).

"If a defense practioner is an out-of-state defendant, it may be advantageous to remove the case to federal court."

Recent Order of Interest

State of South Carolina, County of Charleston, In the Court of Common Pleas
Mary Patricia Estes and Eugene B. Estes, Plaintiffs, vs. Bon Secours – St. Francis Xavier Hospital, Karen Katoski Turley and Baxter Healthcare Corp., Defendants

ORDER

Introduction

This matter is before the Court on Baxter Healthcare Corporation's (hereinafter "Baxter") Motion for Summary Judgment made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. After reviewing Baxter's Motion and accompanying Memorandum and the depositions of Francis Gendron taken on June 16, 1995, and February 2, 1996, as well as hearing oral argument from all parties, this Court grants Baxter's Motion for Summary Judgment for the reasons stated herein.

I. Background

This action was filed by the plaintiffs against Bon Secours – St. Francis Xavier Hospital ("St. Francis") and Karen Katoski Turley, a nurse employed by St. Francis, for injuries the plaintiffs allegedly received as a result of the plaintiff Mary Patricia Estes' (hereinafter "the plaintiff" if referred to individually) treatment at St. Francis on or about December 2, 1992. The plaintiffs alleged that during Mrs. Estes' hospitalization at St. Francis, a "Triple Lumen Catheter was inserted through the right subclavian vein, through and into the right atrium or ventricle" of her heart. The plaintiffs further alleged that on or about December 2, the defendants removed the caps from the catheter without inserting anything therein to prevent the entry of air, which led to a stroke causing, *inter alia*, permanent brain damage.[1]

In its defense, St. Francis identified Francis Gendron as its expert witness. Mr. Gendron, a self-entitled "clinical engineer" for Riverside Regional Medical Center in Virginia, testified at his first deposition that the cause of the plaintiff's stroke was air that entered the plaintiff not via the triple lumen catheter in her chest but via an infusion pump manufactured by Baxter Healthcare Corporation that was being used to infuse fluids into the plaintiff's arm. Subsequent to that deposition, the plaintiffs filed an Amended Complaint on July 26, 1995, and named Baxter Healthcare Corporation as a defendant.

The subject of this suit against Baxter Healthcare Corporation ("Baxter") is the design and manufacture of the Baxter Flo-Gard 6200 Infusion Pump. Because the issues of defect, negligence and medical causation of the plaintiff's stroke will not be within a jury's common knowledge and experience, expert testimony is necessary. *Huggins v. Brown*, 199 S.E. 903, 904 (S.C. 1938); 31A Am Jur 2d, *Expert and Opinion Evidence* §§ 44 and 45. In support of their position on these issues, the plaintiffs have proffered only the opinion of Francis Gendron. Moreover, at oral argument, all parties agreed that the only existing evidence that would potentially allow the plaintiffs to survive Baxter's Motion for Summary Judgment is the testimony of Francis Gendron. Thus, because this Court finds that Mr. Gendron's testimony is inadmissible, Baxter is entitled to summary judgment.

II. Summary Judgment Standard

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where there is "no genuine issue as to any material fact". In deciding a summary judgment motion, the Court must view the facts and inferences in the light most favorable to the nonmoving party. *Bravis v. Dunbar*, 449 S.E.2d 495, 496 (Ct. App. 1994). The moving party has the burden to establish that based on the pleadings, affidavits and discovery on file they are entitled to judgment as a matter of law. *Id.* In response, the nonmoving party may not rest upon the mere allegations in its pleadings, but must present a triable issue of fact. *Id.; Klippel v. Mid-Carolina Oil, Inc.*, 399 S.E.2d 163, 164 (S.C. Ct. App. 1990). Here, because Mr. Gendron's testimony is inadmissible, no genuine issue of material fact exists as to Baxter's alleged liability, and Baxter is entitled to judgment as a matter of law.

Continued on page 16

III. Plaintiffs' Expert's Opinion Testimony is not Admissible Under Rule 702 of the South CarolinaRules of Evidence

It is "incumbent upon the party offering [an] expert to show that his witness possesses the necessary learning, skill, or practical experience to enable him to give opinion testimony." *State v. Meyers,* 391 S.E.2d 551, 554 (S.C. 1990). With the adoption of Rule 702 of the South Carolina Rules of Evidence, the standard for admitting expert scientific testimony is:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 has three requirements before a witness may testify in the form of an opinion: (1) the witness must be qualified as an expert by "knowledge, skill, experience, training, or education" to render the proffered opinion; (2) the subject of the expert's testimony must be "scientific, technical or other specialized knowledge;" and (3) the evidence or testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Thus, Mr. Gendron's testimony is not admissible unless all three requirements of S.C.R.E. 702 are met. *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1315 (9th Cir. 1995).

However, when the sufficiency of Mr. Gendron's testimony is evaluated, this court is constrained to conclude that none of Rule 702's requirements are met. First, Mr. Gendron has not "acquired by reason of study or experience or both, such knowledge and skill" to testify on the subject of the medical cause of plaintiff's stroke or on the design of the Baxter pump. Second, Mr. Gendron's testimony will not assist the trier of fact to understand the evidence or to determine a fact in issue. Third, Mr. Gendron's opinions are not "scientific knowledge," as defined by the United States Supreme Court.

A. Mr. Gendron is not Qualified to Testify to the Medical Cause of the Plaintiff's Stroke

Mr. Gendron is not a physician and his only college degree is in philosophy. Nevertheless, he seeks to be allowed to testify that the Baxter infusion pump used on the intravenous line inserted into the plaintiff's arm was the source of the air that entered the plaintiff's body and brain causing her stroke. Thus, Mr. Gendron testified in his deposition that the source of the air that entered the plaintiff's brain was the Baxter infusion pump rather than the central triple lumen catheter that was found to be uncapped and unclamped. Mr. Gendron opined that micro air bubbles of less that 16 microliters moved through the peripheral line without being detected by the pump's alarm system, that these undetected air bubbles entered the plaintiff's arm and travelled across the plaintiff's lungs and heart and into her brain.

Mr. Gendron's opinions on the source of the air that entered the plaintiff's brain are based on the manner in which air moves across the lungs and heart. Thus, Mr. Gendron is attempting to render a medical opinion in this case, even though his only college degree is in philosophy. He is ten hours short of a bachelors degree in biology and has no scientific degree, whatsoever. Thus, he is not a medical doctor, and admits that he is not an expert on lungs, or the heart. Accordingly, he also admits he is not an expert in medicine.

With no medical expertise on the manner in which air travels through the body and crosses the lungs and heart, Mr. Gendron is not qualified to testify to the source of the air that allegedly was the medical cause of the plaintiff's stroke.

Moreover, Mr. Gendron has not offered any medical, engineering or scientific research documenting that an infusion pump on a peripheral line has ever caused a stroke and did not base his opinions on any specific medical literature; *see also Porter v. Whitehall Laboratories, Inc.,* 9 F.3d 607, 615 (7th Cir. 1993) (plaintiff's expert's testimony excluded and summary judgment granted where expert admitted she had no scientific support for her opinion on medical causation).

Therefore, Mr. Gendron cannot conclude to a reasonable degree of medical certainty as to the source of the air that entered the plaintiff's body and traveled into her brain. His testimony fails to show that he is in any way trained, experienced or expert about the manner in which air travels across a person's lungs and heart. His lack of education and training, lack of medical knowledge, lack of skill and lack of experience on this issue preclude him from qualifying as an expert as to the source of the air that entered the plaintiff's brain and caused her stroke. Thus, Mr. Gendron's proffered opinions are inadmissible. *See Botehlo v. Bycura,* 320 S.E.2d 59, 65 (S.C. App. 1984) (summary judgment was proper in suit against podiatrist where plaintiff's expert, an orthopaedist, was, among other things, not trained or licensed in podiatry, had received no instruction in the practice of podiatry, was not familiar with the standards of professional care generally observed by podiatrists and was not familiar with the surgical procedure performed by the podiatrist).

B. Mr. Gendron did not Conclude that the Baxter Infusion Pump was Defective.

Rule 702 requires that to be admissible, opinion testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Here, the pertinent inquiry is whether the proffered expert testimony from Mr. Gendron will assist the trier of fact in resolving the issue of whether the Baxter infusion pump is negligently designed or manufactured.

To prevail in a products liability lawsuit, the plaintiff must show that the product was defective. *Bragg v. Hi-Ranger, Inc.,* ____ S.C. ____, 462 S.E. 2d 321 (S.C. App. 1995).[2] Specifically, pursuant to S.C. Code Ann. § 15-73-10, to prevail in a strict liability action, a plaintiff must establish that the product at issue was "in a defective condition unreasonably dangerous to the user." Here, Mr. Gendron failed to conclusively state to a reasonable degree of scientific certainty that the Baxter Infusion pump was defective. Instead, Mr. Gendron concluded in his second deposition that the Baxter pump, in fact, operated according to design and was not defective:

> Q. Let me ask it this way: Do you have an opinion that this pump was defective in any manner?
>
> A. It was probably state of the art, then it wasn't.
>
> Q. Do you have an opinion as to whether the pump was defective?
>
> A. My opinion being if it was state of the art, then it wasn't.
>
> Q. It was not defective?
>
> A. It wasn't. There are other pumps, one made by Baxter, the Flo-Gard 8000, that states it will not pass air. What their status was at this point in time, which one was made and designed and which one isn't, I have no idea or I am really not interested in it. All I tell you is these are the facts.
>
> Q. This pump was state of the art at the time and you don't have an opinion that it was defective at the time?
>
> A. It wasn't defective.
>
> Q. And there was nothing— and it was not defectively designed?
>
> A. No.

Mr. Gendron repeatedly testified that no design defect existed. At times he also testified he had no opinion on whether the Baxter pump was defectively designed. Mr. Gendron was even hesitant about whether he had formed an opinion at all about the design of the Baxter pump.

These opinions proffered by Mr. Gendron represent a departure from the testimony he gave at his first deposition, testimony which led directly to the plaintiffs' amendment of the Complaint naming Baxter as a defendant. At his first deposition, Mr. Gendron concluded that the Baxter pump performed erratically and therefore caused the introduction of micro air bubbles "into the plantiff." However, in his second depo-

Continued on page 18

Continued from page 17

sition, Mr. Gendron completely abandoned this theory apparently due to his review of certain literature on the Baxter pump. Mr. Gendron reviewed this literature subsequent to his first deposition. He stated "At this time[3] I didn't have the Baxter service literature or the operator's manual, I don't believe, because at this time when I was talking to you, I didn't know about the exact levels— I know I didn't. I didn't even have the manuals." Mr. Gendron's explanation for his change in testimony demonstrates that his conclusions at his first deposition were premature, and further illustrates the lack of evidentiary reliability of all of his opinions in this matter.

Even on cross-examination by the plaintiffs' counsel, Mr. Gendron never affirmatively testified the Baxter pump was in a defective condition unreasonably dangerous for its intended use as required to properly support a strict liability cause of action. Moreover, as seen in this colloquy, Mr Gendron resorted to "common sense" rather than scientific expertise to respond to counsel's question:

> Q. If the machine was used as instructed by the manufacturer, and if it performed as the manufacturer intended it to, and under those circumstances it caused a stroke in a patient such as Ms. Estes suffered, that would mean that the machine was unreasonably dangerous for its intended use; would it not?
>
> A. Well, common sense would dictate that, yes.
>
> Q. So that's your opinion?
>
> A. Uh-huh.
>
> Q. Right?
>
> A. Right. I just want to stay away from terms of me saying who is negligent.

Even this testimony elicited by counsel for the plaintiffs is insufficient to overcome Baxter's Motion for Summary Judgment because Mr. Gendron resorted to "common sense" rather than to scientific expertise to respond to it, and because Mr. Gendron did not opine that the pump was therefore "defective."

In sum, Mr. Gendron failed to state with any degree of certainty that the Baxter pump suffered from a design defect. In addition, he did not testify as to a feasible design alternative. *Bragg, supra.* Instead of assisting the trier of fact to understand the evidence pursuant to the requirement of S.C.R.E. 702, Mr. Gendron's testimony would inevitably lead them down a winding path of ambiguity and uncertainty. Moreover, his testimony does not satisfy the plaintiffs' burden of proof to show that the Baxter pump was defective.

C. Mr. Gendron is not Qualified to Testify Regarding the Design or Manufacture of the Baxter Pump

Mr. Gendron's opinions on the design of the Baxter pump rest on the theory that micro air bubbles of less than 16 microliters were infused into the plaintiff through the intravenous line inserted in her arm because the alarm on the Baxter pump would not detect air bubbles smaller than 16 microliters.[4] Accordingly, because the Baxter pump does not detect air bubbles less than 16 microliters, Mr. Gendron concludes that micro air bubbles smaller than the Baxter pump was designed to detect infused into the plaintiff.

Mr. Gendron's theory is entirely speculative. First, Mr. Gendron is not aware of and has no knowledge of industry standards on air alarms on infusion pumps. Second, Mr. Gendron does not know of any medical literature or research demonstrating that air bubbles of less than 16 microliters passing through an infusion pump are dangerous. Third, Mr. Gendron did not base his opinions on any specific medical article in the literature. Finally, Mr. Gendron has no knowledge of the medical and scientific basis underlying the air detection level of the alarm on the Baxter pump.

Even assuming Mr. Gendron was able to establish that micro air bubbles of less than 16 microliters did, in fact, pass through the Baxter pump and into the plaintiff's arm, Mr. Gendron still has not presented any medical research or documentation that such air bubbles would be dangerous and harmful to the plaintiff. Moreover, Mr. Gendron is not competent to render opinions on the design of the Baxter pump because he is not a design engineer. *See Brawn v. Fuji Heavy Industries, Ltd.*, 817 F. Supp. 184, 186 (D.Me. 1993) (testimony of expert witness held inadmissible under Rules 702 and 403 because his patent search evidence did not reveal "whether his 'design alternatives' [were] feasible or what their costs would be").

Despite Mr. Gendron's hospital work experience and his previous work as an expert witness, he has never testified before in a case involving an infusion pump, and has never conducted an investigation involving an infusion pump. Moreover, he has never designed an infusion pump, he has no knowledge of an infusion pump ever causing a stroke, he has never been consulted about the design of an infusion pump, and he has never written any papers dealing with the design of an infusion pump. Lastly, Mr. Gendron's opinions proffered in this case were developed solely as a result of this litigation. Accordingly, Mr. Gendron's general experience as a hospital "clinical engineer" and his expert witness work in cases not involving infusion pumps will not serve to qualify him as an expert on the design or manufacture of Baxter's infusion pumps.

Absent such experience, education, training or research, Mr. Gendron's testimony fails to provide "important, objective proof that [his] research comports with the dictates of good science." *Duabert*, 43 F.3d at 1317. He has no previous design experience to render an opinion on the pump's method of detecting air bubbles or at what level the pump should detect air bubbles. Accordingly, his proffered testimony would not "assist the trier in fact to understand the evidence or determine a fact in issue" and is not "scientific knowledge" as required by SCRE 702. Thus, it is inadmissible.

IV. Conclusion

Mr. Gendron's testimony is inadmissible because he is not qualified to testify as to medical causation of the plaintiff's stroke, because he failed to conclusively testify that the Baxter infusion pump was defective, and because he is not qualified to testify regarding the design or manufacture of the Baxter infusion pump. Without his testimony, the plaintiffs cannot establish a "genuine issue as to any material fact" pursuant to S.C.R. Civ. P. 56(c) against Baxter, and Baxter is entitled to judgment as a matter of law. Accordingly, there being no just reason for delay, IT IS ORDERED that final judgement be entered in this action in favor of Baxter Healthcare Corporation and that Baxter Healthcare Corporation be dismissed from this action with prejudice. Rules 54(b) and 56(c), SCRCP.

Honorable William L. Howard
Judge, Ninth Judicial Circuit

Charleston, South Carolina

"The plaintiff further alleged that on or about December 2, the defendants removed the caps from the catheter without inserting anything therein to prevent the entry of air, which led to a stroke causing, *inter alia*, permanent brain damage."

FOOTNOTES

[1] This catheter, called a central triple lumen catheter, was placed in the plaintiff's upper chest.

[2] In *Bragg*, the plaintiff "failed to introduce evidence of a feasible design alternative" in support of the strict liability claim. Mr. Gendron also failed to offer such evidence of feasible design alternative.

[3] At the time of Mr. Gendron's first deposition.

[4] Mr. Gendron's proffered opinions do not rest on a failure to warn. He concedes that Baxter's manual on the infusion pump sets forth the size of air bubbles that would

Cards and Drinks

Chief Judge BENJAMIN H. HILL, in Twilley v. State, 9 Ga. App. 485, 71 S.E. 587.

Opinion: For four men to leave their business in the daytime and go to a cemetary and play cards on the headboard of a grave would seem to indicate that there was something more in the way of temptation than the mere pleasure of playing an innocent game of cards, and in view of the indicia of the presence of intoxicants, and the evidence that a beverage of this character was hard to get in Hancock county and was very valuable, it would seem to be not unreasonable to infer that the "drinks" furnished the inducement for the playing of the game, and it is difficult to believe, in view of the evidence as to the great value of whisky in Hancock county, that the generosity of one of the players would have furnished without price the tempting stake. It is so natural for men who play cards, and for those who drink, to play for drinks, that this court is constrained to the conclusion that the verdict of the jury was not wholly unauthorized. Apparently the law against gaming, as well as against the sale of liquor, is most vigorously enforced in Hancock county, and in the town of Sparta, when the citizens of the town are compelled to resort to the cemetery to play cards for drinks, and when, even in that secluded spot, they don't have a ghost of a chance.

Joint CLE Seminar

Presented by SCDTAA/SC BAR

November 15, 1996

"Direct and Cross Examination of Expert Witnesses-Revisited"

8:30 to 8:45 a.m.	Registration
8:45 to 9:00 a.m.	Welcome and Introduction
9:00 to 10:00 a.m.	Less Boring Direct Examination of Experts *Terrence F. MacCarthy*
10:30 to 10:45 a.m.	Coffee Break
10:45 a.m. to 12:15 p.m.	Science of Cross-Examination of Expert Witnesses *Terrence F. MacCarthy*
12:15 to 1:30 p.m.	Lunch
1:30 to 2:15 p.m.	Direct and Cross-Examination of Computer Animation Expert *Kenneth M. Suggs & Carl B. Epps, III*
2:15 to 3:00 p.m.	Direct and Cross-Examination of Premises Safety/Code Experts *E. Paul Gibson & Matthew A. Henrikson*
3:00 to 3:15 p.m.	Coffee Break
3:15 to 4:00 p.m.	Direct and Cross-Examination of Vocational Rehabilitation Expert *Eugene C. Covington, Jr. & Michael B.T. Wilkes*
4:00 to 4:45 p.m.	Direct and Cross-Examination of Economist *Charles l. Henshaw, Jr. & James W. Alford*
4:45 to 5:00 p.m.	Questions and Adjourn

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

Address Correction Requested