S.C. Defense Trial Attorneys' Association

Volume 25 Number 2 • Spring, 1997

The DefenseLine

Cross-Examining Experts with Hearsay
Under Rules 703, 704 and 705

Plan now to attend the Thirtieth Annual Joint Meeting

of

the South Carolina Defense Trial Attorneys' Association

and

the Claims Management Association of South Carolina

July 24 - 26, 1997

Grove Park Inn, Asheville, NC

The Thirtieth Annual Joint Meeting

The Thirtieth Annual Joint Meeting sponsored by the South Carolina Defense Trial Attorneys' Association and the Claims Management Association of South Carolina will be held July 24 through 26, 1997, again at the lovely historic Grove Park Inn in Asheville, North Carolina.

The morning programs will include many timely substantive topics including, among others: managing the large case and expectations of outside counsel by in-house counsel and/or claims managers; proposed changes in the jurisdictional minimum for magistrates court and how that will impact the practice before that tribunal; and the insurance issues that are emerging as "hot topics" including: sexual harassment, slander, and premises liability, among others. There will also be a legislative update on the bills pending in the legislature of interest to both attorneys and claims managers; a discussion of the new fraud law and the progress in its enforcement; as well as breakout sessions for those interested in workers' compensation and governmental liability issues.

This year we have also invited a number of regional claims managers who may be situated out of South Carolina, but who have case and/or claim responsibility in South Carolina. If you have information about anyone in this category whom you would like to receive an invitation to the Joint Meeting, please let Carol Davis know.

The social program this year will include the golf and tennis tournaments, as well as white water rafting. There will be a cocktail reception and buffet dinner at beautiful Deerpark Restaurant on the Biltmore Estate. For those who are still light of foot, there will be music for dancing - various types, from big band to shag. We will offer a candlelight tour of the Biltmore Estate for both those who have never before seen it and for those who want to revisit its splendor.

Join us for a great meeting, and a great time.

The DefenseLine

Ten Years Ago

THERON G. COCHRAN (Greenville) began his tenure as president of our Association succeeding EUGENE ALLEN (Columbia). THERON reported our membership was up to 500 and he hoped to increase during 1987. ED POLIAKOFF agreed to monitor legislative action and keep us informed on matters which would be of interest to the defense attorneys. CARL EPPS, our president elect, agreed to serve again as Chairman of the Legislative Committee. We continued to be active in the South Carolina Civil Justice Coalition in preparing for introduction of tort reform during the 1987 session.

The DEFENSE LINE reported that GOVERNOR DICK RILEY announced the merger of the firm of RILEY, RILEY, LAWS and STEWART to become NELSON, MULLINS, RILEY & SCARBOROUGH. RILEY was to join the firm when his 8-year tenure as governor ended in January.

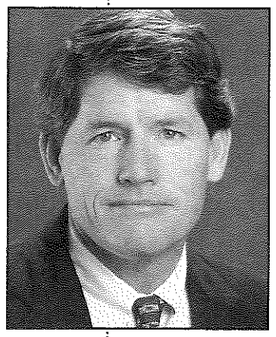
Twenty Years Ago

At our Association's Ninth Annual Meeting at the Hilton Inn, Hilton Head Island, JACKSON L. BARWICK (Columbia) was elected president. Other officers elected were MARK W. BUYCK, JR. (Florence), President Elect; ROBERT BRUCE SHAW (Columbia), Secretary-Treasurer; and C. DEXTER POWERS (Florence), immediate past president. Committeemen selected at this meeting were H. SPENCER KING (Spartanburg), SAUNDERS M. BRIDGES (Florence), and ROBERT H. HOOD (Charleston).

The meeting was highlighted by addresses by two surgeons, DR. LORIN MASON (Florence) who spoke on whiplash injuries; and DR. JACK W. SMITH (Columbia) who discussed lumbar area problems and ruptured discs. During the business session, EDWARD W. MULLINS (President 1973) then Regional Vice President of the Defense Research Institute, presented information in support of that organization. Incidently, the closing of the Hilton Inn was announced in early 1987, but our Association had nothing to do with that.

President's Letter

Thomas J. Wills, IV



The early efforts of the Annual and Joint Convention Committees have met with great success. Mark Phillips and Steve Darling have secured a commitment from Senator Fred Thompson, of Tennessee, to be our keynote speaker at our 30th Annual Meeting to be held at Sea Island November 6 - 9, 1997.

Mills Gallivan, Susan Lipscomb and their committee are working to put together an outstanding program for the Joint Meeting which is scheduled July 24 - 26. We are hoping to increase the number of breakout sessions to accommodate both attorneys and claims managers with special areas of interest. Carol Davis has arranged for a block of rooms at the Radisson Hotel for attorneys and claims managers who may wish to stay at a location other than The Grove Park Inn this year.

For the first time, we have extended invitations to out of state claims managers whose territory includes the state of South Carolina. We are hoping to increase participation both from the claims managers and from our attorneys who will want to attend the meeting to welcome these new claims managers to our Joint Meeting. If any of you know of claims managers you believe would be interested in attending our Joint Meeting, please provide the names and addresses to Carol Davis at SCDTAA, 3008 Millwood Avenue, Columbia, SC 29205. The materials for the program are scheduled to be mailed on April 15. So, please try to provide these names and addresses to Carol as soon as possible.

Sam Outten and Clarke McCants are in the early stages of organizing our Trial Academy this year which will take place July 9 - 11 in Columbia. John Bell has been successful in securing a number of courtrooms at the Richland County Court Complex and, for the first time, the participants will be able to use actual courtrooms in which to try their cases.

The Executive Committee has decided to establish a web page for the association in order to enhance communication and provide the members easy access to information. We are hoping to have the web page set up by late Spring or early Summer. Ultimately, the web site will provide access to brief banks, expert witness lists, member information, and quick access to information concerning conventions and other Association activities.

Our Legislative Committee led by Susan Lipscomb and Jay Courie has been extremely busy. A number of important pieces of legislation have been brought to the attention of the Executive Committee, and Jay has prepared an article (found on page 14 of this publication) which briefly explains the legislation in question. Please feel free to contact Jay with any questions concerning this legislation or any information you may have concerning pending legislation that you believe would be of concern or interest to the Association.

Please continue to send in for publication any interesting orders or unpublished appellate opinions.❖

The Trial Academy

July 9 - 11, 1997

The Trial Academy will be held Wednesday, July 9, 1997 through Friday, July 11, 1997. The lectures and break-out sessions will be held at the law school on Wednesday and Thursday. Thanks to John Bell and Cris Malseed, we are working on having the mock trials held in courtrooms at the Richland County Courthouse.❖

Cross-Examining Experts With Hearsay Under Rules 703, 704, and 705

by E. Warren Moise,
Grimball and Cabaniss

I. Introduction

Expert witnesses frequently render opinions at trial based largely upon hearsay. As a practical matter, rule 703 acts as an exception to the hearsay rule for most purposes and as an exception to the original writing rule for all purposes.[1] Experts generally are permitted to be questioned about their file documents at trial. But may an expert also be cross-examined about documents not found in his file but presented to him for the first time at trial?[2] Although the answer is not certain, evidence rules and their underlying policies would appear to permit such questioning. However, Federal and South Carolina Rules of Evidence 703, 704, and 705 likely would make this cross-examination a matter within the judge's discretion in most cases. Also, the cross-examination might be in error if used to enter through the back door evidence specifically prohibited by other rules or policies. The analysis involves several questions which are discussed below.

II. How Is the Underlying Information for the Expert's Opinion "Authenticated?"

Before hearsay can be reasonably relied upon by the expert, it must be trustworthy. The advisory committee's note to federal rule 703 uses a physician witness as an example. The advisory committee note indicates that a doctor in his own practice gives diagnoses based upon numerous and varied sources. Included in these sources of information are hearsay statements from patients, relatives, nurses, other doctors' reports, hospital records, and x-rays. Although these various witnesses could be brought to court and the records custodians be called to authenticate the documents, this would involve considerable time. Because a physician makes life-and-death decisions based upon the information, the doctor's validation (subject to cross-examination) "ought to suffice for judicial purposes."[3] Put another way, deference is given to experts in authenticating the hearsay upon which their opinions are based.[4]

On the other hand, the final decision on trustworthiness of the information is made by the trial judge. For example, if a document is presented to an adverse expert and he or she refuses to acknowledge its authenticity, the cross-examiner must prove the reliability of the information to the court's satisfaction. In determining the admissibility of evidence, a judge is not bound by the rules of evidence, except as to privilege.[5]

Judicial notice may be taken of the type information upon which an expert may reasonably rely.[6] Literature and information supplied before trial to an expert by the attorney calling him has been held to be an acceptable basis of data for an expert opinion,[7] and thus, it would seem fair to also allow an adverse attorney to present materials to the expert during cross-examination and ask for opinions based upon the documents. (However, reports prepared specifically for litigation are by definition not of a type reasonably relied upon by experts under rule 703[8] and should be excluded as the basis for questioning.) Bare unsworn hearsay statements of a person interviewed prior to trial can be a proper source of information for an expert opinion.[9] Similarly an expert may rely upon deposition[10] testimony in forming opinions. Requests to admit regarding the authenticity of documents to be presented during cross-examination might be served if an objection by adverse counsel is anticipated.

Continued on page 6

Continued from page 5

III. When Must the Expert First Be Presented with the Facts or Data?

There does not appear to be a concern by the federal advisory committee (or evident in the language of the rule itself) that an expert be given more time than any other witness to reflect upon facts or information before testifying as to opinions.[11] Rule 703 specifically notes that the expert may be given the facts and data at the hearing.[12] The advisory committee's notes show that an expert may continue the pre-rule 703 practice of forming opinions while listening to the witnesses testify at trial. The language of rule 703 is not limited to testimony heard by the expert at trial. As noted above, the documents may be supplied by an attorney.

IV. Must the Expert Actually Rely Upon Facts or a Document Before Being Questioned About Them?

There is a conflict about whether an expert may insulate himself from being questioned about facts and data by stating he did not rely upon them.[13] Although the Fourth Circuit Court of Appeals did not specifically use the word "rely" in *United States v. A & S Council Oil Co.*,[14] it did allow a psychiatrist to be cross-examined about a witness' failed polygraph test; this is because the doctor "necessarily discounted" the test result in forming a positive opinion about the witness' truthfulness.[15] Other courts would require that the expert have relied upon the hearsay documents in formulating opinions.[16]

The wording in rule 703 appears to support a broader approach. Rule 703 states that if the facts or data are "of a type reasonably relied upon by experts in the particular field," they still may be a proper basis for expert opinion although otherwise inadmissible. Put in the negative, the rule does not require that the facts or data be the actual evidence relied upon by the expert at trial.

V. Can the Contents of the Document Be Read to the Jury?

Case law construing rules 703, 704, and 705 provides that "an expert may testify as to hearsay matters, not to establish substantive facts, but for the sole purpose of giving information upon which the witness relied in reaching his conclusion . . . ."[17] "[O]therwise the opinion is left unsupported with little way for the jury to evaluate its correctness."[18] The advisory committee's note to Federal Rule of Evidence 705 is in accord: "[T]he rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses . . . ." While the case law and evidentiary rule probably refer to direct examination, there is no reason why the same could not be applied to cross-examination. Disclosure of the underlying facts by the expert do not, however, constitute *substantive* evidence, and the jury must be so instructed.[19]

The Fourth Circuit Court of Appeals has held that a physician may not bolster his opinion by referring to another expert's findings and then testify that his opinions were "essentially the same."[20] The court held, however, that the testifying physician may say that he reviewed the other doctor's report and relied upon it in reaching his opinion.[21]

VI. Do Policy Concerns Favor or Disfavor This Type Cross-Examination?

The policies underlying rule 703 in allowing an expert to base his opinions upon inadmissible hearsay appear to be one of judicial economy balanced by cross-examination and judicial discretion. The advisory committee's notes show that one purpose for the rule is to avoid an "expenditure of substantial time in producing and examining various authenticating witnesses" by allowing an expert to validate the facts and data upon which he relies.[22] As noted through comments made by Advisory Committee Chairman Albert E. Jenner, Jr., the drafters of the federal rule clearly intended to streamline trials by no longer requiring the need for hypothetical questions.[23] Federal and South Carolina Rules of Evidence state that the "rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Use of documents (prepared by absent persons) in cross-examination avoids the need to call numerous witnesses, thereby saving time and money for the litigants. Other rules might permit such cross-examination anyway. For example, subsections (3) and (4) of rule 803 permit certain statements made to physicians to be admitted as hearsay exceptions.

Assuming that (a) reliability of the documents or information forming the basis for an expert's opinion can be established to the court's satisfaction under rule 104(a) by a request to admit, representations of an officer of the court, an affidavit or correspondence of a records custodian, or other means; (b) the documents or information (other than trial testimony) were available to the adverse party within a reasonable time before trial to satisfy constitutional concerns[24] or avoid surprise; and (c) cross-examination is available to point out any unreliability in the information, then questioning the expert about documents not in his file or relied upon him appears to be proper under rule 703. This would comport with the liberal thrust of the federal rules,[25] upon which South Carolina Rules of Evidence 703, 704, and 705 are based.

On the other hand, bare unrecorded hearsay statements of an out-of-court witness would be much more problematic. Although a proper **basis** for an expert opinion in many instances, **disclosure** to the jury of such statements by the expert should be allowed rarely if at all,[26] unless the witness will later testify or the statement is otherwise admissible (such as under the *res geste* hearsay exception).

Nor should the cross-examiner be allowed to get before the jury evidence inadmissible on other policy grounds. For example, evidence of subsequent remedial measures in a products liability trial should not be introduced through the back door of rule 703 as the basis for an expert's opinion.[27]

VII. Conclusion

Cross-examination of experts with documents not generated by their office and not found in their file prior to trial would often appear to be proper under rules 703, 704, and 705. Rule 703 does not specifically require that the document be the actual information relied upon by the witness in forming opinions, merely of a type reasonably relied upon by experts in the field. The rule also notes that the information upon which the expert is asked to form opinions may first be made known to the expert at the hearing. Finally, policy concerns of judicial economy favor this method of examination. Deference is given to the expert in authenticating the hearsay upon which he relies, but the final arbiter of authentication and reasonable reliance on the documents is the trial judge. Assuming that authentication may be proved at trial by requests to admit, representations of counsel, an affidavit or correspondence of a records custodian, or other means, there would seem to be no impediment under rule 703 to such cross-examination. Rule 703 already permits the expert to render opinions based upon hearsay during direct examination; the cross-examiner should be given the same opportunity.

Footnotes

[1] *See State v. Hutto, S.C. Sup. Ct. Op. No. 24573, filed Feb. 10, 1997 (citing United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc), cert. denied, 405 U.S. 954 (1972) as to the former proposition and Graham, Handbook of Fed. Evidence Section 703.1 (3d ed. 1991) as to the latter. Federal and state rules of evidence 703 and 705 are identical. State rule 704 is identical to the pre-1984 version of the federal rule. All references to the advisory committee pertain to the federal rule's committee.*

[2] *If documents already are in evidence or otherwise admissible such as those pertaining to business records or statements relating to medical diagnosis, the expert usually will be able to be asked about them, unless otherwise improper. However, this article solely deals with rules 703 through 705 and assumes the records are not admissible under another hearsay exception.*

[3] *Fed. R. Evid. 703 advisory committee's note.*

[4] *See United States v. L.E. Cooke Co., Inc., 991 F.2d 336, 341 (6th Cir. 1993).*

[5] *Fed. R. Evid. 104(a); S.C.R. Evid. 104(a).*

[6] *See, e.g., United States v. Lawson, 653 F.2d 299, 302 n.7 (7th Cir. 1981).*

[7] *See Mannino v. International Mfg. Co., 650 F.2d 846, 852-53 (6th Cir. 1981).*

[8] *United States v. Tran Trong Cuong, 18 F.3d 1132, 1143 (4th Cir. 1994).*

[9] *United States v. Head, 641 F.2d 174, 181 (4th Cir. 1981).*

[10] *Ellis v. Oliver, __ S.C.__, __, 473 S.E.2d 793, 797-98 (1996).*

[11] *If this were the case, hypothetical questions would not be allowed. The Federal Rules of Evidence did not abolish the hypothetical question, however. See, e.g., 1 Kenneth S. Broun et al., McCormick on Evidence Section 14, at 56-57 (4th ed. 1992).*

[12] *But see State v. Black, __ N.C.__, __, 432 S.E.2d 710, 718 (Ct. App. 1993) (appearing to require either actual reliance by the expert in formulating opinions or prior contemplation of the hearsay data before trial). If the South Carolina courts were to adopt the Black approach, possibly the problem could be cured by sending the documents to the expert before trial for "contemplation." This would not be consistent with the language of the rule stating that the data could be made known to the expert at the hearing, however.*

[13] *Compare 1 McCormick on Evidence, supra note 11, Section 13, at 56-57 (expert may be cross-examined about documents he reviewed but did not rely) with 29*

Continued on page 8

Cross-Examining Experts With Hearsay

Continued from page 7

Charles A. Wright & Victor James Gold, Federal Practice and Procedure Section 6294, at 430-31 (1997) (taking the contrary position). The issue of ***reasonable*** *reliance, of course, is another issue unto itself. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993).*

[14] 947 F.2d 1128, 1134-35 (4th Cir. 1991).

[15] See id. at 1135.

[16] See Black, __N.C. at __, 432 S.E.2d at 718 (expert may not be questioned about materials if the expert has neither contemplated nor relied upon the documents in formulating opinions and citing Bobb v. Modern Prods., Inc., 648 F.2d 1051, 1055-56 (5th Cir. 1981)).

[17] United States v. Sowards, 339 F.2d 401, 402 (10th Cir. 1964). See also Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 (9th Cir. 1984) (citing American Bar Ass'n, Emerging Problems Under the Federal Rules of Evidence 209 (1983) and other authorities for proposition that courts considering the matter have concluded juries should be permitted to hear hearsay bases for opinions); United States v. Sims, 514 F.2d 147 (1975) (statements of IRS investigators disclosed by psychiatrist at trial); Michael H. Graham, Federal Practice and Procedure Section 6651, at 286 (Interim ed. 1992). See also Minner v. Kerby, 30 F.3d 1311, 1313 (10th Cir. 1994) (notes of absent chemist read to jury at trial indicating tests showed to a reasonable scientific certainty that powder was cocaine) (cited in State v. Hutto, S.C. Sup. Ct. Op. No. 24573, filed Feb. 10, 1997, at __ n.8. For a further discussion of this issue, see Federal Practice and Procedure, supra note 13, Section 6273, at 313-21 (noting that inadmissible information should be disclosed in many cases, but not if it contravenes other policy-based exclusionary rules such as those forbidding evidence of offers of compromise, subsequent remedial measures, liability insurance, and privileged matters.)

[18] 2 Kenneth S. Broun, et al., McCormick on Evidence Section 324.3, at 372 (4th ed. 1992).

[19] United States v. Sims, 514 F.2d 147, 149-50 (1975).

[20] See United States v. Tran Trong Cuong, 18 F.3d 1132, 1143 (4th Cir. 1994). The Tran court noted that the non-testifying expert's report was probably not the type information reasonably relied upon by experts in his field and that the out-of-court expert was not properly qualified in the field of family medicine, the area of expertise under consideration. The basis for the court's decision was that the defendant was deprived of cross-examination of the non-testifying expert. But cf. State v. Hutto, S.C. Sup. Ct. Op. No. 24573, filed Feb. 10, 1997 (citing cases allowing admissibility of out-of-court test results and related information).

[21] Tran, 18 F.3d at 1143.

[22] Accord United States v. Abbas, 74 F.3d 506, 513 (4th Cir.), cert. denied, __ U.S. __, 116 S. Ct. 1868 (1996) (rules negate the need to parade into court witnesses to prove facts upon which expert's opinion based).

[23] Federal Practice and Procedure, supra note 13, Section 6272, at 306 n.5 and accompanying text.

[24] This involves a possible confrontation-clause objection, primarily raised in criminal cases. See United States v. Smith, 869 F.2d 348 (7th Cir. 1989) (no confrontation problem when defendant given pretrial access to data and statements forming basis of expert's opinion). See also State v. Hutto, S.C. Sup. Ct. Op. No. 24573, filed Feb. 10, 1997 (citing United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc), cert. denied, 405 U.S. 954 (1972)). The Hutto court found no Confrontation Clause problem when a SLED agent based his opinion on a test performed by an out-of-court witness. Id.

[25] See G. Ross Anderson, Round Pegs and Square Holes - The Aftermath of Daubert, ***South Carolina Trial Lawyer Bulletin****, at 9 (Fall 1996) (noting that Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) has cited "liberal thrust" of the federal evidence rules).*

[26] Cf. Marsee v. United States Tobacco Co., 866 F.2d 319, (10th Cir. 1989) (cited in United States v. Tran Trong Cuong, 18 F.3d 1132, 1144 (4th Cir. 1994)). In Marsee the Plaintiff objected that his physician was not allowed to disclose details of hearsay conversations with non-testifying doctors. The testifying physician was allowed to disclose the substance of the conversations, however. The Tenth Circuit Court of Appeals declined to decide the issue but nonetheless noted that the Plaintiff had not been substantially prejudiced by the ruling. See id. at 323-24. But cf. United States v. Sims, 514 F.2d 147 (1975) (statements of IRS investigators disclosed by psychiatrist at trial).

[27] Accord Federal Practice and Procedure, supra note 13, Section 6273, at 314-15.❖

Mid-Winter IADC Meeting Report

South Carolina was well represented at the 1997 Mid-Winter Meeting of the IADC which was held at the Inn at Spanish Bay, Monterey, California, February 8 - February 15. Attending were:

Jack and Nan Barwick, Columbia
Mike and Judy Bowers, Charleston
John and Elizabeth Britton, Greenville
William C. Cleveland, Charleston
David and Karen Dukes, Columbia
Carl and Diana Epps, Columbia
Davis and Polly Howser, Columbia
Weldon and Elaine Johnson, Columbia
Frankie and Beverly Marion, Greenville
Stephen and Gail Morrison, Columbia.

David Dukes and Will Cleveland were speakers.❖

Recent Order of Interest

State of South Carolina, County of Charleston, In the Court of Common Pleas, Stephen Darling and Rhonda Rene Darling, Plaintiffs, vs. Savers Life Insurance Company, Defendant

ORDER

Introduction

This matter is before the court on motion of defendant, Savers Life Insurance Co., for summary judgement. This action was instituted in the Court of Common Pleas for Charleston County, but removed to this Court by the Defendant on September 13, 1994, on the basis of diversity of citizenship and amount in controversy. This action involves an alleged breach of an insurance contract and a bad faith refusal to pay benefits under that insurance contract. Based on the submitted briefs and oral arguments heard on October 3, 1996, this court grants summary judgment in favor of defendant.

Background

On September 24, 1993, Michael O. Benke ("Mr. Benke"), an independent insurance salesman, met with Mr. Darling at his place of employment to discuss health insurance for Mr. Darling and his wife. Mr. Benke operated an insurance agency known as Business Management Consultants and was a sub-agent of American Health Underwriters (formerly known as Savers Health Underwriters). In accordance with South Carolina law, Benke was licensed to submit applications for insurance to defendant Savers Life Insurance Company ("Savers Life") through American Health Underwriters.[1] Mr. Benke completed an Application for Insurance ("Application") with Mr. Darling for both Mr. and Mrs. Darling.

Plaintiff Rhonda Darling was not physically present during the completion of the Application; however, the record reflects that she was contacted by telephone on three separate occasions to obtain information for the Application. Mr. Darling signed the completed Application for himself, while Erica Darling (Stephen Darling's mother) signed the Application on behalf of Rhonda Darling after obtaining authorization from Mrs. Darling to do so. The Application contained the following language:

> I hereby apply to Savers Life Insurance Company for a certificate to be issued solely and entirely in reliance on the written answers to the question on this Application. I understand and agree that (1) the insurance shall not take effect unless the Application has been accepted and approved by the Company and until the effective date of the Certificate and (2) the agent does not have the authority to waive a complete answer as to any questions in the Application, pass on insurability, make or alter any contract, or waive any of the Company's other rights or requirements. I understand and agree that the falsity of any answer or statement in this Application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the Company. The Company may rely upon this Application and all the information contained herein...

(Emphasis added). The completed Application was submitted to Savers Life.

On or about October 2, 1993, Norma Long of Savers Life initiated a standard telephone interview with Mrs. Darling to follow up on the information contained in the Application.

Based on the information provided in the Application and during the telephone interview, Savers Life issued a Certificate of Insurance ("Certificate") to the Darlings, effective October 8, 1993. The Application was attached to and made a part of the Certificate. The Certificate reads as follows:

> Please read the copy of the Application attached to this Certificate. Carefully check the Application to be sure all information is correct. If you find errors or if any past medical history has been left out of the Application, contact us at 8064 North Point Boulevard, Winston-Salem, North Carolina 27106, immediately. This Application is part of the Certificate, and the Certificate was issued on the basis that the answers to all questions and the information shown on the Application was correct and complete.

(Emphasis added).

Continued on page 10

Recent Order of Interest

Continued from page 9

In conjunction with subsequent claims received by Savers Life from plaintiffs' medical providers, Savers Life also obtained certain historical medical records for the Darlings. These records revealed medical histories different from the information provided by the Darlings in the Application and during the telephone interview. Subsequently, Savers Life notified the Darlings that, had an accurate, complete and truthful medical history been provided with the Application, the Darlings would not have qualified for coverage. As a result, Savers Life refunded the Darlings their premium and declared the Certificate void *ab initio*. This lawsuit followed.

II. Summary Judgment Standard

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. Perini Corp. v. Perini Const., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Finally, the "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.' " Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990)), cert denied, 116 S. Ct. 190 (1995).

III. Analysis

South Carolina statutory law bars the right to recover insurance proceeds when an insurance application contains any false statement which materially affects the acceptance of the risk. S.C. Code Ann. Section 38-71-40 (Law. Co-op. Supp. 1995).[2] Additionally, long standing South Carolina contract law provides that insurers may void policies that are procured by material misrepresentation. See, e.g., Carroll v. Jackson National Life Ins. Co., 414 S.E. 2d 777 (S.C. 1992); Cain v. United Ins. Co., 102 S.E. 2d 360 (S.C. 1958); Reese v. Woodmen of the World Life Ins. Society, 69 S.E. 2d 919 (S.C. 1952); Robinson v. Pilgrim Health & Life Ins. Co., 57 S.E. 2d 60 (S.C. 1949); and McLester v. Metropolitan Life Ins. Co., 179 S.E. 490 (S.C. 1935). Savers Life argues that it is entitled to judgment as a matter of law under either theory, and, this court agrees.

A. Savers Life is Entitled to Judgment as a Matter of Law Pursuant to S.C. Code Ann. Section 38-71-40

Under the pertinent statute, plaintiffs have no right to recover insurance proceeds if a false statement on their application was made with actual intent to deceive; or to materially affect the acceptance of the risk; or to materially affect the hazard assumed by the insurer. S.C. Code Ann. Section 38-71-40 (1976 and Supp. 1995).[3] The record before this court indicates that the Darlings' Application contains false statements which materially affected Savers Life's acceptance of the risk. It is also apparent to the court that the plaintiff's false statements were made with the intent to deceive.

1. **The Darling's Application Contains False Statements.**

The record in this matter establishes that plaintiffs failed to disclose information concerning their prior medical histories and current medical conditions.[4] Accordingly, the only reasonable interpretation of this evidence is that the Darlings' Application contains false statements, which this court finds as a matter of law.

2. **The False Statements on the Application Materially Affected Savers Life's Acceptance of the Risk.**

"[A] representation is material when reasonably careful and intelligent men would regard the fact involved as substantially increasing the chances of the loss insured against; and that this is especially true when the insurer, on becoming aware of the fact, would raise the rates or reject the risk altogether." Atlantic Life Ins. Co. v. Hoefer, 66 F.2d 464, 466 (4th Cir. 1933). Further, "[a] representation is material when the insured knows or has reason to believe that it will likely affect the decision of the insurance company as to the making of the contract of insurance or as to its terms." Southern Farm Bureau Casualty Ins. Co. v. Ausborn, 155 S.E. 2d 902, 908 (S.C. 1967). Plaintiffs' expert testified in deposition that the Darlings' undisclosed prior medical history is material to an underwriter's evaluation of risk. This expert also testified that each ailment is singularly material to the decision of an underwriter to accept or deny an application.

Furthermore, according to the affidavit of Thomas E. Gullett, Director of Major Medical and Chief Underwriter for Savers Life, plaintiffs' medical history renders them uninsurable pursuant to Savers Life's underwriting guidelines. This evidence is uncontradicted. Mr. Gullett is responsible for all decisions to accept or deny health insurance applications to Savers Life. Mr. Gullett personally made the decision to issue the Certificate to the Darlings in this instance. Therefore, this court finds that the Certificate was issued as a consequence of the false statements on the Application.

Plaintiffs, in response to defendant's misrepresentation assertions, argue that the inaccuracies on the Application should be excused because Mr. Benke allegedly inserted answers on the Application without plaintiffs' knowledge and because Mr. Darling, who originally answered the questions, did not know all of his new wife's medical history. This court finds both of these arguments unpersuasive because plaintiffs signed (or in the case of Mrs. Darling, authorized the signing of) the insurance application. A party to a contract cannot avoid the effect of the document by claiming that he did not read it, and insurance contracts are no different. Sims v. Tyler, 281 S.E. 2d 229 (S.C. 1981).

In Parnell v. United American Ins. Co., 142 S.E. 2d 204 (S.C. 1965), the South Carolina Supreme Court affirmed a defendant insurance company's judgment notwithstanding the verdict on nearly identical facts. There, plaintiff alleged that the insurance company's agent inserted false answers in her application without her knowledge. Plaintiff signed the application without reading it. Parnell, 142 S.E. 2d at 206. The insurance company delivered the policy, with the application attached, to the plaintiff a few weeks later. However, plaintiff did not read the policy or the application for five months. Parnell, 142 S.E. 2d at 207. When the insurer learned the true state of plaintiff's health, it rescinded the policy, writing to the plaintiff, "[T]here were misstatements on the application which were material to your acceptance as a risk..." Id. After reviewing these facts, the court stated:

> We have consistently followed the rule that ordinarily one cannot complain of fraud in the missrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and that one entering into a written contract should read and avail himself of every reasonable opportunity to understand its content and meaning. This rule has been applied to applications for contracts of insurance.

Id. (citations omitted). The court further observed: "had [plaintiff] read the application she would have readily known that it contained false answers." Parnell, 142 S.E. 2d at 208. By failing to review her application, "[plaintiff] was guilty of reckless disregard of her duty." Parnell, 142 S.E. 2d at 209.; see also, O'Connor v. Brotherhood of Railroad Trainman, 60 S.E. 2d 884 (S.C. 1950) (insurance carrier was entitled to rescind policy because of false application, notwithstanding the fact that the application had been filled out by soliciting agent, due to the gross negligence of plaintiff in signing application for insurance without knowing its contents and without considering the effect it would have upon his rights).

Accordingly, plaintiffs cannot blame Mr. Benke for the false statements in their Application as plaintiffs breached their contractual and common law duties to review the Application and immediately report inaccuracies. When the plaintiffs signed (or in the case of Mrs. Darling, authorized the signing of) the insurance application containing false statements, they adopted those statements as their own. Floyd v. Ohio General Ins. Co., 701 F. Supp. 1177, 1188 (D.S.C. 1988) (citing Pittman v. First Protection Life Ins. Co., 325 S.E. 2d 287 (N.C. App. Ct. 1985)).

Continued on page 12

3. The False Statements on the Application Were Made with the Actual Intent to Deceive.

Under South Carolina law, an intent to deceive may be inferred when there is no other reasonable or plausible explanation for an applicant's false statements. Floyd, 701 F.Supp. at 1190. When the evidence leads reasonable persons to infer an intent to deceive, the South Carolina Supreme Court has not hesitated to sustain directed verdicts for the insurer, and in some cases reverse jury verdicts and enter judgment for insurers, on the basis that the applicant misrepresented the state of his health. See, e.g., Arnold v. Life Ins. Co. of Georgia, 83 S.E. 2d 553 (S.C. 1954); Johnson v. New York Life Ins. Co., 164 S.E. 175 (S.C. 1932). Intent may be shown by the applicant's express words, or it may be deduced from his acts and the facts and circumstances surrounding the making of the misrepresentations. Johnson, 164 S.E. at 177.

In Phillips v. Life & Casualty Co. of Tennessee, 85 S.E. 2d 197 (S.C. 1954), the court was presented only circumstantial evidence of intent. The insured was the plaintiff's infant daughter. On the application, the insured's father stated that the infant was in good health at the time of the application, and had never had any surgical operation, serious illness or accident. When the infant died following a convulsion, the insurer asserted that false statements, material to the risk, were made in the application with the intent to deceive the company. Phillips, 85 S.E. 2d at 198.

Undisputed testimony at trial revealed that the infant had suffered from convulsions on five separate occasions, had been hospitalized twice, and had been treated in a physician's office twice, the last time approximately three months before the application was made. Phillips, 85 S.E. 2d at 199. In reviewing the evidence of intent to deceive, the court observed that "[t]hese illnesses were not of a trivial nature. The inquiries mentioned above did not relate to matters of opinion or to matters to which there was a possibility of mistake." Phillips, 85 S.E. 2d at 199. Evidence in that record indicated the applicant cancelled a separate policy on the infant once the subject policy was issued, evidence which the court acknowledged as the applicant's good faith. However, the court held that good faith alone was not sufficient evidence to require submission of the intent issue to the jury. Phillips, 85 S.E. 2d at 200. The court reversed the jury's verdict and entered judgment for the insurer.

In the case at bar, the amount of medical history withheld from Savers Life, when viewed in light of the Darlings' multiple opportunities to disclose the information, and in light of the Darlings' duty to disclose, gives rise to only one reasonable inference, that the Darlings intended to deceive Savers Life.

B. Savers Life is Entitled to Judgment as a Matter of Law Pursuant to the Law of Material Misrepresentation.

Under South Carolina law, an insurer may avoid coverage under an insurance policy when it establishes that: (1) the insured made a false statement in the insurance application; (2) that the insured knew was false when made; (3) that was material to the risk covered in the policy; (4) that the insurer relied on; and (5) that was made with the intent to deceive. Gasque v. Voyager Life Insurance Company of South Carolina, 288 S.C. 629, 344 S.E.2d 182, 184 (1986); Strickland v. Prudential Insurance Company of America, 278 S.C. 82, 292 S.E. 2d 301, 304 (1982); United Insurance Company of America v. Stanley, 277 S.C. 463, 289 S.E. 2d 407, 408 (1982).

Floyd, 701 F.Supp. at 1188. The first, third and fifth elements were discussed in the previous section. As to the second element (knowledge of falsity), there can be no doubt that Mr. Darling knew when he made the representations in the insurance application that some were not true. "The facts [plaintiffs] concealed were within [their] personal knowledge...and could hardly have escaped [their] attention in answering the questions propounded." Phillips, 85 S.E. 2d at 199. Furthermore, in signing that application they certified the truthfulness of the answers.

As to the fourth element (reliance), the previously discussed affidavit of Mr. Gullett states that a Certificate could not have been issued if the Darlings had provided full disclosure. The South Carolina Supreme Court stated with respect to an insurer's reliance on an applicant's representations:

> Representations in an application for a policy of liability insurance should not only be true but full. The insurer has the right to know the whole truth. If a true disclosure is made, it is put on guard to make its own inquiries and determine whether or not the risk should be assumed. A misstatement of material facts by the applicant takes away the opportunity to estimate the risk under its contract. (Citation omitted.) Where a fact is specifically inquired about, or a question so framed as to elicit a desired fact, a full disclosure must be made, and the insurer has the right to rely upon the answer. An applicant is required to make full answers without evasion, suppression, misrepresentation or concealment of material facts so that such statement will represent his knowledge of the hazards of loss. (Citation omitted.) If an applicant undertakes to state the circumstances which can affect the risk, he must do so fully and faithfully.

Government Employees Insurance Co. v. Chavis, 176 S.E. 2d 131, 133-134 (S.C. 1970). Accordingly, this court is of the opinion that Savers Life relied on the Darlings' false statements. Therefore, the policy is void pursuant to the common law of material misrepresentation.

IV. Conclusion

It is therefore, ORDERED, for the reasons articulated above, that Defendant's Motion for Summary Judgment be GRANTED.

AND IT IS SO ORDERED.

Patrick Michael Duffy
United States District Judge

Charleston, South Carolina❖

Footnotes

[1] For purposes of this motion, the court need not decide for whom Benke serves as legal agent. However, the court is mindful that an "insurance broker is primarily the agent of the person first employing him, and thus where he is employed to procure insurance, he is the agent of the insured." Allstate Ins. Co. v. Smoak, 182 S.E. 2d 749 (S.C. 1971). Under the present circumstances, it appears that Mr. Benke would be the legal agent of the plaintiffs.

[2] S.C. Code Ann. Section 38-71-40 states: "The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer." (Emphasis supplied.)

[3] The court notes that, even in the absence of the statute, plaintiffs contracted with Savers Life so that false statements on the Application could bar the right to recovery. Paragraph 18 of the Application provides: "I understand and agree that the falsity of any answer or statement in this application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the Company."

[4] When plaintiffs' medical history is compared to the responses to the questions on the Application, many inaccuracies become apparent:

1. The Application indicates that neither Mr. nor Mrs. Darling suffered from any neck, back, spine or hip disease or disorder (Question 9(o)). The medical history reveals that Mr. Darling was diagnosed with a bulging cervical disk on August 26, 1993, and received physical therapy for this condition as late as September 10, 1993.

2. The Application indicates that neither Mr. nor Mrs. Darling has ever suffered from any disease of the thyroid (Question 9(n)). The medical history reveals that Mrs. Darling was diagnosed with thyroiditis on July 9, 1991.

3. The Application indicates that neither Mr. nor Mrs. Darling ever received treatment for dyspnea (Question 16). The medical history of Mrs. Darling establishes that she was treated for dyspnea in December 1988, January 1992, and March 1992.

4. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from chest pains (Question 9(b)) or anxiety (Question 9(s)). The medical history reveals that Mrs. Darling had been treated for chest pains on two occasions and anxiety on two occasions.

5. The Application indicates that Mrs. Darling never had any disease or disorder of her reproductive organs (Question 10(b)) and never had a caesarian section (Question 10(f)). Mrs. Darling's medical history reveals a history of ovarian cysts and three caesarian sections.

6. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any disease of the gall bladder (Question 9(j)). Mrs. Darling's medical history reveals that she had surgery for the removal of her gall bladder.

7. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any disease of the rectum, esophagus, or intestines (Questions 9(j) and 9(h)). The medical history reveals that Mrs. Darling had been treated for diarrhea and rectal bleeding and had undergone a colonoscopy.❖

Legislative Report

by James R. Courie

Although the Confederate Flag has grabbed the headlines, our Legislature has found plenty of time to introduce legislation that is of great interest to our Association. Pre-filed Bills include such topics as Tort Reform, Discovery of Medical Records, Non-Jury Trials, Frivolous Lawsuits, Attorneys Fees, Automobile Insurance and Workers' Compensation. Currently we are monitoring the following legislation:

Tort Reform

Rep. Herb Kirsh has introduced three reform bills. **House Bill 3019** establishes standards and procedures for the recovery of punitive damages in a civil action. Rep. Kirsh's bill limits the maximum amount of punitive damages which may be awarded, the manner in which punitive damages must be pled, and the responsibilities of the trier of fact. The Bill also provides for attorney's fees in defense of frivolous or malicious punitive damages claims. Also included in this legislation are **H.3023** which provides for certain limits on recovery of non-economic damage awards and **H.3024** which provides for the introduction into evidence of collateral source payments that have been paid or may be due the claimant. These three bills are presently in the House Judiciary Committee. They have been introduced by Rep. Kirsh with strong support from the National Federation of Independent Businesses. The NFBI is striving to put together a coalition to actively support these bills and other tort reform efforts. As of this time, the coalition is still in the planning and development stage.

Venue

Rep. Glen McConnell has introduced **Senate Bill 273** which provides that actions against the defendant in a tort case must be tried in the county where the cause of action arose. This Bill was recently on the Senate Judiciary debate calendar. It has now been referred to subcommittee.

Hospital Incidence/Occurrence Reports

H.3248 requires that a patient's medical records include incidence and occurrence report. This bill is sponsored by Rep. Fletcher Smith of Greenville, and is currently in the House Medical, Military, Public and Municipal Affairs Committee.

Non-Jury Trial

Senator Ed Saleeby of Hartsville has introduced a bill which provides that "the General Assembly shall provide for non-jury bench trials in cases at law when the amount in controversy is $25,000.00 or less."

Frivolous Law Suits

Senator Larry Martin has introduced legislation to provide for attorney's fees and costs involved in frivolous law suits. **S.193** is presently in the Senate Judiciary Committee.

Magistrate's Court Representation and Jury Service

H.3021 provides that a professional corporation may designate an employee or agent to represent them in Magistrate's Court and that person is not engaged in the unauthorized practice of law. **H.3022** relates to the penalty for failure to appear for jury service in Magistrate's Court and provides that no person shall serve on a jury in Magistrate's Court more than once every three calendar years rather than once every three months.

Auto Insurance

Representatives Hodges, Cromer, Littlejohn, and Kirsh have introduced a lengthy piece of automobile insurance legislation. This Bill provides a definition for uninsured "motorist" and creates the South Carolina Uninsured Motorist Fund.

Attorney's Fees

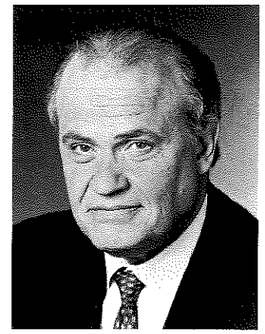
Representative Alfred Robinson has introduced **H.3383** which provides for the award of attorney's fees in contested administrative proceeding under the Administrative Procedures Act that are initiated by the State, a political subdivision of the State, or a party contesting such action. This Bill allows the prevailing party to recover reasonable attorney's fees against the appropriate agency if the agency acted without substantial justification.

Workers' Compensation

S.46 allows employers who participate in a program to prevent the use of drugs on the job to receive a credit under the merit rating system. This Bill also creates a presumption that an injury was occasioned primarily by the intoxication where the employee has a blood alcohol reading of .10 or more, or if the employee has a positive confirmation of a drug. **S.54** and **S.250** add South Carolina State constables to the definition of employee. **H.3328** provides that "all organized volunteer hazardous materials spill response teams" are added to the list of volunteers under Section 42-7-65. **S.303** amends Section 42-1-415 and provides that the Uninsured's Employer's Fund shall assume responsibility for claims within 90 days of the determination of responsibility made by the Commission.

It has been a very busy session so far. I have received calls and letters from many of you informing us about different pieces of legislation. I encourage everyone to please contact me if you become aware of legislation that may impact defense lawyers or our clients. Our lobbyist does a great job keeping us informed, but there is no better resource than our members.❖

Fred Thompson Commits to Annual Meeting



U.S. Senator Fred Thompson has provided an early commitment to address our annual meeting at the Cloister on Saturday, November 8, 1997. Senator Thompson began his law career in 1967 and served as Minority Counsel to the Senate Watergate Committee in 1973 and 1974. In 1977 Senator Thompson again took on government corruption in a Tennessee Parole Board cash-for-clemency scheme that ultimately toppled the governor. The scandal became the subject of a best selling novel and later a film in which Thompson played himself. This led to roles in 18 subsequent movies, including *In the Line of Fire*, *Die Hard II*, and *Hunt for Red October*.

Prior to his election in the Senate, Thompson maintained law offices in Nashville and Washington, and served as Special Counsel to both the Senate Select Committee on Intelligence and the Senate Committee on Foreign Relations. He is also the author of the Watergate memoir *At that Point in Time*. Thompson has been profiled in *Time*, *Newsweek*, and *Business Week*, and is regularly described as a new leader on the national scene.

Please begin NOW to make your plans to attend our 1997 Annual Meeting at the Cloister. Our high profile keynote speaker, an excellent program, and the elegance of the Cloister will make this year's annual meeting most exemplary! We are grateful to Senator Thompson for his early commitment to join us.

– G. Mark Phillips, Co-chair❖

SCDTAA ON THE WEB
http://www.scdtaa.com

The worldwide web presents many valuable opportunities to communicate with clients and business partners. The Executive Board of the South Carolina Defense Trial Attorneys' Association has approved the development of a website for the benefit of its members. The new site can be found at **http://www.scdtaa.com**.

Here members will find information on Association business as well as links to many attorney related sites. A searchable database is available where member firms can link their websites. Take a minute and investigate this latest benefit from your association.

Suggestions and comments may be E-Mailed to info@scdtaa.com. Questions concerning links and/or development may be E-mailed to ncooper@scsn.net.

Defense Research Institute Alternative Dispute Resolution Committee Presents

Two Day Mediation Seminar
April 17 - 18, 1997

ANA Hotel • 2401 M Street, NW • Washington, DC

The DRI ADR Committee is planning a "blockbuster" seminar on mediation April 17 - 18 at the ANA Hotel in Washington, DC. This is a "must be there" seminar for all defense lawyers as well as all mediators. We are assembling a group of the most talented people in the country. The program will include presentations on how to be a really effective defense advocate in the mediation process; on the most frequent mistakes made by both advocates and mediators; on how to deal with difficult or ornery lawyers and nay-saying insurance companies; on human factors and communication tips for the mediator and the advocate; on how to avoid or break through impasse; on special considerations in the mediation of employment cases, complex insurance coverage problems, multi-party claims, and much more. We will also have an ADR Committee meeting Friday morning, April 18, 1997.

Mark Your Calendars!

You won't want to miss this exciting program.

Contact DRI Headquarters at 312-944-0575 for Reservations

$545 per person (for DRI members and employees of member corporations) • **$595** per person (non-members)

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

Address Correction Requested

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE PAID
Columbia, SC 29201
PERMIT NO. 383