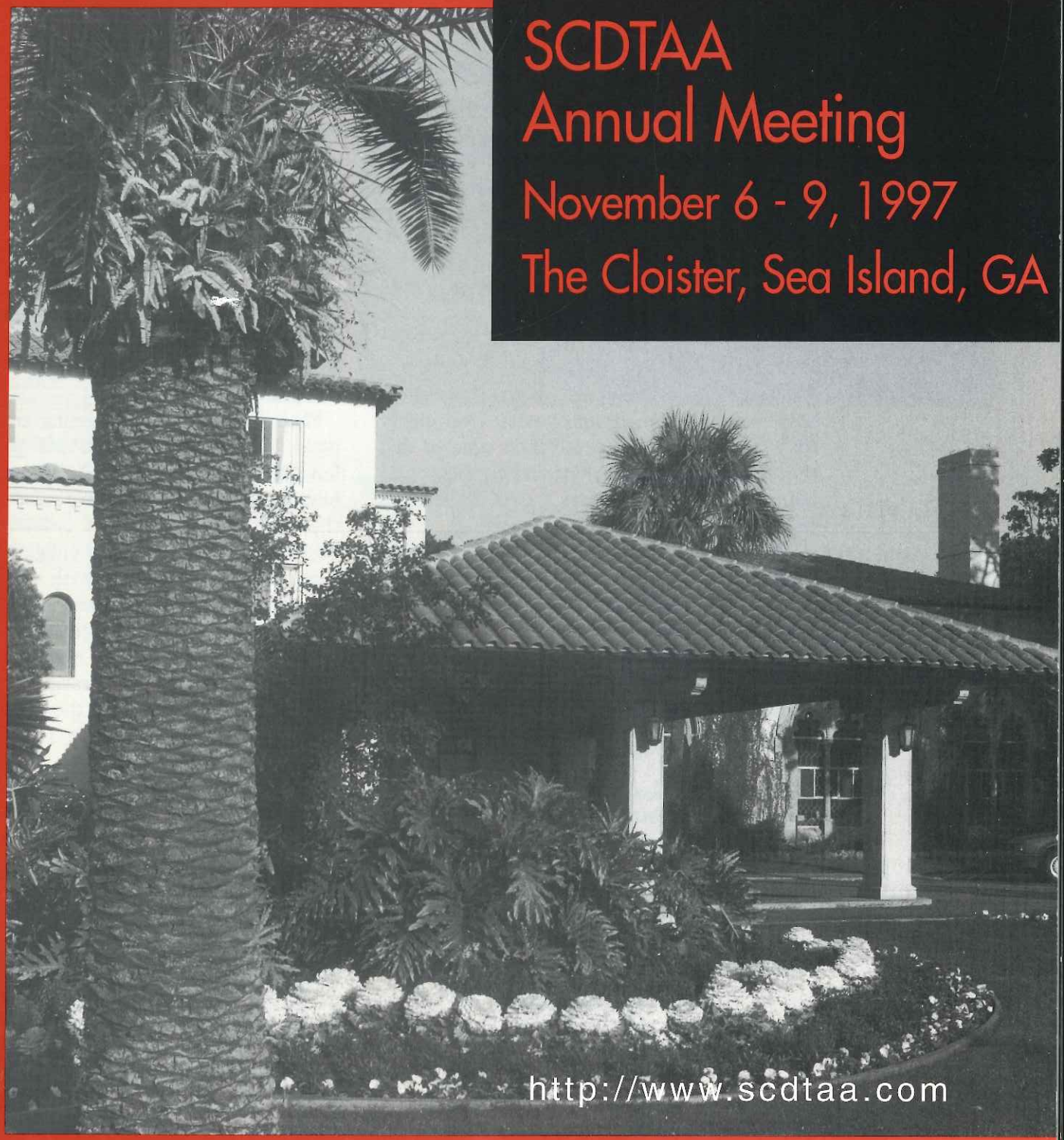
S.C. Defense Trial Attorneys' Association

Volume 25 Number 3 • Fall, 1997

The DefenseLine



SCDTAA Annual Meeting

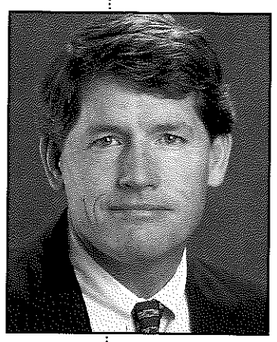
November 6 - 9, 1997

The Cloister, Sea Island, GA

http://www.scdtaa.com

President's Letter

Thomas J. Wills, IV



July has been an active month for our Association. We sponsored the Trial Academy in Columbia and held our Joint Meeting in Asheville. Both events were very successful thanks to the dedication and hard work of our committee chairs and their members. Sam Outten and Clark McCants, along with their committee, devoted countless hours to present another excellent Trial Academy. The faculty was comprised of experienced defense lawyers. State Circuit judges volunteered their time to preside over the mock trials. This year we were fortunate to be able to hold the mock trials in the Richland County Circuit Courtrooms as opposed to classrooms at the law school, which have been used in previous years. Over eighty (80) jurors also volunteered their time so that the students could experience trying their cases before a full set of jurors. Cris Malseed of Nelson, Mullins, Riley & Scarborough, L.L.P (Columbia), deserves special recognition for her tireless efforts in securing the participation of the jurors and in assisting in the other organizational tasks.

I attended the reception and dinner honoring the Judges and Speakers the night before the mock trials. The enthusiasm of the students, faculty and Judges was very impressive. On behalf of the Association, I want to thank all of the participants for providing such a valuable opportunity for the younger defense lawyers of our State to obtain important trial experience at this stage of their careers, especially when opportunities for them to participate in jury trials are fewer and farther between than in years past.

Our 30th Annual Joint Meeting with the South Carolina Claims Management Association was held again at the Grove Park Inn in Asheville. One of our goals this year was to present an educational program designed to appeal to the needs of both the claim managers and the attorneys. Mills Gallivan and Susan Lipscomb accomplished this goal quite well. I received many favorable comments from members of the Claims Organization regarding the content of the programs.

The Joint Meeting is important to our Association. We have one of the only defense associations in the country which participates in a joint program with the insurance representatives. In order to insure its continued success, we need to increase participation and attendance by both claims managers and defense attorneys. A meeting is being scheduled for this Fall at which time members of our Executive Committee and representatives of the Claims Managers' Association will discuss the future of the Joint Meeting and provide suggestions for improving attendance. We would welcome any suggestions from our members for subjects to be discussed at the meeting.

Plans for the Annual Meeting are complete. Steve Darling, Sam Outten and Mark Phillips have secured Senator Fred Thompson as our keynote speaker and have also persuaded the nationally syndicated columnist, James Kilpatrick, to entertain and enlighten us. With such fine speakers and with entertainment provided by Maurice Williams and the Zodiacs at our dinner dance, this meeting promises to be an outstanding event. A special reception will be held for the past presidents, who have served our Association over the last thirty years. This year's meeting will be at The Cloister, Sea Island on November 6th - 9th. You should have received your registration forms by now. Please send them in early. I look forward to seeing all of you there. ❖

SCDTAA ON THE WEB

http://www.scdtaa.com

S.C. Defense Trial Attorneys' Association — Volume 25 Number 3 • Fall, 1997

The DefenseLine

Ten Years Ago

In the Fall '87 issue of *The Defense Line*, President elect, CARL EPPS, received an award from the South Carolina Civil Justice Coalition presented by EDWARD E. POLIAKOFF, Steering Committee Chairman. President THERON G. COCHRAN thanked the Association for the opportunity to serve as president, and was looking to render the gavel to CARL EPPS at the annual meeting.

CARL EPPS, Chairman of the 1987 Legislative Committee, reported on the success of the South Carolina Civil Justice Coalition. GLEN BOWERS, Chairman of the Americas Curie Committee, reported on our Association's petitioning South Carolina Supreme Court to file a brief in the case of *Clarence Barnwell v. Barber-Coleman Company*. GLENN thanked TIMOTHY BOUCH of Charleston, who assumed the responsibility for writing the brief.

MARK WALL, Chairman of the Membership Committee, reported we had a total membership of 605. Of that number 488 were firm members and 117 individual members. The association was pointing toward its Twentieth Annual Meeting at the Hotel Inter-Continental at Hilton Head, South Carolina.

Twenty Years Ago

JACKSON L. BARWICK, JR., President, received the Defense Research Institute's Exceptional Performance Citation Award on behalf of the Association. 1977 marked the Tenth Annual Meeting of the Defense Attorneys Association and the Claims Managers Association. The joint meeting was held at the Landmark Resort Hotel where there was something resembling a **hurricane** during the meeting. JOHN J. MCCAY, Program Chairman, was planning for the annual meeting of the Association to go out of state for the first time at the Savannah Inn and Country Club, Savannah, Georgia.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION ANNUAL MEETING
NOVEMBER 6-9, 1997, THE CLOISTER, SEA ISLAND, GEORGIA
Schedule of Events

Thursday, November 6, 1997

3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 6:30 p.m.	Registration
5:00 to 6:00 p.m.	Nominating Committee Meeting
7:00 to 8:00 p.m.	Welcome Reception honoring the Past Presidents
	Dinner on Your Own

Friday, November 7, 1997

8:00 a.m. to noon	Late Registration
8:00 to 9:00 a.m.	Coffee Service
8:15 to 8:30 a.m.	Welcome and Announcements Thomas J. Willis, IV, Esquire, *SCDTAA President*
8:30 to 9:30 a.m.	Ethics - Henry B. Richardson, Jr., Esquire Lawyer Grievances; The New System; How to Avoid; and What To Do If You Can't
9:30 to 9:45 a.m.	State of the Judiciary - Chief Justice Ernest Finney
9:45 to 10:15 a.m.	State Judicial Panel
10:15 to 10:30 a.m.	Coffee Break
10:00 to 11:15 a.m.	Spouses' Program
10:30 to 11:15 a.m.	Breakouts - A. Workers' Compensation B. Employment Law C. Commercial Litigation D. Products Liability
11:15 a.m. to 12:15 p.m.	James Kilpatrick - A Journalist's Point of View
1:00 p.m.	Golf Tournament
1:00 p.m.	Fishing Trip
2:00 p.m.	Tennis Tournament
7:00 to 8:00 p.m.	Cocktail Reception in honor of the Speakers Dinner on Your Own

Saturday, November 8, 1997

8:00 to 9:00 a.m.	Coffee Service
8:15 to 8:30 a.m.	SCDTAA Annual Business Meeting
8:30 to 8:50 a.m.	SCDTAA Web Site - Nancy Cooper, *SCDTAA Staff*
8:50 to 9:00 a.m.	DRI Report
9:00 to 10:00 a.m.	Litigating the High Profile Case - "To be or Knob to Be" M. Dawes Cooke, Esquire
10:00 to 10:15 a.m.	Coffee Break
10:15 to 10:45 a.m.	Federal Judicial Panel
10:45 a.m. to Noon	Keynote Address - Senator Fred Thompson (R.Tenn)
7:00 to 8:00 p.m.	Cocktail Reception (Black Tie Optional) Dinner on Your Own
9:00 p.m. to 1:00 a.m.	Dance to the music of Maurice Williams and The Zodiacs

Sunday, November 9, 1997

8:30 to 10:30 a.m.	Ethics Replay
10:30 a.m.	Farewell Reception Honoring Thomas J. Wills, IV, Esquire

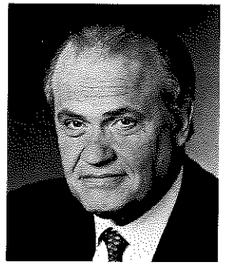
Outstanding Events Planned for the Annual Meeting

James Kilpatrick, the constitutional law columnist and former advocate in Point/Counter-Point on 60 Minutes, will address our Association during the first day of the Annual Meeting on Friday, November 7. On Saturday, Fred Thompson, the former actor and Watergate investigator who is now a U.S. Senator, will address us. After all of the work is done, Maurice Williams and the Zodiacs will entertain us and the judiciary on Saturday evening.

Also durig the seminars, Henry Richardson, our state's new Director on grievances and discipline, will address us. His ethics topic will cover all the new guidelines, how to avoid problems, and what to do if they cannot be avoided. Dawes Cooke will provide some comments on a recent high profile case involving a state military college. There will also be judicial panel discussions, an address from Chief Justice Finney, and break-out sessions that have been multiplied so that all attorneys can take advantage of them.

As always, the Cloister, with its settings and meals, will be a hand that will play itself. The committee is confident that this year's program will enhance our experience at this luxurious resort. Tom Wills just sent the registration materials out to all Association members. Please plant to attend! - by G. Mark Phillips, Program Co-Chair ❖

Thompson

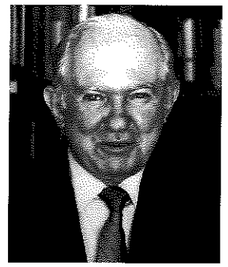


Sen. Fred Thompson

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 to 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. ❖

Kilpatrick



James J. Kilpatrick

James J. Kilpatrick is the most widely syndicated political columnist in the country. He appears in more than 500 daily newspapers.

Most of Kilpatrick's columns deal with the Washington scene -- The White House, Congress, the whims and caprices, and occasional accomplishments of the federal bureaucracy. He has won praise for his frequent columns on the U.S. Supreme Court.

Serving as reporter, political writer, associate editor, and for 17 years the editor of the Richmond, VA. *News Leader*, Kilpatrick began writing his column in 1964.

For nine years, he was a familiar figure to millions as leader of the point against a liberal counterpoint. (*"Point Counterpoint"*) on CBS' *"Sixty Minutes"*. Others know him through his seven books and frequent articles for *Nation's Business* and *National Review*.

In more recent years, Kilpatrick has attended more than 15 national political conventions, traveled widely in Europe and Africa, and interviewed platoons of Presidents, prime ministers, ambassadors, con artists, senators, diplomats, and medical quacks.

He looks upon all of them with a wry and tolerant eye. ❖

Recent Decisions Under the Americans With Disabilities Act

by Susi McWilliams,
Grimball and Cabaniss

In two recent orders granting summary judgment to an employer (coincidentally the same employer, United Parcel Service "UPS"), two federal judges in South Carolina have given further clarification as to the meanings of several key phrases under the Americans With Disabilities Act, 42 U.S.C. Section 12101, *et seq.* ("ADA"). In *Dooley v. United Parcel Service, Inc.* Civil Action No. 3:94-1848-OBC, Judge Matthew Perry further developed the meaning of the phrase "qualified person with a disability" as defined by the ADA and joined a number of other jurisdictions which have recognized the doctrine of judicial estoppel. In *Polston v. United Parcel Service, Inc.*, Civil Action No. 3:94-2348-23BC, Judge Michael Duffy recognized that minor foot and shoulder injuries, even if they cause an employee to miss substantial periods of work, do not automatically qualify as "qualifying disabilities" under the ADA. In addition, Judge Duffy's order further amplified the meaning of the phrase "substantial life activities" as that phrase is used under the ADA. In order to appreciate the significance of these two decisions, a detailed summary of the facts of each is included.

The first case arose out of the work-related back injury to the plaintiff, Allen Dooley ("Dooley"), a supervisor in the Air Industrial Engineering department at UPS. In this position, Dooley's job duties and responsibilities included the following: performing volume forecasting, making flow corrections, determining aircraft capacities; performing audits; training personnel; preparing operating plans and procedures; planning; preparing work measurements; responding to requests; and monitoring I.E. activities related to the gateway operation.

Dooley sustained an on-the-job back injury while lifting boxes at UPS. He thereafter had three surgeries: a decompressive laminectomy with disc extension in December 1988, an instrumental fusion with decompression in December, 1990, and placement of a spinal cord stimulator in June, 1993. Dooley worked intermittently since his injury and was out of work for most of the entire year in 1991. During the periods of time that Dooley was on medical leave, he continued to receive his salary and benefits from UPS pursuant to a salary continuation program for management employees.

In approximately January, 1993, because the pain from his back became progressively worse, Dooley could not sit for long periods of time and had to lie down. As a result, Dooley requested that he be allowed to work at home. One of Dooley's supervisors agreed to send some certain time studies, auditing, and volume projections, along with a computer, to his home to work until he could return to work and resume his duties as an I.E. Supervisor. Dooley attempted to perform this work at home, but he could only work for an hour or two and then be would be forced to lie down. Dooley essentially could not work for more than an hour or two at at a time. In late February, 1993, UPS removed the computer from Dooley's home. UPS notified Dooley, by letter dated April 2, 1993, that his salary continuation was ending because he had exhausted that benefit and he was also provided a COBRA notification form. Dooley was officially terminated by UPS sometime after the instant lawsuit was filed, but for all intents and purposes, he did not ever return to work, nor did he offer himself as ready to return to his job as Air I.E. Supervisor.

As a result of his injury, Dooley applied for worker's compensation benefits with the South Carolina Worker's Compensation Commission (the "Commission"). A hearing was held before the Commission on October 12, 1993, in which Dooley testified under oath that he was totally and permanently disabled and unable to return to work at UPS. Dooley testified that the only work he felt he was capable of performing is a job where he could work and lie down periodically during the day. The Commission issued an Order on November 8, 1993 finding that Dooley had reached maximum medical improvement and declaring him permanently and totally disabled based upon a greater than 50% loss of use to his back. The Commission further held that Dooley "is unable to perform services other than those so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." The Commission awarded Dooley lifetime medical benefits and weekly compensation.

Dooley brought this action alleging a cause of action under the Americans With Disabilities Act ("ADA"). He claimed that UPS failed to reasonably accommodate him and terminated him because of his alleged disability (back injury). UPS's primary defenses were that Dooley was a "qualified individual with a disability" because he could not perform the essential functions of his job and further that Dooley was estopped from recovery under the ADA because of his sworn testimony before the Commission, some six months **after** he claimed he was terminated by UPS, that he could not perform his job at UPS.

The district court, in affirming the Magistrate Judge's Report and Recommendation granting summary judgment to UPS, rejected Dooley's claim that because there was some testimony in the record that some of his duties were performed by other individuals at UPS, there was a question of fact for the jury on whether Dooley could perform the essential functions of his job. The court noted that the material issue was what were the essential functions of Dooley's job, not whether some of the duties could be performed by others. The court noted that under the ADA, "consideration **shall** be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description **shall** be considered evidence of the essential functions of the job." 42 U.S.C. Section 12111(8)(emphasis added by the court). Noting that Dooley admitted in his deposition that his job description accurately reflected his job duties and further admitted that he could not perform the auditing functions of his job, concluded that this testimony, coupled with Dooley's other admissions concerning his inability to stand or sit for more than a short period of time precluded his claim.

Dooley argued that he should have been allowed to continue to work at home and that UPS's removal of the computer constituted a violation of the ADA as a refusal to allow a reasonable accommodation. The court rejected this argument, noting that under well-established law, an employer is not required to allow an employee to work at home as a reasonable accommodation under the ADA. See also *Tyndall v. Nat'l Educ. Centers*, 31 F.3d 209, 213 (4th Cir. 1994); *Vande Zande v. State of Wisconsin Dept. of Administration*, 44 F.3d 538, 544 (7th Cir. 1995); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d cir.), *cert. denied*, 116 S.Ct. 522 (1995); *Whillock v. Delta Air Lines*, 5 AD Cases 1027 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996). It also noted that under the EEOC's framework for analyzing whether a job function is essential, the court should consider (a) whether the position exists to perform that function; (b) whether there are a limited number of employees available who could perform the function; or (c) whether the function is highly specialized. 29 C.F.R. Section 1630.2(n)(2). In this case, Dooley could not have performed what it identified as at least four essential functions from home.

With respect to UPS's argument that judicial estoppel precluded Dooley's recovery under the ADA, the Magistrate Judge rejected this position in his Report and Recommendation, apparently on the basis that a person could be completely disabled for purposes of the South Carolina Worker's Compensation Law, but not under the ADA. The district court overruled the Magistrate Judge's conclusion on this point, ruling that Dooley's unrefuted, sworn testimony in October, 1993, six months after his termination, that he could not perform his job at UPS, estopped him from contending that he was a "qualified person with a disability" for purposes of his ADA claim against UPS. The doctrine of judicial estoppel prohibits a party from taking contradictory positions, especially **factual** positions, which are clearly inconsistent with the prior factual position that the party successfully maintained before another judicial or quasi-judicial forum. *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996).

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Recent Decisions Under the Americans With Disabilities Act

Continued from page 7

The court noted that the Magistrate Judge had correctly relied upon a recent South Carolina case, *Hindman v. Greenville Hos. Sup.*, 947 F. Supp. 215 (D.S.C. 1996), in which the necessary elements of judicial estoppel were set out. In this case, the court found that Dooley's testimony before the Worker's Compensation Commission that he was totally unable to work, and specifically, to perform his job at UPS, for which he was awarded permanent disability benefits, was conclusively inconsistent with his claim in his suit against UPS that he was a "qualified person with a disability".

The second case arose from non-work injuries sustained by Paula Polston ("Polston"). Polston began employment with UPS in August, 1977, as a part-time employee and became a manager in 1981. In her last position, Feeder I.E. Supervisor, Polston's duties included the following: preparing time studies, volume forecasts, feeder capacity determinations, car orders and TDP Audits; training supervisors and feeder drivers; planning operations; conducting quarterly safety rides; and climbing in and out of tractor-trailers.

In January, 1991, Polston had a surgical procedure on her right foot for a bone spur, a non-work related injury, and was on medical leave for approximately one (1) month. In or about December, 1991, Polston injured her right foot again as a result of slipping and falling on her stairs at home. After this injury, she claimed to have developed tumors in her foot and had surgery to remove the tumors in January, 1992. In or about February or March, 1992, Polston developed problems with her shoulder (which she described as "freezing up"), had corrective surgery, and received physical therapy for this condition.

In April, 1992, Jenny Bargen, a UPS nurse, met with Polston to discuss her medical problems and to develop a plan to assist her in returning to work. Upon receipt of medical documentation from Polston's physicians, UPS provided Polston with a part-time desk position in the I.E. Department in June, 1992. UPS attempted to accommodate Polston until she could return to work full-time and resume her duties as an I.E. Supervisor. However, because of her medical conditions, Polston was not able to perform the essential functions of this part-time position. Polston worked for a short period of time and then returned to short-term medical leave. During her periods of medical leave, Polston was placed on a Wage Continuation Plan for UPS's full-time management employees which provided for paid benefits for a maximum period of twelve (12) months of leave.

In December, 1992, UPS informed Polston that her short-term salary continuation benefits had expired and that she could apply for long-term disability under UPS's medical leave plan, if she qualified. On December 31, 1992, Polston was placed in an "unpaid" medical leave status because of her medical problems since she had exhausted her short-term medical benefits. Shortly thereafter, Polston submitted to UPS medical documentation containing restrictions on her activity that, in the opinion of the UPS physician, would not allow her to perform the essential job functions of a Feeder I.E. Supervisor. At that time, Polston had not been able to perform the essential function of the Feeder I.E. Supervisor position since December, 1991, due to various medical problems. However, UPS had paid Polston her full wages since January, 1992. Polston remained on inactive employment status due to her failure to return to work when she brought this action against UPS alleging that she was discharged in violation of the ADA.

Magistrate Judge Joseph R. McCrorey issued a Report and Recommendation ("R&R") granting the motion for summary judgment by UPS, which was based on two primary arguments. FIrst, UPS argued that Polston did not have a disability and therefore, she was not entitled to the protection of the ADA. Second, UPS maintained that Polston's physical and mental impairments did not "substantially limit" a major life activity. Therefore, her claim under the ADA was barred.

The R&R concluded that Polston failed to show that she is a "qualified individual with a disability" within the meaning of the ADA. This was in spite of Polston's reliance on a laundry list of injuries, including a bone spur in her right foot, a break of her right foot in 1991, a "freezing up" of her left shoulder in 1992, carpal tunnel syndrome and the development of arthritis in her right foot. The major life activities Polston claimed were limited by these conditions were walking and performing manual tasks. However, the Magistrate Judge noted that "[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA. The statute requires an impairment that substantially limits one or more of the major life activities." *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995). "Substantially limits" is defined as "unable to perform a major life activity that the average person in the general population can perform, or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. Section 1620.2(j)(1). In Polston's case, the medical testimony of Polston's own physicians refuted her claim that the major life activities of walking or performing manual tasks had been substantially limited. The various conditions of which she complained were either not of significant duration or were corrected (e.g. the treating physician for Polston's shoulder testified that she had only a five percent permanent damage to her upper extremity and that he did not consider the shoulder to be a long-term injury).

Polston also claimed that she was disabled under the ADA because UPS regarded her as having an impairment that would substantially limit a major life activity. Specifically, she claimed that UPS's action to allow her to perform a desk job from June 1992 to August 1992 was an accommodation of her disability and gives rise to an inference that UPS perceived her as being disabled. UPS argued that Polston had no evidence that she was regarded as having a disability and that placing her on medical leave or light duty is not an admission that the defendant regarded her as having a disability. The Magistrate Judge noted that "an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986). Rather, "an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." *Forrisi*, at 944. In addition, the Magistrate Judge concluded that an employer's decision to accommodate an employee or place the employee on limited duty does not establish a "regarded as" claim, citing *Muller v. Automobile Club of Southern California*, 897 F. Supp. 1289 (S.D. Cal. 1995) and *Thompson v. City of Arlington*, 838 F. Supp. 1137 (N.D. Tex. 1993). The Magistrate Judge found that as there was no evidence that UPS did not expect Polston to resume her duties as a Feeder I.E. Supervisor after she recovered from her injuries, she did not have a "regarded as" claim under the ADA.

The *Polston* case is significant for another reason. With only one exception, Polston's objections to the Magistrate Judge's R&R were found by Judge Duffy to be impermissibly general and therefore not worthy of review, as they did not direct the district judge to any specific error in the R&R. Having been given notice of the consequence of failing to state specific objections, the district court concluded that Polston's objections did not have to be considered by it. Nonetheless, Judge Duffy's opinion affirming the Magistrate Judge's R&R provided that the court did review "the merits of the case" and concluded that it agreed with the Magistrate Judge's conclusion that Polston had failed to show that she was a "qualified individual with a disability" within the meaning of the ADA.

Both cases are presently on appeal. ❖

Internet Committee Seeks Input

If you have access to a computer these days you are probably already on line...that is hooked up to the Internet, the future of worldwide communication.

SCDTAA members can enjoy the benefits of a state of the art website at **http://www.scdtaa.com.** Readily available are pages on the history, officers, executive board and staff of the SCDTAA. Other pages feature information about seminars and conventions, legislative news and related defense links.

The SCDTAA Internet Committee is committed to developing and utilizing the Internet in ways that will benefit the membership. In order to best serve our membership your input is needed. Please direct your comments to Bill Davies, Frankie Marion, Mike Bowers or Nancy Cooper (SCDTAA staff) or e-mail your comments to info@scdtaa.com.

Recent Order

In the United States District Court for the District of South Carolina, Charleston, Divison. BET Plant Services, Inc. d/b/a BPS Equipment Rental and Sales, Plaintiff, vs. W.D. Robinson Electric Company, Inc. Defendant.

ORDER

In the United States District Court for the District of South Carolina Charleston Division. This action is before the court on cross motions for Summary Judgement.

I. Background

Defendant contracted with Plaintiff for the rental of a lift to be used on certain contracting jobs. The rental contract contains a clause which provides for indemnification of Plaintiff by Defendant in the event that Plaintiff must pay damages for any occurrence arising out of the use of the equipment during the rental period. The contract provides in part as follows:

> 9. **INDEMNIFICATION**. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, CUSTOMER (DEFENDANT) SHALL INDEMNIFY AND SAVE HARMLESS COMPANY (PLAINTIFF), AND ITS AGENTS, EMPLOYEES, OFFICERS, DIRECTORS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL FEES (INCLUDING ATTORNEY'S FEES), EXPENSES (INCLUDING TRAVEL, COURT REPORTER, COPYING AND ALL OTHER EXPENSES OF LITIGATION), COSTS, CLAIMS, ACTION, DAMAGES, INJURIES, LIABILITIES (WHETHER BASED ON THEORIES OF NEGLIGENCE, STRICT LIABILITY OR OTHERWISE), AND LOSSES OF EVERY KIND. IRRESPECTIVE OF ANY NEGLIGENT ACT OR OMISSION BY COMPANY, ARISING OUT OF OR IN ANY WAY RELATED TO THE EXECUTION, DELIVERY OR PERFORMANCE HEREOF, THE EXERCISE, ENFORCEMENT, OR VOLUNTARY MODIFICATION BY COMPANY OF ANY OF ITS RIGHTS OR REMEDIES HEREUNDER, THE USE, CONDITION (INCLUDING BUT NOT LIMITED TO, LATENT OR OTHERWISE DEFECTIVE CONDITION WHETHER OR NOT DISCOVERABLE BY CUSTOMER OR COMPANY), OPERATION, OWNERSHIP, SELECTION, INSTALLATION, TRANSPORTATION, LOADING, UNLOADING, PRESERVATION, PROTECTION, RETURN OR REPAIR OF ANY OF THE EQUIPMENT OR THE FAILURE OF CUSTOMER TO FULLY PERFORM HEREUNDER...

Plaintiff seeks damages it incurred as a result of an accident in which one of Defendant's employees, Stephen Moore, was injured while operating the lift. Defendant paid worker's compensation benefits to Moore for the accident. Moore subsequently sued Plaintiff for negligence, strict liability, and breach of warranties. Plaintiff incurred damages defending and settling Moore's claims. Plaintiff now seeks to recoup those damages in this action, alleging that it is entitled to indemnification pursuant to certain provisions in the contract with Defendant regarding the lift.

Defendant contends that Moore's accident occurred, at least in part, because of Plaintiffs' negligence. Defendant argues that it need not indemnify Plaintiff for damages caused by Plaintiffs' negligence.

II. Argument

This is a diversity action. When a federal court sits in diversity, it is bound by applicable state substantive law. 28 U.S.C. Section 1652 (1996); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Benner v. Nationwide Mut. Ins. Co.,* 93 F.3d 1228, 1234 (4th Cir. 1996).

Indemnity is that form of compensation in which one party is liable to pay a second party for the loss or damage the second party incurs to a third party. *Loyola Fed. Savings Bank v. Thomasson Properties*, 456 S.E.2d 423, 424 (S.C. Ct. App. 1995); *Campbell v. Beacon Mfg. Co.*, 438 S.E.2d 271, 272 (S.C. Ct. App, 1993). A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity. *Id.* Under South Carolina law, a contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. *Campbell,* 438 S.E.2d at 272 (citing *Federal Pacific Electric v. Carolina Production Enterprises*, 378 S.E.2d 56, 57 (S.C. Ct. App. 1989). A contractual provision purporting to relieve a party from liability from its own negligence must be "clear and explicit" in order to be valid. *Murray v. Texas Co.*, 174 S.E. 231 (S.C. 1934); *Federal Pacific Electric*, 378 S.E.2d 56. The *Federal Pacific Electric* court explained:

> Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee's own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed. Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.
>
> The courts, however, differ in their interpretation of the words, "clear and unequivocal terms" when they are applied to indemnity provisions that contain general language such as "any and all claims." Some courts hold that the "clear and unequivocal terms" requirement is satisfied only by a specific reference in the indemnity clause to the indemnitee's negligence. Other courts take the view that words of general import are sufficient...Still other courts look at the entire contract and any other factors manifesting the intention of the parties to determine whether they "clearly and unequivocally" expressed the intent to indemnify the indemnitee for its own negligence.

Federal Pacific Electric, 378 S.E.2d at 57-58 (citations omitted). The *Federal Pacific Electric* court emphasized that the South Carolina Supreme Court has not yet decided which view it favors, but hinted in *Murray v. Texax Co.* that it requires more than general language. *Id.* At 58 (citing *Murray v. Texas Co.*, 174 S.E. 231 (S.C. 1934).

In *Murray*, Texas Company contracted to provide, install and service gas station equipment to Murray, who would exclusively sell their gasoline. Through Texas Company's negligent installation and servicing of the equipment, a leak developed and caused substantial damages to Murray. Texas Company claimed that Murray could not recover any damages from them because of the indemnification clause in their contract which provided as follows:

> The agent shall...accept full responsibility for and indemnity the company against all acts and omissions of himself, his agents, his employees and servants, and exonerate the Company and hold it harmless from all claims suits and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station.

Id. At 231-32. The court did not agree with Texas Company's argument, stating:

> While it is true that the language used in the [indemnity] provision...is broad and comprehensive, it is...provocative of some doubt. The [oil company] itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the [distributor] agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt...in favor of the [distributor], and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the oil company.

Id. At 232.

Unlike *Murray* and *Federal Pacific Electric,* the language contained in the indemnity provision of Plaintiff and Defendant's contract is not too broad or "provocative of some doubt." Rather, the language unequivocally states that "Customer [Defendant] shall indemnify and save harmless the Company [Plaintiff]...irrespective of any negligent act or omission by Company [Plaintiff]..."[1] This language "clearly and unequivocally" expresses the parties' intent to indemnify the indemnitee against liability for its own negligent actions. *Federal Pacific Electric*, 378 S.E.2d at 58.[2]

Defendant argues that the language is "almost undecipherable" and reproduced in fine print on the rear of the rental contract. (Defendant's Motion for Summary Judgment, p.2). However, the court finds this argument unpersuasive. The rental contact clearly provides, above the signature line, that the customer (Defendant) has

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"read the terms and conditions of this Agreement, including those on the reverse side hereof, and agrees to be bound by the same." Additionally, the front of the contract instructs Defendant, (in bold, red print) to "see reverse side which provides that" (in bold print) "customer will defend and indemnify seller (paragraph 9)." The contract clearly emphasizes and alerts Defendant to the indemnification provision.

Defendant also asserts that the contract was signed by its job superintendent when the equipment was delivered to a job site by Plaintiffs' truck driver. Defendant does not argue it did not accept the contract, but rather that the indemnification provision is unenforceable because it does not express Defendant's intentions. The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks tot he language of the contract. *Sphere Drake Ins. Co. v. Litchfield,* 438 S.E.2d 275, 276 (S.C. Ct. App. 1993). If the language is clear and unambiguous, the language alone determines the contract's force and effect. *Id.* It is uncontroverted that Defendant's agent, Kevin Miesmer, had full authority to enter into the contract with Plaintiff and to bind Defendant to the same. (Miesmer Depo., pp. 11-13). Defendant has admitted that it entered into the contract, which sets forth the terms and conditions which are the subject of this suit. (Defendant's Responses Nos. 3 and 4 to Plaintiffs' Requests for Admission). The language in the indemnification provision clearly and unambiguously establishes that Defendant must indemnify Plaintiff for damages resulting from use of the lift, regardless of any negligence by Plaintiff.

III. Conclusion

For the reasons stated above, Plaintiffs' Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

It is therefore,

ORDERED, that Plaintiffs' Motion for Summary Judgment be **GRANTED**; and Defendant's Motion for Summary Judgment by **DENIED**.

AND IT IS SO ORDERED.

David C. Norton
United States District Judge
May 30, 1997
Charleston, South Carolina

[1] Because the indemnification provision requires Defendant to indemnify Plaintiff for damages which may have been caused by Plaintiff's negligence, determining who caused the accident is unnecessary and irrelevant. Accordingly, the court will not address Plaintiff's argument that Defendant, not Plaintiff, caused the accident.

[2] Defendant analogizes its case to the unpublished opinion in *Mullinax v. Bepex Corp. v. Stouffer Foods Corp.*, C.A. No. 88-368-3 (D.S.C. April 29, 1989). In *Mullinax*, the court had to determine whether an indemnification provision requiring Stouffer to indemnify Bepex for any damages resulting from OSHA violations clearly and unequivocally expressed an intention that Stouffer indemnify Bepex for Bepex's own negligence. Unlike the indemnification provision in *Mullinax*, the one in Plaintiff and Defendant's contract specifically references Plaintiff's negligence. The two provisions are not analogous and the court is not compelled to follow the reasoning behind *Mullinax*. ❖

Recent Order

In the United States District Court for the District of South Carolina Charleston Division. Prentice W. Cooks, Plaintiff, versus Autozone, Inc., Defendant.

Order and Report and Recommendation

This matter came before the court on the plaintiff's motion for sanctions against both the defendant and out of state counsel, The Kullman Firm (Kullman), for numerous delicts in connection with discovery.

After an extensive hearing, it was determined that while all of the delicts could not be laid at the feet of the defendant for the purpose of imposing sanctions, the defendant's foreign counsel should no longer be allowed to proceed *pro hac vice* in this court in connection with this sanction.

This is not a matter which has been considered lightly or one that arises out of any one event. Instead, this decision results from serious consideration of the pre-trial conduct of this case as a whole and the repeated discovery issues with which this court has had to contend.

Three incidents highlight the situation. First, in January of this year, the plaintiff brought to the court's attention problems he was having arranging for the deposition of the defendant's chief executive officer. At a hearing, the plaintiff's counsel, a Kullman associate, represented to the court that the witness had retired, was no longer employed with the defendant and his whereabouts were unknown. After further hearings and the plaintiff's counsel produced a copy of the witness' employment contract with the defendant which he had found on the Internet, Kullman associates admitted that the previous representations to the court were false. Thereafter, the offending associate was replaced by another Kullman associate in this court.

Second, on November 5, 1996, the plaintiff filed a motion to compel production of all files of Tommy Williams, and in January, 1997, at a hearing on all pending motions, the defendant's counsel agreed to produce the documents. The documents were not produced, and on March 5, 1997, another hearing was held at which time the defendant's local counsel agreed to produce the documents within 15 days. The Kullman associate unilaterally decided that the documents did not have to be produced until March 24, 1997, and thereafter some documents were produced. Nevertheless, on June 10, 1997, the day before the deposition of Williams, a Kullman associate, produced documents which specifically supported the plaintiff's allegations herein.

The plaintiff complained that this would require the retaking of some previous depositions concerning the issues discovered in the June 10, 1997, documents and handicapped him in preparing for the Wilson deposition. At the hearing on this matter, the Kullman associate represented to the court that she had redacted the Williams file, notwithstanding the agreement to produce the entire file, and despite having possession of the entire Williams file, had not seen the importance of the additional documents until June 10th at which time she immediately notified plaintiff's counsel.

The third incident involves the taking of depositions. Repeatedly during the taking of depositions, the Kullman associate taking the deposition has directed witnesses not to answer questions propounded by the plaintiff's counsel in contravention of Local Rule 30 (c). Further, when the objection and direction not to answer was based on some form of privilege, counsel

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Evidence Matters

E. Warren Moise
Grimball and Cabaniss, L.L.C.

Evidence of the Plaintiff's Other Claims for Compensation

The defendant attempting to admit evidence that the plaintiff has made other claims for compensation can expect resistance from the plaintiff. The decision usually will be discretionary with the court. Thus, knowing the rules, some basic case law, and some potential theories of admissibility can be helpful.

(A) Some Applicable Evidence Rules

This area of the law generally is controlled by Federal and South Carolina Rules of Evidence **402** (relevant evidence generally admissible), **404(b)** (admissibility of other crimes, wrongs, or acts), **608(b)** (witness' other acts for proving he is not credible), **611(b)** (cross-examination about matters raised in direct examination), **613** (prior-inconsistent statements), and **801**[1] (party admissions). When experts are involved, rule **705** (bases for expert opinions may be disclosed during cross-examination) can become important.

The common law holds that evidence inadmissible for one purpose may be admissible for another reason.[2] Prior claims may not be used to show that because someone was in a prior accident, he was negligent on the occasion being litigated in the case at bar.[3] Evidence of general litigiousness about unrelated claims generally is inadmissible.[4] Thus, for example, a previous breach-of-contract claim about defective materials usually would not be admissible in the plaintiff's later suit about personal injuries. The evidence doors are opened more widely into prior claims when fraud is alleged, and prior, similar fraudulent claims usually are admissible.[5]

Pleadings from another claim (even if they had been withdrawn or abandoned)[6] are admissible in proper cases, whether an answer[7] or an unverified complaint.[8] For example, when a plaintiff denies she suffered the same injuries in an earlier accident as she did in the case at bar, her entire unverified complaint should be admitted as a party admission or inconsistent statement.[9] Alternative pleadings (e.g., "The Co-Defendant\architect did not omit proper flashing details, but if he did, the Co-Defendant owes a duty to indemnify this Defendant") usually are inadmissible, however.[9]

(B) Credibility

A party's credibility always will be relevant,[11] including his testimony about damages. If the present claim is part of a common scheme or plan (for example, part of a series of bogus claims), the other claims may be admissible under rule 404(b). Moreover, the accuracy of a witness' memory[12] is important to credibility.[13] Thus, the plaintiff who alleges she "forgot" to disclose a prior injury either to her doctor or in a deposition might fairly be cross-examined about the fact that the claim was a major event in her life not easily forgotten, including trips to her attorneys' offices, correspondence with her lawyers, receiving money, and signing a complicated release of liability. Also a denial of other injuries might make another claim of injury or damages relevant as a prior-inconsistent statement under rule 613. "Inconsistency" might be interpreted broadly by the court: "'[I]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.'"[14]

(C) Relevance to an Affirmative Defense

Prior knowledge or notice of a dangerous condition under Federal Rule of Evidence 404(b)[15] might be relevant to a plaintiff's own negligence or assumption of the risk.[16] The plaintiff who has previously made a claim for a slip-and-fall accident might be cross-examined that she knew or should have known serious injury can result if one does not pay close attention when walking. If the plaintiff knew this from past experience but failed to pay proper attention to where she was walking, her recklessness (as opposed to the defendant's mere negligence) might bar recovery. "When prior incidents are admitted to prove notice, the required similarity of the prior incidents to the case at bar is more relaxed [than when] admitted to prove negligence."[17]

(D) Expert Witnesses

In trials involving expert-witness testimony, the bases for experts' opinions are critical. A false or inaccurate history in a doctor's report omitting other injury claims might be admitted under several theories. If the plaintiff gave an incomplete history, this can be relevant to show the plaintiff's lack of credibility or under rule 705 to prove the physician's opinions are unreliable. When the physician knew the plaintiff had other claims for the same physical injuries but described the plaintiff as having a healthy prior medical history or omitted the prior condition in the history, the prior claims might be relevant under rules 402 (direct relevance), 608 (credibility of witness), or 613 (prior statements).

(E) Opinions (and Quasi Opinions) About a Party's Honesty

The physician who testifies that he "believes" the plaintiff was hurt or that the plaintiff was being honest in his history may have given an opinion on truthfulness under rule 608(a). If so, the expert might be subjected to the grueling "Did you know" type cross-examination often suffered by character witnesses in criminal cases.[18] This might equally apply to a witness who describes the plaintiff as not being the "type person" to fabricate injuries (i.e., essentially testifying that the plaintiff is honest).

(F) Admitted for Purpose of Casting Doubt Upon the Present Claim

When admission is sought for the purpose of casting doubt about the case being tried, the courts generally fall into one of three camps. Some courts will permit all other claims, reasoning that "[n]egligent injury is not unusual, but it is unusual for one person, not engaged in hazardous activities, to suffer it repeatedly . . . and at the hands of different persons."[19] Other courts disallow any evidence of other claims for compensation,[20] and a third group will allow such evidence after examining their similarity and frequency.[21] Presumably the bases for admissibility would be rule 404(b) (intent or motive) or rule 608 (prior acts relevant to credibility). South Carolina's state courts do admit evidence of prior similar[22] claims when relevant to credibility or as to motive, intent, and knowledge.[23] This area of the law has yet to be fully defined, however.

(G) Opening the Door

When the plaintiff opens the door into a topic, the defendant may cross-examine about the same subject.[24] Consider a plaintiff who testifies that because the worker's compensation benefits he received were less than his usual wage, he would never intentionally malinger. It might be shown that he had received money from prior claims which had paid him in full for his lost time and thus he knew he would be able to do so again in this case.[25]

(H) Proximate Causation and Damages

Evidence of another claim also might be relevant to the proximate cause of damages. The plaintiff who claims injury in Lawsuit A then denies these prior injuries in Lawsuit B essentially is saying that the new injuries are proximately caused by the second accident. Thus, the Lawsuit A claim will be directly relevant under rule 402 because the jury will need to compare it with the present claim to determine which is the proximate cause of the damages.[26]

[1] Note that the United States Supreme Court has proposed additional language to rule 801 pertaining to subsections (C), (D), and (E) which will become effective December 1, 1997 unless Congress acts on the changes.

[2] *Barnes v. Norfolk S. Ry. Co.*, 333 F.2d 192, 197 (4th Cir. 1964); *Smoak v. Robinson*, 156 S.C. 370, 153 S.E. 342 (1930).

[3] *See Barnes v. Norfolk S. Ry. Co.*, 333 F.2d 192, 197 (4th Cir. 1964)

[4] 1 Kenneth S. Broun *et al.*, *McCormick on Evidence* Section 196, at 832 n.6 (4th ed. 1992) [hereinafter *McCormick on Evid.*] *See also* Section (F) below regarding other claims under rules 404(b) and 608.

[5] *McCormick on Evid.*, *supra* note 4, Section 196, at 831-32 n.27.

[6] *See Johnson v. Goldstein*, 864 F.Supp. 490, 493 (E.D. Pa. 1994), *aff'd without opinion*, 66 F.3d 311 (1995) (abondoned pleadings); 29A *Am. Jur.* 2d *Evidence* Section 775, at 143 n.58 & accompanying text (1994).

[7] *See Johnson v. Goldstein*, 864 F. Supp. 490, 493 (E.D. Pa. 1994), *aff'd without opinion*, 66 F.3d 311 (1995) (withdrawn answer admissable as admission).

[8] *See Young v. Martin*, 254 S.C. 50, 173 S.E.2d 361 (1970).

[9] *See id.*, 254 S.C. at 50, 173 S.E.2d at 361.

[10] As to alternative pleadings, *see Corrado v. Consolidated Rail Corp.*, 648 F. Supp. 1004, 1007 (Special Court, Regional Rail Reorgainization Act 1986); *Douglas Equipment, Inc. v. Mack Trucks, Inc.*, 471 F.2d 222, 224 (7th Cir. 1972); *Continental Ins. Co. of N.Y. v. Sherman*, 439 F.2d 1294, 1298-99 (5th Cir. 1971).

[11] *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990). *See also* S.C. R. Evid. (611(b)) (cross-examination about credibility is permitted).

[12] *See State v. Thompson*, 118 S.C. 191, 110 S.E.2d 133 (1921).

[13] *See State v. Jenkins*, ____S.C.____, 471 S.E.2d 760 (Ct. App. 1996) (citing rule 611(b)).

[14] *United States v. McCrady*, 774 F.2d 868, 873 (8th Cir. 1985) (quoting *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980)).

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Evidence Matters

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[15] The state version of rule 404(b) does not include the word "knowledge" found in the federal rule. The state courts would probably admit this type evidence directly under rule 402 (relevant evidence admissible).

[16] The South Carolina Court of Appeals has held that assumption of the risk as a defense to negligence has now been subsumed into comparative negligence. *See Davenport v. Cotton Hope Plantation*, ___S.C.___, 482 S.E.2d 569 (Ct. App. 1997). Its effect in strict-liability cases where fault is not at issue has not yet been decided.

[17] *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1386 (4th Cir. 1995) (requiring only a sufficient similarity to make the defendant aware of the dangerous condition). Put another way, the prior injury and claim would be used to show the plaintiff's state of mind.

[18] For example, "Did you know, Dr. Smith, that the plaintiff had already made another claim for back injuries when she told you she had never suffered this type pain before?" See Stephen A. Salstzburg, Michael M. Martin, & Daniel J. Capra, *Federal Rules of Evidence Manual* 848-49 (6th ed. 1994) ("Did you know" type cross-examination permitted under rule 608(b)). As noted above in Section (D), there may be other theories under which the evidence of prior claims can be admitted.

[19] *See Mintz v. Premier Cab Ass'n*, 127 F.2d 744, 745 (D.C. Cir. 1942). This line of cases may be restricted by the District of Columbia courts in the future, however. *See Hemphill v. Washington Metro. Area Transit Auth.*, 982 F.2d 572 (D.C. Cir. 1942) (concurring opinions).

[20] *McCormick on Evid., supra* note 4, Section 196, at 834 n.10.

[21] *See id.* Section 196, at 834 n.10. These courts note that a series of disparate but bona fide claims seems more likely than a string of similar claims.

[22] *McCormick* cites the degree of similarity between the claims as important and would admit evidence of other claims only if the probability of coincidence seems negligible or if there is distinct evidence of fraud. *See McCormick on Evid., supra* n.4, Section 196, at 834 n.10.

[23] *See, e.g., Rutledge v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 360, 334 S.E.2d 131 (Ct. APp. 1985) (prior similar fraudulent claims relevant to intent, motive, and knowledge). Note that *Rutledge* was a fraud case, and in fraud cases the evidence gates are opened somewhat more broadly. Also, the rule in *Rutledge* does not apply to criminal cases. *State v. Bright*, 1996 S.C. op. No. 2540.

[24] *See Fed. R. Evid.* 611 (cross-examination is proper into matters raised during direct examination); S.C. R. Evid. 611 (adopting broader rule).

[25] *See also Fed. R. Evid.* 404(b) (knowledge and motive admissible).

[26] Although not stated as a proximate-cause issue, the court in *Young v. Martin*, 254 S.C. at 50, 173 S.E.2d at 361, noted the Plaintiff's plight in trying to explain two inconsistent personal-injury claims. ❖

Recent Order

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failed to file a motion for protection as required by Rule 30 (c). Most notably defense counsel directed the defendant's human relations officer, who is also an attorney, not to answer questions at her deposition because of an alleged privilege. No motion consistent with Local Rule 30 was filed, and when plaintiff's counsel moved compel an answer to the question, the Kullman associate moved to be allowed to file a motion belatedly. The only explanation was he did not know about this court's local rule.

In sum, the problems with the Kullman firm have ranged from lying to the court, failing to comply with the orders of the court, and simple ignorance of the procedures of this court. While The Kullman Firm wisely withdrew the attorney who made misrepresentations to the court, thus forestalling this action, that has not cured the situation. More litigation is being conducted over the conduct of counsel than about the merits of the case. The Kullman firm is no longer an aid toward the just, speedy, and inexpensive determination of this action.

However, in compliance with the local rules of this court, local counsel was retained by the defendant at the outset of the litigation to accompany the associates from the Kullman Firm, and withdrawing the *pro hac vice* status of The Kullman Firm should not materially handicap the defendant in preparation for trial.

Therefore, to the extent that *pro hac vice* status has been granted The Kullman Firm by the undersigned, **IT IS ORDERED WITHDRAWN**;

To the extent that such status has been granted by the District Judge to whom this case is assigned, **IT IS RECOMMENDED THAT SUCH STATUS BE WITHDRAWN.**

Respectfully Submitted: Robert S. Carr
United States Magistrate Judge; Charleston, SC
July 22, 1997 ❖

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