S.C. Defense Trial Attorneys' Association
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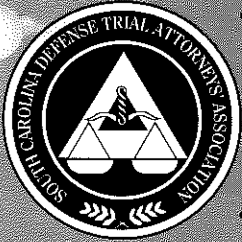

The DefenseLine

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Happy Holidays

http://www.scdtaa.com

JOINT MEETING

July 23-25, 1998

Grove Park Inn ☛ Asheville, NC

summer

TO THE SEA

fall

ANNUAL MEETING

November 5-8, 1998

Kiawah Island Resort ☛ Kiawah, SC

For Additional Meeting Information Check Out SCDTAA's Web Address
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Ten Years Ago

July, 1987, marked the Twentieth Annual Joint Meeting of the Defense Attorneys' Association and the Claims Management Association. It was held at the Grove Park Inn, Asheville, NC and presided over by JOHNNY SOSEBEE, President of the Claims Management Association, and THERON G. COCHRAN, President of the SC Defense Trial Attorneys' Association.

Our association's Twentieth Annual Meeting was held at the Hotel Intercontinental, Hilton Head, SC, November 5-8, 1987. Chief Justice J.B. NESS reported on the State of the Judiciary. HONORABLE JOHN L. NAPIER, discussed the U.S. Claims Court jurisdiction. Commissioner VIRGINIA CROCKER discussed issues in Workers Compensation and the HONORABLE WALTER E. HOFFMAN, United States Judge, Eastern District of Virginia, discussed "Your Ethics and Mine." A panel of South Carolina District Court Judges discussed trial court ethics. The panel consisted of HONORABLE JOE P. ANDERSON, HONORABLE G. ROSS ANDERSON, JR., HONORABLE KAREN L. HENDERSON, HONORABLE MATTHEW J. PERRY, AND HONORABLE CHARLES E. SIMONS, JR.

ROBERT J. SHEHEEN, Speaker of the S.C. House of Representatives, reported on upcoming legislative developments. The program concluded with DR. CHARLES ALLEN WRIGHT, Professor of Law at the University of Texas discussing the Bicentennial in the federal courts. At this meeting, CARL EPPS was moved up to President, FRANK GIBBS was chosen as President-Elect, MARK WALL, Secretary, and GLENN BOWERS, Treasurer.

Twenty Years Ago

The Tenth Annual Meeting of the South Carolina Defense Attorneys was held October 27-29, 1977, at the Savannah Inn and Country Club, Savannah, GA. President JACKSON L. BARWICK, JR., presided at this the first meeting of our association outside the state of South Carolina. Our headliner was the HONORABLE ROBERT W. HEMPHILL, U.S. District Judge for South Carolina, who was our luncheon speaker. The program featured the direct and cross examination of the psychologist JOHNNY GALIMORE, JR. of Durham, NC. For the plaintiff was THOMAS E. McCUTCHEN, for the defendant, THOMAS B. ALEXANDER, of Houston, TX, and JOHN B. ROBINSON, Cleveland, OH. Direct and cross examination of the Economist EDGAR B. HICKMAN of the University of South Carolina, Columbia, SC, for the plaintiff, CHARLES GIBBS of Charleston, for the defendant, JOHN B. ROBERTSON, Cleveland, OH, and THOMAS P. ALEXANDER, of Houston, TX. Videotaped deposition of witness JEAN H. TOAL, then Richland County Representative, for the plaintiff, JOHN B. McCUTCHEN, of Conway, SC, for the defendant, BEN WEINBERG, Atlanta, GA. Final arguments for the plaintiff, J.D. TODD, JR., of Greenville, SC, for the defendant, GLENN FRICK, of Atlanta, GA. Who will ever forget the barbecue supper on the paddle boat of Captain SAM STEVENS.

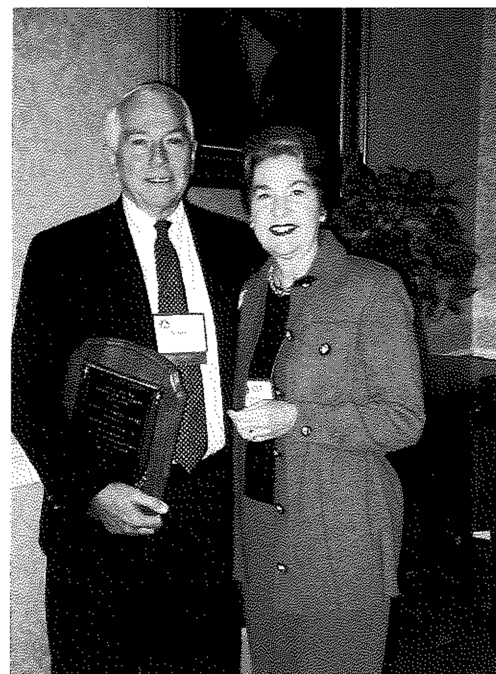
Buyck Receives Hemphill Award

On Saturday morning, November 8, 1997, at the 30th Annual Meeting of the South Carolina Defense Trial Attorneys' Association, the Association's highest honor, the Robert W. Hemphill Award, was awarded to Mark W. Buyck, Jr., a partner in the Florence law firm of Wilcox, McLeod, Buyck & Williams. The award was presented by Joel W. Collins, Jr., a member of the SCDTAA Board of Directors who served as assistant when Mr. Buyck was the United States Attorney for the District of South Carolina.

Past recipients of the Hemphill Award are Harold Jacobs, Jack Barwick, Ed Mullins, Duey Oxner, Bruce Shaw, Carl Epps, and Ben Moore.

Mark Buyck was recognized for his work in founding the SCDTAA. It was noted that at the Palmetto Club in Columbia, Mark Buyck, along with Grady Kirven, Ed Mullins, Ben Moore, and the Honorable Weston Houck met to discuss the need for an organization whereby the Defense Trial Bar could work toward common goals and improve the practice of law in South Carolina. Mark Buyck also had a prominent role in assisting defense trial lawyers in North Carolina in the foundation of their organization. He was the speaker at their first meeting.

Mark Buyck received his undergraduate degree in 1956 and his law degree in 1959. In addition to his service as United States Attorney, he has served on the Board of Trustees for the University of South Carolina, as President of the Greater USC Alumni

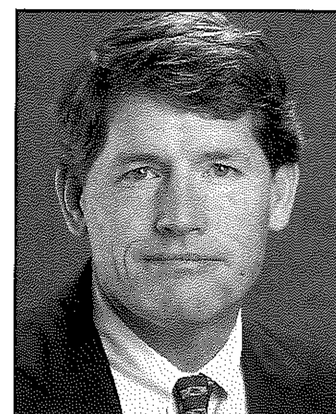


Association, President of the Florence Rotary Club, President of the Florence Country Club, President of the Florence Little Theater, and President of the South Carolina Historical Society. He was a founder of the Florence Heritage Foundation and served as the first Chairman of its Board of Directors. He was a member of the initial Advisory Board for the Kennedy Center. He is a recipient of the Order of the Palmetto, and is a fellow in the American College of Trial Lawyers. Mark Buyck served as President of the South Carolina Defense Trial Attorneys' Association in 1968.

The SCDTAA Board hard at work.

President's Letter

Thomas J. Wills, IV



This past year has been both a rewarding and enjoyable experience for me. In the years I have spent on the Executive Committee, I cannot remember a more enthusiastic and hard working group than that which I was privileged to work with this year. I thank them all for their hard work and dedication.

I continue to receive letters from our membership and members of the judiciary; both praising the program and thanking the Association for its hospitality at the annual meeting in Sea Island. Steve Darling, Mark Phillips, Sam Outten and their committee are to be commended for preparing and presenting such a fine convention. As is often the case, people's true ability does not become evident until they are tested. I was tremendously impressed by the committee's ability to react to and accommodate for Senator Fred Thompson's unavoidable absence. From the comments of the membership, it appears that the breakout sessions were a great success, and hopefully, we can continue that format in future years.

In light of the recent, substantial, changes in the attorney disciplinary procedures in this state, it was a great benefit to all of us to hear the remarks of the special disciplinary counsel, Henry Richardson. We are grateful to him for taking the time out of his schedule to provide us with his advice and guidance with respect to the new disciplinary structure.

James Kilpatrick's command of the English language and his intimate knowledge of United States Supreme Court combined to provide an entertaining and enlightening presentation. Few lawyers have an opportunity to appear on the U.S. Supreme Court, but through Mr. Kilpatrick's articulate and detailed descriptions,

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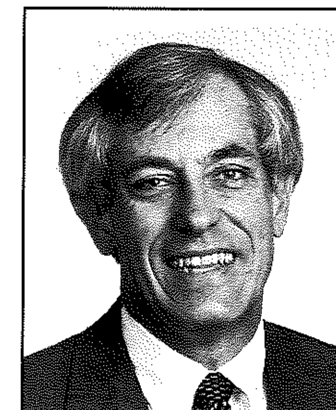
Bill Davies



It is with a great deal of pleasure that I have become your president. I look forward to working with each of you during the coming year in an attempt to maintain the high standards of this organization and to explore new areas of opportunity for all of us.

In this first letter as president, I must immediately recognize the tremendous efforts and results provided to the organization by Tom Wills during his time as president. Tom assumed the position with a program in mind which he immediately set into motion. All year he has worked us hard but, as I said several times at Sea Island, he has done it in a manner which made us happy to work with him. Tom has great balance in his life. He completely commits himself to whatever he does. During the last year, he has included this organization as one of his prime focuses to the Association's great benefit. I hope you will join me in thanking Tom whenever you see him.

During the years in which I have been a member, this organization has become more active and more proficient in serving the interests of its members. There are a number of reasons that all lawyers, young and old, should be active in The Defense Attorneys' Association. This is the only coordinated effort by civil defense lawyers in South Carolina. The Association has become quite involved in the legislative process, and now has a part-time lobbyist on its payroll. The two conventions we hold annually present wonderful continuing legal education programs, as well as the opportunity to meet with representatives of our clients and members of the judiciary. The Association invites members of the state and federal judiciary to the annual convention allowing members attending that convention to

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Tom Wills, President's Letter

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the procedures from arguments and the Justices' personalities, he painted a remarkably vivid mental picture. He has a unique perspective which, I believe was appreciated by all.

I would also like to thank Dawes Cooke for his excellent presentation on the handling of a high profile case. In addition, our thanks go to the moderators of the break out session who ultimately were required to provide double duty. Keith Hutto presented the commercial law, Jim Blair and Elbert Dorn product liability, Sterling Davies and Pat Fant workers compensation and Phil Kilgore and Scott Justice employment law.

If there was any question as to success of the annual meeting, that question was answered at approximately 12:30 a.m. Sunday morning. As Maurice Williams was belting out another song, I glanced down to view two (formerly respected) members of our organization writhing alternately on their stomachs and backs (gatoring or roaching as the case may be). I knew at that moment that the meeting had met my highest expectations.

Congratulations to Bill Davies, our new president. The Association will be in very good hands under his leadership.

Bill Davies, President's Letter

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have the opportunity to meet them on a more personal basis. This is an opportunity not offered elsewhere in the state. The Trial Academy has been tremendously successful in the last few years, and should be a desirable entry for any young lawyer's resume. Overall, there are numerous benefits to active membership.

During the coming year, I hope that our Association will focus on several areas as well as carrying on all of its normal important programs. We intend to stress financial responsibility during 1998, with strict guidelines on staying "within the budget" in all areas. Many of our programs are expensive and we need financial stability to combat cash flow situations. As in our practice of law, costs are increasing. We must protect our ability to invite the judges to the annual meeting as well as fund all our new programs in other areas.

We hope to be quietly proactive on legislative issues. In this area, we would like to have you feedback so that we are certain that the organization is supporting your interests. As the second year in a term, this will be important one for our industry. Please give us your comments early and often.

We are going to reconsider all aspects of our two meeting, including the places at which the meetings are held, the time of year of the meetings, and the format of the meetings. If you have any suggestions in this regard, please let us know. Having the annual meeting in Bermuda was discussed last year but there was very little support for the idea until we announced that we would not do it. Again, your early suggestions would be helpful.

We would like to get more members involved in the Association on a regular basis. With this in mind, co-chairs of committees have been assigned with one chair being a member of the Executive Committee, and one not being on that committee. We will send letters to all members soon soliciting your participation in one of the many committees. Please volunteer! Hopefully, we will have more people involved and more seeking leadership positions in the future.

During 1998, we are going to look at one new area in which this organization may serve our members and the communities in which we live. A temporary committee has been organized to study opportunities for the Association and its members to participate more actively in *pro bono* contributions to our state and our various communities. Several other state defense attorneys' associations have very active *pro bono* programs. Our committee, which will be co-chaired by Executive Committee member Joel Collins, George Cauthen, and Amy Snyder, is looking for volunteers to work with them in forming recommendations for activities by the Association in this critical area.

All of the members of your Executive Committee and your officers stand ready to accept any suggestions, and assistance, from you at any time. Please do not hesitate to contact us. We look forward to serving you in the coming year.

Convention Wrap Up

Mark Phillips

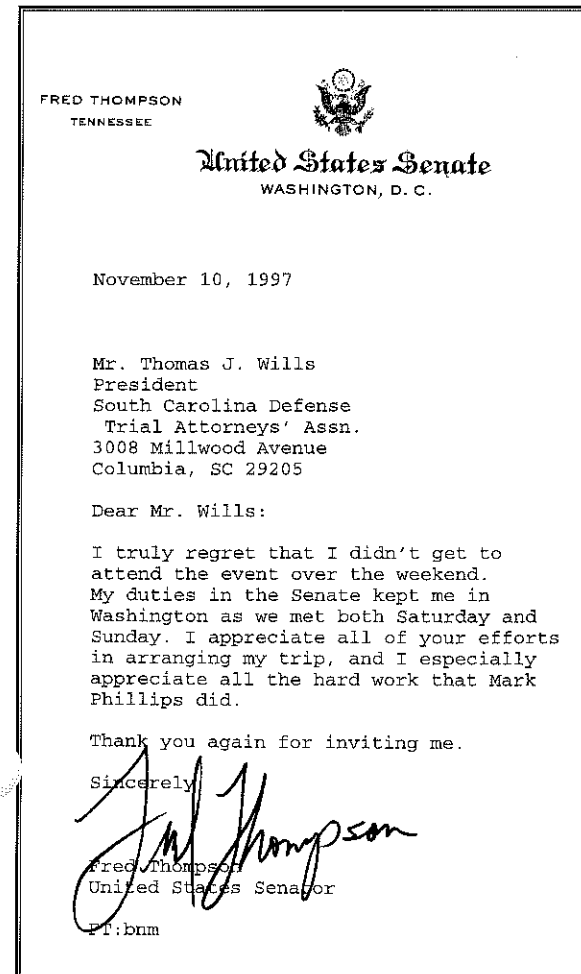
Syndicated columnist Jack Kilpatrick highlighted the Association's annual meeting at the Cloister on November 7. Mr. Kilpatrick discussed his own impressions of each of the U.S. Supreme Court Justices, all of whom he knows well.

Another pleasant surprise was S.C. Supreme Court Disciplinary Counsel Henry Richardson. Henry outlined the new disciplinary rules and how they are enforced. The federal and state judiciary panels were particularly good. The judges were generally in charge of their own programs. U.S. District Judge Cameron Currie gave a timely talk on the *Hedgepath* case and *ex parte* contact with treating physicians in personal injury cases.

Dawes Cooke gave a most entertaining, informative talk on handling the news media in a high profile case. He provided a lot of national footage from the Shannon Faulkner case. This year, four different break-out sessions were offered during two of the educational hours. These included small group sessions on product liability, employment law, commercial litigation, and workers compensation. The speakers were well-prepared and several of the state and federal judges provided active participation in the sessions.

A big disappointment was that Senator Fred Thompson made a last-minute cancellation on his keynote address. The U.S. Senate stayed in session during the weekend of November 8. The Association nonetheless rallied and held its second four-set break out session with virtually all of the attorneys and judges in active attendance.

The weather in Sea Island was beautiful and the accomodations and meals were excellent. Maurice Williams and the Zodiacs gave a great show, playing enthusiastically until 1:00 AM Sunday morning. Everyone danced the night away on our last evening together.



FRED THOMPSON
TENNESSEE

United States Senate
WASHINGTON, D. C.

November 10, 1997

Mr. Thomas J. Wills
President
South Carolina Defense
Trial Attorneys' Assn.
3008 Millwood Avenue
Columbia, SC 29205

Dear Mr. Wills:

I truly regret that I didn't get to attend the event over the weekend. My duties in the Senate kept me in Washington as we met both Saturday and Sunday. I appreciate all of your efforts in arranging my trip, and I especially appreciate all the hard work that Mark Phillips did.

Thank you again for inviting me.

Sincerely,

Fred Thompson
United States Senator

FT:bnm

Kilpatrick Keynotes Annual Meeting

Veteran newsman James J. Kilpatrick recounted his "lifelong love affair with the Supreme Court" as keynote speaker at Sea Island. He predicted that after the explosive 1996 Term, when the court knocked down four acts of Congress, the 1997 Term will be on the quiet side.

"Only one major case has been scheduled in race relations," he said, "and it's one of those bad cases that make bad law. Two teachers, one white, the other black, had identical qualifications. In a downsizing, the Piscataway (N.J.) school board retained the black teacher for reasons of diversity, and let the white teacher go. They should have flipped a coin."

Kilpatrick said trial defense lawyers will want to watch closely for the high court's opinion in *General Electric Co. v. Homer*, testing new standards for the admissibility of expert evidence. An unrelated case, on the admissibility of polygraph evidence, covers some of the same ground.

As Supreme Court correspondent for Universal Press Syndicate, Kilpatrick writes a weekly column, *"Covering the Courts,"* for 220 American newspapers. He also writes about "the usage and abusage" of the English language. Except for Justice Scalia (and occasionally Justice Thomas), he said, members of the high court "usually write as if their pens were filled with library paste."

He expressed his strong view that court proceedings should be televised, but he sees no prospect that the Supreme Court will risk its "mystique" on anything so radical and democratic.

The Fourth Circuit Reinforces the Doctrine of Qualified Immunity

by Elizabeth Campbell,
Nexson, Pruet, Jacobs & Pollard, LLP

On April 30, 1997, in *White v. Chambliss*, the Fourth Circuit held that various employees of the South Carolina Department of Social Services ("DSS") were entitled to qualified immunity for their conduct in removing children from an abusive home and placing the children in foster care.

I. Background Facts

Plaintiff Cindy White took Daniel, one of her six children, to the hospital on November 20, 1991 with a spiral fracture of his left arm. The treating physician suspected child abuse because a spiral fracture is a strong indicator of an abuse inflicted injury. The hospital contacted the Aiken County DSS office and reported the suspected abuse of Daniel White. When the caseworker arrived at the hospital, she spoke with both the mother and the treating physician as part of her investigation into the abuse. Ms. White claimed that she was not in the room when Daniel received the injury, but she suspected that Daniel fell out of his bed and caught his arm in the bed slats. The caseworker then consulted with the treating physician and an orthopedist. Both agreed that the mother's explanation was "very unlikely" and that "the child needed to be in custody." Next, the caseworker went to Ms. White's home to view the bed from which Daniel had supposedly fallen. The caseworker determined that Ms. White's explanation was unbelievable because the caseworker's arm was larger than Daniel's, yet it did not get caught in the bed slats. Further, she noted that the bed was less than one foot from the floor.

The caseworker than conferred with her supervisor, and they determined that an *ex parte* petition for custody of Ms. White's children should be submitted to the family court. Shortly thereafter, DSS filed a petition for emergency protective custody and a petition for removal in Aiken County Family Court. The court entered an order which stated that probable cause existed to believe that, by reason of abuse and/or neglect, there is a threat to the life and physical safety of the White children and that DSS should have temporary custody. Once DSS received the order, caseworkers and Aiken County Sheriff's personnel went to Ms. White's trailer and took custody of her children. Upon their arrival, they noticed that the children had soiled diapers, wore dirty clothes, and smelled terrible; additionally, the house was filthy and smelled of excrement.

A probable cause hearing was held the day after the removal, which Ms.White attended, and the court found probable cause existed for the minor children to be taken into emergency protective custody. The court further concluded that it would be contrary to the best interests of the children to return them to Ms. White in view of the *prima facie* evidence of physical abuse to Daniel White. The court ordered that custody of the children remain with DSS pending a merits hearing, but allowed Ms. White supervised visitation with the children. The White children were placed in various foster homes, with Keena White going to the home of Anthony and Gladys Bonner, whose foster home had previously been licensed.

During the weeks between the December 4 probable cause hearing and the scheduled merits hearing, Ms. White was allowed supervised visitation with her children. Ms. White alleged that during these visits, she noticed bruises and scratches on her children and that she relayed her concerns to a DSS caseworker. Ms. White subsequently wrote a letter to Senator Strom Thurmond seeking return of her children and expressing her concerns regarding the alleged bruises and scratches. Senator Thurmond wrote DSS on December 20 on Ms. White's behalf. Ms. White told Cassie Wilson, who was director of Human Services at Aiken County DSS, that the children routinely

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The Fourth Circuit Reinforces the Doctrine of Qualified Immunity

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sustained injuries from normal play activity and fighting. When the children were removed from Ms. White's home, they had various bruises, scratches, and other injuries. Tina Werts, who was the Aiken County DSS' foster care worker, took Keena White to the doctor for treatment of a cold around January 3, 1992, and Keena was in good condition on that day. Thus, DSS concluded that the children's injuries were either present when the children were taken into custody or were sustained during normal child play.

On January 19, 1992, approximately six weeks after being placed with the Bonners, Keena died, apparently of blows to the head, while in the Bonners' care. The forensic pathologist concluded that her death was "best classified as a homicide." Because law enforcement officials were unable to determine who struck Keena, no criminal charges were filed. DSS removed all foster children from the Bonners' home and placed no other children in their home after Keena's death. Following an investigation into Keena's death, DSS revoked the Bonners' foster care license.

At the merits hearing on January 24, 1992, counsel for the respective parties submitted a settlement agreement in which Ms. White acknowledged that Daniel White had been physically abused by an "unknown" perpetrator. DSS returned both legal and physical custody of the minor children to Ms. White on the condition that she receive a psychological evaluation, including observation of the family unit, at the expense of DSS. Ms. White also agreed to several other specified conditions with which she was to comply and DSS was to monitor. Ms. White freely and voluntarily entered into the agreement outlined in the order, agreed it was fair and equitable and in the best interests of the minor children, and asked that it be approved and made the order of the court.

Ms. White filed suit on November 18, 1993, as personal representative of the estate of Keena for her alleged wrongful death, pain and suffering, and for alleged violations of Keena's due process rights. Ms. White also sued as guardian *ad litem* for her other five children for alleged violations of both their due process rights and her own due process rights. Ms. White named various employees of DSS as defendants ("the DSS defendants") in the suit along with the Bonners.

After extensive discovery, the DSS defendants filed motions for summary judgment based, in part on the grounds of qualified immunity. The district court denied the motions, and the DSS defendants appealed. On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court, finding that the DSS defendants were entitled to qualified immunity.

II. Specific Issues on Appeal

On appeal to the Fourth Circuit, the DSS defendants argued that the district court erred in denying their motions for summary judgment on the grounds of qualified immunity. Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[2] Thus, the analysis for determining a defendant's entitlement to qualified immunity is threefold:

(1) has the plaintiff alleged a violation of a federal constitutional right or a federal statutory right which is privately enforceable?
(2) was the right clearly established at the time of the events in question?
(3) would a reasonable person in the defendant's position have known that his conduct would violate that right?[3]

The first two questions raise purely questions of law, while the third question requires analysis of the facts.[4] Because qualified immunity is an immunity from suit, and not just from liability, "it is effectively lost if a case is erroneously permitted to go to trial."[5] Thus, summary judgment is the appropriate tool for determining a defendant's entitlement to qualified immunity.[6] However, on appeal from a denial of summary judgment, the appellate court may only review a denial of summary judgment based upon the first two prongs of the qualified immunity analysis, and may not review a denial based upon the third prong.[7]

In *White v. Chambliss*, the district court based its denial of summary judgment on two grounds. First, the district court concluded that at the time of the events in question, the plaintiffs had a constitutional right to protection by the state. Second, the district court concluded that the South Carolina Child Protection Act clearly established a statutory right to protection by the state. Therefore, the district court based its denial of qualified immunity on the second prong, finding clearly established rights at issue.

On appeal, the DSS defendants argued that none of the alleged constitutional rights was clearly established at the time of the events in question. The plaintiffs alleged the following constitutional violations:

(1) denial of procedural due process in violation of the Fourteenth Amendment;
(2) denial of their right to be free from unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments;
(3) denial of their right to be free from cruel and unusual punishment in violation of the Fifth and Eighth Amendments;
(4) deprivation of Keena White's life in violation of the Fifth, Eighth, and Fourteenth Amendments;
(5) deprivation of their substantive liberty interest in the parent-child relationship; and
(6) denial of meaningful access to the courts.

III. Fourth Circuit's Analysis

The Fourth Circuit first addressed Ms. White's claim that the DSS defendants unlawfully seized her children. While recognizing that a parent's right to the custody of his or her child is among the most fundamental rights, the Fourth Circuit noted that the parent's right remains "subject to the child's interest in his personal health and safety and the state's interest as *parens patriae* in protecting that interest."[8]

In *Jordan v. Jackson*, the Fourth Circuit held that a Virginia statute, which allowed emergency removals when there is an imminent danger to the child's life or health, was constitutional.[9] Following *Jordan*, the court held that South Carolina's statute, which allows emergency removals when "there is probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety,"[10] was constitutional. The substantive limitations the statutes place on the state's power to effect an emergency removal sufficiently safeguard the parent's due process rights in the custody of their child.

The Fourth Circuit further noted that substantial evidence supported the DSS defendants' decision to pursue the emergency removal of the White children. The caseworker was entitled to rely upon the opinions of the two physicians and her own investigation into Ms. White's explanation for Daniel's spiral fracture. The caseworker reasonably concluded that a significant probability of child abuse existed in the White home. The Fourth Circuit held in *Weller v. Department of Social Services*[11] that an emergency removal of a child is constitutional when "some evidence of child abuse" exists.

In evaluating Ms. White's claim that the DSS defendants violated her and her children's procedural due process rights, the Fourth Circuit concluded that the "Fourteenth Amendment interest that White possesses runs to court proceedings provided under state law and not to the discretionary discharge by DSS of its duties."[12] Following *Jordan*, the court then noted that " 'the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child.' "[13] The DSS defendants sought an *ex parte* order prior to the removal, and the court held a hearing within twenty-four hours of the removal. Thus, the DSS defendants complied with the requirements of procedural due process.

The Fourth Circuit concluded that the DSS defendants violated no "clearly established" law. Therefore, they were entitled to qualified immunity for their conduct in the removal of the White children.

Next, the Fourth Circuit addressed the allegation that the DSS defendants violated Keena's constitutional rights by placing her in an unsafe foster home. The court recognized the existence of cases from other circuits in which those courts held that a deliberately indifferent placement implicates substantive due process rights. However, the Fourth Circuit concluded: "Whatever the clearly established law on this question, White's claim simply falls short on the facts."[14] The record contained no evidence that the DSS defendants knew or should have suspected that the Bonners were abusive foster parents when they placed Keena in their home. "Indeed, the Bonners were licensed by the DSS, and White points to no evidence indicating that the Bonners had previously been accused of, or investigated for, child abuse."[15] Thus, the court found it unnecessary to decide whether Keena had any clearly established constitutional rights regarding her placement or the impact, if any, of the cases from other circuits providing a deliberate indifference standard. The court

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The Fourth Circuit Reinforces the Doctrine of Qualified Immunity

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concluded that the DSS defendants were also entitled to qualified immunity for their conduct in placing the White children in their respective foster homes.

The Fourth Circuit then addressed whether the White children had a substantive due process right to affirmative protection by the state while they were in foster care. In *DeShaney v. Winnebago County Department of Social Services*,[16] the Supreme Court held that the state does not bear an affirmative duty to protect children from private violence. In *DeShaney*, the department of social services removed a child from his home due to suspected abuse, but then returned the child to his father, who subsequently beat him so severely as to render the child profoundly retarded. The mother sued on behalf of her child for alleged constitutional violations. In *DeShaney*, the Supreme Court expressly declined to determine whether the state had an affirmative duty to protect children in foster care.[17] However, just over a month after *DeShaney*, the Fourth Circuit squarely confronted the issue in *Milburn v. Anne Arundel County Department of Social Services*.[18] In *Milburn*, parents voluntarily placed their child in foster care where he received injuries requiring medical treatment on four separate occasions. The parents sued on the child's behalf alleging constitutional violations arising out of the state's failure to protect the child in foster care. The court held firmly that harm inflicted by foster parents is not harm inflicted by state actors, and thus, following *DeShaney*, the state did not owe a constitutionally imposed duty to protect the child in foster care. The court reasoned:

> The State of Maryland was not responsible for the specific conduct of which plaintiff complains, that is, the physical abuse itself. It exercised no coercive power over the Tuckers; neither did it encourage them. The care of foster care children is not traditionally the exclusive prerogative of the State. Thus,...the Tuckers should not be considered state actors.[19]

Although White sought to distinguish *Milburn* on the grounds that the parents voluntarily placed the children in foster care, the Fourth Circuit noted that nothing in *Milburn*, or any of the subsequent decisions, limited its application to voluntary placement situations. [20] In light of *Milburn* and the lack of controlling Supreme Court precedent, the Fourth Circuit concluded that the White children did not possess a clearly established constitutional right to affirmative protection by the state while in foster care.

Beginning its analysis of Ms. White's claim that the South Carolina Child Protection Act clearly established a child's right to protection while in foster care, the Fourth Circuit noted that 42 U.S.C. Section 1983 is only available to redress violations of federal statutes and the Constitution.[21] Then, following Fourth Circuit precedent, the court again recognized that a state statute cannot create substantive due process rights enforceable under Section 1983.[22] "[W]here state officials acting within the scope of their discretionary duties commit violations of state law, one must look to state law and to state courts to pursue those remedies that the state has provided."[23]

Finally, the Fourth Circuit addressed Ms. White's claim that the federal Adoption Assistance and Child Welfare Act[24] ("AACWA") clearly established a child's right to protection while in foster care. In *Suter v. Artist M.*,[25] the Supreme Court held that Section 671(a)(15) of the AACWA does not create a private right of action enforceable under Section 1983. The Court reasoned that (1) the section did not clearly provide any conditions on the state for its receipt of federal funds,[26] (2) the statue did not provide any guidance as to how the state was to measure the "reasonable efforts" required by Section 671(a)(15),[27] and (3) the AACWA provided an alternative enforcement mechanism by authorizing the Secretary of Health and Human Services to redress violations of the Act.[28]

For the same reasons expressed by the Court in *Suter*, the Fourth Circuit concluded that Section 671(a)(10)[29] was not privately enforceable under Section 1983. The court reasoned that (1) Section 671(a)(10) was no more specific than Section 671(a)(15), (2) the act provided no statutory guidance to clarify the provision's requirement, and (3) violations of Section 671(a)(10) are enforceable through the same alternative enforcement mechanism.

After *Suter*, Congress enacted 42 U.S.C Section 1320a-2 which provided:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671 (a)(15) of this title is not enforceable in a private right of action.

Ms. White argued that *Suter* was no longer good law and that the enactment of Section 1320a-2 revived the Fourth Circuit's decision in *L.J. v. Massinga*[30] which was abrogated by *Suter*. In *Massinga*, the Fourth Circuit held that the AACWA "spell[s] out a standard of conduct" and that the Act is privately enforceable under Section 1983.[31] In *White*, the Fourth Circuit concluded that Section 1320a-2 did not alter its application of *Suter* because the Supreme Court in *Suter* applied prior Supreme Court precedent and *Suter* was not a novel holding.

Therefore, the Fourth Circuit held that the DSS defendants were also entitled to qualified immunity for their conduct while the White children were in foster care.

IV. Current Status of the Case

Ms. White filed a petition for rehearing with a suggestion for rehearing *in banc* which the Fourth Circuit denied on May 28, 1997. On July 29, 1997, Ms. White filed a petition for *writ of certiorari* to the Fourth Circuit, which is currently pending before the Supreme Court. Ms. White raised three potential questions to the Court. First, she claims that the Fourth Circuit's decision regarding whether foster parents are state actors and whether foster children are in state custody giving rise to an affirmative duty of protection is in conflict with decisions of the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. Because of the alleged conflict in the circuits, Ms. White argues that the Supreme Court should decide the issue which it left open in DeShaney. Second, Ms. White claims that provisions of the AACWA create privately enforceable rights. Finally, Ms. White claims that the South Carolina Child Protection Act creates procedural due process rights to the protective services provided in the Act.

Until the Supreme Court rules on Ms. White's petition for *writ of certiorari*, the best lesson learned from this case is that a thorough development of the facts is essential to prevailing on the merits in qualified immunity cases. Special congratulations are due to Doug McKay and Russ Foster for their herculean work in establishing the underlying record under extremely difficult and demanding circumstances.

Footnotes

[1] 112 F.3d 731 (4th Cir. 1997).
[2] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
[3] *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992).
[4] *Id.*
[5] *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991).
[6] *Id.*
[7] *Johnson v. Jones*, 115 S. Ct. 2151, 2159 (1995).
[8] *White*, 112 F.3d at 735 (citing *Jordan v. Jackson*, 15 F.3d 333, 342, 346 (4th Cir. 1994) and *Renn v. Garrison*,

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The Fourth Circuit Reinforces the Doctrine of Qualified Immunity

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100 F.3d 344, 349 (4th Cir. 1996)).

[9] *Jordan*, 15 F.3d at 346.

[10] S.C. Code Ann. Section 20-7-610(F)(1) (Law. Co-op. Supp. 1993) (version in effect at the time of the events at issue in this case). The current version is found at S.C. Code Ann. Section 20-7-610(N)(1) (Law. Co-op. Supp. 1996).

[11] 901 F.2d 387, 391 (4th Cir. 1990).

[12] *White*, 112 F.3d at 736 (citing *Weller*, 901 F.2d at 392).

[13] *Id.* (quoting *Jordan*, 15 F.3d at 343); *see also Weller*, 901 F.2d at 393.

[14] *Id.* at 737.

[15] *Id.*

[16] 489 U.S. 189 (1989).

[17] *Id.* at 201 n.9.

[18] 871 F.2d 473 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989).

[19] *Id.* at 479.

[20] *See United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995) (" 'care of foster children' not considered traditionally and exclusively a governmental function"); *Andrews v. Federal Home Loan Bank*, 998 F.2d 214, 220 (4th Cir. 1993) ("child abuse by foster parents not state action when state failed to intervene to protect child"); *Weller*, 901 F.2d at 392 ("We recently held that harm suffered by a child at the hands of his foster parents is not harm inflicted by state agents.").

The state bore a contractual obligation in *Milburn* to license the foster home, supervise placement of the child in the home, and provide board, medical care, clothing and supervision of the child during placement. The state shoulders the same responsibilities regardless of how the child comes to be placed in foster care.

[21] *White*, 112 F.3d at 738 (citing *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)).

[22] *See Hodge v. Jones*, 31 F.3d 157, 168 (4th Cir. 1994); *Weller*, 901 F.2d at 392; and *Jensen v. Conrad*, 747 F.2d 185, 195 n.12 (4th Cir. 1984).

[23] *White*, 112 F.3d at 738. The South Carolina Supreme Court has held that the South Carolina Child Protection Act provides a private right of action in state court for alleged violations of the Act. *Jensen v. Anderson County Dep't of Social Serv.*, 403 S.E.2d 615, 617 (S.C. 1991).

[24] 42 U.S.C. Sections 620-628, 670-679a.

[25] 503 U.S. 347 (1992).

[26] *Id.* at 356-57.

[27] *Id.* at 360.

[28] *Id.* at 360-61.

[29] Although Ms. White never identified which specific provision of the AACWA upon which she relied, the Fourth Circuit apparently concluded that she intended to state a violation of Section 671(a)(10).

[30] 838 F.2d 118 (4th Cir. 1988).

[31] *Id.* at 123.

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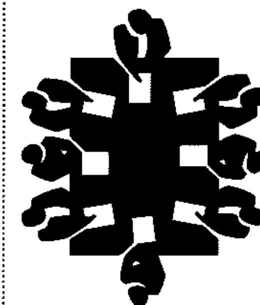

In the United States District Court for the District of South Carolina, Charleston, Division. Elease Amos-Goodwin, Anna G. Carter, Ann K. Healy, Lonnie W. Jenkins, Kenneth A. Greene, Sabrina G. Smith, Theresa A. Williams and Emmy Burnell Williams, Plaintiffs, v. Charleston County Counsel, County of Charleston, and the Honorable Irvin Condon as Judge of the Probate Court for Charleston County..

ORDER

This matter is before the court on plaintiff's motion for partial summary judgment, defendant Probate Judge Irvin Condon's motion to dismiss and motion for summary judgment and on defendants Charleston County Council's ("County Council") and County of Charleston's ("the County") motion to dismiss. The court heard argument on all motions on July 31, 1997.

I. Background

Plaintiffs were all employed by the Probate Court. In November 1994, Judge Condon was elected Probate Judge. Upon taking office, Judge Condon discharged plaintiffs, all of whom were hired by previous probate judges. Judge Condon informed plaintiffs that they were employees at-will and therefore not entitled to a grievance procedure.

Plaintiffs commenced this action against the defendants on December 13, 1996, alleging violations of First Amendment rights, 42 U.S.C. Section 1983, and South Carolina public policy.

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 Counsel 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).

III. Analysis

A. Judge Condon's Motion for Summary Judgment

Judge Condon argues that he is entitled to summary judgment because plaintiffs were all at-will employees of the probate court. Plaintiffs dispute this argument and claim that they were employees of the County, and thus entitled to access to the County's grievance procedure. They further allege that even if they were not County employees, they were terminated because of their political beliefs in violation of their First Amendment rights. There are three critical issues to be decided: (1) Who employed plaintiffs?; (2) Were plaintiffs at-will employees?; and (3) Were plaintiffs terminated because of their political affiliation?

As to the first issue, plaintiffs contend that they were employees of the County, and thus entitled to the County's grievance procedures. Defendant's claim, however, that plaintiffs were employees of the probate court.

Judge Condon argues that all plaintiffs were commissioned as clerks of the probate court pursuant to S.C. Code Ann. Section 14-23-1090 (Law, Co-op, 1976), which provides: "The judge of probate may appoint a clerk and may remove

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him at his pleasure." All plaintiffs were commissioned clerks of the probate court as evidenced by the formal commissions, recorded by book and page number, in the Charleston County Clerk of Court's office. Plaintiffs admitted at oral argument that all of their commissions specifically cited Section 14-23-1090.[1]

Plaintiffs argue that they were not clerks because Section 14-23-1090 is worded in the singular, and thus, there can be only one clerk. This argument is undercut, however, by S.C. Code Ann Section 62-1-307 (Law, Co-op, 1976), which provides:

> The acts and orders which this Code specifies as performable by the court may be performed either by the judge or by a person, including one or more clerks, designated by the judge by a written order filed and recorded in the office of the court. (emphasis added).

Clearly the legislature envisioned a situation where more than one clerk could be appointed. Since the prior probate judges specifically referenced Section 14-23-1090 in the commission papers of all plaintiffs, this court is of the opinion that the only reasonable inference to be drawn is that all plaintiffs were clerks pursuant to Section 14-23-1090, and therefore employees of the probate court.

Plaintiffs also argue that they fall under S.C. Code Ann. Section 14-23-1130 (Law, Co-op, 1976), which provides in relevant part: "...In addition, the governing body of each county shall provide office space and additional support personnel necessary for the orderly conduct of the business of the probate court." This argument is without merit because the plaintiffs were appointed by probate judges and not supplied by the county.

Judge Condon next contends that because plaintiffs were employees of the probate court pursuant to Section 14-23-1090, they were at-will employees pursuant to the statute and under the common law doctrine of employment at-will. *Shealy v. Fowler*, 188 S.E. 499 (S.C. 1936). The court agrees. The statute specifically states that a clerk may be removed at the pleasure of the probate judge. Under the employment at-will doctrine, employment is deemed to be terminable by either party at any time and for any reason or for no reason at all. *Shealy*, 188 S.E. 499; *Todd v. South Carolina Farm Bureau Mut. Ins.*, 278 S.E.2d 607 (S.C. 1981). A presumption of at-will employment still exists in South Carolina. *Ludwick v. This Minute Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985). In this case, no plaintiff had an employment contract. Furthermore, the grievance procedure section of the employee handbook (which was distributed by Charleston County and issued to all Probate Court employees), placed all employees on notice that they are at-will employees. Accordingly, Judge Condon had the authority to terminate plaintiffs at will.

Plaintiffs further allege that they were terminated for their political beliefs. Despite the court's conclusion that all plaintiffs were at-will employees, a public employee cannot be discharged because of his or her political affiliation. This would be a violation of the employee's First Amendment rights to freedom of association and freedom of belief. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). Courts utilize a two-part test for analyzing discharge cases involving a constitutionally protected right. First, the employee bears the burden of establishing causation by proving that the protected activity was a motivating factor or played a substantial role in the discharge. *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Hall v. Marion School Dist. No. 2*, 31 F.3d 183, 193 (4th Cir. 1994). If the employee/claimant is able to meet this burden, the employer must then show that it would have fired the employee even in the absence of the protected activity. *Mt. Healthy*, 429 U.S. at 287.

Judge Condon moved for summary judgment based upon the deposition testimony in which each plaintiff testified that he or she did not make his or her political beliefs known to Judge Condon and that Judge Condon did not have any reason to know of their political beliefs.[2] Plaintiffs have not produced any evidence that their political beliefs were the motivating factor in their discharge or that these beliefs played a substantial role in the discharges.

Further, Judge Condon stated in his interrogatory responses that he did not know any of plaintiffs' political affiliations, nor did he know the political affiliation of the six retained probate court employees who had been appointed by previous probate judges.

This case is therefore not one of political patronage. Addressing a political patronage class action brought in North Carolina against several elected officials, Judge Russell wrote that "[t]he teaching of *Elrod-Branti* then, is that mere allegation of political patronage dismissal falls short of stating a cause of action capable of class treatment. The inquiry must focus on the claim of the individual." *Stott v. Haworth*, 916 F.2d 134, 141 (4th Cir. 1990).

In this case, plaintiffs have failed to make a showing sufficient to establish that their First Amendment rights were violated. Therefore, pursuant to Rule 56(c), the court finds that there is no genuine issue of material fact and that Judge Condon is entitled to judgment as a matter of law.[3]

B. The County's and County Council's Motion to Dismiss

The County and County Council contend that they could not have wrongfully terminated the plaintiffs because they had no authority over plaintiffs. The court agrees, having decided that plaintiffs were employees of the probate court. S.C. Code Ann. Section 4-9-30(7)(Law, Co-op, 1976), as amended in 1988, provides in relevant part:

> [E]ach county government with the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:
>
> (7) to develop personal system policies and procedures for county employees by which all county employees are regulated **except those elected directly by the people,** and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government. **This employment and discharge authority does not extend to any personnel employed in departments or agendas under the direction of an elected official or an official appointed by an authority outside county government.** (Emphasis added).

The South Carolina Supreme Court has held that "[t]he plain language of the statute limits the county government's power to employ and discharge elected officials or those under their direction..." *Bales v. Aughtry*, 395 S.E.2d, 277 (S.C. 1990).

Furthermore, this statute also bans such employees' access to the County's grievance procedures. *See* 1988 Op.Atty.Gen., No. 88-68, p 199 (No employee of an elected official, such as a sheriff, who is discharged by such official, is entitled to a grievance hearing under Section 4-9-30(7); *see also Jones v. Gilstrap*, 343, S.E.2d 646 (S.C. Ct. App. 1986).

Accordingly, plaintiffs have failed to state a claim upon which relief can be granted, and defendants' motion to dismiss pursuant to Fed.R. Civ. P. 12(b)(6) is granted.

Conclusion

It is therefore ordered, for the foregoing reasons, that plaintiffs' motion for partial summary judgment is **DENIED**, that defendant Judge Irvin Condon's motion for summary judgment is **GRANTED**; and that defendants Charleston County and Charleston County Council's motion to dismiss is **GRANTED**.

AND IT IS SO ORDERED.

Patrick Michael Duffy
United States District Judge
September 12, 1997, Charleston, SC.

Footnotes

[1] The actual commissions for plaintiffs Lonnie W. Jenkins, Kenneth A. Greene, and Emmy Burnell-Willimas are part of the record.

[2] In the 1994 Probate Court election, Judge Condon's opponent was former Judge Bernard R. Fielding. Plaintiff Amos-Goodwin testified that she did not participate in Judge Fieldig's re-election campaign (Exhibit 2A, pp. 51 and 67) and that her political views were never made known to Judge Condon (Exhibit 2A, pp. 67-68). Plaintiff Carter never discussed her political beliefs with any person (Exhibit 3A, pp. 7-9) and she did not participate in Judge Fielding's re-election campaign (Exhibit 3A, pp.7-9). Plaintiff Healey does not consider herself a political person, and she does not know that her political beliefs were ever communicated to Judge Condon. She did not particpate in the 1994 Probate Court election (Exhibit 4A, pp. 17-20). Plaintiff Jenkins never saw Judge Condon at any campaign event during the 1994 Probate Court election and therefore never communicated her political beliefs to Judge Condon (Exhibit 5A, pp. 21-22 and 49). Plaintiff Greene is not aware of anyone who has ever communicated his political beliefs to Judge Condon (Exhibit 6A, p.25) and he did not participate in Judge Fielding's re-election campaign with the single exception of putting up signs at the request of Fielding's funeral home (Exhibit 6A, p. 25). Plaintiff Smith never communicated any of her thoughts on politics to Judge Condon (Exhibit 7A, p.26). Plaintiff Williams specifically testified that she never communicated her political beliefs to Judge Condon (Exhibit 8A, pp. 16-17, 40, 69) or to any person (Exhibit 8A, p. 69), that she is not a political person (Exhibit 8A, p. 17 and 69), that she did not participate in Judge Fielding's campaign, and that she does not know the political affiliation of her replacement (Exhibit 8B). Plaintiff Burnell-Williams never met Judge Condon before his election (Exhibit 9A, p. 10), never saw him at any campaign event (Exhibit 9A, pp. 10-11), never expressed her political beliefs to Judge Condon (Exhibit 9A, p. 10), and only participated in Judge Fielding's campaign after hours (Exhibit 9A, p. 11).

[3] South Carolina courts have held that, where a claimant has redress through a Section 1983 action, there can be no cause of action grounded on a South Carolina public policy violation. *Epps v. Clarendon County*, 405 S.E.2d 386, 387 (S.C. 1991).

Recent Order

In the Court of Common Pleas of the state South Carolina, County of Greenville. Harold Dean Sproles, and Bethony Sproles, Plaintiffs, vs. Ruby Hold Hagood, Defendant.

This matter is before me pursuant to the Defendant's Motion to Determine a Reasonable Expert's Fee for the Plaintiff's automobile reconstruction expert, Dr. Melvin K. Richardson.

This matter was called for a Hearing on November 7, 1996. Appearing at the Hearing were Jack D. Griffeth and W. Francis Marion, Jr., for the Defendant and G. Edward Welmaker for Dr. Melvin K. Richardson. Russell W. Harter, Jr. appeared as well on behalf of the Plaintiff.

Extensive and articulate arguments were presented on behalf of the Defendant and on behalf of Dr. Richardson. A number of exhibits were received dealing with Dr. Richardson's charges for his services and other affidavits for prevailing charges of similar expert in the field.

After extensive argument and review of all before me, two issues were presented by the Defendant. They were:

I. In this case, what should the Defendant pay Dr. Richardson for his travel time and deposition time for the discovery deposition taken of him by the Defendant on September 18, 1996; and

II. May an expert require the payment of a predeposition retainer fee before attending a deposition set pursuant to Subpoena?

The first issue is *fact specific* to this case. The parties agree that Dr. Richardson is entitled to a fee for his time to attend the deposition. They disagree on what is reasonable. Dr. Richardson avers that he is entitled to charge the Defendant the same hourly rate as he is charging the Plaintiffs in this case, as well as other clients. It is elemental that, in the open marketplace, parties should be free to contract on such terms as are mutually agreeable. Dr. Richardson avers that to require him to charge the Defendant and others less than the Plaintiff compromises his earning ability and interferes with his ability to contract.

Defendant avers that she had no contract with Dr. Richardson, was not free to negotiate the price of his services and is forced to pay an extraordinary amount to participate in permitted discovery. Defendant avers that a reasonable fee should be limited to a prevailing rate in the community for similar services.

Though there were exhibits presented showing lower hourly rates, I do not find Dr. Richardson's charges of $250.00 an hour for travel and $300.00 an hour for testimony unreasonable. Dr. Richardson is claiming two hours travel time to attend the discovery deposition and an additional two hours for the deposition itself as well as $39.00 for travel expenses. The total bill claimed by him s $1,139.00. I find that the Defendant should pay this amount.

As to the second issue, the deposition has taken place since the parties, through their respective attorneys, agreed to an amount to be deposited into the trust account of Mr. Harter. Thereafter, the deposition took place on September 18, 1996. As a result, counsel for Dr. Richardson contends that the matter is now moot. The position is compelling since this Court should not issue decisions as to matters not in actual controversy. It is important to the Bar, however, that certain agreements be reached so that both Plaintiffs and Defendant know the propriety of pre-deposition deposits for fees. Certainly expert and non-expert witnesses are required under the rules to comply with subpoenas for appearance. Perhaps the easiest approach would be for experts to negotiate with the parties who hire them to guarantee deposition fees if an adverse party does not pay. In exceptional cases, the expert has the opportunity to file a preemptive Motion to Quash the Deposition Subpoena.[1]

In light of the applicable law and the evidence before me, IT IS HEREBY ORDERED that Defendant shall pay the hourly rate of $300.00 for the deposition testimony of Dr. Richardson, as well as $250.00 an hour for travel to and from the deposition. Having incurred two hours for travel and two hours at the deposition, plus $39.00 in travel expenses, the sum of $1,139.00 should be paid by the Defendant to Dr. Richardson. IT IS SO ORDERED.

John W. Kittredge, Jr.
Resident Judge of Thirteenth Judicial Circuit
December 19, 199[illegible]

[1] Such a motion must, of course, be filed and served a reasonable time prior to the scheduled deposition. I emphasize that an expert witness like any other witness, must comply with a lawful deposition subpoena. *A fee dispute is no basis for an expert witness to refuse to honor a proper subpoena.*

Evidence Matters

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

Under The Microscope: How Juries Perceive Us, Our Witnesses, and Our Evidence

Many trial attorneys are unaware that psychologists and behavioral scientists have devoted a great deal of study into the drama of the courtroom.[1] Apparently entire careers are built around analyzing lawyers, witnesses, and trial behavior, although most of us do not utilize the fruits of such labors. Mock trials, questionnaires, and videotaped jury discussions are some of the tools of the researchers. In many instances, these studies only reveal that psychologists have a firm grasp on obvious truths trial lawyers know through common sense and experience. Some conclusions appear to be at odds with good common sense. In other cases, however, the studies give insight upon jurors' views that, if accurate, are helpful. Samples of some conclusions drawn from studies about various topics are given below:

1. Social Status of Witnesses and Their Styles of Testifying

The social status of witnesses affects their credibility. For example, in the absence of other factors, an architect is more likely to be believed than a janitor. Jurors supposedly will accept more direct, less deferential testimony from socially influential witnesses. Low-status witnesses are expected to be more polite and less direct; when they use direct or impolite styles (e.g., as a reaction to an aggressive cross-examination), they are perceived as less persuasive and likeable.

2. Children in the Courtroom

In general, jurors do not believe children. This is because they think children are more easily manipulated and remember less than adults.

3. Pleading the Fifth Amendment

Defendants who invoke the Fifth-Amendment privilege to remain silent are more likely to be convicted. The more times the Fifth Amendment is invoked, the more likely it is that a juror will disbelieve the witness.

4. Sexual Stereotypes

Women lawyers are every bit as effective as male lawyers in the courtroom. Studies show no difference in verdicts between male and female lawyers, even when both used an aggressive style. Female witnesses, however, allegedly suffer from credibility/gender prejudice in some cases. When the jurors have more information about status (for example, that a female witness is a banking officer) than gender, the woman's status often will outweigh the gender prejudice.

5. Hypercorrect Speech

When witnesses testify in court, they sometimes use more formal speech than in normal conversation. Often these witnesses commit grammatical errors as a result. One study showed that witnesses using hypercorrect speech were less believable.

6. Trial Objections

There is good news and bad news about trial objections, and both should be taken with a grain of salt. The good news is that mock jurors allegedly give higher fairness ratings to the objecting lawyer. Because objections often involve arguments for exclusion by the attorney, the testimony once admitted might be seen as less influential. Also, lower fairness ratings are given to the examining lawyer (at least during cross-examination) after his adversary objects.

On the other hand, studies also reveal the obvious: jurors often better remember evidence to which an objection was raised. Moreover, when a lawyer objects more than several times during the examination of a single witness, he or she receives lower competence ratings by mock jurors.

7. Cautionary and Limiting Instructions by the Judge

Jurors tend to ignore judicial instructions about evidence. Also, the instruction may bring

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more attention to the disputed evidence. Criminal convictions are more likely when there is no limiting instruction, however, especially when there is some accompanying explanatory comment by the judge. When an instruction **precedes** the disputed evidence, it has more chance of being effective.[2] Finally, studies show that jurors will more likely follow instructions concerning **criteria** for making a decision than instructions to **disregard** a piece of evidence completely.

8. Lie Detectors

Despite what might be the beginnings of a movement in other jurisdictions to admit polygraph-test results, this evidence traditionally has been excluded both in the Fourth Circuit and the state courts. Apparently there is good reason for doing so, assuming that one believes polygraph results disproportionately affect jurors. Studies show that jurors can be highly influenced by a polygraph test: in one case, evidence of a failed polygraph test changed the verdict from 85% for acquittal to 65% for conviction.

9. Physically Attractive Litigants

Studies suggest that attractive civil litigants win more often than their unfortunate counterparts. Jurors appear more certain of less-attractive defendants' guilt. Facial scars and disfigurement seem to make jurors less likely to believe a witness. On the other hand, physically attractive defendants receive less-severe punishment, except when the bad act/crime is related to attractiveness (e.g., embezzlement by a handsome swindler from an unsuspecting widow).

Despite these studies, it would seem that a well prepared lawyer more often than not can disprove any of the results shown above. Nonetheless, the writer hopes that they may be useful, at least as a reference point, for future trials.

Footnotes

[1] *See, e.g.*, Richard D. Rieke & Randall K. Stutman, *Communications in Legal Advocacy* **passim** (1990).

[2] For example, if an instruction about limiting the use of a prior conviction preceded the testimony itself, it apparently is more likely to be well received.

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