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SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

2003 SCDTAA Annual Meeting in Sea Island, GA

http://www.scdtaa.com

President's Letter

by Stephen E. Darling

As the stretch run of my presidential year unfolds, I am pleased to report that the activities of the Association have progressed nicely.

The 36th Annual Joint Meeting between the SCDTAA and the Claims Management Association of South Carolina was held at The Grove Park Inn in July. John T. Lay of our organization and Rick Lamar of the CMA put on a smashing program. Everyone in attendance was delighted by the content of the CLE. Almost 110 defense lawyers and 30 claims managers plus their spouses and guests participated. A number of exhibitors displayed their wares. Social events were well attended and enjoyed.

One of the important features of the meeting again this year was the silent auction spearheaded by pro-bono chairman David Traylor. I am pleased to report that the auction raised a record amount of money, which will be donated to the Wills for Heroes program, which we are co-sponsoring this year. Truly this is a beneficial event for a worthwhile cause.

For those of you who have attended a number of joint meetings you realized that the format and composition of this meeting is something we need to address. With claims being handled by many companies from out of state, the participants in our meeting from the claims side have dwindled over the years. In order to address the continued viability of the meeting, I have asked incoming president Sam Outten and the long-range planning committee to recommend to the executive committee at the annual meeting changes, updates or reformats of the joint meeting that can be considered. Your executive committee has been pondering the nature of the joint meeting for the last several years and I am confident the committee will make the proper recommendation to be implemented by your board.

At the joint meeting, an important milestone in the organization occurred. The by-laws were amended to allow corporate attorneys from South Carolina to become members. I anticipate a large number of applications from in-house lawyers with South Carolina corporations to increase our membership. I expect corporate counsel to become an active, energetic and hardworking component of our association who will provide leadership and excitement as we move forward.

I eagerly await the Annual Meeting upcoming at The Cloister at Sea Island, Georgia November 6-9. This will be the last function at Sea Island before renovations start at The Cloister just after we vacate the premises. All of you who have spent many wonderful times at the old Cloister, please come and enjoy the historic premises prior to renovation. The annual meeting committee chairman Matt Henrikson, Gray Culbreath and David Rheney are putting the finishing touches on an exceptional program. You will find speakers from various legislative bodies, entertaining raconteurs and you'll certainly get your money's worth. Again, we are planning golf, fishing, skeet shooting, a wonderful repeat performance by The Fabulous Kays at the Saturday evening dinner dance, and the unexcelled ambiance of The Cloister, one of the finest resorts in the world. We will be inviting the South Carolina judges and expect a healthy turnout from their ranks. See you at Sea Island.

As I reflect over the past year, I must commend the work of our executive committee, our executive director and the membership of the SCDTAA. From legislative activities, to the Trial Academy, to the joint meeting, to interaction with tort reform groups, to setting forth our position on confidential settlements, to partnering with the law school, to day-to-day activities of the Association, I have seen tireless work by officers, executive committee members and defense lawyers in this case. I applaud you for your good works and encourage you to continue vigorously to expound the defense position on matters important to us.

Finally, on a personal note, allow me to thank you for permitting my serving as president this year of the SCDTAA. My job was made easy by the sometimes thankless but always entirely devoted, exemplar work of your executive director Aimee Hiers. Great job, Aimee! Furthermore, the members of the executive committee again have proven their mettle. To a person, every time I have asked someone to spearhead an activity, it has been done with grace and excellence. As my term ends and the new administration assumes their roles under the leadership of your outstanding President-elect Sam Outten, only good things shine on the horizon for the SCDTAA. At the beginning of the year I asked you to work and play hard and enjoy yourselves doing it. From what I have observed, you have taken me to task and done exactly that. I have appreciated the opportunity to go down the path with you.

I look forward to joining everyone at Sea Island. Have fun!

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

2003 Joint Meeting Recap
Asheville, NC • July 24 - 26, 2003

by John T. Lay

The 2003 Joint Meeting of the South Carolina Defense Trial Attorneys and Claims Management Association of South Carolina was another great success. Not only did we enjoy spending time with our fellow attorneys and claims managers, but we also benefited from an outstanding educational program. Law Professor John Freeman gave an update on Hot Ethic Topics for the Defense Bar and Insurance Industry and also gave an interesting talk on HIPPA, which was a surprise to all who had heard previous discussions on this seemingly difficult legislation. Dr. David Price provided insight on how to evaluate mild brain injury cases and showed us a very "interesting" slideshow. Curtis Ott gave a powerful presentation on *State Farm v. Campbell*, which is an extraordinarily important case to the defense bar and to our clients. We were also honored to have Judge David Norton participate in a panel discussion on Third-Party Practice along with John Cuttino, Mitch Griffith and Mark Phillips. All provided lively discussions in this important area. Dave Howser and Carlton Dunn also provided us with a blueprint on avoiding bad faith and scared many in attendance with interesting "war stories." The highlight of the program was the presentation by Governor Mark Sanford. He gave an hour-long PowerPoint presentation on various issues effecting South Carolina, including a discussion on tort reform in South Carolina. The standing room only crowd included spouses and other patrons of the Grove Park. We also had numerous break out sessions with wonderful speakers in employment law and workers compensation law. Our organization truly appreciates the participation of all speakers and the extent to which each speaker prepared for this year's meeting.

As always, everyone enjoyed spending time together including playing golf and tennis and white water rafting. Of course, many people enjoyed the spa at the Grove Park. Finally, the silent auction had its most successful year ever. The South Carolina Defense Trial Attorneys raised over $4,000.00 to donate to the Wills for Heroes Program. We thank you for your generous support of the auction.

Also the organization gives special thanks to Anne Noonan who was primarily responsible for organizing the workers compensation program and also Sterling Davies who was invaluable in assisting with all aspects of the meeting.

If you missed this year's meeting, it's not too early to start thinking about next year. Mark your calendar for July 22-24, 2004 and we look forward to seeing you there.

2003 SCDTAA Annual Meeting Returns to Sea Island, GA

by Matthew H. Henrikson

This year's annual meeting is back at everyone's favorite venue, The Cloister, Sea Island, Georgia, and it is shaping up to be another great program. Featured this year is a legislators' panel discussing the issues and fielding questions about the venue bill, tort reform, and other pending and contemplated legislation affecting the trials of civil cases in state court. The Association welcomes back the former Ambassador to the Court of King James, Phil Lader, as moderator. The distinguished panel will include The Speaker of the House of Representatives, David Wilkins; Chair of the House Judiciary Committee, Jim Harrison; and Senators Linda Short and Brad Hutto of the Senate Judiciary Committee.

David Dukes and Mark Jones of Nelson Mullins Riley & Scarborough will delve into the netherworld of the e-mails your client's safety director *thought* he double deleted, and they will discuss issues presented by the rapidly expanding area of the discovery and admissibility of electronic evidence. Curtis Ott of Turner Padget Graham & Laney will reprise his July joint meeting presentation on the groundbreaking U.S. Supreme Court decision on punitive damages, *Campbell v. State Farm*, in panel discussion form by moderating a roundtable of the case and its implications by the state and federal trial and appellate judges who will soon be ruling on our *Campbell* motions. Former Circuit Court Judge and Chief Judge of the United States Court of Appeals for the Armed Forces, Walter T. Cox, III, will present an out of the ordinary but entertaining ethics hour, and featured speaker, attorney, humorist, and writer Bob Steed of King & Spaulding in Atlanta, is guaranteed by Steve Darling and Mark Phillips to bring the house down.

Friday's fishing expedition, as well as the tournaments on The Cloister's beautiful golf courses and tennis courts will be followed by an oyster roast and cocktail party at The Plantation Lounge and Terrace, and of course Saturday features a grand black tie dinner followed by dancing to the music of "The Fabulous Kays." It is truly a pleasure and a privilege to be able to spend time with friends at this world class resort, and there is perhaps no more painless a way and no more beautiful a setting within which to collect one's CLE hours than the Golden Isles in early November.

See Tentative Agenda on page 6

The Lodge at Sea Island

South Carolina Defense Trial Attorneys' Association Annual Meeting
November 6-9, 2003
The Cloister, Sea Island, Georgia
Tentative Agenda

Thursday, November 6, 2003

3:00 p.m. to 5:00 p.m.
Executive Committee Meeting

4:00 p.m. to 6:00 p.m.
Registration Desk Open

5:00 p.m. to 6:00 p.m.
Nominating Committee Meeting

7:00 p.m. to 8:00 p.m.
President's Welcome Reception

Dinner on your own

Friday, November 7, 2003

8:00 a.m. to 12:00 noon
Registration Desk Open

8:00 a.m. to 9:00 a.m.
Coffee Service

8:15 a.m. to 8:30 a.m.
Welcome
Stephen E. Darling, President SCDTAA
Opening Remarks and Announcements

8:30 a.m. to 9:30 a.m.
Ethics Hour:Critical Conflicts:
Five Acts on Law of Lawyering
Walter T. Cox, III, Esquire
Nelson Mullins Riley & Scarborough

9:30 a.m. to 10:45 a.m.
State and Federal Trial and Appellate Judges Panel:
Now we have Campbell, what do we do with it?
Curtis L. Ott, Esquire - Moderator
Turner Padget Graham & Laney

9:30 a.m. to 10:45 a.m.
Workers' Compensation Breakout

10:45 a.m. to 11:00 a.m.
Break

11:00 a.m. to 12:00 noon
Reflections from a Jaundiced Eye
Robert C. Steed, Esquire
King & Spaulding

12:30 p.m.
Golf Tournament
Curtis L. Ott, Chair

1:00 p.m.
Fishing Expedition

2:30 p.m.
Tennis Tournament

7:00p.m. to 9:30 p.m.
Oyster Roast and Cocktail Party

Saturday, November 8, 2003

7:30 a.m. to 12:00 p.m.
Registration Desk Open

7:30 a.m. to 9:00 a.m.
Coffee Service

8:00 a.m. to 8:30 a.m.
SCDTAA Business Meeting / DRI Report

8:30 a.m. to 8:45 a.m.
State of the Judiciary Address
Chief Justice Jean H. Toal
South Carolina Supreme Court

8:45 a.m. to 9:00 a.m.
DRI – State of Defense Practice – National View
DRI Representative

9:00 a.m. to 10:00 a.m.
Challenges in Electronic Discovery
David E. Dukes, Esquire
J. Mark Jones, Esquire
Nelson Mullins Riley & Scarborough

10:00 a.m. to 10:15 a.m
Break

10:15 a.m. to 10:30 a.m.
Announcements

10:45 a.m. to 12:00 p.m.
Legislative Panel – Tort Reform and Venue Bill
David Wilkins, Speaker of the House
Jim Harrison, House Judiciary Chairman
Linda Short, Senate Finance Committee Member
Brad Hutto, Senate Judiciary Committee Member
Philip Lader, Esquire - Moderator
Nelson Mullins Riley & Scarborough

Afternoon on your own

7:00 p.m. to 8:00 p.m.
Cocktail Reception

8:00 p.m. to 12:00 a.m.
Dinner and Dancing with music by
"The Fabulous Kays"
(Black Tie Optional)

Reigning in Runaway Punitive Damages Awards:
A Close Look at *State Farm Mutual Automobile Insurance Company v. Campbell*

By Curtis L. Ott

In the past few years, escalating jury awards of punitive damages have been measured not in millions of dollars, but billions.[1] While South Carolina practitioners may minimize the importance of these large awards because they involved target defendants in other jurisdictions, a South Carolina jury in 1999 awarded $250 million in punitive damages against an automobile manufacturer in a case filed by the estate of a six-year old child.[2] Defense attorneys previously had limited resources available to measure the potential threat of a punitive damages award or to quantify how far a runaway jury would run. Fortunately, the United States Supreme Court in *State Farm Mutual Automobile Insurance Company v. Campbell* [3] pulled the reigns and provided guidance on what constitutes a constitutionally permissible punitive damages award. While the legal pronouncements are not new, the Supreme Court provides substance to the skeletal framework of its earlier decisions.

Notably, the Court elected to clarify its previous holdings in a case where the defendant's conduct likely justified a punitive damages award. State Farm insured Campbell under an automobile policy providing $50,000 liability coverage. Campbell and his wife were driving on a two-lane road in Utah and decided to pass six other cars traveling in the same direction. The attempt failed as a car driven by Ospital approached from the opposite direction. Ospital swerved to avoid Campbell and hit another car driven by Slusher. Ospital died in the accident, Slusher was permanently disabled, and Campbell escaped unharmed. Ospital's estate and Slusher then sued Campbell. Although Campbell insisted he was not at fault, State Farm's own investigator concluded otherwise, and the consensus of the evidence showed Campbell was at fault. However, State Farm contested liability and rejected the plaintiffs' offer to settle for the policy limits. State Farm also assured Campbell his assets were safe, he had no liability, State Farm would protect his interests, and he did not need separate counsel. The jury found Campbell solely and completely at fault, but only awarded $185,849.[4]

Following the verdict, State Farm advised Campbell that it would only pay the policy limits. Furthermore, State Farm told Campbell that it would not post the required bond for him to appeal the verdict. State Farm's attorney advised Campbell to consider selling his home, saying "you may want to put for sale signs on your property to get things moving."[5] Campbell hired his own attorney and unsuccessfully appealed the original verdict. Campbell then agreed with the plaintiffs that they would not execute on his personal assets provided Campbell pursued a bad faith action against State Farm.[6]

State Farm finally paid the entire verdict, including the amounts in excess of the policy limits. However, Campbell still sued State Farm for bad faith, fraud and intentional infliction of emotional distress in Utah state court. In a bifurcated trial, the jury initially found State Farm's decision not to settle was unreasonable. The second phase involved whether State Farm was liable for fraud and intentional infliction of emotional distress and the amount of any damages to award. After the trial judge admitted extensive evidence of State Farm's business practices over a twenty-year period, practices outside Utah and not involving defense of third party claims, the jury awarded Campbell $2.6 million in compensatory damages and $145 million in punitive damages.[7] In ruling on post-trial motions, even the trial judge, who clearly had an agenda against State Farm, recognized the verdict was excessive and reduced the actual damages to $1 million and the punitive damages to $25 million. Both Campbell and State Farm appealed to the Utah Supreme Court. However, that court ruled the trial judge abused his discretion by remitting the punitive damages award and reinstated the original verdict of $145 million. The court justified its holding because of State Farm's reprehensible conduct, State Farm's "massive wealth," and the extremely small percentage of cases in which State Farm would be punished.[8] The United States Supreme Court granted certiorari to address State Farm's argument that the punitive damages award violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[9]

After summarizing the facts and proceedings, the United States Supreme Court's opinion analyzed the nature of punitive damages and how they differ from

Continued on page <None>

Reigning in Runaway Punitive Damages Awards

continued from page 7

actual or compensatory awards. The Court noted the dual aims of deterrence and retribution but also reiterated that there are substantive limits to a state's ability to impose punitive damages. If an award is grossly excessive, then no legitimate purpose is served and the award becomes an arbitrary deprivation of property.[10] The Court expressed concern that punitive damages serve the same function as criminal penalties, but that a criminal defendant is afforded more protection. The Court also recognized inherent problems when a jury hears evidence of a defendant's net worth followed by jury instructions that provide wide discretion. This combination creates potential for backlash against large companies, especially those without a local presence.[11]

The Court reviewed at length its punitive damages decisions over the past decade. The Court reiterated its holding in *BMW of North America, Inc. v. Gore* [12] in which it instructed reviewing courts to consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[13] In cases subsequent to *Gore*, the Court clarified that the appellate review is de novo - the reviewing court is not bound by the jury's decision or the trial court's rulings.[14]

The crux of *Campbell* is how the Supreme Court applied the *Gore* guideposts to the underlying facts. Importantly, the Court decided *Gore* between the two phases of the underlying trial of Campbell's bad faith case. Indeed, the Utah Supreme Court applied the three guideposts to reinstate the original punitive damages award that the trial court remitted.[15] The United States Supreme Court, however, applying the same three criteria to the same underlying facts, reached the exact opposite conclusion. The actual holding of *Campbell* is simple: "Under the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award."[16]

The Court then analyzed the individual guideposts. The third one, the comparison of the punitive damages award to available civil penalties under state law, was clearly not met. The Court found that the closest civil penalty under Utah law was a $10,000 fine that was "dwarfed" by the $145 million award.[17]

The real impact of *Campbell* lies in the Court's analysis of the first and second guideposts. The Court reminded that the first guidepost, the reprehensibility of the defendant's conduct, is the most important indicator of the reasonableness of the punitive damages award. The Court reiterated the five considerations outlined in Gore to evaluate reprehensibility: whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident."[18] The existence of only one of these five factors likely is not sufficient, but the absence of all of them makes any award suspect.[19]

Importantly, while the Court noted that State Farm's conduct was not praiseworthy, the Court directed most of its criticism toward the Utah state courts. The Court concluded that the Utah courts utilized this case as a platform to expose and punish State Farm for perceived improper business practices throughout the country, not just in Utah. This agenda violated the principles of federalism because each state is allowed to determine what is lawful conduct within its borders.[20] A Utah court is not allowed to punish a defendant's conduct that was lawful in another state, or even unlawful acts committed in other states. In fact, if such evidence is admissible for other purposes, then the jury must be instructed that it cannot use out-of-state conduct to punish a defendant for action that was lawful where it occurred.[21]

The Court also ruled that the evidence concerning State Farm's practices was not probative because the conduct was unrelated to the specific harm suffered by Campbell. The evidence was not limited to State Farm's handling of third-party liability claims. The Court held: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[22] The Court also noted that trial courts cannot conduct a series of mini-trials to adjudicate the merits of other unrelated,

hypothetical claims against a defendant under the guise of the reprehensibility analysis. Ultimately, the Court held that Campbell failed to satisfy the reprehensibility guidepost.[23]

Similarly, the Court found the evidence failed to meet the second guidepost that compares actual harm to the amount of punitive damages awarded. While the Court repeated its prior holdings that it would not impose a mathematical ratio to compare punitive damages to actual damages, the Court in fact did so. The Court held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[24] The Court further narrowed the ratio by indicating that four to one "might be close to the line of constitutional impropriety."[25] While the Court noted that sometimes a higher ratio may be justified in cases with only a small amount of actual damages, the converse is also true: "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[26]

The Court then analyzed the Utah Supreme Court's rationale under *Gore* to uphold the original award. In so doing, the Court provided two important insights. First, individual states are not watchdogs, and the fact that a defendant would only be punished in rare cases does not justify an award because the conduct had nothing to do with the harm suffered by the plaintiff. Secondly, "the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."[27]

Campbell contains strong and clear pronouncements for how trial judges and appellate courts should review punitive damages awards. The Supreme Court's opinion clarifies that punitive damages awards may only be upheld in cases involving a defendant's reprehensible conduct. Furthermore, juries should not hear evidence about a defendant's conduct, be it lawful or unlawful, in other states solely for the purpose of analyzing and awarding punitive damages. A defendant's wealth also cannot justify an otherwise unconstitutional award. Perhaps most importantly, the Court provides mathematical boundaries to the ratio of punitive damages awards to actual damages. The ratio should be in single digits, and only in the worst cases should it be more than four to one. Also, if the jury awards a large amount of actual damages, then the ratio should only be one to one, which is what the Supreme Court held would be appropriate in *Campbell* upon remand.[28]

The implications of *Campbell* are far reaching and attorneys will watch with interest how the courts apply *Campbell*. Most importantly, *Campbell* is not limited to federal court cases; rather, all state courts must apply *Campbell* because the Fourteenth Amendment protects all defendants. The opinion contains powerful language that defense attorneys can use offensively, not just defensively, during discovery, at summary judgment and in motions *in limine*. Finally, *Campbell* provides substantive and mathematical protection should a jury return a large punitive damages award.

Footnotes

1 *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001) ($5 billion punitive damages award); *Price v. Philip Morris, Inc.*, Case No. 00-L-112 (Ill. Cir., Madison County), March 31, 2003 ($3 billion award); *Engle v. R. J. Reynolds Tobacco Co.*, Case No. 94-08273 CA-22 (Miami-Dade County, Florida Cir. Ct.), July 17, 2000 ($1.45 billion award).

2 *Jimenez v. Daimler Chrysler Corp.*, 269 F.3d 439 (4th Cir. 2001).

3 123 S.Ct. 1513 (2003).

4 *Id.* at 1517-1518.

5 *Id.* at 1518.

6 *Id.*

7 *Id.* at 1519.

8 *Id.* at 1518-1519.

9 "[N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

10 Campbell, 123 S.Ct. at 1520.

11 *Id.*

12 517 U.S. 559 (1996).

13 Campbell, 123 S.Ct. at 1520 (citing Gore, 517 U.S. at 575).

14 *Id.*.

15 *Id.* at 1519.

16 *Id.* at 1521.

17 *Id.* at 1526.

18 *Id.* at 1521 (citing Gore, 517 U.S. at 576-577).

19 *Id.*

20 *Id.* at 1521-1522.

21 *Id.* at 1522-1523.

22 *Id.* at 1523.

23 *Id.* at 1523-1524.

24 *Id.* at 1524.

25 *Id.*

26 *Id.*

27 *Id.* at 1525.

28 *Id.* at 1626.

The Plaintiff's Deposition in an Employment Case: A Strategy for Summary Judgment

by Wendy J. Keefer

The world of what is considered "employment law" is ever growing – from wrongful discharge to harassment to disciplinary disputes to strictly labor disputes (e.g., wage and hour disputes). But despite the spectrum of claims that now fall within this area of the law, what is pretty certain is that whenever an attorney is retained to defend an employer who has been sued by a disgruntled employee, the process and order of discovery can make all the difference.

The most crucial point in any such case will likely be the plaintiff's deposition. Though attorneys differ on whether the plaintiff's deposition should be taken before or after the serving and receiving of responses to written discovery, defense attorneys should strive to ensure that the plaintiff's deposition is taken prior to the deposition of defense witnesses, particularly representatives of the defendant employer. In part, the reason for this deposition strategy is the key role affirmative defenses almost always play in employment cases. The plaintiff is in a much better position to undercut an employer's reason for a particular action after he has heard a full explanation of that reason. The goal of defense counsel should be to get the plaintiff's story untainted, free from the manipulation that so often occurs once one side in litigation learns the strategy of the other side.

It is during the plaintiff's deposition that his story or version of events will be solidified, stripping him of the ability to tailor his story to later produced evidence to avoid summary judgment or to strike affirmative defenses asserted by the defendant employer, the factual basis for which the plaintiff will ideally be unaware at this stage in the litigation. Deposition priority is critical to the management of an employment case and can provide to the defendant some control of the litigation.

Though attorneys may feel uncomfortable deposing a plaintiff prior to completing at least some written discovery, the initial advantage of the employer in these cases should provide confidence in this approach. Immediately after being retained in one of these cases, it is the responsibility of the defense attorney to conduct a thorough investigation of the incidents alleged in the plaintiff's complaint. This investigation should include review of all files relating in any way to the plaintiff, a review of the employer's policies and practices, interviews with the decision-makers of the employer, and the obtaining and review of any notes or correspondence between the employer or any of its decision-makers and the employee. Access to these records at a time prior to any discovery requests served on the defendant provides an automatic head start to the employer and its counsel in evaluating the strengths and weaknesses of the plaintiff's case and the employer's defenses. But this advantage is quickly lost once full blown discovery is underway. Scheduling the plaintiff's deposition prior to any document production by the employer and prior to the deposition of defense witnesses is the most efficient and effective use of this advantage.

Deposing the plaintiff is not for discovery purposes alone; indeed, in employment cases, where the employer is in possession and control of most of the

documentary evidence, the deposition of the plaintiff is more appropriately viewed as an early opportunity to negate some, if not all, of the plaintiff's claims. It is also by taking an early plaintiff's deposition that defendants can avoid the plaintiff's presentation of evidence that will rebut the defendant employer's affirmative defenses. It is during an early deposition that plaintiffs will admit to facts they may not acknowledge at a later date well into the disclosure of the substantive theories put forward by the defendant employer. For this reason, these depositions should be incredibly thorough and fact-specific.

This strike-first deposition provides the chance to go through every fact known or believed by the plaintiff in relation to his employment without nearly the ability to prepare for the deposition that the plaintiff and his attorney will have if the deposition occurs further into discovery. Below is a brief mention of topics that should be covered in a plaintiff's deposition, the discussion of which can do no more harm than the complaint itself, but may foreclose certain claims or remedies sought by the plaintiff.

The plaintiff should be asked to detail every act of the employer he deems wrongful, specifying for each why he believes the particular decision, act, or conduct occurred and what evidence he has for that belief. It is easy to forget that the plaintiff does not know the intricacies of employment law and will not know whether the testimony and facts he provides legally establish the claims being asserted. The plaintiff should be asked to provide the names of every person who may have witnessed conversations between the plaintiff and a decision-maker of the employer and every person to whom the plaintiff claims he complained or otherwise discussed any concerns about the employer's activities.

Where the plaintiff claims to have been treated differently than other employees, he should be asked to name every employee receiving better treatment and to describe the circumstances of that employee's situation. Often in discussions on this issue, it becomes evident through the plaintiff's own testimony that his opinions of preferential treatment are based on office rumor or perception but cannot be supported by the actual documentary evidence or the testimony of other witnesses.

Areas of discussion where defense counsel might be successful at essentially getting the plaintiff to testify against himself include the areas of past discipline, employment history, qualifications for the position at issue, and where the employee is claiming termination (constructive or actual) as a result of the employer's wrongdoings, what steps the plaintiff has taken to find subsequent employment.

To cast doubt on the plaintiff's version of events, the plaintiff should be asked in hindsight what he would have done differently or what he would not have done given his current situation with the employer, and whether he complained to the employer after the incidents or events giving rise to the lawsuit. An employee's story becomes much less credible if the wrongs allegedly committed by the employer were never raised with the employer and asked to be remedied prior to litigation.

Though the topics set out above do not purport to be anything close to an exhaustive list or outline, they demonstrate the importance of having the chance to broach these subjects with the plaintiff before he or his attorney are in a position to tailor his testimony. The defendant is now in the position of providing legitimate rationales (where they exist) for every complaint of the plaintiff. Depose the plaintiff first, educate him later.

Bylaw Change

(The Proposed Bylaw changes are in all caps and are bold)

ARTICLE III

QUALIFICATIONS FOR MEMBERSHIP:

Those persons shall be qualified for membership who (1) Are members in good standing of the South Carolina Bar **OR ARE CORPORATE COUNSEL WHO MAINTAIN THEIR OFFICE IN SOUTH CAROLINA AND ARE ADMITTED TO A STATE BAR IN THE U.S.**; (2) Are actively engaged in the private practice of civil law, as corporate counsel, or are employed by governmental bodies; and (3) Individually devote a substantial portion of their time in litigated matters to the defense of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or (b) the representation of management in labor disputes.

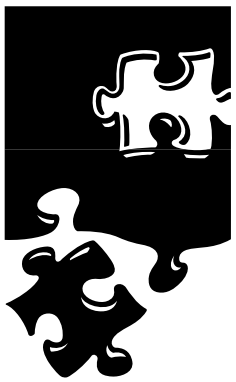
Application for membership must be made upon a form provided by the Secretary or the association administrator and submitted to the Secretary, who shall then refer the application to the Membership Committee. A check for annual dues, in an amount fixed by the Executive Committee, shall accompany the application.

Life Membership shall be granted to applicants who have held membership in the South Carolina Defense Trial Attorneys' Association for twenty (20) consecutive years and have retired from full-time legal practice. Life membership status will grant all rights and privileges awarded any other members, howe ver the Life Member's annual dues will be waived. Application forms for life membership will be available upon request by the member.

Law students of the University of South Carolina who are members in good standing of the student division of the Association shall be qualified as "Student Members" of the Association.

Production of Documents and Things, and Entry Upon Land for Inspection: Civil Procedure Rule 34

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



After almost seven years of writing *Evidence Matters and Discovery for Defense Lawyers*, I am laying down my pen. Like a friendly old mule, I'm happy to be hitched to the plow again if need be; however, I am hopeful that by reducing my extracurricular activities, I will be able to spend more time with my family. I am amazed at how much this legal research has taught me, and I want to thank *The Defense Line* Editor John Massalon, and his predecessors Clarke McCants and Will Davidson for the opportunity. I encourage others to write for our magazine: you'll get more out of it than you know.

History, Policy, and the Basics of Rule 34

Rule 34 as originally written borrowed from former Equity Rule 58, the English Judicature Act, and several state statutes.[1] The federal rule was much less user-friendly when first adopted in 1938, and thanks to numerous amendments over the years, it has now become a less technical and more important means of discovery.

Before the state rule became effective, Circuit Court Rule 88 controlled production of documents in state civil litigation, and before that, the court's equitable powers governed document productions. Like the federal rule, South Carolina's rule 34 eliminated the burdensome requirement that good cause be shown before a party is entitled to discovery. Because many prior cases were decided under the more restrictive "good cause" standard, they are of doubtful precedent. However, as many senior attorneys recall, modern discovery rules have not preempted or abrogated federal or state judges' equitable powers to order discovery in an extraordinary situation when the standard discovery rules are inadequate.[2]

The policy underlying rule 34 is to make relevant, nonprivileged documents, objects, other information, and property available to parties. In this way surprise is eliminated, issues are simplified, and trials expedited.[3] As well put by one court, trial should be a search for the truth, not a sporting event,[4] and discovery such as requests for production furthers this policy. Rule 34 is liberally construed by the courts.[5]

Rule 34 allows for two basic means of discovery. First, it permits a party to inspect and copy designated documents or to inspect and copy, test, or sample any other tangible things discoverable under rule 26(b). A "document" is defined broadly under rule 34 and includes photographs (which the common law has read to include video recordings[6]), data compilations, and drawings. Rule 34 was written with the ever-changing nature of technology in mind.[7]

Second, rule 34 allows a party to enter designated land or other property for inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property. Federal and South Carolina Rules of Civil Procedure 34 read essentially the same, the only real difference being that state rule 34(c) has a final sentence specifying that subpoenas to nonparties are controlled by rule 45. It has been held that an informal request for documents during a deposition is not enforceable under rule 34 as the basis for a motion to compel,[8] although an on-the-record stipulation to produce documents between attorneys at a deposition may be enforced by the court.

As with any discovery request, the court's discretion is critical. "Granting or denying a request under rule 34 is a matter within the trial court's discretion, and it will be reversed only if the action taken was improvident and affected substantial rights."[9]

When Does Rule 34 Apply?

Requests under rule 34 apply only to parties in litigation,[10] although in extraordinary circumstances the courts have allowed discovery in arbitration or prior to suit being filed.[11] The documents, tangible things, property, and other things properly discoverable must be within the "possession, custody, or control" of a party.

When a party has possession of documents belonging to third parties, it may be required to produce them,[12] even when the documents are themselves are beyond the court's jurisdiction.[13]

Control is a term of art. It means the same thing as "available" as used in rule 33 regarding interrogatories.[14] It has been held to be the "legal right to obtain the document on demand."[15] Clearly a party may not immunize documents by turning them over to a nonparty, such as the party's attorney or insurer. However, control is highly fact specific, and it has

been held that just because a party can get a document if it tries hard enough does not mean the document is under its control.[16] Judge Samuel Stilwell, writing for the Court of Appeals in *Reiland v. Southland Equipment Service*,[17] held that documents in possession of a party's expert were not discoverable under rule 34, and noted that the documents sought by the requesting party could have been obtained through a subpoena.[18]

On the other hand, a party may be required to procure documents from an independent entity or to assist the requesting party in doing so, especially when the requesting party would have great difficulty in, or face the impossibility of, obtaining the documents. In several cases, courts have held that a party to SEC litigation must request a copy of his or her transcript from an SEC hearing.[19] Corporations that are related closely to one another may be required to produce documents in the other's possession in some cases, for example if one corporation is the parent of a wholly owned subsidiary[20] or is seen as the alter ego or "sister" of another, even if they are technically separate businesses.[21]

Some courts go beyond whether a party has the legal right to control a nonparty (e.g., where an employee has a contractual duty to do the employer's bidding) and look at whether the party has a "practical" right by using influence to control the nonparty and thus procure the documents. "Caution must be exercised when the notion of control is extended in this manner, . . . because sometimes the party's actual ability to obtain compliance from nonparties may prove more modest than anticipated."[22] A plaintiff has been held not to be in control of her physician's records,[23] and an insurance carrier has been held not to be in control of its insured's records.[24] However, as a practical matter, a subpoena under rule 45 generally is a more useful way of receiving nonparty records than under rule 34, as it has a better chance of ensuring that all documents are produced.

How Records Are To Be Produced and Inspection Done

The party who produces documents for inspection must (a) organize them as kept "in the usual course of business" or (b) label them to correspond to the categories in the request to produce itself. (Rule 33 also allows a party the option of producing business records rather than answering interrogatories in some scenarios.)[25] The choice of how production is to be made should be within the producing party's discretion, but only when the receiving party will be able to understand the documents as kept in the ordinary course of business.[26] Production of over 7000 documents in no apparent order is an example of a response not falling within the spirit of the rule.[27]

When a party seeks to discover computer data, several difficulties present themselves. First, a party unfamiliar with the producing party's software may be unable to draw any useful information from the computer. A reasonable solution might be to require the producing party's software expert to withdraw the information from the computer, but make the requesting party pay the cost of the expert's fees, assuming a fair amount is charged. Also, both parties should have the right to be present at the extraction of computer data so as to avoid straying into privileged or otherwise unauthorized material.

Inspection of property or a business operation must be done in a reasonable manner and time. The court may balk at a wide-ranging inspection involving numerous people, unless justified. Disruption of a business may be a real concern and should be minimized.[28] Thus, the Fourth Circuit has held that rule 26(b) is not necessarily controlling regarding an inspection of premises and that rule 26(c) with its good cause standard may apply upon motion to such inspections under rule 34.[29]

Objecting to Requests to Produce

Once a rule 34 request is made, the adverse party may not rest on its rights and simply ignore it. Many lawyers believe that both an objection and a motion for a protective order must be made to avoid waiver after a request for production has been received. The Advisory Committee's note to the 1970 amendment of rule 34(b) indicates that when a responding party believes some or all of the requests are objectionable, it "may choose to seek a protective order under [r]ule 26(c) or may serve objections . . . ."[30] When a privilege is claimed, however, a detailed motion for a protective order is probably the better course.

Documents not produced in response to a valid request may be barred at trial. However, at least when an adversary's failure to disclose documents pursuant to rule 34 was not *willful*, a timely objection and/or motion to compel must be made.[31] In the Fourth Circuit, once a party makes a timely objection to a document request, the burden moves to the party seeking production to make a motion to compel.[32] The motion to compel generally must be done at a pretrial conference or sooner if the party hopes to be successful in barring those documents from evidence at trial.[33]

Requests to Produce and Trial Evidence

There are several issues that may arise when requests to produce are brought to trial. *First*, the documents produced must be distinguished from the party's written answers to the request to produce. Written answers to requests to produce may be used as party admissions or prior-inconsistent statements. For example, a party's written response pursuant to rule 34 that it has none of the requested documents might be admissible as an admission if the adversary can prove that the party had the document, or

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should have known of the document's existence. Unlike interrogatory answers, responses to a request for production need not be signed under oath. Rule 34 requires the "party" to sign; it is unclear whether the attorney's signature satisfies this rule. Of course, the attorney's signed answer also may be a party admission.[34] Failure to produce documents or things, even when the party has a legal right to do so, may lead to an inference of obstruction of justice under the common law.[35]

Second, merely because documents are produced pursuant to rule 34 does not mean the documents themselves are admissible. The documents will be hearsay unless they constitute admissions, are not offered for their truth, or fall within a hearsay exception; moreover, there may be hearsay-within-hearsay problems. Although a request possibly could be fashioned so that a party's production of a document lays an evidentiary foundation sufficient to make the document admissible at trial, this generally is not the case.

Third, the failure to produce documents may affect their admissibility at trial. As discussed above, the court may bar documents not produced, for example in response to a timely motion to compel or when withheld in bad faith, or which were produced late such that the requesting party is prejudiced on the merits. A defense lawyer should review the file a month or two before trial to detect any potential discovery problems (e.g., an inadvertent failure to name a witness) and make arrangements to solve them.

Form Requests for Production

The decision about how to word each request for production depends upon the facts of the case. Below are some sample requests, however, that may be helpful as a starting point. As with interrogatories, do not dilute your potential impeachment evidence by addressing requests to produce to the attorney. Address them to the *party*, who is ultimately responsible for producing, or refusing to produce, the records; a party who fails to disclose documents or to truthfully answer requests for production should not be able to avoid cross-examination by telling the jury that the request was addressed to his lawyer, not him.

Also, timing is important. You may want to send an initial, basic set of requests for production, take the plaintiff's deposition, then send a supplemental set.

TO: JOHN P. SMITH, THE PLAINTIFF

The Defendant hereby requires you, within thirty days after service, to produce and answer the following requests for production, in accordance with Federal Rule of Civil Procedure 34.

Special Notes:

(A) Please do not allow your answers to be sent by your attorney to the Defendant until your answers have been checked for accuracy.

(B) These requests for production do not seek to discover privileged information. However, for any and all information, including communications, withheld because you contend they are privileged, set forth the facts required by Federal Rule of Civil Procedure 26(b)(5). The disclosures required by rule 26(b)(5) are mandatory ("shall"), not permissive.

(C) For all documents and things requested below that you know to exist but which you refuse to produce because they are not within your or your attorney's "care, custody, or control," please set forth a detailed objection explaining your grounds.

(D) Please produce only authentic copies of the requested documents and things. All documents and tangible things will be assumed to be authentic unless stated otherwise in your responses.

Personal Injury Suits

- Copies of all statements, written or recorded, of any person, including parties hereto, who are or may be witnesses to any of the matters complained of in the Complaint.
- All photographs, video recordings, and DVDs relating in any way to the matters referred to in the Complaint or the damages claimed.
- All communications, telephone logs, notes, emails, statements, computer data, and memos by or regarding you in any way connected to the matters alleged in the Complaint, including communications between you and witnesses.
- All diagrams, plats, reports, or other documents relating to the matters in suit.
- Copies of the complete files of any experts you intend to call as witnesses (or if not intended to be called as witnesses, which may pertain, in any way, to the issues involved in this case), as well as their resumes & curricula vitae, including correspondence and email exchanged between the expert and you, your attorney, or any witness in this case, and promotional material or letters sent by the expert to you or your attorneys.
- Copies of all medical documents related to you, including, but not limited to, doctor and hospital file records, x-rays, x-ray reports, evaluations, correspondence, notes, charts, diagrams, discharge summaries, and bills. **Note: this request is broad and includes records pertaining to your health from health-care providers for visits before the accident as well as for treatment for other causes since the accident in your or your attorney's care, custody, or control.**
- If you are claiming lost wages from this injury, copies of your tax returns from two years before the injury until the time your lost wages ceased.
- If you are claiming lost income from a business, including one in which you are self-employed, access to or copies of the business's financial records beginning two years before the injury until the time your lost income ceased, including all business tax returns, ledgers, banking statements and checks, computer data, and financial

statements.
- Copies of any diaries or records of daily activities pertaining to this accident and injuries.
- The motor vehicle in which you were involved in this accident and all repair records relating to it, including copies of repair estimates.
- Any other relevant documents or things pertaining to this lawsuit.

Computer Data

- Access to hard drives and backups of data from your personal computer, as well as that of [e.g., your office manager Paul Jones, and your caseworker Melinda Vinson,] for copying and review. In the alternative, this information may be produced on CD (computer disc) in a WordPerfect, Word, or Excel format.

Other Legal Claims and Lawsuits

- Copies of pleadings, discovery requests and responses, deposition transcripts, correspondence, and settlement agreements from other claims and lawsuits involving you and regarding which you alleged personal injuries.

Products Liability

- The product that you allege injured you and for which you have brought claims in this lawsuit.
- The results of any tests regarding the product you allege to be defective.

Premises Liability

- The shoes or other footwear you were wearing at the time of the injury.
- A copy of the receipt for goods allegedly purchased by you in the Defendant's business immediately before or after the accident happened.

Disputed Identity Case

- The clothes you were wearing at the time you were allegedly injured.

GRIMBALL & CABANISS, L.L.C.
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ATTORNEYS FOR THE DEFENDANT

Charleston, South Carolina
Dated:

Footnotes

1 8A Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice and Procedure* Section 2201, at 354 (2d ed. 1994) [hereinafter *Federal Practice and Procedure*].

2 *See Comsat Corp. v. National Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999); *Wofford v. Ethyl Corp.*, 316 S.C. 75, 447 S.E.2d 187 (1994).

3 *Federal Practice and Procedure, supra* note 1, Section 2202, at 356-57.

4 *See Comercio E Industria Continental, S.A. v. Dresser Indus., Inc.*, 19 F.R.D. 513, 514 (D.N.Y. 1956).

5 *Federal Practice and Procedure, supra* note 1, Section 2202, at 357.

6 *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997).

7 Fed. R. Civ. P. 34(a) advisory committee note to 1970 amendment; *Federal Practice and Procedure, supra* note 1, Section 2206, at 381. *See also* Gregory Forman, *Four Things Family Law Attorneys May Not Realize About Civil Procedure Rule 34*, in S.C. Trial Lawyer Bulletin (Summer 2003) for an excellent article on rule 34.

8 *Roberts v. American Int'l, Inc.*, 883 F. Supp. 499, 501 n.2 (D. Cal. 1995).

9 *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958).

10 *See Comsat Corp. v. National Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999). *But cf. Wofford v. Ethyl Corp.*, 316 S.C. 75, 447 S.E.2d 187 (1994) (holding that equity may require discovery of nonparties) (citing *Ex parte Goodyear Tire & Rubber Co.*, 248 S.C. 412, 150 S.E.2d 525 (1966)).

11 *See Deiulemar Compagnia Di Navigazione v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999) (Williams, J.) (citing *Ferro Union Corp. v. SS Ionic Coast*, 43 F.R.D. 11, 14 (S.D. Tex. 1967) (permitting discovery under Rule 34 where evidence was on ship about to leave United States waters)); *see also Wofford*, 316 S.C. 75, 447 S.E.2d 187.

12 *See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

13 *Federal Practice and Procedure, supra* note 1, Section 2210, at 405.

14 *Wilson v. Volkswagon of Am., Inc.*, 561 F.2d 494 (4th Cir. 1977) (Russell, J.) (citing *Commonwealth v. Happnie*, 326 N.E.2d 25, 28-29 (Mass. Ct. App. 1975) ("The terms 'availability,' or 'probable availability,' or 'control' [w]hich, . . . is often used to express the same thought) are words of art. They refer not to proof of actual physical whereabouts, but rather to the likelihood that the party against whom the inference is to be drawn would be able to procure the missing witness' physical presence in court.")).

15 *See Gerling Int'l Ins. Co. v. C.I.R.*, 839 F.2d 131, 140 (3d Cir. 1988).

16 *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993).

17 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998).

18 Whether the expert's file documents were specifically requested pursuant to rule 34 is unclear from the opinion, but the expert had not produced the requested documents to the party calling him to trial. In any event, prior to his cross-examination a recess was made and the entire file was produced. *Reiland* may stand for the proposition that a party must have first availed himself of procedural remedies such as a motion to compel in order to bar use of a document or a witness's testimony at trial.

19 *See, e.g., In re Woolworth Corp. Sec. Class Action Litig.*, 166 F.R.D. 311 (S.D.N.Y. 1996) (party was required to request transcript of her hearing from SEC).

Continued on page <None>

Production of Documents and Things...

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20 *Gerling Int'l Ins. Co*, 839 F.2d at 140-41.

21 *Federal Practice and Procedure, supra* note 1, Section 2210, at 397-98.

22 *Id.* Section 2210, at 402.

23 *See Greene v. Sears, Roebuck & Co.,* 40 F.R.D. 14 (D. Ohio 1966) (cited in *Ulrich v. City of Crossby*, 848 F. Supp. 861 (D. Minn. 1994)); *Reeves v. Pennsylvania R. Co.*, 80 F. Supp. 107 (D. Del. 1948); *Federal Practice and Procedure, supra* note 1, Section 2210, at 404.

24 *See Read v. Ulmer*, 308 F.2d 915 (5th Cir. 1962).

25 For a more in-depth discussion of this issue, see the last column of *Discovery for Defense Lawyers* in *The Defense Line*.

26 *Federal Practice and Procedure, supra* note 1, Section 2213, at 429-30 n.15 and accompanying text.

27 *Cf. Stiller v. Arnold*, 167 F.R.D. 68 (D. Ind. 1996).

28 *See Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904 (4th Cir. 1978) (discussing five day plant visits accompanied by unspecified attorneys, paralegals, and experts during working hours).

29 *See id.*

30 The Committee's note says that the discussion appended to rule 33 is relevant to rule 34 also. The rule 33 note is discussed in the text modified to apply to rule 34.

An objection (rather than a motion for a protective order) usually should suffice unless privileged material is sought to be protected. If a motion for a protective order were required each time a party declined to produce documents based upon an objection, the courts would be flooded with such motions.

31 *See Jom, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47 (4th Cir. 1997) (citing several cases in support of this proposition).

31 *See Clinchfield R.R. Co. v. Lynch*, 700 F.2d 126 (4th Cir. 1983) ("Once a party registers, by way of a timely response, an objection to a document request, 'the initiative rests with the party seeking their production to move for an order compelling it.'") (cited in *DesRosiers v. Moran*, 949 F.2d 115 (1st Cir. 1991)).

32 This assumes that the adversary did not willfully conceal documents and that the party seeking production was unaware of the concealment.

33 Judge Anderson makes this point clear in G. Ross Anderson, Jr. & James A. Patrick, III, *Attorney Admissions*, in 7 S.C. Lawyer 20 (Nov./Dec. 1995).

34 *Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) is the leading case on this issue. In Welsh, the South Carolina Supreme Court observed that under the procedural rules of the 1940s, the trial judge correctly denied the defendant's motion requesting a pretrial inspection of a Coca-Cola bottle allegedly containing poisonous liquid. The plaintiff had refused to allow the inspection or to have one made himself. The defendant was entitled as a matter of law to cross-examine on the issue and to argue an adverse inference. Welsh and its progeny have been cited repeatedly over the years and are consistent with the common law of other jurisdictions.

35 I once was involved in an auto accident case where our defense was that a man, not the plaintiff (a woman), was driving the other car: because the plaintiff was not in the car, she was not injured. Pursuant to rule 34, we requested the red dress that the plaintiff alleged to have worn at the accident scene, put it on a dress mannequin, and moved it into evidence. The jury sent the plaintiff home without a penny.

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