SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

http://www.scdtaa.com

Spring

TRIAL ACADEMY

April 21 - 23, 2004

Charleston, SC

Summer

JOINT MEETING

July 22 - 24, 2004

Grove Park Inn Asheville, NC

Fall

ANNUAL MEETING

November 11-14, 2004

Château Élan Braselton, GA

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

TRIAL ACADEMY
April 21 - 23, 2004

Tentative Agenda

Wednesday, April 21, 2004

9:00 - 9:15 am.....Welcoming remarks
Samuel W. Outten, Esquire, SCDTAA President

9:15 - 10:15 am .....Motions in Limine/Voir Dire
John Hamilton Smith, Esquire

10:15- 11:00 am.....Opening Statements:
The Plaintiff's Perspective
Gedney M. Howe, III, Esquire

11:00 - 11:15 am.....Break

11:15 - 11:45 am .....Opening Statements for the Defense
Mark H. Wall, Esquire

11:45 - 1:00 pm.....Breakout Session
Opening Statement Skills

1:00 - 2:00 pm .....Lunch On Your Own

2:00 - 2:45 pm .....Direct and Cross of Lay Witnesses
Samuel R. Clawson, Esquire

2:45 - 3:00 pm.....Break

3:00 - 4:00 pm.....Five Acts on the Law of Lawyering
The Honorable Walter T. Cox, III
and Cast Members:
Stephen E. Darling, Esquire
J Rutledge Young, Jr., Esquire
G. Mark Phillips, Esquire
Molly H. Craig, Esquire

4:00 - 5:15 pm.....Breakout Session
Direct/Cross - Lay Witnesses

Thursday, April 22, 2004

9:00 - 10:00 am .....Protecting the Record on Appeal

10:00 - 10:15 am.....Break

10:15 - 11:15 am.....Direct and Cross of Expert Witnesses
Robert H. Hood, Esquire

11:15 - 12:30 pm.....Breakout Session
Direct/Cross - Expert Witnesses

12:30 - 1:30 pm .....Lunch On Your Own

1:30 - 2:30 pm.....Evidence/Objections/Questions
Warren E. Moise, Esquire

2:30 - 2:45 pm.....Break

2:45 - 3:45 pm .....Closing Arguments/Post Trial Motions
John S. Wilkerson, III, Esquire

3:45 - 5:00 pm.....Breakout Session
Closing Argument Skills

5:00 - 5:30 pm .....Trial Academy Staff Available for Questions

6:30 pm .....Dinner and Cocktail Party

Friday, April 23, 2004

9:00 - 4:30 pm.....Mock Trials
Charleston County Judicial Center

President's Letter

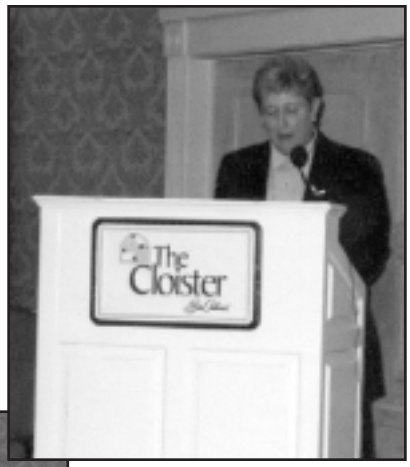
by Samuel W. Outten

Let me begin by thanking the Committee Chairs for our 36th Annual Meeting at The Cloister--David Rheney, Gray Culbreath and Matt Henrikson. The program was both informative and entertaining. Thanks to Walter Cox, Judge Costa M. Pleicones, Judge Alexander S. Macaulay and Sterling and Kris Davies for their participation in this. Curtis Ott moderated a panel discussion on *State Farm v. Campbell*, which included Chief Justice Jean Toal, Chief Justice Kaye G. Hearn, Judge J. Michael Baxley and Judge J. Derham Cole. That discussion gave us some insight as to how our trial and appellate courts interpret this decision. No doubt many issues related to evidentiary matters and punitive damage awards will be affected by this Supreme Court decision.

The speech delivered by Bob Steed of King & Spaulding was hilarious and reminded us not to take ourselves too seriously. Many thanks to Chief Justice Jean Toal for delivering the State of the Judiciary address. Thanks also to David Dukes for addressing the issue of electronic discovery, an issue which we will confront regularly in discovery. Finally, the discussions from the Legislative Panel regarding tort reform were very insightful and informative. We appreciate the Legislators taking time out of their busy schedule to join us.

We would like to thank all of the judges who attended our meeting and express our hope that they will mark their calendars for next year's meeting at Château Élan. Please join me in recognizing Steve Darling who provided excellent leadership to the SCDTAA in 2003. Both meetings were well-attended, the programs were excellent and the trial academy was once again a success. I hope that in 2004 we can build on the success we enjoyed under Steve's leadership.

Chief Justice Jean Toal adminsters the Lawyer's Oath at the SCDTAA Annual Meeting



2003 Annual Meeting Recap
Sea Island, GA • November 6-9, 2003

by Matthew H. Henrikson

Perfect coastal south Georgia weather greeted the 106 lawyers, 38 judges, and over 150 spouses, children, guests, and speakers attending the Annual Meeting November 6-9, 2003 at The Cloister, Sea Island Georgia for a very informative and entertaining program. Defense Research Institute President Elect Richard Boyette addressed the members and judges on national defense issues marking the fourth consecutive year that top leadership from DRI has attended our meeting. Former Circuit Court Judge and Chief Judge of the U.S. Court of Appeals for the Armed Forces entertained with instructive ethics vignettes performed by the skillful comedic ensemble of Costa Pleicones, Alex McCaulay, and Sterling and Kris Davies. A judges panel moderated by Curtis Ott including Chief Justice Jean Toal, Chief Judge Kaye Hearn, U.S. District Court Judge David Norton, and Circuit Court Judges Michael Baxley and Derham Cole conducted a very informative discussion of the U.S. Supreme decision, Campbell v. State Farm, learning that two South Carolina Supreme Court decisions dealing with Campbell issues are expected before Christmas. As promised, Bob Steed of King & Spaulding did indeed bring the house down, and in the course therof brought to light some theretofore unknown details of Steve Darling's love life. Thanks a lot Bob. One liner of the day however went to Judge Norton who queried if anyone had noticed how much smarter and better looking Henry Floyd had recently become.

Saturday morning, Chief Justice Toal presented an encompassing look at the truly amazing modernization our state courts and county clerks of court offices have undergone in terms of computer and internet technology in the space of just three years. All but two counties are now hardwired for high speed internet, and e-filing is right around the corner. Coincidentally, David Dukes thereafter presented a very informative primer on electronic evidence discovery and admissibility issues. Ken Walsh, the U.S. News and World Report White House correspondent, gave a very interesting and well received brief history of Air Force One, leaving everyone wishing that he had another hour to speak. The program segment of the meeting ended with Phil Lader deftly moderating a panel of legislators including Jim Harrison, Hugh Leatherman, Linda Short, David Jennings, and Brad Hutto in a lively debate of tort reform issues yielding the probability that the General Assembly would pass a bill changing the venue and judgment interest statutes, and the improbability of any damages caps in the foreseeable future.

Next year's meeting will return to Château Élan in Braselton, Georgia, November 11-14, 2004, while the joint meeting with the Claims Managers Association at The Grove Park in Asheville, North Carolina will be held July 22-24, 2004. Please mark your calendars to join us for what promises to be two more excellent programs next year.

Challenging Plaintiff's Expert

by Lane Davis

I. INTRODUCTION

Using a motion *in limine* to exclude or narrow an expert's testimony can be a potent weapon for a defense attorney. Now commonplace in the federal system, such motions remain underutilized in South Carolina's state courts. While applicable case law invites the motions, state court practitioners have not consistently challenged the admissibility of the testimony of plaintiff's expert. Often, their reluctance balloons fees and loses cases. The following article provides a cursory guide to challenging a plaintiff's expert in South Carolina.

II. EXPERT TESTIMONY UNDER SOUTH CAROLINA LAW

The admissibility of expert evidence is governed by Rule 702 of the South Carolina Rules of Evidence. Rule 702 states:

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

Rule 702, SCRE. Analysis under the Rule is distilled into three parts, as follows:

(1) Whether the evidence will assist the trier of fact;
(2) Whether the expert witness is qualified; and
(3) Whether the underlying science is reliable.

See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). All three criteria must be met for an expert's testimony to be admissible.

The third criterion, or the reliability prong, has historically proved most important. As a consequence, in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), the South Carolina Supreme Court further distilled the criterion into the following:

(1) The publications and peer reviews of the technique;
(2) Prior application of the method to the type of evidence involved in the case;
(3) The quality control procedures used to ensure reliability; and
(4) The consistency of the method with recognized scientific laws and procedures.[1]

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001).[2] Failure to make the required showing under these criteria renders the proposed testimony inadmissible. *See e.g., State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001).

The *Council* opinion and its progeny have left two significant issues unanswered. First: must all expert testimony abide by *Council's* dictates or just scientific testimony? Second: must all the sub-criteria be met, or just some, or most? Unfortunately, South Carolina decisional law has not yet answered these questions. *See* Hon. G. Ross Anderson, Jr., *Evidence Eggshells—A New Walk for Experts*, The Bulletin, Fall 1999.

A strong argument exists that *Council's* analysis applies to all expert testimony. In *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), the United States Supreme Court addressed the same issue on the federal level when asked whether the *Daubert* reliability standard applied to all expert testimony or just scientific testimony. The *Kumho* Court held that because Federal Evidence Rule 702 made no distinction between, "scientific knowledge and technical or other specialized knowledge", the *Daubert* standard applied to all experts. *Id.* at 148 (internal citations omitted). The *Kumho* Court further noted how difficult it would be for lower courts to differentiate between scientific testimony and merely "technical or specialized" testimony. *Id*. Council's application to non-scientific testimony raises the same issues as presented in *Kumho*. Just like in *Kumho*, then, *Council's* analysis should be extended to all experts.

If the *Council* sub-criteria apply to all expert testimony, then a flexible approach to applying the factors would be required. This is because some factors cannot be applied to certain types of "technical or specialized" expert testimony. For example, an expert in a legal malpractice action will not use quality control procedures in reaching opinions about the applicable standard of care. And, a master mechanic is unlikely to cite peer reviews in order to support opinions about repair issues. Accordingly, if the South Carolina Supreme Court follows *Kumho's* rationale, which it should, then it will likely adopt a flexible application of the reliability sub-criteria.

Continued on page 8

continued from page 7

III. PRACTICAL ASPECTS

Several practical items help maximize the effectiveness of a limine motion made pursuant to *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). As an initial matter, defense counsel should use interrogatories under Rule 33, SCRCP to learn the name and address of plaintiff's expert. *See* Rule 33, SCRCP. Interrogatories can also be used to acquire a summary of the expert's opinions, but such summaries are rarely useful. As early in the litigation as possible, the expert's file should be subpoenaed and reviewed. It is important to identify what opinions the expert intends to offer, and in what field his expertise allegedly lies. Research should be done into the background of the expert and the subject matter of his opinions in previous cases. Appellate opinions from previous cases involving the expert can be useful and usually obtained through Westlaw or Lexis. If contacted, defense counsel from earlier cases can also provide valuable insight and a wealth of materials.

All non-legal materials gathered should be copied and forwarded to the defense expert so that (s)he can assist in preparing for the deposition of plaintiff's expert. f the defense expert is not well-seasoned, he should be advised of the *Council* analysis so (s)he can identify the attorney's objective in the deposition. Preparation for the deposition should concentrate in covering the criteria articulated in *Council*. After the deposition, preparation of the ensuing *limine* motion and supporting memorandum should occur as soon as possible, and in any event, well in advance of trial. Finally, if the limine motion is lost, it should be renewed at trial so as to preserve the issue for the record.

IV. CONCLUSION

An effective challenge to the admissibility of an expert's testimony can seriously hamper if not dismantle a plaintiff's case. So far, the defense bar in South Carolina has not capitalized on this procedural tool in the state court system. As a result, unreliable expert testimony is presented to the jury when it warrants exclusion. South Carolina defense practitioners should consider incorporating such motions into state court practice in order to improve the quality of evidence offered at trial.

Footnotes

1 These sub-criteria are known as the *Jones* factors, named after *State v. Jones,* 273 S.C. 723, 259 S.E.2d 120 (1979). Interestingly, while the *Council* decision credits the *Jones* opinion with establishing the sub-criteria, they are not actually enumerated in the opinion. *See also* Hon. Roger M. Young, How do you know what you know?, South Carolina Lawyer, November 2003.

2 Even though the *Council* decision expressly refused to adopt the *Daubert* criteria, South Carolina's standard is virtually identical to its federal counterpart. *See* Hon. G. Ross Anderson, Jr., *Evidence Eggshells—A New Walk for Experts*, The Bulletin, Fall 1999. One possible explanation for this result is that the state Supreme Court sought to use the *Daubert* standard but wanted to make clear that South Carolina would develop its own body of precedent determining how to apply the same.

Amended Order

Rockford Manufacturing, LTD, et al., vs. David D. Bennett, et al.

By Ellis R. Lesemann

In a noteworthy recent order issued by the United States District Court in Charleston, counsel for an employer were able to obtain an injunction against six former employees and the competing entities formed by them for violation of certain restrictive covenants that were included in employment acknowledgments signed by the former employees. The successful employer and its affiliated companies are represented by John B. Hagerty, John C. McElwaine, and Ellis R. Lesemann, all of the Charleston office of Nelson Mullins Riley & Scarborough, L.L.P.

The fact that an injunction was granted is not what rendered the decision noteworthy. Rather, the significance stems from the fact that, for what might be the first time under South Carolina law, the Court modified or "blue-penciled" the restrictive covenants and enforced them by way of injunction in a limited form. Traditionally, when faced with a restrictive covenant that was potentially overbroad, South Carolina courts had simply refused to enforce the agreement. Prior cases might discuss the possibility of blue penciling a restrictive covenant, i.e., *Eastern Business Forms, Inc. v. Kistler*, 189 S.E.2d 22 (S.C. 1972) or *Somerset v. Reyner*, 104 S.E.2d 344 (S.C. 1958), but the courts would ultimately decline to blue pencil on the basis that the restrictive covenants at issue were considered "indivisible" and could not be blue penciled.

In this case, the Court reviewed the restrictive covenants and, unlike the prior courts, found a sufficient basis to conclude that the restrictive covenants in this case were divisible. The restrictive covenants sought to protect the interests of the actual employer as well as a group of companies affiliated with the employer. The defendants attempted to argue that an injunction should not be granted because the restrictive covenants were overbroad. The basis for the argument was that the defendants had not worked for the affiliated companies and did not have any confidential information or knowledge that would allow the defendants to compete unfairly with them. Counsel for the employer succeeded in convincing the Court that, if the Court was concerned with the breadth of the covenants, the facts presented the ideal case for blue penciling. Their efforts resulted it what might be the first instance in which restrictive covenants have been blue penciled by a court applying South Carolina law in the employment context.

Amended Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ROCKFORD MANUFACTURING, LTD., ROCKFORD DEALER ACCEPTANCE CORPORATION, SUNWARD CORPORATION, WEDGCOR, INC. a/k/a WEDGCOR STEEL BUILDING SYSTEMS, WEDGCOR ACCEPTANCE CORPORATION, GOLD SEAL STEEL BUILDINGS, INC., and AFFILIATED COMPANIES,Plaintiffs,

vs.

DAVID D. BENNETT, MIMI MOGUL, GREGORY W. HERALD, DAVID P. CORDINA, CHARLES W. LONG, KAREN L. MERRITT, JASON C. POPOWICH, SUPREME STEEL BUILDINGS, INC., and SUPREME BUILDING SYSTEMS CORPORATION, Defendants.

Civil Action No. 2:03-0837-23

AMENDED ORDER

This matter is before the Court on Plaintiffs' Motion for Preliminary injunction, pursuant to 5 U.S.C. Section 705 and Fed. R. Civ. P. 65. For the following reasons Plaintiffs' motion is granted.

BACKGROUND

Plaintiffs filed suit in this Court on March 14.2003. On April 25, 2003, Plaintiffs filed their First Amended Verified Complaint, seeking damages and other relief, for various claims, including breach of contract, breach of the duty of loyalty and violations of the federal Copyright Act, 17 U.S.C. Section 101, and the federal Computer Fraud and Abuse Act, 17 U.S.C. Section 1030. Plaintiffs contend that

Continued on page 10

Rockford vs. Bennett

continued from page 9

Defendants were former employees who have now wrongly solicited customers, dealers, and employees and who have appropriated confidential trade secrets in violation of non-solicitation agreements entered into by the panics.

Plaintiffs are all legally distinct, but affiliated entities involved in the engineering, design. manufacture, and marketing of steel buildings. Plaintiffs' products are available to the general public through a network of authorized dealers. Defendants each formerly held a position of employment with either Plaintiff Rockford Manufacturing or Plaintiff Rockford Acceptance.

Plaintiffs originally alleged that Defendants Supreme Steel Buildings, Inc. and Supreme Building Systems are the apparent and current employers of some or all of the individual Defendants.

Plaintiffs, however, have recently dismissed without prejudice Defendant Supreme Steel Buildings. Inc. Plaintiffs contend that as sales employees, Defendants had significant access to confidential, proprietary and trade secret information, including, but not limited to: (1) confidential dealer lists; (2) confidential vendor lists; (3) confidential client lists; (4) confidential cost, estimating and pricing data; and (5) confidential information concerning manufacturing processes and practices.

Plaintiffs conclude that Defendants signed agreements containing restrictive covenants regarding non-solicitation, non-disclosure, and non-competition. Plaintiffs allege further that in violation of such agreements, Defendants have (1) established a website, which allegedly plagiarizes information from Plaintiffs' website; (2) obtained illegal access to Plaintiffs' computer systems by fraud and have used such access to misappropriate highly protected trade secrets; and (3) solicited Plaintiffs' dealers, vendors, customers, contacts, and employees.

DISCUSSION

I. Preliminary Injunction

The Fourth Circuit outlined the analytical framework, which courts must employ in determining whether to grant preliminary relief, in *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (citing *Blackwelder Furniture Co. v. Selig Mfg. Co.,* 550 F.2d 189, 195 (4th Cir. 1977)). First, the party requesting preliminary relief must wake a "clear showing" that he will suffer irreparable harm if the court denies his request. Id. at 812-13. Second, if the party establishes irreparable harm, "the next step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." *Id.* at 812. Third, if the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Id.* at 813. However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." *Id.* Fourth, the court must evaluate whether the public interest favors granting preliminary relief.

The two most important factors are the probable irreparable harm to the moving party if an injunction is not issued and the probable harm to the non-moving party if an injunction is issued. *Blackwelder*, 550 F.2d at 120. If the balance of these two factors is the non-moving party's favor, he or she does not have to show a likelihood of success on the merits, and the presentation of a grave or serious question is sufficient to warrant a preliminary injunction. *Id.* However, the inverse is true that if the likelihood success on the merits is great, the need for showing irreparable harm decreases proportionately. *Combined Insurance Company of America v. Investors Consolidated Insurance Co.*, 499 F. Supp. 434 (E.D.N.C. 1980).

A. Balance of Harms

Plaintiffs contend simply that they will suffer irreparable injury because their "confidential information, dealer lists, completed building lists, price lists and pricing information, and detailed customer information that Plaintiffs have spent years developing...is invaluable in the hands of Plaintiffs' competitors (Pls' Mot. at 11.) Plaintiffs have made a significant

attempt to quantify the cost associated with developing what they consider their most important asset: a network of dealers who sell Plaintiffs' steel buildings products. (See Wirth Aff at 2-6.) Notwithstanding their ability to quantify a portion of the potential injury they face, Plaintiffs contend that if Defendants are permitted to interfere in their dealer network, much of the injury would be irreparable insofar as there would he a resultant loss of good will and inability to restore dealer relationships. Plaintiffs have submitted the affidavit of Michael Wirth in support.

In contrast. Defendants have come forward with no evidence as to the potential harm they might face if the injunction were to lie. Plaintiffs contend that Defendants would suffer no harm because abiding by the Agreement not to solicit Plaintiffs' customers, employees, or dealers in no way prohibits them from other meaningful work. (See Wirth Aff. at 6-7.)

On this evidence, however, the Court cannot conclude that the balance of harms tips decidedly in Plaintiffs' favor. The Court is not convinced of the degree of irreparability as Plaintiffs contend. As a result, the burden on Plaintiffs to establish a likelihood of success on the merits becomes considerably greater. *See Direx Israel. Ltd. v. Breakthrough Medical Corp.*, 952 P.2d 802, 817 (4th Cir. 1991). Plaintiffs must demonstrate that there is a "*strong probability* of success on the merits." *Id.* at 813 (emphasis added).

II. Likelihood of Success on the Merits

Plaintiffs also contend that there is a strong probability that they will succeed in enforcing the non-solicitation agreements. Restrictive covenants not to compete or solicit, however, are generally disfavored and will be strictly construed against the employer. An agreement's enforceability depends on whether it

(1) is necessary for the protection of the legitimate interest of the employer,
(2) is reasonably limited in its operation with respect to time and place;
(3) is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
(4) is reasonable from the standpoint of sound public policy; and
(5) is supported by valuable consideration.

Sermons v. Caine & Estes Ins. Agency, Inc., 273 S.E.2d 338 (1980); *Rental Uniform Service of Florence, Inc. v. Dudley*, 301. S.E.2d 142, 143 (S.C. 1983).

1. Legitimate Interest of the Employer

South Carolina has expressly recognized that the "most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer." *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533 (1061). Plaintiffs contend that their network of dealers should be afforded the same characterization. The Court agrees that Plaintiffs will likely be able to demonstrate that the dealer network developed by Plaintiffs is a legitimate business interest worthy of protection. Plaintiffs have already submitted some evidence of the significant time and money invested in the development of their dealer network. (Wirth Aft at 2-4.) There is little question that such an investment would constitute a legitimate interest.

Defendants do not disagree that customers, employers, or dealers are of a legitimate interest to Plaintiffs, but contend that Plaintiffs have no legitimate interest in prohibiting the solicitation of employees, clients, and dealers of "Affiliated Companies" with whom Defendants never had any personal contact and, further, that such overbreadth renders the entire covenant unenforceable.

As an initial matter, the Court is convinced that Plaintiffs may in fact demonstrate that the non-solicitation agreement is properly tailored and not overbroad. The agreement is expressly premised on the understanding and acknowledgment of the employee that "during his employment with the Company he shall have access to certain confidential, proprietary and trade secret information including dealer and Affiliated Company related information," (First. Am. Compl. Ex. A-G at 1.) There is no evidence that Defendants, through their employment with either Rockford Manufacturing or Rockford Acceptance, might not have, in fact, had access to information concerning the proprietary interests of Affiliated Companies for which they did not actually work. Regardless, the Court concludes that Plaintiffs have shown that they are likely to demonstrate that the covenants are ultimately divisible and capable of enforcement to the extent they do protect reasonable and legitimate interests of the Plaintiffs.

Defendants contend that South Carolina does not permit courts to "blue pencil" unreasonable provisions of an agreement and enforce reasonable ones. A survey of South Carolina law suggests otherwise.

In *Eastern Business Forms, Inc. v. Kistler*, 189 S.E.2d 22 (S.C. 1972), the South Carolina Supreme Court considered that

> some courts have applied [he so called "blue pencil test", that is, if the excessive restraint is severable in terms, it may be disregarded and the remaining part of the contract agreed; but if the contract is not severable in terms, the entire covenant fails. We recognize dint sonic courts apply the rule that if the restrictive covenant ~ to time or space is unreasonable, even though indivisible in terms, it is nevertheless enforceable for so much of the performance as would be a reasonable restraint. These courts hold

Continued on page 12

that the legality of restraint should not turn on the mere form of the wording but upon the reasonableness of giving effect to the *indivisible* promise to the extent that would be lawful. We quote the following from the Somerset case which comes from Pollock, Contracts (11th Ed.), page 335:

> "A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject matter, may be good as to part and bad as to part. But this does not mean that a single covenant maybe artificially split up in order to pick out sonic part of it that it can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants."

We quote from 17 C.J.S. Contracts Section 289a, page 1224. the following:

> The severability of the contract must be determined from its language and subject matter; and where the severable character of the agreement is not determinable from the contract itself, the court, in order to uphold the contract, cannot create a new agreement for the parties, for example, so as to make the restraint a partial restraint within a lesser area than that specified in the covenant or For a lesser period of time.

Eastern Business Forms, Inc. v. Kistler, 189 S.E.2d 22, 23-24 (S.C. 1972) (emphasis added) (citing *Somerset v. Reyner*, 104 S.E.2d 344 (S.C. 1958). *Eastern* and its progenitor, *Somerset*, suggest that South Carolina has, not wholly rejected the "blue pencil" test. Both cases can be reasonably read to conclude that although an *indivisable* covenant may not he enforced even to a reasonable extent, a *severable* and reasonable covenant may he enforced independent of any unreasonable provisions. *See Eastern*, 189 S.E.2d at 23-24; *Somerset*, 104 S.E.2d at 347-48. Defendants contend that nowhere in the history of South Carolina jurisprudence has such an application of *Somerset* ever been made. Notwithstanding, it is clear that *Somerset* contemplates as much. Plaintiffs rightly contend that just because the particular agreements at issue in *Eastern* and *Somerset* did not lend themselves to severability does not mean that there is not some covenant properly divisible such that the Court might honor the principles of *Somerset* and yet still, in effect, "blue pencil" any overbroad provisions of the covenant and enforce the narrowly tailored ones. Tile Court also agrees that Plaintiffs have shown a likelihood that the non--solicitation agreement in the present ease is one such covenant.

Eastern and *Somerset* delineate two important principles for determining the enforceability of non-solicitation clauses First, as stated, the contract must be severable. Second the severability must be apparent from the contract itself—in language and subject matter.

A covenant is severable only where it "is in effect a combination of several distinct covenants." *Somerset*, 104 S.E.2d at 348 (citing Pollock, Contracts (11th Ed.)). Unlike the covenants at issue in *Eastern* and *Somerset*, the present covenant incorporates a definition of "Affiliated Companies" which on its lace may be altered without writing into the agreement something unintended by the parties. This necessarily suggests that the covenant operates more like several distinct covenants than a single indivisible one. The definition of Affiliated Company expressly lists the entire universe of companies which the Court might *potentially* conclude have a legitimate interest in enforcing the covenant against Defendants. Accordingly, the Court can logically "blue-pencil" provisions that implicate companies that have *no* legitimate interest without disrupting the integrity, continuity, or intent of the remaining provisions. *See Somerset*, 104 S.E.2d at 348.

By comparison. *Eastern* involved a covenant that delineated an unreasonable 100-mile radius. The supreme cowl refused to make "a partial restraint within a lesser area than that specified in the covenant" because to do otherwise would be to "create a new agreement for the parties." *Eastern*, 189 S.E.2d at 23-24. This conclusion is necessarily predicated on the indivisible quality of the "100 mile radius" restriction. There is no smaller unit of space which the supreme court might have identified as representing an expression of the intent of the parties. The choice was either between a 100-mile radius or none at all. Likewise, in Somerset "[t]he covenant ...was clearly indivisible, it cover[ed] the entire State of South Carolina and furnishe[d] no basis for dividing this territory. Not only d[id] the contract show that it was the intent of the parties that th[e] covenant be treated as indivisible, there [wa]s no basis for drawing a sharply defined line separating the excess territory," *Somerset* 104 S.E.2d at 348.

Such is not the case here. First, the covenant is mechanically divisible. In the structure of the covenant itself, Plaintiffs have manifested an intention regarding each company individually, by choosing to list them by name. Such an expression makes it possible, logistically, to extricate those companies, without a legitimate interest, from the more global intent concerning all "Affiliated Companies," while leaving intact the covenant as to those companies which *do* have a legitimate interest, knowing with full confidence that the intention of the parties has been expressed and preserved in the remainder of the abridged covenant. Accordingly, the covenant is

potentially severable.

Second, the parties have expressly stated their intent that the covenants be severable, importantly, the court in *Eastern* focused on whether or not the parties intended that the covenant be treated as divisible. *Eastern*, 258 S.E.2d at 24. Here, the non-solicitation agreement contains a Severability Clause which states that the "invalidity or unenforceability at any provisions of the Agreement shall not affect the other provisions hereof and this Agreement shall be enforced and construed as if such invalid or unenforceable provision were omitted." (First Am. Compl. Ex. A-U at 3.) Thus, the covenant is not only in mechanically severable, but it was the intent of the patties that it be treated as such.

Accordingly, the Court finds that Plaintiffs have demonstrated a strong probability that the Court can enforce an otherwise overly broad covenant as to only those companies which have a legitimate interest.

2. Reasonably Limited in Time and Place

The covenants at issue in this case are for a two year duration. Covenants of comparable duration have been regularly upheld as reasonable. *See. e.g. Standard Register Co. v. Kerrigan*, 199 S.E.2d 533 (S.C. 1961) (two year covenant); *Rental Uniform Service of Florence, Inc v. Dudley*, 301 S.E.2d 142, 143 (S.C. 1983) (three year covenant). Defendants contend that section 5(b) of the agreement, because it does not delineate a time limitation, requires Defendants to indefinitely communicate the substance of the non-solicitation agreement to any future employers, thereby making the entire covenant unreasonable. Defendants argument is strained. While it is true that 5(b) states no time limitation, any obligation to give notice to an employer of the non-solicitation agreement obviously terminates when the agreement itself terminates. As the covenants expire after two years, Defendants could not possibly have any duty tinder the agreement to communicate the substance of a covenant no longer operative. The Court finds that Plaintiffs will likely demonstrate that the covenants are reasonable as to time.

The covenants at issue also impose client and employee based restrictions—to wit, Defendants are prohibited from soliciting Plaintiffs' employees or cheats—rather than geographical restrictions. While "the general test is that contractual prohibitions must be geographically limited to what, is reasonably necessary to protect the employer's business...[p]rohibitions against contacting existing customers can be a valid substitute for a geographic limitation." *Caine & Estates Ins. Agency, Inc. v. Watts*, 293 S.E.2d 859 (1982); *see also Oxman v. Profitt*, 126 S.E.2d 352 (1962); *Wolf v. Colonial Life and Acc. Ins. Co.*, 420 S.E.2d 217, 222 (S.C. Ct. App. 1992). In *Wolf V. Colonial Life and Acc. Ins. Co.*, 420 S.E.2d 217, 222 (S.C. Ct. App. 1992), the South Carolina Court of Appeals expressly concluded that such restrictions are reasonable arid enforceable. Plaintiffs are likely to prevail in showing that the dealer and customer based restrictions are a reasonable substitute for a geographical limitation. Plaintiffs have already conic forward with sonic evidence that the dealer and customer based restrictions will not unreasonably limit Defendants ability to do business and that they are at least as narrowly construed as a geographical limitation to effectuate Plaintiffs' legitimate interest. (See Wirth Aff. at 6-7.)

3. Whether the Covenant is Unduly Harsh on the Employee Defendants' Ability to Earn a Livelihood

Plaintiffs contend that the restrictions are narrowly drawn so as not to be unduly harsh on Defendants' ability to earn a living. The Court agrees that Plaintiffs will likely be able to demonstrate that the covenants do not prohibit employment with any of Plaintiffs' competitors and that because the-re is no geographical limitation, Defendants can still solicit business anywhere. The Wirth Affidavit is evidence tending to demonstrate that Defendants continue to enjoy the ability to pursue many, steel-building-related business opportunities of their choosing. Conversely, Defendants have put forward no evidence suggesting that enforcement of the covenant would in fact be unduly harsh.

Finally, the restrictive covenants appear reasonable from the standpoint of sound public policy and are supported by consideration (in exchange for at-will employment). Defendants have not come forward with any public policy which would call the covenants into question, other than their arguments concerning the alleged overbreadth of the covenants. The covenants were concomitant to enforceable employment agreements, which the state has an interest in enforcing. There is no indication that the agreements were made under duress.

4. Whether the Covenant is Supported by Valid Consideration

Defendants do challenge whether there is valuable consideration to support the non-solicitation agreement as against Defendant Bennet. The South Carolina Supreme Court has stated that "a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself." *Riedman Corp. v. Jarosh*, 349 S.E.2d 404, 404 (S.C. 1986.) However, "when a covenant is entered into after the inception of employment separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to he enforceable." *Poole v. Incentives Unlimited, Inc.*, 54S S.E.2d 207, 209 (S.C. 2001).

Although at the hearing Defendants argued that certain Defendants did not sign the non-solicitation agreements until a day alter they started work, Defendants have only submitted an Affidavit of

Continued on page 14

Rockford vs. Bennett

continued from page 13

Defendant Herald to that end. Rather, in their memorandum in opposition. Defendants focus primarily on Plaintiffs' alleged failure to pay Defendant Bennett upon his termination and argue that such a failure renders the provisions of the non-solicitation agreement unenforceable. Defendants cite *Williams v. Riedman*, 529 S.E.2d 28 (S.C. Ct. App. 2000) in support. The affidavit of Defendant Herald that he did not sign the agreement until his second day of work and the affidavit of Defendant Bennett that he was not properly paid wages due, while some evidence of those facts, does not, alone, convince the Court that, on whole, Plaintiffs' have not demonstrated a strong probability of success on the merits.

CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that Plaintiffs Motion for Preliminary Injunction is **GRANTED**. Specifically, Defendants are **ENJOINED** from (1) using all electronic files, data, and documents taken from Plaintiffs Rockford Manufacturing. LTD. and Rockford Dealer Acceptance Corp. and destroying or altering such materials; (2) using Plaintiff Rockford Manufacturing, Ltd's or Plaintiff Rockford Dealer Acceptance Corp.'s confidential information, as delineated and contemplated in the Confidentiality provision of the parties' respective Employment Agreements; (3) soliciting or accepting business from any of Plaintiff Rockford Manufacturing, Ltd's or Plaintiff Rockford Dealer Acceptance Corp's dealers, vendors, clients, or customers whose identity was obtained through use of confidential information taken from Plaintiff Rockford Manufacturing. LTD. or Plaintiff Rockford Dealer Acceptance Corp. (any such business previously solicited shall be specifically and fully detailed and accounted for at the hearing on the merits); and (4) otherwise refusing to honor in full the Employment Agreements entered into by Plaintiff Rockford Manufacturing, LTD. and Plaintiff Rockford Dealer Acceptance Corp. and Defendants until such time as the Court finally rules on the merits of Plaintiffs' claim. The patties shall confer and within five days submit a proposed scheduling order to the Court for expedited discovery and a date for a hearing on the merits. Finally Plaintiffs shall post a bond in the amount of $200,000 (two hundred thousand dollars) as per Federal Rule of Civil Procedure 65(c).

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
May 27, 2003

Footnotes

1 The non-solicitation agreement prohibits the solicitation of employees, customers, and dealers of Rockford Manufacturing or any "Affiliated Company." "Affiliated Company" is defined as

> any and all companies and/or other entities which, directly or indirectly, in whole or in part, own, manage, and/or are managed by the Company, and any and all companies and/or entities which, directly or indirectly, in whole or in part, are related to the Company as a result of common ownership, and/or common control and/or common management. Currently, the 'Affiliated Companies' include WedgCor, Inc., Sunward Corporation, Rockford Manufacturing, Ltd. WedgCor Acceptance Corporation, Gold Seal Steel Buildings, Inc., Rockford Dealer Acceptance Corporation, Sunward Trucking Incorporated, Advertising Incorporated, Plus .50 Delaware Corporation and Certified Components Corporation...."

(Agreement at 1.)

Member Profile: Mark H. Wall
2003 Hemphill Award Winner

By R. Bruce Shaw

Mark Wall was presented the "Robert W. Hemphill Award" at the Annual Meeting of the South Carolina Defense Trial Attorneys' Association held at The Cloister at Sea Island, Georgia. The "Robert W. Hemphill Award" was created by the South Carolina Defense Trial Attorneys' Association to honor those of its members who had demonstrated the highest degree of service to the legal profession and the public. It was named in honor of Judge Robert W. Hemphill, who had served South Carolina as a solicitor, as a United States Congressman and, for many years, as a United States District Judge. He was a frequent guest and speaker at our meetings. The award represents the Association's recognition of true professionalism in the law, as well as service for the public good.

Bruce Shaw presents Hemphill Award to Mark Wall

The "Robert W. Hemphill Award" is not given every year. It is only given when the Association feels that one of its members truly deserves the honor and recognition that it bestows. Mark Wall is a member who fits the criteria for this award in the fullest sense.

Born in New York, Mark moved with his family to Charleston, South Carolina when he was nine years old. He attended high school in Charleston at Bishop England High School and, upon graduation, entered Saint Anselm College in Manchester, New Hampshire. After graduating from college, he attended the University of South Carolina School of Law, graduating in 1974. Mark began the practice of law in Charleston, South Carolina with the distinguished firm of Bailey and Buckley. The main partners in that firm were active trial lawyers and lawyers who were active in the Bar and in Charleston. After Ed Buckley retired, Mark became a named partner, as well as a founding partner of a new law firm, and continued to practice in Charleston. In 1997, Mark became the Charleston Managing Partner of a national law firm, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. He remained in that position until 2000, when he, Frank Elmore, Neil Haldrup, Kim Wooten, Keith Coltrain, Andy Goldsmith, and Morgan Templeton established the law firm of Elmore and Wall, P.A., with offices in Charleston and Greenville, South Carolina and Raleigh, North Carolina.

Mark has always lived and practiced in Charleston, South Carolina, but that was and is merely a home-base for his far-flung trial practice. Mark is well-recognized as a trial lawyer and has tried cases in the State and Federal courts of many states. He does and has tried all types of lawsuits.

Mark's career, as well as his appearance, has been enhanced by his wife of many years, Kathy Rencken. Mark and Kathy were married while in college. They have two grown children, who also live in Charleston.

Mark has served the South Carolina Defense Trial Attorneys' Association and, indeed, the Defense Bar, in many ways. Mark was President of the South Carolina Defense Trial Attorneys' Association in 1990. He was also deeply involved in the development and implementation of our very successful trial school. He has lectured at the trial school and has mentored many of our members over the years in countless hospitality suites.

Mark has also served two terms as President of the Hibernian Society in Charleston, which is the oldest Irish society in America, and remains active there. He is also on the Executive Committee of the Carolina Yacht Club, once they lowered their criteria sufficiently to make him a member.

More important than all of his many legal and civic accomplishments, Mark Wall has been a friend to all of us and a mentor to many. His strong belief in the judicial system has been a guide to all lawyers who may have doubted its process or its integrity.

Mark is and has been a great example and representative of all that is good in our profession.

It was a great personal pleasure to me to be chosen to present Mark with the "Robert W. Hemphill Award." He deserved it.

A Look Back at The Wills for Heroes Program

By Anthony C. Hayes

For the past year, the South Carolina Defense Trial Attorneys' Association has taken the Wills for Heroes Program around the state, giving back to the men and women who respond in the time of need. The efforts of the SCDTAA have resulted in over one hundred (100) first responders receiving free wills and demonstrated the organization's commitment to public service.

The SCDTAA initially began preparing wills for the Cayce Public Safety Officers in August of 2002. That department provides both police and fire services to the City of Cayce. Associates from McAngus Goudelock & Courie and Nelson Mullins staffed the Cayce event, as well as hosting the program for the Lexington Police Department, also in October.

(l to r) Samuel W. Outten, President SCDTAA; Anthony C. Hayes, Founder of Wills for Heroes Program; David G. Traylor, Pro Bono Chair; John T. Lay, Joint Meeting Chair.

The program then moved on to Blythewood, South Carolina, where the SCDTAA partnered with the Blythewood Lions Club. The partnered event allowed the attorneys to meet with other community groups, while providing free wills to the Blythewood Fire Department and to several Richland County Sheriff Deputies and EMS workers. Lawyers from all over the state participated in the event, including representatives from Haynsworth Sinkler Boyd; Gallivan White & Boyd; McAngus Goudelock & Courie; and Nelson Mullins. These firms sent representatives from their Greenville, Columbia, and Charleston offices.

In April of 2003, the wills program moved on to the City of Greenville. Lawyers from Gibbs Burton; Gallivan White & Boyd; McAngus Goudelock & Courie; and Nelson Mullins partnered with lawyers from the City Attorney's Office to provide wills to the city's police and fire departments. The chiefs from both departments deeply appreciated the time and effort donated by the lawyers, and said as much in thank you letters sent to the SCDTAA leadership.

The program continues in the upstate. In 2004, the SCDTAA will offer the program to the Spartanburg Public Safety Officers, the Greenville Sheriff's Department, and the Simpsonville Fire Department.

In addition to the all the time donated by the SCDTAA, the organization is "putting its money where its mouth is." During the mid-year meeting in July, the organization raised over $4,000.00 for the program. This money will be used to create a "Wills for Heroes" website, sponsored by the SCDTAA, that will explain the program and offer a "how to" guide that can be used to implement the program around the country.

South Carolina Defense Trial Attorneys' Association
1 Windsor Cove, Suite 305
Columbia, SC 29205

Address Service Requested

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