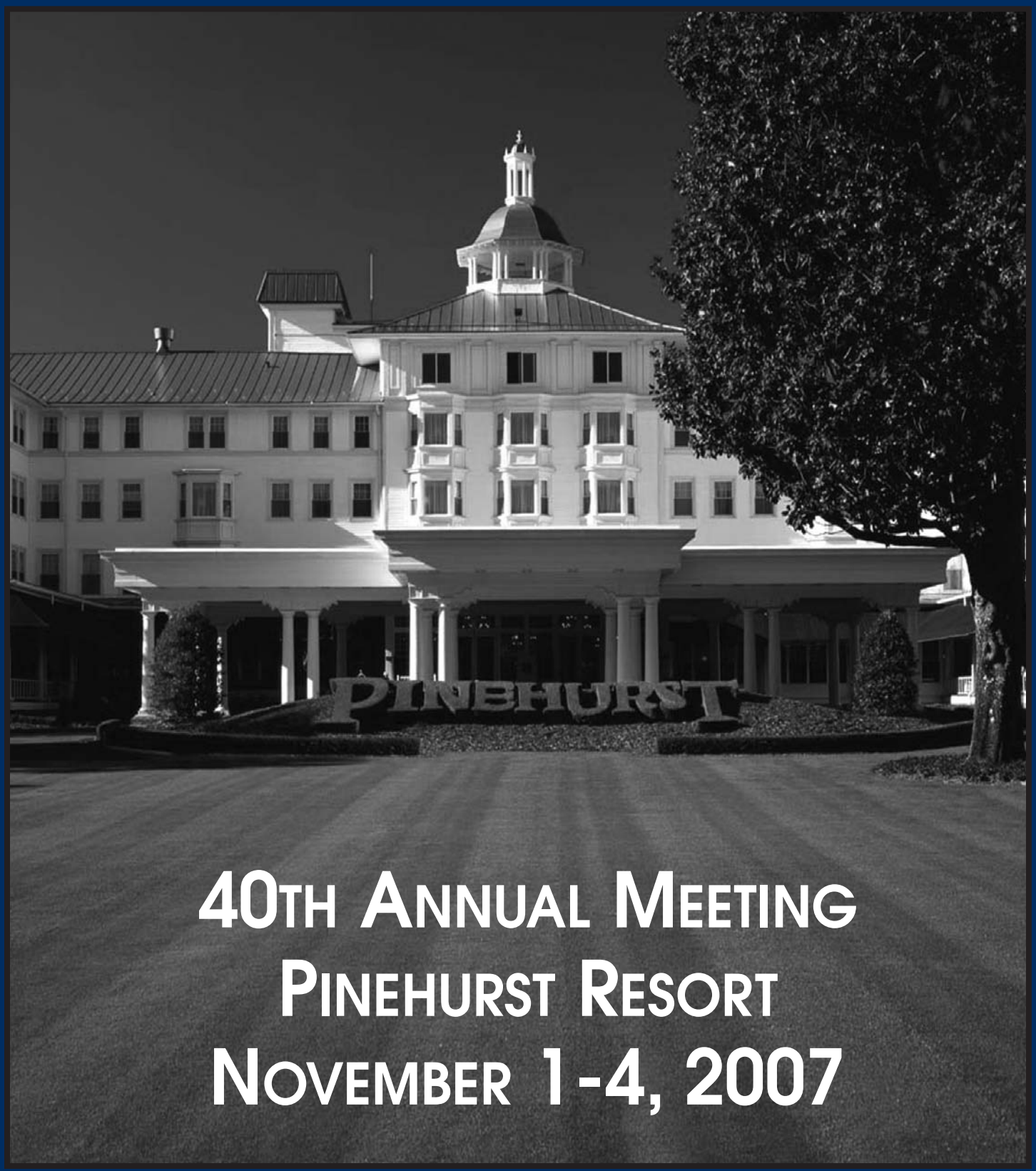
S.C. Defense Trial Attorneys' Association Volume 35 Number 2 • Summer, 2007

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



40th Annual Meeting
Pinehurst Resort
November 1-4, 2007

President's Message

by Elbert S. Dorn

As summer winds down, I hope everyone has had an opportunity to take a vacation, spend time with family and friends, and generally relax to counterbalance the work demands of a defense practice. The joint meeting in Asheville was a huge success. Several attorneys commented to me that the educational program was as informative and interesting as any SCDTAA event in recent memory. We owe many thanks to Glenn Elliott, Erin Dean, and Mitch Griffith for putting together a fine educational and social program. We also thank all the Workers' Compensation Commissioners in attendance and Judge Goolsby and Judge Lockemy for their excellent presentations in Asheville.

You will soon be receiving the registration packet for the annual meeting at Pinehurst. I encourage every member to sign up and seek out others who may want to attend for the first time. Attendance at the annual meeting is an excellent way to reward energetic associates and help foster new young membership and leadership in the SCDTAA. The annual meeting will take place at the historic and beautiful Pinehurst Resort on November 1-4, 2007. Molly Craig, Curtis Ott, and Sterling Davis, as Co-Chairs of the Annual Meeting Committee, have prepared an excellent program which should prove both entertaining and educational. The meeting will be well attended by both state and federal judges, many of whom are appearing on the program. Some highlights include a panel program to discuss changing South Carolina law with respect to expert witness testimony and a panel, headed by Chief Justice Jean H. Toal, to discuss the new South Carolina Mentor System. We also have a special guest on the program to infuse a new perspective. Bruce Barze, President of the Alabama Defense Lawyers Association, will give an interesting talk on "Climate Change Litigation," which is on the cutting edge of litigation trends. Also, Jeff Cohen of Miami, an experienced appellate lawyer and trial strategist, will discuss preserving the trial record for appeal. Travis Smith and Ben Basista of Philadelphia will provide an informative segment "Medicare Set Asides," a topic with which every defense lawyer needs to be familiar given the climate and changing law in that arena. Senior Judge William W. Wilkins of the Fourth Circuit will speak on the death penalty. We also expect John Martin of Dallas, President of DRI, to make an appearance and provide insight on the DRI initiatives. The Hon. Jim Harrison, Chairman of the House Judiciary Committee, will attend and participate in a panel discussion updating our attorneys on upcoming legislative issues. These are just the highlights of the educational program and there is much more on the agenda to share knowledge and perspectives both of our own attorneys and those from other states.

Of course, the social program is exciting. Golf at Pinehurst will be a delightful experience in early November. The weather conditions and setting should be perfect. There is also a hunting excursion, antique tour, and other opportunities abound in the local village for attorneys and spouses. Our social program will be concluded on Saturday night with a dinner and dance with music by the Ross Holmes Band, providing a classic sound that befits the traditional surroundings of Pinehurst. In conclusion, the executive committee and I are here to serve you as members of the SCDTAA. We are becoming more active in legislative affairs that potentially impact our practice and our clients. Please do not hesitate to contact me or one of the Board if you wish to participate in process or can provide helpful information and ideas to advance these initiatives. I look forward to seeing each of you at the upcoming judicial receptions and in Pinehurst. Please register now and reserve your rooms as you will not want to miss this meeting.

Letter From The Editors

by Gray T. Culbreath & Wendy J. Keefer

Labor Day has passed and the seersucker should be in the closet. With the Courts and the schools back in session at full strength, we all find ourselves falling into our normal, fall routines. Whether your routine involves sending children off to college or high school, going to Columbia or Clemson on Saturdays for football games or simply staying at home as opposed to the beach, fall brings about a change.

This fall of course brings us to another annual meeting as we once again return to Pinehurst. As you can see from the material in this issue of The Defense Line, a substantial program is planned, representing the hard work of the organizers of this meeting. For those of you who have not attended an annual meeting before, it is an opportunity to spend time with judges in a relaxed setting away from the courthouse. We encourage all of you – first time attendees and meeting veterans – to come.

Also with the fall comes the anticipation of the next session of the General Assembly. As many of you know, the Association has tried to raise its profile at the State House and with the General Assembly over the past four years. This is important as we try to influence decisions and legislation that may impact the quality of life of defense lawyers. One of the things that you and your firm may be asked to do in the near future is contribute to our political action committee. Your participation and contributions to this endeavor are crucial. Likewise, if you have questions or concerns about the legislative process, please do not hesitate to contact one of the officers or a member of the executive committee so we can alert our lobbyists.

Gray T. Culbreath

Wendy J. Keefer

Equally important to the Association's efforts to better the legal profession in general and the profession of defense attorneys specifically is information sharing. Stories of your trial and other courtroom experiences are invaluable to other members. Whether you provide a jury verdict report for inclusion in The Defense Line or simply email the Association with information about an experience you had with an expert witness, which experience can then be shared with all members, your professional experiences are educational for us all.

As another year starts quickly to slip by yet again, let us not forget that the purpose of this Association is to share professional experiences, friendships and to work to better each of our lifestyles as defense attorneys.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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SCDTAA Executive Committee

The SCDTAA Nominating Committee is accepting applications for the Executive Committee. To be considered you must submit a Potential Board Member Information sheet. You can find the form by going to the SCDTAA website www.scdtaa.com and go to Membership Info area and click on the Potential Board Member Information Sheet link to download the form.

Forms must be completed and returned to Aimee Hiers at SCDTAA Headquarters no later than Friday, October 12th. Please contact Aimee if you have any questions (803) 252-5646 or aimee@jee.com.

The SCDTAA Docket

MEMBER NEWS

5th Annual Cedar Creek Classic

Shareholders of the law firm Sweeny, Wingate & Barrow, P.A. of Hartsville and Columbia, South Carolina, participated in the 5th Annual Cedar Creek Classic, Ben Lippen School's annual fundraiser. The fundraiser, which was held on April 28, raised more than $56,000 for the Ben Lippen Annual Fund. The Fund provides classroom equipment and scholarships, among other educational expenses not covered in the general budget.

Nexsen Pruet Lawyers and Practice Groups Named Among S.C.'s Best

David Dubberly, Vicki Eslinger, David Gossett, Mark Knight, Susi McWilliams, Ed Menzie, Neil Robinson, Tom Stephenson, Tom Tisdale, and Jeff Vinzani were all named among the top legal practitioners in their fields in the 2007 edition of the *Chambers USA* Guide. In addition, Jeff Vinzani was listed as "up and coming" in the area of real estate law.

For the third straight year, the corporate/mergers and acquisitions, real estate law and general commercial litigation practices of Nexsen Pruet were ranked No. 1 in *Chambers USA.* The firm's employment practice was ranked No. 2.

Rankings in the *Chambers USA* Guide are based on more than 10,000 interviews conducted across the country. Attorneys are rated based on factors that include legal ability, professional conduct, client service, commercial awareness, diligence, commitment, and other qualities valued by clients.

Chambers USA Recognizes Nelson Mullins Partners and Practice Groups

Nelson Mullins Riley & Scarborough's product liability practice along with attorneys David E. Dukes, Stephen G. Morrison, Gus Dixon, Sue Erwin "Corky" Harper, Mason Hogue, Daniel Fritze, and Joel H. Smith were all recognized in the 2007 edition of *Chambers USA*. Chambers also ranked the firm's corporate/mergers and acquisitions, labor and employment, litigation, and real estate practice areas as among the best in South Carolina.

Nelson Mullins Ranked by Two Legal Referral Firms

The Legal 500 US has ranked Nelson Mullins Riley & Scarborough as among the top third most recommended law firms in the product liability and mass tort defense category in its Volume II: Litigation. Also, the *BTI Power Rankings: The BTI Client Relationship Scorecard for Law Firms* has named the firm as a market leader based on client feedback.

S.C. Bar Foundation Receives Significant Donation for Projects

The S.C. Bar Foundation received a check for more than $630,000 on July 19. These funds will allow the funding of two significant South Carolina projects. The funds were presented by Nelson Mullins Riley & Scarborough LLP, Richardson, Patrick, Westbrook & Brickman, LLC, and the National Bank of South Carolina. The money came from an account set up during a multi-district litigation that began in the early 1990s and was assigned to U.S. District Judge Matthew Perry in Columbia. The two law firms participated in the multi-district litigation as liaison counsel and the bank served as account custodian. "This is a wonderful example of South Carolina law firms working to assist the public and the profession, and we hope it will be an inspiration to other firms in the state," said S.C. Bar President Lanny Lambert.

James E. Weatherholtz Becomes a Firm Principal

Buist Moore Smythe McGee P.A. announces that James E. Weatherholtz has become a Principal of the firm. Mr. Weatherholtz received his B.A. in history from The Citadel, graduating *magna cum laude*. He received his J.D. from the University of Virginia in 1999. Mr. Weatherholtz is an active member of the American Bar Association Forum on the Construction Industry and serves as a member of both the Division 7 Steering Committee and Young Lawyers Committee and serves as a liaison to the Forum Technology Committee. He is also a member of the Executive Committee of the Charleston County Bar Association. Mr. Weatherholtz practices general civil litigation, with an emphasis on construction law, surety and product liability cases.

David Dukes Elected President of Lawyers for Civil Justice

David Dukes, managing partner of Nelson Mullins Riley & Scarborough was elected president of Lawyers for Civil Justice. Lawyers for Civil Justice is a national coalition of defense trial lawyer organizations and corporations that seeks to restore and maintain balance in the civil justice system. The organization has been actively involved in working for class action reform and reform of rules relating to the use of electronic information in litigation. Mr. Dukes is the third Nelson Mullins attorney to be elected president of the organization, following Ed Mullins and Steve Morrison.

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Member News Cont.

Richard Riley Receives Honorary Degree

Nelson Mullins Riley & Scarborough partner Richard W. Riley received an honorary doctor of laws degree Sunday, May 13, during the University of North Carolina at Chapel Hill's spring commencement. Mr. Riley, noted as a statesman committed to education, is the former governor of South Carolina and former U.S. Secretary of Education. The Christian Science Monitor called Mr. Riley "one of the greatest statesmen of education in this (20th) century." The *Washington Monthly* once said he was "the best governor in America – and you've never heard of him." Two decades later, Mr. Riley is widely known as one whose steady efforts on behalf of public education have made a major, positive difference in the classroom and in the workplace.

William Hubbard Receives Fourth Circuit Professionalism Award

Nelson Mullins Riley & Scarborough Partner William C. Hubbard received the American Inns of Court's 2007 Professionalism Award for the Fourth Circuit. The award was presented at the Fourth Circuit Judicial Conference. The Fourth Circuit Professionalism Award is presented biannually to honor a practicing judge or lawyer whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession. Candidates are nominated through circuitwide open nominations and selected by a panel of representatives from both the circuit and the American Inns of Court Foundation.

S.C. Commission on Women Honors Corky Harper

Sue Erwin "Corky" Harper, a partner at Nelson Mullins Riley & Scarborough, was recognized by the S.C. Commission on Women with a 2007 S.C. Women of Achievement Award for Promoting Economic Autonomy for Women. The award, presented during A Seat at the Table luncheon, is an "opportunity to identify and acknowledge women who exemplify excellence in service, leadership, community visibility and professionalism and whose efforts have helped build a hopeful future for all South Carolinians." The commission recognized Ms. Harper, a certified Labor and Employment Law specialist, as an attorney on the forefront of mentoring and supporting women in the profession.

Tim Madden Completes Liberty Fellowship

Nelson Mullins Riley & Scarborough partner Tim Madden graduated in the Class of 2007 Liberty Fellows, a two-year leadership program designed to empower the future leaders of South Carolina. The statewide leadership effort, initiated by Hayne Hipp and sponsored by Liberty Corp., Wofford College, and the Aspen Institute, promotes values-based leadership to South Carolina leaders ages 25-45 geared toward critical thinking, skilled mentorship and camaraderie. Participants are selected by third-party nominations. Mr. Madden was one of 20 individuals selected from 100 nominees and is the second Nelson Mullins partner to become a Liberty Fellow.

Philip Lader Receives Rotary International Foundation's Top Honor

Philip Lader, a partner with Nelson Mullins Riley & Scarborough, received the Rotary International Foundation's 2007 Global Alumni Service to Humanity Award. The honor is awarded each year to one person. Mr. Lader, the former U.S. Ambassador to the Court of St. James and member of President Clinton's Cabinet, is also Chairman of WPP Group, a worldwide communications/media company. Mr. Lader's public service activities over 30 years include White House Deputy Chief of Staff, Administrator of the U.S. Small Business Administration, Deputy Director of the U.S. Office of Management and Budget, trustee of the Smithsonian American History and the British Museums, St. Paul's Cathedral, the College of Charleston, Lander and Francis Marion Colleges, a director of the South Carolina Chamber of Commerce, and a vestryman of his church.

DRI NEWS

New DRI State Representative Elected

The South Carolina Defense Trial Attorneys' Association is pleased to announce H. Michael Bowers, of Wilkes Bowers PA, has been selected as the South Carolina State Representative for the Defense Research Institute. Bowers, who served as President of the SCDTAA in 2000-2001, will begin his term immediately following the DRI Annual meeting in Washington D.C. in October.

New DRI Regional Director Elected

DRI has announced that former NCADA President and current North Carolina State Representative, John S. Willardson, of the Wilkesboro firm of Willardson Lipscomb & Miller LLP, won a contested election for Mid-Atlantic States Regional Director of DRI. He will begin a three-year term on the DRI Board of Directors following the DRI Annual Meeting in Washington, D.C., on October 10-14, 2007.

The Mid-Atlantic States Region of DRI consists of North Carolina, South Carolina, Virginia, Maryland, and the District of Columbia. Willardson was pitted against Ford Loker, the former DRI State Representative from Maryland. According to figures obtained from DRI, Willardson garnered 58% of the vote and Loker received 42% of the vote.

17th Annual Trial Academy Recap

by Ronald K. Wray II, William S. Brown and D. Alan Lazenby

The SCDTAA conducted its seventeenth annual Trial Academy on June 6-8 in Greenville, South Carolina. Ogletree, Deakins, Nash, Smoak and Stewart sponsored this year's Academy. The SCDTAA is deeply grateful to the Ogletree, Deakins, Nash, Smoak & Stewart firm for its support.

Twenty-four lawyers from SCDTAA-member firms across the state attended the three day program. The first two days of the program were devoted to educational sessions. On Day One, Howard Boyd of Gallivan, White and Boyd taught the finer points of jury selection and opening statements, Professor Robert Wilcox of the University of South Carolina School of Law led an interactive discussion of various ethical situations that might arise in a litigation practice, Marvin Quattlebaum of Nelson Mullins Riley & Scarborough demonstrated effective use of evidence and demonstrative aids, and David Moore of Love, Thornton, Arnold & Thomason (with the assistance of several hilarious clips from "My Cousin Vinnie"), taught direct and cross examination of lay witnesses. Day Two was equally well presented, with Billy Gunn of Holcomb Bomar starting the morning with instruction on direct and cross examination of expert witnesses. The Academy was then honored to have two sitting judges, United States District Judge Joe Anderson and South Carolina Court of Appeals Judge Sam Stilwell, address the participants. Judge Anderson spoke on closing arguments, while Judge Stilwell taught the attendees about protecting the record on appeal.

Break-out sessions were held each day during which attendees had the opportunity to practice the skills they learned and discuss the lectures with break-out group leaders. The Academy Staff would like to express its thanks to Beth McMillan, Sterling Davies, Phil Reeves, Kip Darwin, David Rheney, Eric Englebardt, Matt Henrikson and Andrew Culbreath for serving as our break-out group leaders this year.

Of course, the Academy was not all work and no play. Participants attended the SCDTAA Young Lawyers reception at Smoke on the Water in Greenville on Wednesday night. On Thursday, the SCDTAA held its upstate judicial reception at the home of past president Mills Gallivan.

The Trial Academy culminated with a day-long trial at the Greenville County Courthouse. Participants were given a fact pattern and mock deposition testimony to prepare and present their cases. Defense lawyers, law students and others served as witnesses and jurors for the trials. Each trial jury deliberated and returned a verdict in each case. We owe tremendous debts of gratitude to Judge Gary Hill, Judge Victor Pyle, Judge John Hayes, Judge Mark Hayes, Judge Durham Cole and Judge Roger Couch who presided over our trials. Also, we very much appreciate Greenville County Clerk of Court Paul Wikensimer, Assistant Clerk of Court Leanda King, the courtroom bailiffs and the entire staff of the Greenville County Clerk's Office who went above and beyond the call of duty to host the Academy trials and make this a great event. A special thanks also goes to Jennifer Barr and the SCDTAA Young Lawyers Division for organizing and arranging for our jurors and witnesses. Aimee Hiers did her usual tremendous job in running the show and keeping everything on track.

The Academy was a tremendous success and a great learning experience for all involved.

SEMINAR NEWS

40th Annual SCDTAA/CMASC Joint Meeting A Great Success!

by E. Glenn Elliott

If you missed this year's Joint Meeting at Grove Park you missed an excellent seminar and a great time. 100 lawyers, 23 claims managers, and 3 Workers' Compensation Commissioners attended the 40th Annual SCDTAA/CMASC Joint Meeting and, by all accounts, a good time was has by everyone!

The seminar included the following excellent presentations

- Jim Lehman on recent changes in the Federal Rules concerning Electronic Discovery;
- Charles Thomas, M.D. discussing a Physician's perspective on the use of medical records during Cross-Examination;
- Shawn Wallace on Employment Issues that lawyers face as employers;
- David Anderson on Strategic & Ethical concerns when retaining Consultants and Experts;
- James Elliott on Current Status of Insurance Coverage issues related to construction defect cases;
- Rick Lamar on Ten Ways to Lose a Client;
- Michael Chase on this year's Legislative changes to SC Workers' Compensation Law; and
- A group discussion on Complex Regional Pain Syndrome in the Workers' Compensation system featuring, Barbara Gregory, Bill Shaughnessy, Cindy Dooley, and Workers' Compensation Commissioners Roche, Williams, and Funderburk.

Two members of the judiciary served as this year's featured and keynote speakers for the conference. On Friday we were both enlightened and entertained by Circuit Court Judge James Lockemy with his talk entitled, "Where was his Wife?" On Saturday we were moved from hilarity to tears by C. Tolbert Goolsby, Associate Justice of the South Carolina Court of Appeals, Retired, with his speech entitled, "Stone Soup for a Judges Soul – Lessons Learned from a Career on the Bench."

This year's Silent Auction, put on by the Young Lawyers Division of SCDTAA raised over $5,000 for the SC Bar Foundation. We also collected money for the family of Brent Fortson, a longtime member of the SCDTAA whose son recently suffered catastrophic injuries in a car accident. A total of $2,500 was donated from the contributions of individuals and the SCDTAA.

We must also again recognize and thank this year's sponsors who made our meeting possible:

A. William Roberts, Jr. & Associates

EPS Settlements Group

South Carolina Lawyers Weekly

South Carolina Bar Foundation

South Carolina Bar – CLE Division Publications

My thanks to: Cindy Dooley for organizing the Workers' Compensation breakout; Drew Butler and the Young Lawyers for their help with the program and the Silent Auction; and, to Anthony Livoti for organizing the golf tournament. My special thanks to Co-Chairs Erin Dean and Mitch Griffin for their hard work and to SCDTAA executive Director Aimee Hiers whose loyalty and tireless efforts helped make this meeting a success.

SCDTAA 40th Annual Meeting
Pinehurst Resort, NC • November 1-4, 2007

by Sterling G. Davies

The 2007 South Carolina Defense Trial Attorneys' Association Annual Meeting will mark our 40th such event. This year we will reconvene in Pinehurst, North Carolina from November 1 through November 4. Based on our great experience in Pinehurst at the 2005 Annual Meeting, we expect another outstanding weekend.

The name Pinehurst is synonymous with golf, and this meeting is a must for any and all golfers practicing defense work throughout the state; our annual tournament will be held at Pinehurst Course No. 5. Additionally, as we learned two years ago, Pinehurst offers much more than golf. We will enjoy all the amenities of the resort's primary hotel, the Carolina, which is a four star hotel offering amazing restaurants and a full service spa. The village of Pinehurst also offers many unique and specialized shopping opportunities. We rescheduled the hunting excursion which was so popular during our last trip to Pinehurst and will also offer an antique tour. As we learned two years ago, Pinehurst presents a relaxing and entertaining weekend for golfers and non-golfers alike.

We are also extremely excited about our program this year. The first morning of our program gives us the honor of presenting Chief Justice Jean H. Toal and Justice James E. Moore as they help lead a discussion on the new South Carolina Mentor System. By popular demand, we have reinstituted the Substantive Law Breakouts in order to present some specialized practice tips and information for our attendees. Furthermore, our first day will give us the opportunity to learn from lawyers from other jurisdictions as they address issues which are at the forefront of their defense bars.

The second day of the Meeting also starts with a bang as we present the Honorable James H. Harrison, the judiciary chairman of the South Carolina House of Representatives, to enlighten our group on key legal developments in the state legislature. We will be honored once again to have a presentation by the current Defense Research Institute President, John H. Martin of Dallas, Texas. We will update members on preserving the Record for Appeal. Finally, we will end with two blockbuster presentations. The first will be an expert witness panel discussing changes in South Carolina's laws regarding expert witnesses. Our final speaker will be Senior Judge William W. Wilkins, who will give us an enlightening and entertaining view from the bench on a number of topics, including the ever controversial death penalty.

As you can tell from both our surroundings and our agenda, we believe this meeting will be one of our most educational and enjoyable in years. We look forward to seeing each of you at the Pinehurst Resort in November.

Tentative Agenda

Thursday, November 1

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

5:00 p.m. to 6:00 p.m.
Young Lawyers' Meeting

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

Dinner on your own

Friday, November 2

8:00 a.m.
Registration Desk Open

8:15 a.m. to 8:30 a.m.
Welcome and Opening Remarks

Elbert S. Dorn,
President SCDTAA

8:30 a.m. to 9:15 a.m.
Is It Hot In Here, or Is It Just Me? Climate Change Litigation Update

R. Bruce Barze, Jr., Esquire
President of Alabama Defense Lawyers Association

9:15 a.m. to 10:15 a.m.
New South Carolina Mentor System

Chief Justice Jean H. Toal
Justice James E. Moore
G. Dewey Oxner, Esq.
Professor Robert M. Wilcox, Esq.
Moderator: Kay G. Crowe, Esq.

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

10:30 a.m. to 11:15 a.m.
Medicare Set Asides- What Every Defense Lawyer Must Know to Protect Themselves and Their Clients

Benjamin M. Basista, Esq.
Travis W. Smith, Esq.

11:15 a.m. to 12:15 p.m.
Substantive Law Breakouts

Product Liability –
Nicholas W. Gladd, Esq.

Auto/Tort –
A. Johnston Cox, Esq.

Medical Malpractice/Healthcare Law – *D. Jay Davis, Jr., Esq.*

Workers' Compensation –
A. Mundi George, Esq.

Construction –
Mason A. Goldsmith, Jr., Esq.

Managing Partners-
James R. Courie, Esq.

12:30 p.m. Golf Tournament

1:00 p.m. Antique Tour

2:00 p.m. Chef Demonstration & Wine Tasting

2:00 p.m. Hunting Excursion

7:00 p.m. to 9:30 p.m.
"Taste of North Carolina" Dinner

Saturday, November 3

8:00 a.m.
Registration Desk Open

8:00 a.m. to 8:30 a.m.
SCDTAA Business Meeting

8:30 a.m. to 9:00 a.m.
Legislative Update

Honorable James H. Harrison,
Judiciary Chairman
South Carolina House of Representatives
Jeffrey N. Thordahl,
SCDTAA Lobbyist
Gray T. Culbreath, Esquire

9:00 a.m. to 9:45 a.m.
How to Preserve Your Record for Appeal

Jeffrey A. Cohen, Esquire

9:45 a.m. to 10:00 a.m.
Defense Research Institute President

John H. Martin, Esq.

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

10:15 a.m. to 11:30 a.m.
Expert Witnesses:

Changing South Carolina Law

Honorable Roger M. Young
Elbert S. Dorn, Esquire
E. Warren Moise, Esquire
Moderator: John S. Wilkerson III, Esquire

11:30 a.m. to 12:00 p.m.
Death Penalty

Senior Judge
William W. Wilkins

12:00 p.m.
Closing Remarks

Elbert S. Dorn,
SCDTAA President

2:00 p.m.
Chef Demonstration and Wine Tasting

Afternoon on your own / Hospitality Suite Open

5:30 p.m. to 6:30p.m.
Past President's Reception (by invitation only)

6:30 p.m. to 7:30 p.m.
Cocktail Reception

7:30 p.m. to 12:00 midnight
Dinner and Dancing

(Black Tie Optional)

FEATURE ARTICLE

Putting Litigants on Notice: *Bell Atlantic Corporation v. Twombly*'s Tightened Pleading Standard

by Thad H. Westbrook and M. Todd Carroll

For fifty years, federal courts and those of several states have employed a stray statement by the United States Supreme Court to allow skeletal, ambiguous pleadings to advance beyond dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Based solely on the court's own conjecture as to what the claimant could have pleaded in support of its claim, many cases have proceeded into discovery on the hope that some relevant fact may be identified which would allow it to eventually survive summary judgment. Recently, though, the Court reviewed the pleading standards for hopeful claimants under Rules 8(a)(2) and 12(b)(6) and, in a decision that strengthens the utility of a Rule 12(b)(6) motion for defendants, shifted the pleading requirements back to those envisioned by the Federal Rules at the time they were promulgated.

On May 21, 2007, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955 (2007), the Supreme Court vacated its half-century-old invitation to lower courts to read unstated facts into pleadings in order to advance a case past a Rule 12(b)(6) motion to dismiss and into the discovery phase. In so doing, the Court provided a forceful declaration that the responsibility for adequately pleading a claim falls to a claimant alone. This article reviews pleading standards both prior to and under the Federal Rules, discusses the *Twombly* decision, and evaluates its implications on the lower federal courts and South Carolina's state courts.

The Transition to Notice Pleading Under the Federal Rules

As every introductory course in civil procedure teaches, prior to the codification of the Federal Rules of Civil Procedure, pleadings in the federal courts were evaluated according to the "code pleading" standard. *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 900 (4th Cir. 1996). Under this scheme, claimants were expected to plead the facts that entitled them to relief. "Facts," however, came to mean different things to different courts: some insisted that a claimant plead the "ultimate facts" that supported a claim, which is an ambiguous phrase at best; others rejected pleadings for phrasing facts in such a way that they morphed into "conclusions of law;" and others rejected pleadings that stated facts with too much specificity, accusing claimants of pleading "evidentiary facts" rather than more generic facts that supported a cause of action. *See generally id.; Stroud v. Riddle,* 260 S.C. 99, 103, 194 S.E.2d 235, 237 (1973); *see also* Richard D. Freer & Wendy Collins Perdue, *Civil Procedure* 312–14 (3d ed. 2001). These particulars of code pleading often proved unworkable, both at the federal level and in several states.

In response to these difficulties, the authors of the Federal Rules of Civil Procedure created a new type of pleading—typically called "notice pleading"—in which a potential claimant is expected to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While this standard was designed to be liberally construed to allow legitimate claims to advance beyond the pleading stage, it certainly did not eliminate all of a claimant's pleading obligations. Though Federal Rule 8 does not force a claimant to plead particular facts, it does require her to include allegations sufficient to give a defendant "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Labram v. Havel,* 43 F.3d 918, 920 (4th Cir. 1995).

From Notice Pleading to "Conjecture Pleading"

Not long after the Federal Rules became effective, the United States Supreme Court issued an opinion that discussed how liberally a complaint's allegations were to be construed when evaluating a Rule 12(b)(6) motion to dismiss under the notice pleading standard. In *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *overruled in part by Bell Atl. Corp. v. Twombly,* 550 U.S. ____, 127 S. Ct. 1955 (2007), the Court explained the standard for dismissing a complaint for failure to adequately state a claim as follows: "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

This "no set of facts" language became a benchmark for measuring the sufficiency of a complaint. It found acceptance in later opinions of both the Supreme Court, *see, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999), and federal courts of appeal, including the Fourth Circuit, *see, e.g., Presley v. City of Charlottesville*, 464 F.3d 480, 483, 488–89 (4th Cir. 2006). Additionally, several states, including South Carolina's neighbors Georgia,

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Mattox v. Bailey, 472 S.E.2d 130, 131 (Ga. Ct. App. 1996), and North Carolina, *Sutton v. Duke*, 176 S.E.2d 161, 165–66 (N.C. 1970), incorporated the "no set of facts" standard into their civil jurisprudence.

Taken on its face, *Conley's* "no set of facts" test generously allows a claim to survive when a reviewing court can surmise any conceivable situation in which the plaintiff would be entitled to relief, even if no such facts appear in the complaint. To be sure, many courts employed the test in precisely this way, allowing claims to proceed into discovery based on mere speculation of the judiciary. *See, e.g., Gorstein v. World Sav. Bank*, 46 F. App'x 546, 546 (9th Cir. 2003) (reversing a lower court's dismissal of a complaint simply because "[i]t is conceivable that [the plaintiff] could allege facts constituting a federal claim"); *Ventrassist Pty, Ltd. v. Heartware, Inc.*, 377 F. Supp. 2d 1278, 1285 (S.D. Fla. 2005) (refusing to dismiss a claim because the court could "easily conceive of facts that would entitle Plaintiffs to relief"). Under this interpretation of *Conley*, the Federal Rules lowered the minimum pleading requirements, not to notice pleading, but to a form of pleading in which a claim is sufficiently pled if the claimant provides enough conclusory statements to enable a court to imagine facts that could appear over the course of discovery that would entitle the claimant to relief.

As a result of this application of *Conley*, the Supreme Court once described the diminished significance of Rule 12(b)(6) motions as follows:

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). One exasperated commentator even lamented that a Rule 12(b)(6) motion to dismiss for failure to state a claim was "last effectively used during the McKinley Administration." A. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* 7–8 (1984).

Some courts, however, challenged the literal reading and application of *Conley's* standard, finding it to be inconsistent with the claimant's responsibility to provide a "showing" that it is entitled to relief under Rule 8. The First Circuit, for instance, explained away *Conley's* "no set of facts" language by stating that "we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional official action into a substantial one." *O'Brien v. Di Grazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976). Further quashing the idea that the Federal Rules allow a claim to survive based solely on the court's conjecture, the *O'Brien* court observed that "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *Id*. The First Circuit later commented that "in the menagerie of the Civil Rules, the tiger patrolling the courthouse gates is rather tame, but 'not entirely . . . toothless.' Despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990) (ellipsis in original). Some courts agreed with the First Circuit. *See, e.g., McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988) (per curiam) (adopting the First Circuit's arguments in *O'Brien*). No clear majority position, however, emerged regarding how to treat *Conley's* "no set of facts" standard during the fifty years following the decision. The Supreme Court resolved this inconsistency during its October 2006 Term and forcefully signaled a return to the notice pleading standard originally contemplated by the Federal Rules.

The Supreme Court's Tightening of the Federal Pleading Standard

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1962 (2007), a putative class of plaintiffs alleged that a series of telecommunications providers engaged in anticompetitive parallel business conduct in violation of Section 1 of the Sherman Act. This parallel conduct allegedly prevented market entry by competitors and purportedly resulted in higher prices for telephone and Internet services. *Id*. Under applicable case law, though, allegations of parallel business conduct alone do not suffice to state a violation of the Sherman Act; instead, a plaintiff must allege that the defendants have "conspired" to engage in anticompetitive behavior. *See id.* at 1963–66. No such allegations were present in the Twombly complaint. *See id*. at 1970–72.

The trial court dismissed the complaint for failing to state a claim upon which relief could be granted, noting that the plaintiffs' theory of "conscious parallelism," standing alone, does not meet the "conspiracy" element of a Sherman Act violation. *Id.* at 1963 (citing 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003)). The Second Circuit reversed. Applying *Conley's* "no set of facts" standard, the court reasoned that the complaint's allegations of parallel business conduct included an implication that the defendants entered into an anticompetitive agreement. *Id*. (citing 425 F.3d 99, 114 (2d Cir. 2005)). According to the lower

appellate court, this implication satisfied the pleading requirements for a violation of the Sherman Act. *Id.* (citing 425 F.3d at 114).

The Supreme Court granted certiorari and, through an opinion authored by Justice Souter, reversed the Second Circuit's decision. In reviewing the lower appellate court's decision, the Court took particular issue with the Second Circuit's application of *Conley*'s "no set of facts" standard to the complaint. It criticized the lower court for deeming "the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement." *Id*. at 1968–69. Such reasoning, according to the *Twombly* Court, was inconsistent with Rule 8's requirement that a claim "possess enough heft to 'show that the pleader is entitled to relief.'" *Id.* at 1966 (quoting Fed. R. Civ. P. 8(a)(2)). The Court identified preventing "a plaintiff with a largely groundless claim [from] be[ing] allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," as a primary function of Rule 8. *Id*. (internal quotes and citations omitted). Accordingly, Rule 8 requires a claimant to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 1964–65. Instead, the Court made clear that pleadings must contain enough facts to cross the line "between possibility and plausibility of entitlement to relief." *Id*. at 1966 (internal quotes omitted). The *Twombly* plaintiffs' complaint fell short of this "plausibility" showing, as it lacked sufficient allegations of an illegal conspiracy or agreement to sustain a Sherman Act claim. *Id*. at 1970–74.

In addition to tightening the minimum pleading standard, the *Twombly* Court took measures to preempt future courts from allowing a complaint to survive a Rule 12(b)(6) motion based on the court's speculation about what unpled facts may exist to support an otherwise-deficient claim. After heavily critiquing *Conley*'s "no set of facts" standard, the Court removed the test from federal jurisprudence altogether, stating:

> . . . *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

Id. at 1969.

The Court's decision to eliminate the "no set of facts" test did not come without opposition. Two justices dissented, with Justice Stevens writing a sharply critical dissenting opinion in which he argued that undoing the *Conley* standard was inconsistent with federal pleading guidelines: "Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in." *Id*. at 1976 (Stevens, J., dissenting). In arguing for sustaining the "no set of facts" language, the dissent placed great reliance on the lower courts' ability to manage discovery and other pretrial matters in even the most complex and expensive cases. *See id*. at 1976, 1987–88 & n.13 (Stevens, J., dissenting). At one point, the dissent called the majority's position "mind-boggling," *id.* at 1984 (Stevens, J., dissenting), and it later stated that the majority must have "pretend[ed]" that certain facts were not present in order to reach its conclusion, *id*. at 1985 (Stevens, J., dissenting). The dissenting opinion concluded by pitting the majority against federal judges in the lower courts: "For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent." *Id.* at 1989 (Stevens, J., dissenting) (Notably, Justice Ginsburg, the other dissenting justice, did not join this section of the opinion.)

Rejection of *Conley*'s "no set of facts" test, coupled with the Court's articulation of a minimally-adequate pleading standard under Rule 8, leaves no doubt that the responsibility for properly pleading a claim lies squarely, and exclusively, with a hopeful claimant in federal court. Gone are the days where a federal court's imagination can catapult an insufficient pleading past a motion to dismiss and into the often-expensive discovery phase of litigation. In fact, the desire to avoid needless discovery costs in defending baseless claims was a significant motivating factor for the *Twombly* decision. *See id*. at 1967. *Twombly* therefore marks a significant reclamation of the pleading standard envisioned by the Federal Rules at the time of their codification, and a faithful application of the decision's principles renders a Rule 12(b)(6) motion a more meaningful shield for federal defendants against groundless claims than it was under previous case law.

Implications from Twombly in South Carolina State Court

At first blush, *Twombly* appears to have only marginal applicability to South Carolina's state courts. South Carolina, after all, is ostensibly a code pleading state, *see* Rule 8 note, SCRCP (explaining that South Carolina's Civil Rule 8(a) mirrors the federal rule "with the important distinction that the State practice requiring pleading of the facts . . . is retained"), and *Twombly* represents a shift in law under the notice pleading standard. On the surface, therefore, a case decided under an entirely different pleading standard would seemingly have little impact

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...TWOMBLY CONT.

on this State's jurisprudence. But South Carolina's courts have not strictly adhered to the guidelines that forced the federal system and several states away from code pleading.

Early opinions interpreting the South Carolina Rules of Civil Procedure, which became effective in 1985, remained faithful to the requirements of code pleading. *See, e.g., Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 326, 334, 377 S.E.2d 102, 104, 108 (Ct. App. 1987) (explaining that a "pleader is only entitled to the benefit of the well pleaded facts and not to the inferences to be drawn therefrom"), *aff'd, Jensen v. Anderson County Dep't of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991). Over time, though, the State's courts have noticeably relaxed the pleading standard. S*ee Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (noting that South Carolina's courts do not necessarily enforce "technical, restrictive or outmoded requirements of Code Pleading" (quoting James F. Flanagan, *South Carolina Civil Procedure* 93–94 (2d ed. 1996))). On most occasions where South Carolina's courts have articulated the minimal pleading requirements to survive a Rule 12(b)(6) motion under the State's procedural rules, they have explained the standard in a manner that bears an unmistakable resemblance to notice pleading. *See, e.g., Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.") (internal citations omitted); *Keiger v. Citgo*, 326 S.C. 369, 374, 482 S.E.2d 792, 794 (Ct. App. 1997) ("Pleadings are to be construed liberally and any conclusion of fact that may properly arise from a well pleaded fact is to be regarded as contained in the allegation."); *see also Newton v. S.C. Pub. Rys. Comm'n*, 319 S.C. 430, 433–34, 462 S.E.2d 266, 267–68 (1995) (Chandler, Acting J., dissenting) (arguing against dismissal of a complaint by extrapolating from facts actually pled to infer additional facts that would have been necessary to sustain the putative claims). In fact, the Court of Appeals has expressly held that a proper pleading in South Carolina need only give the opposing party "fair notice" of the claims alleged, a guideline that is traditionally linked to the notice pleading standard. *See Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001).

As a result, it is not unfair to say that South Carolina's appellate courts often review pleadings under the notice pleading standard without saying as much. With this understanding, *Twombly* can provide helpful guidance to South Carolina's trial courts as they evaluate motions to dismiss pursuant to the State's Rule 12(b)(6). While *Twombly* does not officially redefine pleading standards in South Carolina's state courts, it very well could persuade those courts not to carry the water for claimants who file insufficient or baseless claims. The elimination of needless discovery expenses championed by the *Twombly* Court has a universal appeal, as does that Court's criticism that a court's conjuring up of a previously unpled (and possibly nonexistent) fact does not suffice to give a defendant fair notice of the claims against it. As a result, defendants should not shy away from citing *Twombly* and its principles when seeking dismissal of actions pursuant to Rule 12(b)(6) in South Carolina's state courts.

Conclusion

The *Twombly* decision marks a significant restatement of a claimant's obligation to properly plead all elements of its claim under the Federal Rules of Civil Procedure. When defending itself in federal court, a litigant now can move for dismissal of claims that are insufficiently pled with knowledge that the court is prohibited from supplementing a claimant's pleadings with its own speculation as to what unpled facts may support the claims. While Twombly does not necessarily have the same talismanic effect in South Carolina's state courts, defendants should not hesitate to cite this new decision in support of dismissal pursuant to State Rule 12(b)(6) for two reasons: 1) South Carolina courts are increasingly evaluating allegations based on the same notice pleading standard that the federal courts use when reviewing the viability of complaints; and 2) the principles supporting the *Twombly* decision are based on notions of fairness to litigants and judicial economy, both of which would be applicable in the state-court setting.

FEATURE ARTICLE

S.C. Legislature Seeks to Relieve Businesses From Increasing Labor Costs: Top 5 Business-Friendly Changes to South Carolina Workers' Compensation Law

by Hilary D. Moore

The new Workers' Compensation legislation signed into law by Governor Sanford on June 25th successfully takes aim at several pro-claimant cases handed down by the South Carolina Courts over the past decade. With the cost of running labor-intensive businesses on the rise, many business owners, especially small business owners, have been looking for some form of relief. Their concerns were recently addressed by both the legislature and the governor, and a re-cap of the Top 5 Business-Friendly Changes to South Carolina Workers' Compensation Law are outlined below.

1. The Claimant's Case Just Got Harder

In 1999 the South Carolina Supreme Court case *Tiller v. National Health Care Center of Sumter*, 513 S.E. 2d 843 (S.C. 1999) held that expert medical testimony was not required to establish causation of a medically complex condition in order for a Commissioner to find that a Claimant is entitled to compensation under workers' compensation law. Instead, the Commission was allowed to find compensability based upon lay testimony, despite the lack of any medical statement to a reasonable degree of medical certainty. This decision decreased the amount of evidence that a claimant was required to produce in order to recover benefits from an employer and/or its workers' compensation insurance carrier. In effect, it tipped the scales in favor of the claimant. New legislation however, returns balance to the process and decreases administrative discretion.

The new legislation amends S.C. Code § 42-1-160 to include definitions not previously found in our State's statutory law. This section defines "medically complex cases" as those "requiring highly scientific procedures or techniques for diagnosis or treatment" and defines "medical evidence" as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." Furthermore, the new legislation requires that particular claims, including repetitive traumas, aggravation claims, occupational diseases, and mental injuries, be supported by these types of medical evidence. This increased threshold of proof is expected to decrease the Commission's discretion as to compensability, decrease insurance costs for employers, and potentially decrease the volume of claims brought to suit.

2. Defense Counsel Can Speak to Treating Physicians

Since 2003 defense counsel has essentially been able to obtain discovery from healthcare providers in only two ways - by subpoenaing documents and through depositions. No ex parte communications were allowed between defendants (or their attorneys) and the physicians treating a Claimant without Claimant's permission, regardless of whether the defendants were actually paying for such treatment. Claimant's counsel was empowered to control communications between defense counsel and healthcare providers by the Supreme Court case *Brown v. Bi-Lo*, 581 S.E.2d 836 (S.C. 2003). Although this decision was soundly based upon interpretation of the legislation then in place, the realistic impact was to slow the discovery process and in fact handicap employers and defense counsel in obtaining information pertinent to the defense of the case and Claimant's treatment. An expensive alternative to speaking with the treating physician was to obtain a defense expert with whom counsel could communicate freely.

Amended S.C. Code § 42-15-95 decreases the limitations on communications between defense counsel and treating physicians, thereby increasing counsel's ability to prepare a defense and potentially decreasing defense costs in both time and dollars. The section allows defense counsel to contact treating physicians without obtaining permission from opposing counsel. Instead, the section requires only that Claimant be notified prior to such communication of the nature of the communication and Claimant's right to be present. This section also requires that defense counsel share with Claimant any written questions to a provider and the responses thereto. Finally, to quell the fears of the Claimant's bar, the section includes safeguards against abuse by defense counsel by requiring that no defense counsel communications interfere with the employee's treatment and that evidence obtained via communications undertaken in violation of the section be excluded at any hearing.

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FEATURE ARTICLE CONT.

3. Unrelated Conditions are a Thing of the Past

In 2006 the South Carolina Supreme Court case of *Ellison v. Frigidaire Home Products*, 638 S.E.2d 664 (2006) empowered the Commission to consider a claimant's pre-existing, unrelated conditions when determining Claimant's level of disability resulting from a work-related injury. This case concluded that Claimant need not show that a pre-existing condition aggravated the work-related injury or vice versa, but only that Claimant's disability resulting from the work-related injury was greater due to its combination with the pre-existing, unrelated condition. Essentially, defendants were deemed responsible for degrees of disability not caused by the work-related injury itself. The Claimant's entitlement to such benefits was anchored in S.C. Code § 42-9-400, which until 2006 had been seen as a source of reimbursement for employers and carriers from the Second Injury Fund.

From two directions, the new legislation appears to chip away at *Ellison*. Section 42-9-400 is now void of any language expressing either reimbursement for or entitlement to benefits based upon a combination of pre-existing conditions and the work-related injury. This is an intentional deletion by the legislature of the language upon which the *Ellison* decision was based. Additionally, section 42-7-320 establishes a phasing out of the Second Injury Fund.

At first glance, employers and carriers may be distraught by the resulting deterioration and inevitable end of Second Injury Fund reimbursement. Realistically, however, the benefit of reimbursement may have been somewhat muted by a resulting propensity to increase the extent of disability awarded. Commissioners may have expected the punch of inflated disability to be taken by the State Fund and employers collectively rather than by the individual defendant employer/business, and a more generous claimant's award only exercised the general policy of workers' compensation law – to err on the side of coverage. This thought process may not have utilized the statute to the advantage of the business community as initially anticipated. While an eventual end to Second Injury Fund reimbursement may appear menacing, it may also have the effect of reigning in disability ratings and hastening the conclusion of claims.

4. Out of Control Medical Expenses Reduced

Under *Dodge v. Bruccoli*, 514 S.E.2d 593, a 1999 South Carolina Court of Appeals case, hearing Commissioners were empowered to award Claimant lifetime medical benefits and treatment that tend to lessen the period of disability. The case clarified that a defendant's liability for medical expenses was not cut off once Claimant reaches maximum medical improvement. While the bones of this holding remain intact, amended S.C. Code § 42-15-60 more precisely defines the duration of the defendant's liability, and the evidentiary requirements for an award of future medicals.

Newly-added subsection (B)(3) requires that the employer's liability for medical treatment or modalities be cut off in any case where there is a year-long lapse in the claimant's treatment, and it allows exceptions only in two specifically defined circumstances. Additionally, although subsection (A) leaves the hearing Commissioner to determine what medical treatment tends to lessen the period of disability; the determination must be supported by medical evidence, as newly defined in § 42-1-160, rather than simply by lay testimony or circumstantial evidence. Both changes provide avenues to decrease the employer's likelihood of liability for continuing, lifetime medical benefits.

5. Mental Injury Claims are now Tougher to Prove

Finally, as with claims of aggravation, occupational disease, and repetitive trauma, claims of mental injury must be supported by medical evidence. Such evidence is defined to include expert opinion or testimony stated to a reasonable degree of medical certainty. This requirement most significantly reduces the subjectivity and unpredictability of awards for mental injuries not accompanied by any physical injury. Psychological claims may continue to be somewhat of a "wildcard" nonetheless, but the new statutory requirement at least guarantees that a finding of compensable psychological injury will be based upon medical evidence.

Section 42-1-160(D) also outlines the evidentiary requirements for a claim that pre-existing stress, mental injury, or mental illness was aggravated by a work-related physical injury. Proof of such a claim now requires that the causal connection be either admitted by the employer; or indicated by medical records or testimony. The above evidentiary requirements raise the bar for compensability. These standards are most effectively applied to mental injuries, which tend to perplex defendants as well as their attorneys because an additional psychological claim can ultimately turn a simple, small rating to a scheduled member into a case of permanent and total disability.

While the above changes are only a sampling of the recent changes to the South Carolina Workers' Compensation law, they appear to be an intentional legislative step back from the progeny of recent Claimant-friendly case law, and a step in favor of the business community. Interpretation of the statutory language, however, is once again left to the Commission.

Order Granting Defendants Care Holding Company, Inc. and Health Care Corporation's Motion to Dismiss

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2006-CP-09-00122

ORDER GRANTING DEFENDANTS CARE HOLDING COMPANY, INC. AND HEALTH CARE CORPORATION'S MOTIONS TO DISMISS

Helen Carson, as Personal Representative of the Estate Of Curnell Glover, Deceased, and Helen Carson, Anderson J. Glover, Alfred B. Glover and Harriett A. Glover, Statutory Beneficiaries,

Plaintiff,

v.

Care Holding Company, Inc. Health Care Corporation; and Calhoun Convalescent Center, Inc. d/b/a Calhoun Convalescent Center, Laurel Baye Healthcare of Orangeburg, LLC d/b/a Laurel Baye Healthcare of Orangeburg,

Defendants.

THIS MATTER is before the Court on Defendant Care Holding Company, Inc. and Defendant Health Care Corporation's Motions to Dismiss. Defendant Care Holding Company, Inc. (hereinafter "Defendant" or "CHC") and Defendant Health Care Corporation (hereinafter "Defendant" or "HCC") filed separate motions to dismiss, on or about March 2, 2007. Both Defendants have submitted their reasons for dismissal on similar grounds; therefore, this Court deems it appropriate to execute one singular Order which dismisses both Defendant CHC and Defendant HCC.

The Defendants based their respective motions for dismissal under Rule 12(b)(4), (5), and (6), on the basis that the Plaintiffs failed to file a Notice of Intent to File Suit under S.C. Code §15-79-125(A). Under S.C. Code §15-79-125(A), the Notice Of Intent to File Suit is a pre-requisite to filing a medical malpractice (including a professional negligence action), such as the one that Plaintiffs have filed. Neither CHC nor HCC received said Notice prior to being served with either the original Summons and Complaint in January of 2007, or the Amended Summons and Complaint filed and served on or about February 7, 2007. As such, and for the reasons stated below, Defendants' Motions to Dismiss shall be granted.

LEGAL STANDARD

Under *S.C.R.C.P.* 12(b)(6), a defendant may move to dismiss based upon a plaintiff's failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Roper St. Francis Alliance*, 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). The trial judge in a civil suit may dismiss a claim when the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). **When ruling upon a motion to dismiss pursuant to S.C.R.C.P. 12(b)(6), the trial judge must base its decision solely upon the allegations contained in the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *Bergstrom*, 352 S.C. at 233, 573 S.E.2d at 811; *see also Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987)(stating that the trial court must dispose of a motion for failure to state a claim based solely upon the allegations set forth on the face of the complaint); *Williams*, 347 S.C. at 233, 553 S.E.2d at 499(stating that the trial court's ruling on a 12(b)(6) motion must be based solely upon plaintiff's allegations)** (emphasis added).

LEGAL APPLICATION

This Court heard oral arguments from counsel for the Plaintiffs and counsel for these Defendants on April 3, 2007, which this Court then took under advisement. This Court hereby grants these Defendants' Motions to Dismiss on the following grounds:

(1) S.C. CODE §15-79-125(A) APPLIES TO THESE DEFENDANTS

This is a professional negligence action, arising out of the nursing home care rendered by Defendant Laurel Baye Healthcare of Orangeburg and Defendant Calhoun Convalescent Center to the resident, Curnell Glover, deceased. Helen Carson has brought this professional negligence action as a

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wrongful death/survival claim, in her capacity as Personal Representative of the Estate of Curnell Glover.

All of the allegations asserted by the Plaintiff in the Amended Complaint relate to professional liability, and as such, Chapter 79 (Medical Malpractice Actions) of S.C. Code §15 is controlling. Specifically, S.C. Code §15-79-125(A) **mandates** that Plaintiff "shall contemporaneously file a Notice of Intent to File Suit" . . . and "the notice **must name all adverse parties as defendants**. Further, "the Notice of Intent to File Suit **must be served upon all named defendants** . . ." (S.C. Code §15-79-125(A))(emphasis added).

Plaintiff failed to file a Notice of Intent to File Suit as to CHC and HCC, and they failed to serve these Defendants with the pre-suit notice as well. As such, these Defendants properly moved to dismiss for lack of proper service under SCRCP, Rule 12, as indicated in §15-79-125(A): "The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure." (S.C. Code §15-79-125(A)). In examining the plain and unambiguous language of the statute, it is clear that neither Defendant CHC nor Defendant HCC were properly served with pre-suit notice, and thus dismissal as a matter of law is proper.

Plaintiffs argue that CHC and HCC are not licensed health care providers, and therefore, S.C. Code §15-79-125(A) does not apply, and thus, pre-suit notice was not required. This argument is flawed for the following reasons:

(i) The clear and unambiguous language of §15-79-125(A) requires **all** named defendants to be served with the pre-suit notice. The legislature did not draft this requirement more narrowly, as to applying the notice to defendants who are deemed to be "health care providers", as defined in S.C. Code §15-79-110(3). However, the pre-suit notice provision references "all named defendants," and further references that the notice "must name **all adverse parties as defendants.**" (S.C. Code §15-79-125(A) (emphasis added)). The statute does not limit the requirement that the notice 'must name all "health care providers" as defendants,' for example.

(ii) The Amended Complaint, as written, does not delineate any of the Defendants from one another in its allegations of professional negligence. As to the causes of action, CHC and HCC are lumped together with the other named Defendants: Calhoun Convalescent Center, Inc.; Laurel Baye Healthcare of South Carolina, LLC; and Laurel Baye of Orangeburg, LLC. Under each cause of action, every allegation is asserted against "Defendants," in a collective manner. As such, the Amended Complaint is void of any causes of action asserted against CHC and HCC, other than the professional negligence action generally.

In opposing the subject motions, Plaintiffs err in arguing that there is a professional negligence allegation against Calhoun Convalescent Center, Inc. and a separate simple negligence and/or vicarious liability action against CHC and HCC. The Amended Complaint, as drafted, does not contain this distinction; in fact, nowhere in the Complaint is there any reference made to "vicarious liability." Therefore, Plaintiffs cannot try and retro-actively delineate CHC and HCC from CCC for purposes of avoiding the pre-suit notice requirement.

Again, under *Williams v. Condon, supra*, for purposes of a motion to dismiss, when looking solely at the allegations within the four corners of the Complaint, Plaintiffs have failed to assert any allegations against CHC and HCC that they did not assert against the other co-Defendants, who were properly noticed pre-suit. Accordingly, this Court holds that neither CHC nor HCC should be should be treated any differently than the other Defendants who were properly noticed pre-suit. Therefore, S.C Code §15-79-125 applies to CHC and HCC, as there is no basis for its exclusion when interpreting the statute in conjunction with the allegations plead on the face of the Amended Complaint.

(iii) In a light most favorable to the Plaintiffs, assume arguendo that CHC and HCC are deemed to be alleged as vicariously liable for the alleged professional negligent care and treatment rendered by CCC, and assume further arguendo that only "health care providers," as defined in S.C. Code §15-79-110(3), are subject to the pre-suit notice requirement. Plaintiffs have nevertheless failed to assert a cause of action against either CHC or HCC that is separate and distinct from professional negligence. That is, the Plaintiffs name CHC and HCC as parties to this lawsuit solely on account of their respective mano']/// jmx 5 70014vagement and ownership interests of CCC. Therefore, even if this Court were to agree with Plaintiffs' theory that vicarious liability can be retroactively inferred in this instance (although not explicitly plead in the Amended Complaint), CHC and HCC still should have been served with pre-suit notice.

Plaintiffs cannot argue it both ways: If Plaintiffs are going to assert vicarious liability against CHC and HCC, without any other cause of action, then these Defendants should be provided the notice and allowed the protections afforded by, S.C. Code §15-79-125(A). If Plaintiffs allege that CHC and HCC should "step in the shoes" and assume the liability from their downstream entity, CCC, then these Defendants should also be treated as "health care providers," if indeed such designation is required to apply the pre-suit notice statute, as Plaintiffs suggest.

Further, "health care provider" is defined, in part, as "including a health care practice, association,

partnership, or other legal entity." (S.C. Code §15-79-110 (emphasis added)). Thus, it is reasonable to characterize ownership and management entities, such as CHC and HCC, to fall into the "health care provider" definition under the aforementioned statute. This characterization is strengthened in instances such as these, when a plaintiff attaches management and ownership entities as parties in professional negligence lawsuits vis-à-vis vicarious liability, without any additional cause(s) of action asserted against these entities.

(2)CHC AND HCC'S LEGAL RELATIONSHIP STATUS TO CCC DOES NOT PRECLUDE THE APPLICABILITY OF THE PRE-SUIT NOTICE STATUTORY REQUIREMENT

Plaintiffs argue that CHC and HCC's legal relationship to CCC precludes those entities/Defendants from needing to be served with a pre-suit notice, pursuant to S.C. Code §15-79-125(A). However, there is no South Carolina precedent which supports this theory. Plaintiffs erroneously rely on Florida law, which holds since non-noticed defendant(s) who bear a legal relationship to the defendant(s) who receive pre-suit notice, separate notice to the non-noticed defendant is not required. *Kukral v. Mekras,* 679 So.2d 285 (Fla. 1996); *Arch Plaza, Inc. v. Perpall,* 947 So.2d 476 (Fla. 2006). Importantly, however, *Arch Plaza* et al. rely on Florida's statutory language and construction in basing their decisions. Specifically, Fla. Stat. §766.106 (2007) is Florida's medical malpractice pre-suit notice provision. Florida Rule of Civil Procedure 1.650 expands pre-suit notice, under Fla. Stat §766.106, to prospective defendants in the medical malpractice context "to operate as notice to that defendant any other prospective defendant who bears a legal relationship to the prospective defendant receiving that notice." *Arch Plaza*, 947 So.2d at 478 (citing FRCP 1.650).

However, South Carolina's Rules of Civil Procedure does not have this "legal relationship" language in its notice provisions, and it is for the South Carolina Legislature, and not this Court, to create and/or amend the applicable rules and statutes. See, *Lazerson v. Hilton Head Hosp*., 312 S.C. 211, 439 S.E.2d 836 (1994) (reversing lower court's denial of Defendant's motion to limit liability based on constitutionality of South Carolina statutes regarding charitable organization criteria: "It is for the legislature and not this Court to determine what criteria best establish eligibility for the statutory limitation on liability. Since these statutes pass constitutional muster, we defer to the legislature's judgment." *Lazerson*, 312 S.C. at 213, 439 S.E.2d at 838). Therefore, Florida law is distinguishable and not applicable in this instance, since South Carolina's legislature has not enacted or adopted any similar statutes or rules allowing pre-suit notice for one entity to be sufficient notice for all of its legally-related entities.

(3) LEGISLATIVE INTENT WAS NOT MET

Plaintiffs have argued, and the Defendants would agree, that the legislative purpose in enacting S.C. Code §15-79-125(A) is to allow prospective parties the opportunity to engage in settlement negotiations prior to the filing of a lawsuit. A mediation was conducted in this case as required, pursuant to S.C. Code §15-79-125(C), on or about December 13, 2006. At that time, neither CHC nor HCC were given pre-suit notice, and as such, neither of these entities were allowed the opportunity to participate in the mediation. Neither CHC and HCC were served with the initial Summons and Complaint until January of 2007, and neither had any knowledge constructive or actual, that they would be added as parties subsequent to the mediation.

Plaintiffs argue that CHC and HCC had notice of the prospective lawsuit since August 18, 2006, when CCC was served with the initial pre-suit notice, given the aforementioned entities' legal relationship and commonalities of their respective board members. However, the three entities' legal relationship and shared board membership have no legal bearing on whether pre-suit notice is required for CHC and HCC, prior to the mediation with CCC. All three entities are separate and distinct, recognized as separate legal entities under the laws of this state. As such, each entity is entitled to the rights and protections given to any person or entity in this state. Plaintiffs' argument is also speculative, presuming that since mediation was unsuccessful with CCC's participation, then it would not have been successful had CHC and HCC been noticed pre-suit, and thus, been part of the mediation process.

There is no language in S.C. Code §15-79-125 allowing for such speculation or, more specifically, "constructive knowledge" of a legally-related entity as grounds to forego pre-suit notice of any defendant. The language of the statute is clear and actual notice is mandatory, not permissive; nowhere in the statute is there any provision or annotation allowing for the speculation/presumption of pre-suit mandatory mediation being sufficient for one legally-related entity, but not others.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Defendants Care Holding Company, Inc. and Health Care Corporation's Motions to Dismiss all of the Plaintiff's claims against them with prejudice is hereby granted as a matter of law for the reasons set forth above, as well as those presented to the Court at oral arguments.

IT IS SO ORDERED

Aug. 3, 2007
Summerville, SC
(filed Aug. 10, 2007)
Honorable Diane S. Goodstein
Judge, First Judicial Circuit

Case Notes

State

Hendricks v. Hicks, Op. No. 4273 (S.C. Ct. App. July 6, 2007).

Defendant assigned a leasehold interest he held to Plaintiff Hendricks. The lease covered property, including furniture, fixtures and equipment, which Plaintiff intended to use as an adult entertainment business. At the time of the lease assignment Plaintiff was aware that Defendant was involved in litigation with the City of Myrtle Beach regarding the connection of sewer lines to the property. Defendant failed to inform Plaintiff, however, that DHEC issued a cease and desist order prohibiting the continued use on the property of a septic system. Without use of either the septic system or the connection of sewer lines by the city, the property could not be operated as an adult entertainment business, a purpose for which Plaintiff acquired the lease and a purpose of which Defendant was aware. Plaintiff sued Defendant for fraud. After referral to the master, judgment was granted in favor of Plaintiff.

Defendant appealed, arguing that because Plaintiff was aware of the lawsuit between Defendant and the city, he could not have reasonably relied on any representation made by Defendant regarding available sewer service. The court of appeals disagreed and affirmed the master's judgment. The appellate court explained the matter as follows:

> [Plaintiff] Hicks warranted that he had "no knowledge of any fire, health, safety, building, pollution, environmental, zoning, or other violation of law in respect to the property or any part thereof" . . . nor had he "received written notice from any federal, state, county, or municipal government authority alleging any such violations." He went on to warrant specifically "that applicable zoning permits operation of an adult entertainment business on the premises." The combination of these warranties represented to [Defendant] Hendricks that the purpose for which he was leasing the property, to open an adult entertainment business, would be possible.
>
> Even though Hendricks was aware of the sewer-related litigation, he did not know DHEC was requiring discontinuation of the "pump and haul" method of waste disposal, leaving him with no sewer service to the property. Regardless of whether the city had improperly denied sewer service to Hicks, there was clearly a notice from DHEC that the continued use of a septic system constituted a violation.

Bradley v. Doe, Op. No. 4274 (S.C. Ct. App. July 6, 2006).

Plaintiff, shortly after leaving a Waffle House restaurant, veered to avoid an object in the road, lost control of his vehicle and struck a tree. No one, other than Plaintiff, actually witnessed the single car accident. Plaintiff originally believed the object he was swerving to avoid was a dog. A short time after the accident, another driver noticed Plaintiff's son, who Plaintiff called to come to the accident scene, signaling with a flashlight for assistance. This other driver circled back to the scene and noticed a large, white garbage bag in the road. Yet another driver, a friend of Plaintiff's, had also been driving the same road just a short time before Plaintiff's accident and saw a large trash bag in the road and also a little beyond the trash bag saw a street sweeper truck that dropped onto the road a bag similar to the one seen before and hit by Plaintiff.

Plaintiff sued to collect under the uninsured motorist provision of his insurance policy. Doe moved for summary judgment, which was granted by the trial court based on the lack of an independent witness to Plaintiff's accident. Plaintiff appealed and the court of appeals affirmed.

South Carolina Code § 38-77-170(2) sets forth the requirements to collect under uninsured motorist insurance coverage. Where there is not physical contact between the insured's vehicle and the unknown motorist, someone other than the owner or operator of the insured vehicle must have witnessed the accident. Though circumstantial evidence from this independent witness may suffice to satisfy the statute's requirements, the witness must have contemporaneously witnessed the accident. In this case, Plaintiff's independent witnesses did not see Plaintiff's accident, but rather simply saw a bag in the road and a truck dropping another bag further down the road. Essentially, the independent witness must have personally observed events that corroborate the insured's account of the accident.

The appellate court explained that though "[m]ost courts take a liberal view when dealing with the question of coverage . . . the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover."

Judge Short dissented from the panel's opinion.

Erickson v. Boykin, Op. No. 4264 (S.C. Ct. App. June 27, 2007).

Appellant Erickson, a North Carolina law firm, sued South Carolina residents James and Mona Boykin in North Carolina to collect allegedly owed legal fees. The Boykins did not make an appearance in the North Carolina action and a default judgment was entered against them. Erickson then filed to have the foreign judgment enforced in South Carolina. The Boykins challenged the validity of that judgment based on the fact that North Carolina did not have personal jurisdiction over them. The circuit court denied enforcement of the judgment. Erickson appealed.

Erickson claimed that the lower court failed to give the North Carolina judgment full faith and credit and failed to consider this matter by presuming the validity of that state's judgment. The court of appeals disagreed. Though the Full Faith and Credit Clause of the U.S. Constitution precludes examination into the merits of the matter, it does not prevent litigation of issues of personal jurisdiction when the judgment is to be enforced. Under the statutory scheme in South Carolina, including the Uniform Enforcement of Foreign Judgments Act, S.C. Code § 15-35-940, "the presumption of regularity [provided to out of state judgments] ends when the judgment debtor files a motion for relief from or notice of defense to the foreign judgment. At that time, the burden of proving the foreign judgment is entitled to full faith and credit shifts to the judgment creditor.

The court of appeals also affirmed the lower court's decision not to take judicial notice of a number of documents, including the retainer agreement between the parties, which specified that any action to collect fees would be filed in Buncombe County, North Carolina. These documents, according to the majority of the court, were not the type accepted without qualification, particularly where the facts contained in the documents were contested by the Boykins. Moreover, Erickson failed to provide these documents to the lower court until after that court granted the Boykins' request for relief.

Judges Goolsby, Cureton and Lee dissented.

Pressley v. REA Constr. Co. and Zurich-American Ins. Co., Op. No. 4266 (S.C. Ct. App. June 27, 2007).

REA Construction Company and its insurer appealed from the circuit court's decision (consistent with the Commission's decision), which decision required REA, Pressley's employer, to provide Pressley with a wheelchair accessible mobile home, including the base cost of the home, and compensation for ten hours a day of non-professional home healthcare services being provided by Pressley's mother. The employer and the insurer acknowledged Pressley had a compensable injury and that he was entitled to lifetime benefits.

"[T]his appeal presents the novel issue of whether the Commission has the statutory authority to require an insurer to provide the base cost of furnishing an employee handicap accessible housing." Relying on the North Carolina Supreme Court's decision in *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986) and subsequent decisions in that jurisdiction, the court of appeals adopted the following legal principle: "the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Workers' Compensation Act. The costs of modifying such housing, however, to accommodate one with extraordinary needs occasioned by a workplace injury, such as the [claimant] in this case, is not an ordinary expense of life for which the statutory substitute for wage is intended as compensation." Thus, the appellate court reversed the prior decisions to the extent they interpreted S.C. Code § 42-15-60 as permitting the award of the base cost of handicap accessible housing.

In connection with the award of $7.00 per hour for ten hours a day of non-professional home healthcare, the appellate court also reversed that award. "Although there is evidence that some non-professional care is needed, there is no basis for the finding of the circuit court awarding 10 hours of non-professional care." Part of the award, which was not challenged in this appeal, also provided funds for professional home healthcare 8 hours a day.

Shelton v. LS&K, Inc., Op. No. 4268 (S.C. Ct. App. June 28, 2007).

LS&K, Inc. owned and operated a Burger King franchise. While pulling out of the parking lot from that Burger King, a driver struck Plaintiff. A pear tree allegedly obscured the driver's view of the sidewalk. Plaintiff sued, claiming LS&K's negligence failed to provide a clear view for drivers exiting the parking lot. Plaintiff, however, failed to provide any expert testimony as to the design of the parking lot. Thus, the trial court granted summary judgment to LS&K. Plaintiff appealed.

Plaintiff's appeal asserted that the lower court misinterpreted her negligence claim as one for negligent design. She argued that was never her claim. The court of appeals, however, viewed her claim as just such a negligent design case. This conclusion was based on the complaint's allegations that LS&K

Continued on page 22

was negligent in "[p]lacing inappropriate trees, shrubbery and landscaping around the driveway," and in "[f]ailing to appropriately delineate where the sidewalk was with any sort of lineage." Moreover, in her arguments to the lower court on the summary judgment motion, Plaintiff took the position that summary judgment was inappropriate because "[t]hey designed the lot. They designed where the exit was. They designed where the tree was planted and they planted it."

Without expert testimony on the negligent design and given that landowners do not generally owe any duty to warn of open and obvious dangers, summary judgment was appropriate and was affirmed.

Federal

Taylor v. Progress Energy, Inc., No. 04-1525 (decided July 3, 2007).

The Court affirmed its prior decision that 20 C.F.R. § 825.220(d), implementing the Family and Medical Leave Act of 1993 (FMLA), prohibited any waiver by an employee of his rights under the FMLA. Those rights include the right of action for a past claim. In light of the Department of Labor's different interpretation, the Court recognized that "[a]n agency's interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation." The Court, however, did not view the DOL interpretation as appropriate.

The DOL claimed that only the prospective waiver of rights under the FMLA was barred by the pertinent statute and implementing regulations. Retrospective waiver was, according to the DOL, permissible. The regulation provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The Court concluded that the clear language, prohibiting the waiver of "rights," included all rights, including rights of action for violations of the FMLA.

Choice Hotels, Int'l v. Shiv Hospitality, LLC, Op. No. 05-2201; 06-1043 (decided June 20, 2007).

After a franchisee defaulted on payments of franchise fees, the franchisor (Choice Hotels) terminated the franchise agreement. Choice Hotels then filed suit for breach of contract. This matter when first before the Court was remanded to the district court to determine whether, in light of the recently decided, similar case, an arbitration provision was triggered. The district court concluded the parties were required to arbitrate.

The arbitration resulted in an award for Choice Hotels totaling $59,208.75, plus interest until paid. The arbitration award was made on December 9, 2003. In September 2004, Choice Hotels returned to the district court seeking confirmation of the arbitration award. The franchisee challenged the district court's subject matter jurisdiction based on the fact that the arbitration award was less than the $75,000 jurisdictional minimum. The district court disagreed and concluded that the amount in controversy requirement was satisfied. The amount in controversy, according to the district court, included the arbitration award and the $36,935.00 sought by the franchisee for attorneys' fees. In the alternative, the district court concluded that given the interest that had already accrued, the amount owed under the arbitration award was more than $75,000.

In considering this jurisdictional issue, the Fourth Circuit focused instead on the fact that Choice Hotel filed its initial complaint in the federal court, where jurisdiction was then proper. That action was stayed pending arbitration. Choice Hotels was now merely seeking to reopen that properly filed and stayed action to confirm the award. Thus, the Court concluded that the district court did have subject matter jurisdiction because "[t]he black letter rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in good faith."

Goodman v. Praxair, inc.; Praxair Services, Inc., Op. No. 06-1009 (decided July 25, 2007).

This is primarily a breach of contract action. In the original complaint, Plaintiff named Praxair, Inc. as defendant. Plaintiff believed that the actual party to the contract at issue had been acquired by another company, which company was a wholly-owned subsidiary of Praxair, Inc. It was later learned that Praxair Services, Inc. was the proper party and Plaintiff moved to amend the complaint to add, not replace, that company as a party. The addition rather than substitution of parties was based on allegations of alter ego between the two Praxair entities. Defendants argued that such an amendment did not relate back to the original filing for purposes of statute of limitations because Rule 15(c)(3) permits relation back only for a change of party, not the addition of a party.

The Fourth Circuit disagreed. The grounds for the Court's decision were both the general policy that amendments and relation back should be freely given and that since the newly added party was, in fact, substituted for the original party (i.e., in terms of which allegations were made against the new, substituted party) in the breach of contract claim, it met the type of amendment subject to relation back under the rules.

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AND THE DEFENSE WINS:
SCDTAA Members Strut Their Stuff

Though we have not received much information in 2007 about our member's courtroom results, this edition of DefenseLine provides some encouraging Verdict Reports.

Hood Law Firm Lawyers Obtain Defense Verdicts in Malpractice Suits

On at least two occasions Robert H. Hood, Sr. and James B. Hood obtained defense verdicts in cases involving medical malpractice claims.

On January 11, 2007, a defense verdict was returned in Richland County. The case, Fulmer v. Midlands Orthopaedics, P.A., et al., tried before the Honorable James Barber, involved development of a significant fever following elective microdecompression surgery to address increasing back pain. The source of the fever was unknown. The patient was admitted to the hospital and followed by a number of specialists in attempts to diagnose and treat the source of the fever. Fifteen days after the elective surgery, the patient's wound was noted to be abnormal and was opened, revealing an infection. Despite efforts to treat the infection, the patient developed severe sepsis and ultimately passed away. Plaintiff, the Personal Representative of the patient, alleged the wound should have been opened immediately upon developing the fever and reporting to the hospital. The jury disagreed, finding for the defense. Prior to the verdict, Plaintiff demanded $290,000. The highest offer made by the defendants was $150,000.

More recently, on August 3, 2007, another defense verdict was reached in a medical malpractice action defended by the Hood Law Firm and tried before the Honorable Ned Miller in Pickens County. That case, McWhorter v. Eric Young, M.D., et al., involved treatment of the patient for abdominal complaints. Dr. Young was called in as a surgical consult and diagnosed the patient with gall bladder disease, for which treatment was given. Plaintiff alleged that Dr. Young failed to diagnose the patient, now deceased, with gastric volvulus, which resulted in the perforation of her stomach and its ultimate removal. A defense verdict was reached in that case, in which Plaintiff had demanded the insurance policy limits. Several expert witnesses aided in obtaining this verdict, including Hamilton Earle Russell, MD of Greenville, Stephen Yarbourough, MD also of Greenville, and E. Arden Weathers, MD of Orangeburg.

Nelson Mullins Wins Significant Victory for volvo Trucks North America, Inc.

Nelson Mullins Riley & Scarborough partners Clarence Davis and Bill Latham recently obtained a defense victory on behalf of Volvo Trucks North America Inc. (Volvo). The Fourth Circuit reversed a jury verdict against Volvo and remanded the matter to the district court for entry of a judgment in favor of Volvo. The case involved allegations that Volvo conspired to, among other things, wrongfully terminate the dealership plaintiff. Volvo won dismissal of some claims prior to trial and the trial of the remaining claims commenced in October 2005 and lasted four weeks. The jury returned a verdict against Volvo on a single claim under the South Carolina Dealers Act related to Volvo's ownership of a used truck subsidiary that sold trucks to South Carolina residents from its Atlanta sales location. The sales were alleged to be in violation of the Dealer Act provision prohibiting the direct sales of motor vehicles by manufacturers in South Carolina. The jury verdict awarded plaintiff $583,245. The statute also provided for the award of attorneys' fees, which according to the plaintiff's petition amounted to $1,222,683.70. The Fourth Circuit affirmed the jury verdict on those claims for which the jury found for the defendant but reversed the single claim on which the plaintiff succeeded making the case a complete defense victory for Volvo.

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