SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

The SCDTAA Trial Academy June 6-8, 2007

President's Message

by Elbert S. Dorn

After twenty years of great experiences as an SCDTAA member, it seems surreal that my time has come to lead this distinguished association of South Carolina attorneys. However, before we vault forward with the details of an exciting year, let's take a moment to reflect on our tradition, which serves as a solid foundation for our future. I am sure you, like me, cherish the rich memories of Sea Island, Kiawah and Grove Park:

Remember -

- when the hospitality suite was literally the president's hotel room with the occupant and revelers smoking, drinking and holding forth late into the night.
- the many golf tournaments where the best-laid plans and carefully crafted pairings were abandoned to accommodate a judge or senior attorney.
- the glee of a senior judge as the birdie putt rolls in on the 18th green to secure a victory in the golf tournament and to provide great cocktail conversation that evening.
- the long drives of deserving golfers which were eclipsed by the young first-timer with too much strength and not enough sense to defer.
- the bands and dances where judges and attorneys alike spun in a whirl of enjoyment as "Sixty Minute Man" or "Miss Grace" blared from the stage.
- the programs with speakers ranging from Supreme Court justices, actors, humorists, politicos, and our learned members sharing their knowledge and experiences.
- the elegant meals with five courses at the Cloister dining room and the casual ambience of the oyster roasts at Mingo Point.
- the fresh breeze of the Terrace at the Grove Park Inn when rainbow trout, not porterhouse, was the signature dish.
- the "Bloody Mary" reception on Sunday morning before everyone hit the road, which did not seem so imprudent at the time.

These memories reinforce the notion that fellowship and some time to socialize and relax with the judiciary, friends and family are the true hallmarks of this group, no matter the venue. As we reflect on the past, however, we look to the future, which is well-represented by the young attorneys who serve on the Executive Committee, joined by the sage presence of Bruce Shaw, who provides so much depth and perspective. Together, we hope to focus this year on external affairs that may make a difference in the justice system in which most all of us earn our livings. We hope to advance substantive changes like the adoption of a more vigorous standard for scientific expert testimony in state court. Just recently, corporate and legal groups, at the national level, spearheaded the introduction of the "Reliability in Expert Testimony Standards Act" in the S.C. General Assembly. Through resolution passed last Fall, we endorse it and support it to help bring state practice on experts in line with federal practice.

There are many upcoming opportunities to participate in achieving higher goals and also in simply having a good time. Please mark your calendars for these important SCDTAA events over the next few months. On April 10th, there was a Legislative Reception for the judiciary committees and leadership of both houses of the S.C. General Assembly. It took place at the Oyster Bar on Park Street in Columbia. These receptions are important events and provide an excellent opportunity for us to mingle and socialize with key legislators who oversee the election of the judiciary and who are integral in passage of new substantive and procedural law.

On June 6-8, the SCDTAA Trial Academy will take place in Greenville. Ron Wray, William Brown, and Alan Lazenby have organized a terrific event. Please encourage sign-up by young lawyers in your firm. We also need volunteer participation from attorneys and their staffs to serve as witnesses and jurors to help make this a meaningful and realistic event. The participation of our state and federal judges has always been tremendous, and the Trial Academy serves as another opportunity for lawyers, young and old, to share their knowledge and to mingle with those who preside over our judicial system.

The Joint Meeting will take place July 26-28 at a new location, the Grove Park Inn. Many of you probably have never been there, but it is an excellent mountain retreat to escape the summer heat. Seriously, Glenn Elliott, Mitch Griffith, and Erin Dean are putting together an excellent program for the joint meeting and you should make your plans now.

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Letter From The Editors

by Gray T. Culbreath & Wendy J. Keefer

If all goes as planned, each of you will have received one issue of Defense Line in 2007 and shortly thereafter will receive this issue. Though the end of the year and the start of the new year saw some transitional delays, we are back on track.

Along those lines, we are, as always, in search of interesting and entertaining contributions to our publication from the Association's membership. Our current membership includes some of the most prestigious and experienced South Carolina attorneys and some of the most energetic and promising young attorneys. This publication provides an ideal forum for the exchange of ideas between these two groups and among all attorneys of every age and experience level.

A similar exchange of perspectives occurs during the SCDTAA Trial Academy, which is scheduled for June 6-8. This year's Trial Academy will be held in Greenville. Whether your office and home are located in or near Greenville or somewhere else in the State, if you have not yet participated in Trial Academy, as a student, speaker, group leader, witness or evaluator we highly recommend making it this year. No other event provides the same opportunity to share guidance in the art of trial advocacy, making not only the members of the state bar more prepared but increasing the competence of our members, more specifically our younger members.

If your schedule this year won't accommodate participation in the Trial Academy, consider getting involved with the planning and organization of the other SCDTAA events, the Joint and Annual Meetings. Attending these events is always both beneficial and a good time, but participating in the actual putting together of them permits members to express their own ideas and views about what topics, speakers and recreational activities would be best received.

Though Milton Berle wisely observed that "a committee is a group that keeps minutes and loses hours," Helen Keller also astutely recognized that "alone we can do so little; together we can do so much." The same is true for SCDTAA. This Association does such a good job organizing its leadership into small enough units to avoid the lack of decision making common in the committee environment, but a handful of attorneys cannot do it alone. We need your help in any way you can provide it.

Make 2007 your year to get involved. We certainly welcome any comments or contributions on this publication and we are certain the rest of the officers and executive committee members equally welcome your participation and insights.

Gray T. Culbreath

Wendy J. Keefer

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

PRESIDENT'S MESSAGE CONT. FROM PG 2

Finally, the Annual Meeting will take place November 1-4 at Pinehurst Resort. While the Cloister is unique, Pinehurst offers a great venue with rich tradition and refinement befitting the Annual Meeting of our group. Molly Craig, Curtis Ott, and Sterling Davies are putting together an interesting program to add to the superb golf, dining, and accommodations of Pinehurst. Through a special effort of mine, we will also have guest speakers from the defense bar of Alabama with which we have established an informal reciprocal exchange. It should prove entertaining and informative.

While we have taken a few minutes to reflect on the past, please take several more minutes and plan your future participation in these upcoming events in 2007. I look forward to seeing you very soon.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

Cover photo: The Greenville County Courthouse by Shawn M. Knox / www.smk-images.com

The SCDTAA Docket

MEMBER NEWS

Nelson Mullins Elects Seven New Columbia Partners

Nelson Mullins Riley & Scarborough LLP has elected seven new partners in its Columbia office: Glen Caulk, Brian Comer, Debbie Durban, Tom Kennaday, Cory Manning, Kay Tennyson, and Thad Westbrook.

Glen Caulk, a 1994 graduate of the University of South Carolina School of Law, practices in the areas of real estate, banking, municipal finance, and corporate law. A member of the South Carolina Bar, Mr. Caulk has experience in all aspects of the creation and enforcement of horizontal property regimes. He has performed quiet title actions, been involved in negotiations involving tax credit based transactions, and transactions involving fee in lieu of tax, like-kind exchanges, sale-lease back, synthetic leases, wrap mortgages, and mezzanine financing. Mr. Caulk is a member of the American Bar Association, the Richland County Bar Association and the South Carolina Defense Trial Attorneys' Association. He is also a director of the Palmetto Land Title Association.

Brian Comer, a 1999 graduate of the University of South Carolina School of Law, is a member of the Firm's Litigation Group and practices in general products liability, business, pharmaceutical and securities litigation. Mr. Comer also has past experience in general corporate transactions and economic development work. Along with other Nelson Mullins attorneys, Mr. Comer serves as national coordinating counsel in pharmaceutical mass tort litigation spanning the United States. He frequently serves as local counsel for pharmaceutical and medical device manufacturers facing litigation in South Carolina and has also served as local counsel for financial institutions facing securities and broker/dealer litigation in the South Carolina and the southeast.

Debbie Whittle Durban, a 1999 cum laude graduate of the University of South Carolina School of Law, practices in the field of labor and employment law, including employment discrimination, FMLA, wage and hour issues, and employment contracts. A member of the South Carolina Bar, Ms. Durban is admitted to practice before the 4th U.S. Circuit Court of Appeals and the U.S. District Court for the District of South Carolina. Ms. Durban is a member of the American Bar Association, the Richland County Bar Association, the South Carolina Defense Trial Attorneys' Association, and the South Carolina Women Lawyers Association.

Cory Manning, a 1997 graduate of the University of Iowa College of Law, practices in the areas of business litigation, securities litigation, and professional liability. His experience covers several areas, including securities law, officer and director liability, commercial contracts, complex commercial litigation, and class actions. Prior to joining Nelson Mullins, Mr. Manning worked for a leading law firm in Palo Alto, Calif. He also served as a judicial clerk for the Honorable Robert M. Parker of the U.S. Court of Appeals for the Fifth Circuit.

Thomas Kennaday practices in the areas of product liability and business litigation. A member of the South Carolina Bar, Mr. Kennaday is admitted to practice before the 4th U.S. Circuit Court of Appeals and the U.S. District Court for the District of South Carolina. Mr. Kennaday is a member of the American Bar Association, the Defense Research Institute, and the South Carolina Defense Trial Attorneys' Association. In 1999, after enrollment in a joint degree program, Mr. Kennaday earned a Juris Doctor, cum laude, from the University of South Carolina School of Law and a Master of International Business Studies from the Moore School of Business.

Kay Tennyson, a 1988 graduate of the University of South Carolina School of Law, practices in business, securities, and technology litigation, and in products liability defense. A member of the South Carolina Bar and former editor-in-chief of its magazine, South Carolina Lawyer, Ms. Tennyson is a member of the American Bar Association (fellow, Young Lawyers Division; Affiliate Assistance Team member, 1998-2000; Young Lawyers Division Liaison to Senior Lawyers Division, 1998-99), the Defense Research Institute, the Federal Bar Association, the Richland County Bar Association, the South Carolina Defense Trial Attorneys Association, and the South Carolina Women Lawyers Association. She served as law clerk to U.S. District Judge Sol Blatt Jr. of the District of South Carolina, to U.S. District Judge Falcon B. Hawkins of the District of South Carolina and to U.S. Magistrate Judge E.S. Swearingen of the District of South Carolina.

Thad Westbrook, a 1999 graduate of the University of South Carolina School of Law, practices in the areas of business litigation, consumer finance litigation, and class action defense. Prior to joining the Firm, Mr. Westbrook was a law clerk for U.S. District Judge G. Ross Anderson, Jr. of South Carolina. Mr. Westbrook has experience in handling litigation matters in federal and state courts, and multiple arbitral forums. Mr. Westbrook has handled a variety of business litigation disputes involving financial institutions, insurance, class actions and other commercial law issues. In the American Bar Association's Young Lawyers Division, Mr. Westbrook has served as chair of its Business Law Committee. In the South Carolina Bar, Mr. Westbrook has served as

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chair of its Law Related Education Committee. Active in the community, Mr. Westbrook currently serves as vice chairman of the Board of Directors for Lexington Medical Center, serves on the Board of Visitors for the University of South Carolina, and will soon join the Board of Visitors for the Medical University of South Carolina (effective January 2007). Mr. Westbrook is also a member of the Waterfront Steering Committee, which is working together with the University of South Carolina, City of Columbia, and Richland and Lexington counties to develop and enhance the City of Columbia's riverfront. He is the author of "Balancing the Scales: Victims Rights in South Carolina's Justice System," *South Carolina Lawyer*, May/June 1999; and "At Least Treat Us Like Criminals! - South Carolina Responds to Victims Pleas for Equal Rights," S.C. L. REV. Vol. 49, No. 3, at 575.

James E. Weatherholtz Becomes a Principal Of Buist Moore Smythe McGee, P.A.

The attorneys of Buist Moore Smythe McGee P.A. are pleased to announce that James E. Weatherholtz has become a Principal of the firm. Mr. Weatherholtz received his B.A. in history from The Citadel where he graduated magna cum laude in 1996 and was elected to Phi Kappa Phi. He received his J.D. from the University of Virginia in 1999. He 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 as well as liaison to the Forum Technology Committee. He is active in the Charleston County Bar Association as a member of the Executive Committee. Mr. Weatherholtz practices general civil litigation, with an emphasis on construction law, surety and product liability cases.

Collins & Lacy Welcomes Three Attorneys

Collins & Lacy, PC is pleased to announce that Edward D. Sullivan, Rebecca C. Kirkland, and Robert F. Goings have joined the firm.

A native of Laurens, South Carolina, **Eddie Sullivan** earned his Bachelor of Science in Business Administration-Accounting in 1976 and a Master of Accountancy degree from the University of South Carolina in 1978. He is a 1987 graduate of the University of South Carolina School of Law and a Certified Public Accountant. Mr. Sullivan also studied at Oxford University (The Queen's College) where his courses included European Economic Community law. In 1994, Mr. Sullivan continued his legal education at Georgetown Law School. His studies in Securities Regulation resulted in his being published in the November-December 1995 issue of The Banking Law Journal. Mr. Sullivan's work was entitled "Glass-Steagall Update: Proposals to Modernize the Structure of the Financial Services Industry." Mr. Sullivan was admitted to the South Carolina Bar in 1998. He is also admitted in the District of Columbia and Colorado. In addition, Mr. Sullivan is admitted to the United States Tax Court, the United States District Court - South Carolina, the United States Court of Appeals - Fourth Circuit and the United States Supreme Court. Mr. Sullivan serves on the South Carolina Bar Professional Responsibility Committee and on the Board of Directors for EngenuitySC and the ATO Housing Corporation at the University of South Carolina.

Rebecca C. Kirkland is a 2001 graduate of the University of North Carolina. She earned her law degree from the University of South Carolina School of Law in 2006. In law school, Ms. Kirkland served as Justice of Fundraising and Alumni Relations for Moot Court Bar, on the legislative council for the Student Bar Association and as Magister of Phi Delta Phi.

A native of Union, South Carolina, **Robert F. Goings** is a 2003 summa cum laude graduate of Wofford College, where he served as Student Body President. He was named the Most Outstanding Campus Citizen of 2003. At Wofford, Mr. Goings was also a member of Phi Beta Kappa and the Blue Key Honor Society. He received his law degree from the University of South Carolina School of Law in 2006. While clerking almost full-time at Collins and Lacy, he also participated in Moot Court and served as an editor of the Southeastern Environmental Journal. In 2006, Mr. Goings received the law school's prestigious Claude Sapp Award.

Former Palmetto Behavioral Health CEO Joins Nelson Mullins Health Care Team

The former chief executive of Palmetto Behavioral Health System has joined Nelson Mullins Riley & Scarborough's health care team and will be based in its Charleston office. Daniel J. Body, of counsel to the Firm, brings considerable health care experience to the Firm's clients. He has more than 15 years experience serving in executive positions at several health care facilities across the country. Mr. Body will represent health care providers with organizational and operational issues, mergers and acquisitions, managed care contracting, business management and planning, health policy, certificates of need, licensure matters, general contract negotiation, Medicare and Medicaid reimbursement, and state and federal fraud and abuse issues.

Mr. Body also has more than 15 years experience as a health care executive, having served as the chief executive officer for several behavioral health hospitals throughout the country. Before relocating to South Carolina, he practiced in health care and corporate law with a national law firm in St. Louis and Washington, DC. Admitted to practice in South Carolina, Illinois, and Missouri, Mr. Body is also a member of the American Bar Association (Health Law Section), the American Health Lawyers Association, the American College of Healthcare Executives, the Bar Association of Metropolitan St. Louis, and the Charleston County Bar Association. He is currently a participant in the Riley Institute of Furman University's South Carolina Diversity Leadership Academy, an Honorary Commander of the 437th AW/PA at Charleston A.F.B., and a member of the Trident United Way Board of Directors.

S.C. Association of Legal Administrators elects officers

The Association of Legal Administrators, South Carolina Chapter, has elected and installed its officers and board of directors for the coming year, as follows:

President: Brenda Stewart, Leatherwood Walker Todd & Mann, P.C. (Greenville)

President-Elect: M. Shawn Payment, Nelson Mullins Riley & Scarborough LLP (Charleston)

Secretary: Margaret T. Glassman, Ellis, Lawhorne & Sims, P.A. (Columbia)

Treasurer: S. Jane Todd, Nelson Mullins Riley & Scarborough LLP (Columbia)

At-Large Directors: Rhonda B. Amick, Turner Padget Graham & Laney, P.A. (Columbia); Larry Mack, Haynsworth Sinkler Boyd, P.A. (Columbia); Valorie M. Songer, Nelson Mullins Riley & Scarborough LLP (Columbia).

The South Carolina Chapter of the Association of Legal Administrators (SCALA) provides support to professionals involved in the management of law firms, corporate legal departments, and government legal agencies throughout the state of South Carolina. The mission of SCALA, as well as the Association of Legal Administrators, is to promote and enhance the competence and professionalism of legal administrators and all members of the management team. SCALA's members include more than 60 law firm administrators from all over the state of South Carolina.

Phil Lader Reappointed to Board of Lloyd's of London

Philip Lader, a partner in Nelson Mullins Riley & Scarborough, has been reappointed to the board of Lloyd's of London, the global insurance market that has underwritten individual and corporate risks for more than 300 years. Mr. Lader is, by law, one of the five members of the "Council of Lloyd's" who are not directly engaged with the insurance industry, and his reappointment to a second three-year term was approved by the head of the Bank of England.

Lloyd's is the platform for more than $30 billion of insurance coverage provided by the 66 financial syndicates that provide its capital. The range of coverage includes airplane and marine assets, resident and commercial properties, businesses, and nearly every aspect of risk management. Forty percent of Lloyd's worldwide business is in the United States.

Mr. Lader also serves as chairman of WPP Group, the worldwide advertising/media services company with 98,000 people in 106 countries, and as a senior adviser to Morgan Stanley.

Former South Carolina Governor Elected Vice Chairman of Carnegie Corporation Board

Carnegie Corporation President, Vartan Gregorian, announced the election by the Trustees of the Corporation of Governer Thomas H. Kean to Chairman of the Board and Secretary Richard W. Riley, to Vice Chairman.

Richard W. Riley was elected Governor of South Carolina in 1978 and served for eight years. During his tenure, he joined with other leading governors in helping to elevate education to the top of the nation's agenda. In 1992, he was appointed U.S. Secretary of Education by President Bill Clinton and served the eight years as the nation's chief education officer. Secretary Riley helped launch historic initiatives to raise academic standards; improve instruction for the poor and disadvantaged; and expand grant and loan programs to help more Americans go to college. He also created the Partnership for Family Involvement in Education, which now has more than 8,000 participating groups. Since leaving his national post in January 2001, Riley has rejoined the law firm of Nelson Mullins Riley & Scarborough. He has also been appointed Distinguished Professor at his alma mater, Furman University. Secretary Riley graduated cum laude from Furman University in 1954 and then served as an officer aboard a U. S. Navy minesweeper. In 1959, Riley received a law degree from the University of South Carolina.

SCDTAA Hosts Legislative Reception

by Jeffrey N. Thordahl

The SCDTAA hosted the House and Senate Judiciary Committee members and their staff for a reception at the Oyster Bar in the Vista on Tuesday April 10, 2007. In attendance were 20 legislators and staff as well as a majority of the SCDTAA Board. This was the second year we have held the legislative function at the Oyster Bar. The event (and the venue) is one of the favorite events for these legislators and staff. Unfortunately, attendance was affected this year due to several fundraisers held the same night which were scheduled after our event was scheduled.

Senator McConnell, Chairman of the Senate Judiciary Committee, and Representative Jim Harrison, Chairman of the House Judiciary Committee, both attended and graciously stayed for a long time. Some members made the effort to drop by for only a short time to express their regrets for not being able to stay longer because of other conflicts.

This event continues to create an identity for the SCDTAA as an organization with legislative interests. It also provides an opportunity to make a direct connection with members of the SCDTAA and legislators, many of whom are attorneys themselves.

2007 SCDTAA Trial Academy
Greenville, SC • June 6-8, 2007

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

SEMINAR NEWS

The 17th Annual South Carolina Defense Trial Attorneys' Association Trial Academy will be held June 6-8, 2007 in Greenville. The Trial Academy is being sponsored by Ogletree, Deakins, Nash, Smoak and Stewart. The SCDTAA is grateful to the Ogletree firm for its generous sponsorship.

This year's Trial Academy promises to be an incredible experience for all involved. Participants will undergo two days of extensive training sessions to be held at the Hyatt in Greenville. These training sessions will be presented by some of the finest and most experienced defense attorneys in South Carolina on all phases of a trial and trial preparation. In addition to the presentations, breakout sessions will be held daily during which small groups of participants will practice the skills they have learned, working closely with experienced defense attorneys on aspects of the trial problem. Participants will be provided in advance information as to which party in the case they will represent. This will allow for advanced preparation and understanding of the facts of the case to be presented at the mock trial.

The Trial Academy will culminate with mock trials to be held on Friday, June 8. We are deeply appreciative of The Honorable John C. Few, The Honorable Gary Hill and the Honorable Paul Wickensimer, Greenville County Clerk of Court, for their allowing us to use the courtrooms and facilities at the Greenville County Courthouse for the mock trials.

While hard work and preparation are a must for all participants, social activities are also planned to make the Trial Academy both an educational and enjoyable experience. The social activities will include the SCDTAA dinner and Judicial Reception on Thursday, June 7 to be held at the home of Past President Mills and Carol Anne Gallivan, which provides an invaluable opportunity for students to get to know other defense lawyers, members of the SCDTAA, and judges from around the state.

Enrollment will be limited to the first 24 registrants. Spaces in the Trial Academy fill up quickly, so those who are interested or who have associates in their firm who would be interested, should get their applications in soon. An application can be obtained online at www.scdtaa.com or by calling SCDTAA headquarters (803) 252-5646.

We look forward to the participation and attendance at the Trial Academy and its related activities, and welcome the assistance of any SCDTAA member during the mock trials. If you are interested in assisting, please contact Ron Wray, William Brown or Alan Lazenby, this year's co-chairs for the Trial Academy.

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TRIAL ACADEMY CONT.

TRIAL ACADEMY AGENDA

Wednesday, June 6

9:00 – 9:15 am
Welcoming remarks
Elbert S. Dorn, Esquire
SCDTAA President

9:15 – 10:15 am
Jury Selection / Voir Dire /
Opening Statements
W. Howard Boyd, Jr., Esquire

10:15 – 11:30 am
Practice / Breakout Session
Opening Statement Skills

11:30 – 12:30 pm
Ethics & Professionalism
Professor Robert M. Wilcox
University of South Carolina
School of Law

12:30 – 1:30 pm
Lunch on your own

1:45 – 2:45 pm
Use of depositions, evidence and
demonstrative aids
A. Marvin Quattlebaum, Jr., Esquire

2:45 – 3:00 pm
Break

3:00 – 4:00 pm
Direct and Cross of Lay Witnesses
David L. Moore, Jr., Esquire

4:00 – 5:00 pm
Practice / Breakout Session
Direct / Cross – Lay Witnesses

5:00 – 6:00 pm
Team Practice
Exhibits and Trial Academy staff
available for questions

6:30 pm
Cocktail Reception sponsored by SCDTAA
Young Lawyer's Division

Thursday, June 7

9:00 – 10:00 am
Direct and Cross of
Expert Witnesses
William U. "Billy" Gunn, Esquire

10:00 – 11:00 am
Practice / Breakout Session
Direct / Cross – Expert Witnesses

11:00 – 11:15 am
Break

11:15 – 12:15 pm
Appeal issues: Objections and
Preserving the Record on Appeal
The Honorable H. Samuel Stilwell

12:15 – 1:15 pm
Lunch on your own

1:30 – 2:30 pm
Closing Arguments / Post Trial Motions
The Honorable Joseph F. Anderson

2:30 – 3:30 pm
Practice / Breakout Session
Closing Argument Skills

3:30 – 5:30 pm
Team Practice
Exhibits and Trial Academy staff
available for questions

6:30 pm
Dinner and reception

Friday, June 8

9:00 – 4:30 pm
Mock Trials
Greenville County Court House

2007 Joint Meeting
Asheville, NC • July 26 - 28

by E. Glenn Elliott

Golf, horseback riding, white water rafting, an excursion at Chimney Rock, a full-service spa, fine dining, and CLE credit all at a Five Star resort! Who could resist!

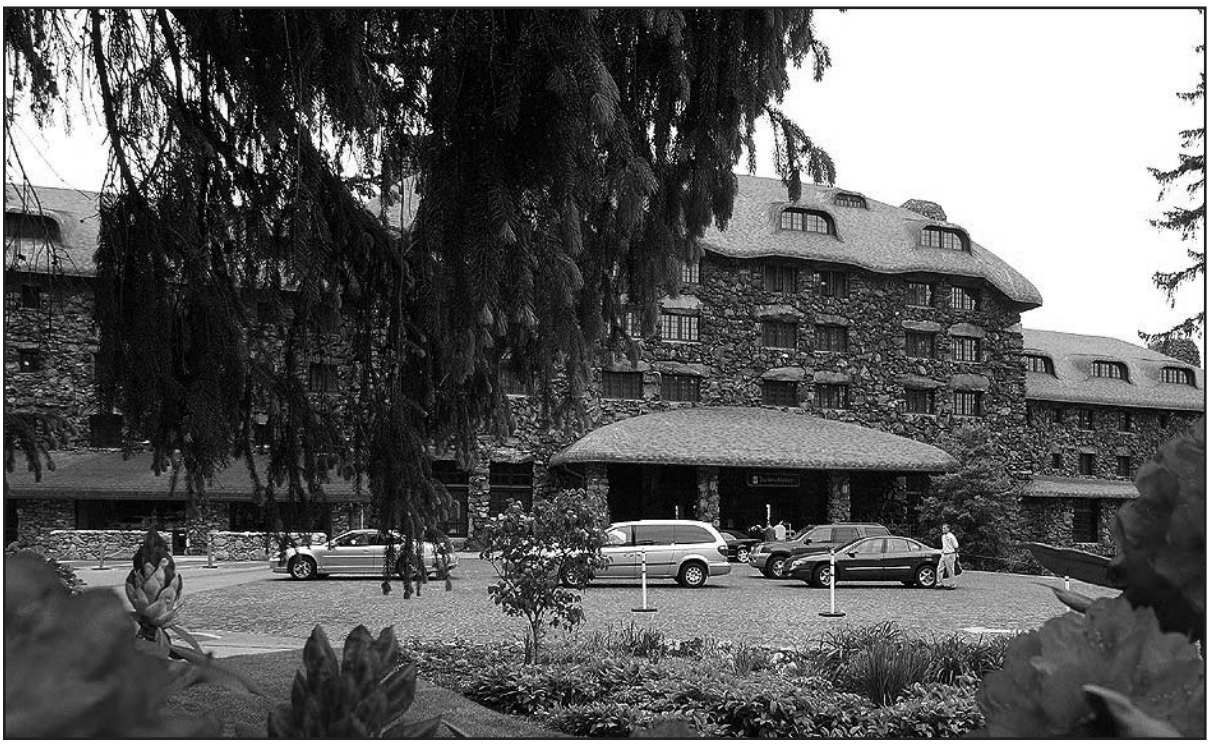
Once again the SCDTAA/CMASC Joint Meeting will be held at the historic Grove Park Inn in Ashville, North Carolina. Dates for this year's meeting are July 26, 27, and 28. Featured topics during this year's seminar will include presentations on recent changes in the Federal Rules regarding Electronic Discovery, a discussion of the current state of insurance coverage issues in the wake of L-J v. Bituminous, Hot Topics in Employment Law, and a practical discussion on the hiring and use of consultants and experts.

We are also fortunate to have two physicians attending this year's Joint Meeting to speak to us on medical issues. During the main seminar orthopedic surgeon Charles Thomas, M.D. will discuss a Physician's Perspective on the use of Medical Records during Cross-Examination of an Orthopedic Surgeon. In the Workers Compensation breakout session David Shallows, M.D. will help Workers Compensation practitioners understand Complex Regional Pain Syndrome.

We are also most excited to have two members of the judiciary speaking during this year's meeting. Friday's seminar session will end with what is sure to be both an erudite and humorous presentation by Circuit Court Judge James Lockemy. Saturday's highlighted speaker will be Burt Goolsby, Associate Justice of the South Carolina Court of Appeals. Justice Goolsby's presentation is titled, "Stone Soup for a Judges Soul – Lessons Learned from a Career on the Bench."

As usual, cocktail receptions will be held on Thursday and Friday evenings with dinner on your own. We will also continue our tradition of supporting the South Carolina Bar Foundation with a Silent Auction on Friday evening. Please make your room, spa, and dinner reservations as early as possible. You may do so by calling the Grove Park Inn at 800-438-5800 or by visiting the web site at www.groveparkinn.com.

We look forward to seeing you in Asheville!



2007

Spring

TRIAL ACADEMY

June 6 - 8

Greenville, SC

Summer

JOINT MEETING

July 26 - 28

The Grove Park Inn

Asheville, NC

Fall

ANNUAL MEETING

November 1-4

Pinehurst Resort

Pinehurst, NC

DRI REPORT

News from DRI
The Voice of the Defense Bar

by John S. Wilkerson III, DRI State Representative

Among the many benefits of DRI membership is the opportunity to share ideas, socialize and network with other defense lawyers throughout the country. One of those opportunities took place recently in Richmond, Virginia. The DRI Mid-Atlantic Regional Meeting was held on the beautiful weekend of April 20-21 at the historic Jefferson Hotel. Hosted by the Virginia Association of Defense Attorneys, the meeting was attended by over 30 defense bar leaders from South Carolina, North Carolina, Virginia, Maryland and the District of Columbia. The event was kicked off with a delightful dinner at the Commonwealth Club on Friday evening. Saturday morning was devoted to the business meeting, which included presentations by past DRI Presidents Richard Boyette and Bob Scott. John Willardson and Brian Beverly reported on the success of the North Carolina Association of Defense Attorneys' initiative to increase organized defense bar participation by members of large law firms. The remainder of the program consisted of a lively panel discussion of generational issues, moderated by Marisa Trasatti of the Maryland Defense Counsel and a very informative roundtable discussion of state and local defense bar issues. In addition to the writer, our President, Elbert Dorn, Executive Committee member, Gray Culbreath and Executive Director, Aimee Hiers, represented the SCDTAA at the meeting.

DRI past president, Bob Scott reported on the overwhelming success of the newly formed National Foundation for Judicial Excellence. The mission of the NFJE is to support a strong, independent judiciary by providing high quality educational programs. The third annual NFJE Judicial Symposium will be held at the Renaissance Hotel in Chicago on June 29-30, 2007, and will be attended by 150 state appellate judges from around the country, including South Carolina. SCDTAA past president Mills Gallivan is a member of the NFJE Board of Directors and will facilitate one of the discussion sessions at this year's Symposium. The title of the program is E-Discovery and Spoliation on Appeal -- the Convergence of Law and Technology. As the title suggests, the program will explore the challenges posed to the courts by electronic discovery issues and the computer technology underlying it, and the application of the rules of spoliation to this form of evidence. NFJE was initially formed with the financial support of DRI. As a 501(c)(3) entity, it must be self-sustaining at least by 2009. Bob Scott reported that the funding model for the NFJE includes contributions from state and local defense organizations (the SCDTAA has pledged $1000 per year for at least three years), law firms, corporate contributions and individual donations. A voluntary "opt-out" contribution of $25 is included on all DRI annual dues statements. Please consider making this contribution at your next DRI renewal date.

The 2007 Annual Meeting of DRI will be held at the Marriott Wardman Park in Washington, DC from October 10-14, 2007. Those who have attended past DRI Annual Meetings can attest that it is one of the finest meetings of its kind featuring blockbuster speakers, timely CLE topics and many opportunities for networking and socializing. Registration before September 21 entitles you to a $100 discount, so register early. On-line registration is available now at DRI.org.

Expert Evidence Bill

A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 12 TO TITLE 19 SO AS TO ENACT THE "RELIABILITY IN EXPERT TESTIMONY STANDARDS ACT" SO AS TO PROVIDE CIRCUMSTANCES UNDER WHICH LAY WITNESSES MAY OFFER OPINION TESTIMONY, ESTABLISH PROCEDURES AND STANDARDS FOR THE ADMISSIBILITY OF EXPERT WITNESS'S TESTIMONY, INSTRUCT THE COURTS ON THE INTERPRETATION OF THE CHAPTER, AND PROVIDE A DE NOVO STANDARD OF REVIEW FOR APPELLATE COURTS WHEN DETERMINING WHETHER A COURT APPLIED THE PROPER LEGAL STANDARD RELATED TO THE USE OF EXPERT TESTIMONY.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 19 of the 1976 Code is amended by adding:

"CHAPTER 12

Expert Witnesses

Section 19 12 110. This chapter may be cited as the 'Reliability in Expert Testimony Standards Act'.

Section 19 12 120 If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(1) rationally based on the perception of the witness;

(2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and

(3) not based on scientific, technical, or other specialized knowledge within the scope of Section 19 12 130.

Section 19 12 130. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise, if the:

(1) testimony is based upon sufficient facts or data;

(2) testimony is the product of reliable principles and methods; and

(3) witness has applied the principles and methods reliably to the facts of the case.

Section 19 12 140. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If it is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, then the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Section 19 12 150. (A) A witness qualified as an expert by knowledge, skill, experience, training, or education may only offer expert testimony with respect to a particular field in which the expert is qualified.

(B) An expert witness may receive a reasonable and customary fee for the rendering of professional services, provided that the testimony of an expert witness may not be admitted if compensation is contingent on the outcome of a claim or case with respect to the testimony being offered.

Section 19 12 160. If a witness is testifying as an expert, upon motion of a party, the court shall hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Sections 19 12 130, 19 12 140, and 19 12 150. The court shall allow sufficient time for a hearing and shall rule on the qualifications of the witness to testify as an expert and whether or not the testimony satisfies the requirements of Sections 19 12 130, 19 12 140, and 19 12 150. The hearing and ruling must be completed no later than the final pretrial conference contemplated pursuant to the South Carolina Rules of Civil Procedure, Rule 16. The trial court's ruling shall set forth the findings of fact and conclusions of law upon which the ruling to admit or exclude expert evidence is based.

Section 19 12 170. (A) Whether or not a party elects to request a pretrial hearing as contemplated in Section 19 12 160, all parties shall disclose to other parties to the litigation the identity of all persons who may be used at trial to present expert evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, must be accompanied by a written report prepared and signed by the witness. The report must contain:

(1) a complete statement of all opinions to be expressed and the basis and reasons for them;

(2) the data or other information relied on by the witness in forming his opinions;

(3) all exhibits to be used as a summary of or support for the opinions;

(4) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(5) the compensation to be paid for the study and testimony; and

(6) a listing of cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

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Commissioner Derrick L. Williams

by Christian E. Boesl

He thought he had finished litigating his last workers' compensation claim when he left the law firm of Collins & Lacy in Columbia, and started a new practice in business franchising with Nelson Mullins Riley & Scarborough until he received a call from Governor Sanford's office. "I was shocked to find out Governor Sanford was considering me for the vacant slot in the Workers' Compensation Commission," jokes Commissioner Derrick L. Williams. "I thoroughly enjoyed practicing workers' compensation early in my career and I am looking forward to the opportunity to hear claims from this side of the bench."

Prior to his confirmation by the South Carolina Senate in March 2007, Commissioner Williams was an associate in the Columbia offices of the Nelson Mullins Riley and Scarborough Law Firm. His practice with Nelson Mullins focused in the areas of business litigation, franchise distribution litigation and labor and employment issues. Prior to practicing in this area of the law, Commissioner Williams got his first taste of the workers' compensation arena while a practicing associate with Collins & Lacy, P.C. in Columbia. "As anyone would be, I was excited and at the same time nervous with the possibility of rendering judicial decisions affecting the lives of employees and employers in a workers' compensation scenario in South Carolina. Despite my mixed emotions, I was confident in knowing that I had a tremendous amount of experience litigating and trying more than 60 cases before the Commission while an associate at Collins & Lacy in Columbia." Commissioner Williams recalls having appeared before every current commissioner as an attorney with the exception of Commissioner Andrea Pope Roche.

Commissioner Williams earned a Juris Doctorate from the University of South Carolina School of Law in 2002, where he served as a member of the South Carolina Environmental Law Journal, Member of the USC School of Law Minority Recruitment Committee and a member of the Black Law Students Association. Commissioner Williams earned his Bachelor of Arts Degree from the College of Charleston with honors while he captained the College of Charleston's Cross Country Team.

Before being appointed as the newest Commissioner of the Workers' Compensation Board, Commissioner Williams has served in a number of capacities within the community and various organizations including a member of the John Dela Howe Board of Trustees and memberships with the following organizations: The Defense Research Institute; American Bar Association; South Carolina Bar Association; Richland County Bar Association; South Carolina Defense Trial Attorneys Association; College of Charleston Attorney Assistance Program; and the South Carolina Bar Foundation.

Speaking as to the transition from practicing attorney to Commissioner, "From my background of practicing with some of the best law firms in the state, I was more than prepared for the long hours I would have to put in as a Commissioner. As with any new job, getting settled into the role as Commissioner has been an enjoyable challenge."

In his spare time, Commissioner Williams enjoys spending time with his wife, Alana Odom Williams, an associate with Nelson Mullins Law Firm in Columbia, and their four-month- old daughter, Valerie Regan Williams.

FEATURE ARTICLE

The Aftermath of Phillip Morris USA v. Williams: Is evidence of acts against others safe bet or a gamble?

by Gray T. Culbreath

On February 20, 2007, the United States Supreme Court decided the case of Phillip Morris USA v. Williams, 127 S.Ct. 1057 (2007), the latest in a line of cases dating back to 1991, in which the Court has attempted to set forth a constitutional standard for punitive damages. While the Phillip Morris holding appears to provide some guidance as to what evidence is permissible in support of punitive damages, the 5:4 decision leaves the reader with as many questions as it does answers. The following article analyzes the Phillip Morris decision and whether some of the factors for the imposition of punitive damages set forth by the South Carolina Supreme Court in Gamble v. Stevenson, 305 S.C. 104; 406 S.E.2d 350 (1991) are now constitutionally impermissible.

The Phillip Morris case arose from a wrongful death suit brought by the Estate of Jesse Williams, a longtime smoker who died of lung cancer in 1997. In support of Williams' claim, Plaintiff's counsel made arguments to the jury that it should consider the harm to persons other than Williams. Plaintiff's counsel told the jury "think about how many other Jesse Williams in the past 40 years in the state of Oregon there have been . . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes ? . . . [C]igarettes . . . are going to kill 10 [of every hundred] [And] the market share of Marlboros [i.e., Phillip Morris] is one-third [i.e., one of every three killed]." Id. at 106. Phillip Morris sought from the Court a proposed jury instruction that the jury could not seek to punish Phillip Morris for injury to other persons not before the Court. Specifically, Phillip Morris asked the trial court to instruct the jury:

> That you may consider the extent of the harm suffered by others in determining what [the] reasonable relationship is between any punitive award and the harm caused to Jesse Williams by Phillip Morris' misconduct, [but] you are not to punish the defendant for the impact of the alleged misconduct on other persons, who may bring lawsuits of their own and which other juries can resolve their claims . . .

Id. The Judge refused to charge this and, instead, simply charged the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." Id.

The jury found Phillip Morris liable for both negligence and fraud and awarded $821,485.00 in compensatory damages and $79.5 million in punitive damages for the fraud claim only. Plaintiff's counsel successfully convinced the jury that Phillip Morris' conduct directed at the decedent and an unspecified number of unidentified potential Oregon plaintiffs justified a punitive award 97 times the amount of the compensatory award. On the negligence claim, the jury found Williams fifty (50%) percent at fault and, as a result, no punitive damages were awarded. At the post-trial motions stage, the trial court held that the punitive damage award was excessive under federal standards and reduced the amount to $32 million.

From that point, the case made its way through the Oregon Appellate Courts once and to the Supreme Court where it was remanded in light of State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003). On remand, the Court of Appeals of Oregon reaffirmed its own decision to reinstate the jury's punitive damages award of $79.5 million. In doing so, it concluded that the amount of the award "does not violate the due process clause under the guidelines provided by State Farm because the amount of the award is reasonable and proportionate to the wrong inflicted to the decedent and to the public of this state." Williams v. Phillip Morris, Inc., 193 Or. App. 527, 563 (2004). The Oregon Supreme Court subsequently upheld the Oregon Court of Appeals' decision affirming the punitive damages verdict. Williams v. Phillip Morris, Inc., 340 Or. 35 (2006). At that point, Phillip Morris once again petitioned the United States Supreme Court for *certiorari*.

The Supreme Court accepted *cert* and, in doing so, placed two issues before the Court. First, Oregon unconstitutionally allowed Phillip Morris to be punished for harming nonparty victims. The second issue presented by Phillip Morris' *cert* petition was whether Oregon had, in effect, disregarded the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

Justice Stephen G. Breyer delivered the majority opinion, which answered only the first issue. The Court did not reach the question whether the 97:1 ratio between punitive and compensato-

ry awards was constitutionally excessive. The Supreme Court explained that constitutionally acceptable boundaries prohibit a jury from exacting punishment upon defendant for injuries allegedly caused by the defendant to nonparties. This favorable decision to defendants is compromised by the holding of the same majority that a jury may consider a defendant's acts to nonparties when evaluating the reprehensibility of a defendant's misconduct. Phillip Morris, 127 S.Ct. at 1059-60. Notwithstanding this confusion, the majority's opinion as to acts against nonparties raised significant questions about the propriety of Gamble v. Stevenson and certain of the factors contained therein.

The language of the majority opinion on nonparty conduct is strong. The opinion begins with the statement that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." Phillip Morris, 127 S.Ct. at 1063. In so holding, Justice Breyer recognized the practical problems that result when a plaintiff is allowed to inject nonparty evidence into a proceeding. The following quote illustrates the problems that most defense counsel have when these issues are presented and the difficulties that are presented when trying tactically to decide whether to respond to those claims or focus on the case that you were hired to defend:

> Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.
>
> For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages refer – risks of arbitrariness, uncertainty and lack of notice – will be magnified.

Id. at 1063. (Citations omitted). The concerns raised by the majority are those which all of us who try cases with a punitive damages component involving other acts are faced. However, the Supreme Court's previous opinions were less than clear as to the extent those holdings explicitly outlawed evidence of acts against nonparties. Justice Breyer resolved this issue, stating "we can find no authority supporting the use of a punitive damages awards for the purpose of punishing a defendant for harming others." Id. at 1063. The Court unambiguously stated "[w]e did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now." Id. at 1065. This is where the clarity of the majority opinion ends. Even though the majority expressly admonishes a jury's direct punishment of a defendant for alleged harm to nonparties, it then turns and affirmatively endorses a jury's consideration of alleged harm to nonparties under the guise of the assessment rubric of reprehensibility first set out in BMW of North America v. Gore, 517 U.S. 559 (1996). In addressing this piece of the argument, the majority states:

> Phillip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public and so is particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public or the converse.

Id. at 1064. This opinion leaves the reader with some confusion as to the full extent of the holding. The decision leaves the lower courts and counsel with a quagmire of trying to sort out how evidence of conduct involving nonparties may or may not be used. The Court essentially left it to the states to try to determine how this evidence, if introduced, complies with the principals set forth in the case:

> It is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one . . . – it is particularly important that states avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the due process clause requires states to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.

Phillip Morris, 127 S.Ct. at 1064. The practical problem which results from the Phillip Morris opinion is that it muddies the already confusing waters of punitive damages. On one hand, a jury is instructed to consider the defendant's alleged misconduct and resulting harm to nonparties in determining the reprehensibility of a defendant's conduct (i.e., in its determination whether punitive damages are appropriate in the first instance), but, on the other hand, is effectively told, you cannot consider the conduct in calculating the amount of punitive damages to award. The inconsistency of this holding simply pro-

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Phillip Morris v. Williams Cont.

vides a possibility of more appeals. When contrasted against the factors of Gamble v. Stevenson, the prospect of that appeal becomes even greater and the challenge at trial even greater.

The Gamble opinion, decided in 1991, held that a trial court could consider the following conduct in evaluating the propriety of a punitive damages award.

1. Defendant's degree of culpability;
2. Duration of the conduct;
3. Defendant's awareness or concealment;
4. The existence of similar past conduct;
5. Likelihood the award will deter the defendant or others from like conduct;
6. Whether the award is reasonably related to the harm likely to result from such conduct;
7. Defendant's ability to pay; and
8. As noted in Haslip, other factors deemed appropriate.

Gamble, 406 S.E.2d at 354. Among the 8 factors, factors 2 (duration of the conduct), 3 (Defendant's awareness or concealment), and 4 (existence of similar past conduct) all provide a trial court with the mechanism to admit evidence of acts against others.

To date, very few reported cases in South Carolina have addressed specific Gamble factors or the specific ones set forth above. There remains a lively debate as to whether Gamble is constitutionally permissible. (See March 2007 South Carolina Lawyer Letters to the Editor, pp. 10-11). However, an examination of past cases demonstrates the difficulty of prior acts.

Start with the case of Burbach v. Investors Management Corporation, 326 S.C. 492; 484 S.E.2d 119 (Ct. App. 1997). In that case, a landlord/tenant dispute, revolved in part around the admission of evidence regarding the landlord's prior conduct withholding tenants' security deposits. There, it was deemed admissible not only under the first five Gamble factors (including the existence of similar past conduct) but also the Unfair Trade Practices Act cause of action. The Court of Appeals concluded that the evidence "was relevant to the first five factors set forth in Gamble." The Court of Appeals has admitted similar evidence in more recent cases. In Mackela v. Bentley, 365 S.C. 44; 614 S.E.2d 648 (Ct. App. 2005), the Court of Appeals in conducting a review of a $50,000.00 punitive damages award found that the admission of other suits filed against the defendant Automotive Finance Corporation alleging similar conduct was admissible under factor 4 under past similar conduct. Under a Phillip Morris analysis, that evidence is most likely not admissible without further analysis as to how it might relate to a reprehensibility prong which, although recognized by the Campbell Court, is not a specific factor enumerated in Gamble.

The opinions of the South Carolina Supreme Court involving evidence of other acts have been more consistent with the Phillip Morris analysis. For example, in Durham v. Vinson, 360 S.C. 639, 602 S.E.2d 760 (2004), the Supreme Court reversed a punitive damages verdict holding that under Campbell, evidence should not be submitted to the jury that allows the punishment of a defendant for bad acts that do not harm the plaintiff. In remanding the case for a new punitive damages phase, the Court found error in the submission to the jury of the prescription of valium to other members of the plaintiff's family. Chief Justice Toal held:

> We find that the Trial Court erroneously allowed the valium prescription evidence. The evidence was inappropriate because it concerned Dr. Vinson's misconduct toward a third party, rather than his misconduct toward Durham. We disagree with the Trial Court's finding that the evidence was relative to the Gamble factor of concealment. The finding that the evidence is relevant to whether Dr. Vinson attempted to conceal his misconduct toward Durham is attenuated . . . . By allowing the evidence, the Trial Court allowed the jury to punish Dr. Vinson for a bad act unrelated to his actions toward Durham. See State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 409, 123 S.Ct. 1513, 1515, 15 L.Ed.2d 585 (2003).

Id. at 567. The Supreme Court reached a similar result in Webb v. CSX Transportation, Inc., 364 S.C. 639, 615 S.E.2d 440, rejecting the Plaintiff's introduction of evidence of other incidents:

> It is clear that much of the evidence of acts in other jurisdictions, including CSX and other railroads and of acts unrelated to crossing safety in South Carolina admitted in this trial is not constitutionally permissible under Campbell.

Id. at 450. Although the Webb evidence appears to be from out of state and, therefore, clearly inadmissible under Campbell, there was at least some suggestion in the opinion that some of the evidence arose from South Carolina conduct wholly unrelated to the plaintiffs. Clearly, under the Phillip Morris analysis, the Court got this right.

Going forward, courts and counsel will have to find the delicate balance between excluding evidence of other conduct to punish the defendant but at the same time, allowing it in for the purposes of a reprehensibility analysis. This, in the writer's opinion, will be very difficult. Even with proper curative instructions and argument by counsel, the reality is that you cannot put the evil back in Pandora's box and avoid the jury's consideration of other acts under Phillip Morris. The internally inconsistent holding of this decision provides yet another pathway for a punitive damages appeal.

Beware Retroactive Application of "New Duties": Protecting Your Clients From Retroactive Liability

FEATURE ARTICLE

by Wendy J. Keefer

"[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." McCaskey v. Shaw, 295 S.C. 372, 368 S.E.2d 672, 673 (Ct. App. 1988) (citing Bartlett v. Nationwide Mut. Fire Ins. Co., 290 S.C. 154, 157, 348 S.E.2d 530, 532 (Ct. App. 1986)). "Prospective application is required when liability is created where formerly none existed." Hupman v. Erskine College, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984).

These rules, however, do not always prevent application of a newly created duty or liability to the defendant in the very case in which the potential liability is first recognized. Nor have these rules, as evidenced by the various justices' disagreement on retroactive application, provided clear direction as to how to determine whether creation or recognition of a particular liability might be applied to conduct committed prior to the courts' legal change. See Marcum v. Bowden, et al., Op. No. 26259, 2007 S.C. LEXIS 45 (S.C. Feb. 5, 2007) (creating a new common law duty imposed on those who serve alcohol to underage, 18-20 year old, guests and to third parties who are injured by those guests). Adding additional uncertainty to whether a court decision will apply retroactively or prospectively is the third category of application used by the courts – selective or modified prospectivity. See McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) (A court uses selective or modified prospectivity where a rule is applied to the case at bar, but not other cases involving pre-decision conduct, and to all future cases.).

Two recent decisions of the South Carolina Surpeme Court highlight the difficulty in predicting, under these general rules, whether the creation of a new potential liability will be applied to past conduct, namely in the very case in which the courts first create or recognize the liability. See Marcum, supra; and Hardee v. Bio-Medical Applications of S.C., Inc. d/b/a Conway Dialysis Center, 370 S.C. 511, 36 S.E.2d 629 (2006).

In Hardee, the South Carolina Supreme Court concluded that this State's law recognizes a duty running from medical providers to third parties. Prior to the decision in Hardee, the law indicated that "a physician's malpractice in treating a patient may form the basis of a negligence action against the physician by a third party in limited circumstances," but that the Court had "never defined what constitutes the limited circumstances in which a third party can maintain a suit against a medical provider." Hardee, 370 S.C. at 515, 636 S.E.2d at 631 (discussing the Court's decision in Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998) wherein the existence of limited exceptions to the general rule that a third party had no claim against a medical provider was recognized). Without discussing the reason, the Court applied this new or expanded liability to the case at bar and made no pronouncement that the newly recognized duty would not apply to all cases. Indeed, the opinion does not discuss retroactive or prospective application at all other than to make clear the new duty was to be applied on remand in Hardee.

In Marcum, the Court similarly recognized a new duty – that of a social host to its underage guests, those guests who are not minors but who have not yet reached the age of 21, and to third parties when the social host knowingly and intentionally serves alcohol to the underage guest. Despite criminal statutes prohibiting the transfer or serving of alcohol to those under 21, the Court refused to apply this new liability retroactively, including application to the present case: "Because our decision today creates tort liability where formerly there was none, a social host will be liable only for claims arising after the effective date of this decision." Marcum, 2007 LEXIS at *2 (citing Toth v. Square D Co., 298 S.C. 6, 377 S.E.2d 584 (1989)). In the majority opinion in Marcum, the Court appears to apply an earlier espoused test for retroactive application of judicial decisions creating new liabilities or potential liabilities – retroactivity is permissible where the newly recognized legal duty or liability is simply a legal extension that was clearly "foreshadowed." Id., at *3.

Chief Justice Toal, though concurring in the recognition of the newly created social host duty, filed a separate dissent relating to the Court's decision not to apply the new duty to the current litigants. The Chief Justice's opinion rests in part on the relative fairness. In other words, "[a]lthough no civil liability existed for social hosts at the time of these incidents, [it is] difficult to believe that the defendants were ignorant of any potential liability which could result from serving alcohol to underage drinkers in light of the existence of criminal statutes prohibiting such behavior and our

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expanding extension of liability in the commercial context." Marcum, 2007 LEXIS at *16, n.10 (Toal, C.J., dissenting). Thus, though Chief Justice Toal did not agree a clear foreshadowing of the legal change was required to justify selective prospective application of a new duty (application to the current case and all future cases), she regarded this matter as one where clear foreshadowing of the potential for a change in the duties of social hosts did exist. Moreover, the dissent makes clear that given that some duty on the part of social hosts should have been expected, it was more unfair not to provide the current plaintiffs with the benefit of the legal change they effected:

> In my view, we should extend our decision to impose limited first and third party social host liability to the cases before us today and all future cases which arise after the filing of our opinion. Resolving the cases in this manner would, in my opinion, allow the plaintiffs the benefit of the change in the law which they induced without making our decision retroactive.

Id.

At first blush, these opinions may appear inconsistent. More likely, though, they are the result both of application of a very subjective test of fairness – whether incorporating the idea of legal foreshadowing or not – and the result of the arguments before the Court. Clearly, judicial opinions recognizing completely new causes of action are not likely to apply retroactively or even very often via selective prospective application. See, e.g., Ludwick v. This Minute of Carolina, 287 S.C. 219, 337 S.E.2d 213 (1985) (recognizing a tort cause of action for retaliatory discharge and applying that decision solely prospectively); McCaskey, 295 S.C. 372, 368 S.E.2d 672 (recognizing the tort of negligent infliction of emotional distress and applying that decision prospectively). Similarly, most opinions in which the Court abolishes a preexisting immunity are applied prospectively; though most of those decisions also include application, at least in part, of statutory abrogations of immunity. See, e.g., Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978) (statute abrogating parental immunity not applied retroactively); Walton v. Stewart, 277 S.C. 436, 289 S.E.2d 403 (1982) (abrogation of interfamily immunity not retroactively applied); and Douglass v. Florence Gen. Hosp., 273 S.C. 716, 259 S.E.2d 117 (1979) (modifications, both judicial and statutory, to hospital charitable immunity not applied retroactively).

On the other hand, where the decision merely expands on a well established basis for liability and prior cases at least hint at the likely outcome in the pending case – where the court's opinion is clearly foreshadowed by earlier decisions on similar issues – retroactive application, or at least selective prospective application, is appropriate. See Toth, 298 S.C. 6, 377 S.E.2d 584. In Toth, the South Carolina Supreme Court, answering a certified question from the United States District Court, determined that its decision in Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987) was properly applied retroactively. In Small, the Court concluded that employee handbook provisions could be introduced as evidence in support of an employee's claim of a breach of the employment contract. Rather than creating a new cause of action or an unexpected liability, the Court reasoned that since no new contractual obligation was created – the companies themselves having created any such obligations via their handbooks – and given the prior introduction of handbook provisions in employment cases, the litigants should not be surprised introduction of such provisions would be permitted in their case. Toth, 298 S.C. at 10, 377 S.E.2d at 586 ("In light of these past decisions upholding consideration of handbook provisions to construe employment contracts, respondents' claim that the Small decision was totally unforeshadowed is untenable.").

When the issue at hand can be viewed not as a wholly new cause of action or duty, however, but as a logical extension of a previously recognized duty or an additional exception to a general rule of no duty, the Courts may impose expanded responsibilities on current litigants for conduct undertaken at a time when it was not clear liability could be imposed for their actions. The potential for this application of judicial opinions is worth noting in any case in which a new or expanded duty or basis for liability is argued and counsel should be diligent in ensuring to raise before all courts, preserving for appeal, the proper application of court decisions.

FEATURE ARTICLE

Firm Life

by Wendy J. Keefer

Letter from an Associate...

Dear Partner:

As you know, I have been a loyal and hard worker at the firm for five (5) years. During that time, I have enjoyed all the mentoring and information you shared with me. I am certainly a better lawyer for it. It is my hope that I will continue to grow in the firm environment and to develop my own legal practice in order to be considered for partnership in the near future.

To aid in my attempts at personal and professional growth, I request the following support and adjustments to current working arrangements:

1. If I am expected to cultivate my own clients, I respectfully request that my billable hours goal be lowered from 2600 to 2000. Despite my attempts to alter the fact, each day only has 24 hours and, unfortunately, in addition to my work I must also fit in eating, sleeping, participating in the various community and professional organizations in which the firm has "encouraged" me to take an active role, and occasionally reminding my family who I am.
2. If I am expected to be profitable for the firm, I respectfully request that you stop assigning to me only those files and clients that either fail to pay their legal fees or pay less than half the hourly rate set by the firm as my "target" or "default" hourly rate. I am not opposed to pro bono work but please provide some balance by spreading out more of the better paying work.
3. Though I am sure that your experience provides you with better insight on this point, I continue to be baffled by the proper procedure for obtaining staff assistance. Our joint legal assistant remains unwilling to perform any tasks on my behalf if there is any task pending for you. I appreciate that you certainly take priority in the general sense, but when you assign me to help you with certain matters I am unable to do so if "our" assistant fails to assist me with that work.
4. Despite the fact that I may not appear on a balance sheet to be a profitable entity, I do believe the quality of my legal work is beyond question. Thus, though seeking to bill fewer hours, I would respectfully request a pay raise. I understand from several of my "friends" that I am being severely underpaid in comparison with other lawyers with my experience.
5. Finally, I believe my professional development will be benefited from attending certain seminars this year focusing on areas of the law in which I am interested. Conveniently, these seminars are being conducted in Hawaii, Italy and one is even right here in the continental United States. I am sure the expense to the firm of my attendance at these events will be repaid by the valuable information I will learn. By the way, I assume my spouse may attend these events with me, as our planned three (3) week vacation is not scheduled to take place until the end of the year.

In closing, I appreciate all you have done for me over the years. Furthermore, I appreciate the firm's continued understanding and support of my interests both in furthering my legal career and in valuing time with my family.

Sincerely,
Your Faithful and Brilliant Associate

Letter from the Partner...

Dear Associate:

As you know, the firm is thrilled to have you as part of our team. You have developed nicely as a lawyer. I am, however, concerned about your failure to see the big picture in this situation and your obviously lacking negotiation skills. Please take the following responses to your requests as constructive criticism:

1. If the firm agrees to your reduced workload, someone else will have to make up those missing hours. If your other obligations are interfering with your ability to meet your firm goals perhaps you need to work on prioritizing. In this regard, I feel we defense lawyers are better equipped. By perfecting the ability to carve our lives into 6 minute segments, let me provide the following guidance for your daily scheduling:

   - Arrive at office at 6:00am

   - Work through lunch – there is a great sandwich shop across the street and

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FIRM LIFE CONT. FROM PG 21

the desks in the office are plenty large to accommodate your lunch

- Leave the office at 7:00pm

Accounting for bathroom breaks and a few personal tasks, you should have billed about 12 hours

- Attend community and professional organization meetings or engage in marketing efforts to find the firm new, high paying clients from 7-8pm

- Eat dinner with your family at 8:30pm

- Work from 9-10pm, which allows you to choose whether to work on billable or nonbillable matters

- Go to bed at 10pm to permit you to get up at 5.

Even if we permit you to take a full two week vacation, this schedule should result in your billing 3000 hours. Thus, you should view your current 2600 billable hour requirement as already accommodating a reduced schedule.

2. I am assigning the files to you that are commiserate with your experience and competence at this time. In addition, it is far less economically sound for me to perform tasks for these low paying clients than it is for the firm to have you work on them. Though I am certainly interested in your success at the firm, we are a team here and everyone needs to pitch in.
3. My legal assistant has been with me over 20 years and is probably better at prioritizing than you are. You should appreciate her experience.
4. If you bill 3000 hours this year, I will suggest a raise. Until that time, I believe your compensation adequately reflects your reduced billable requirements.
5. I have located three wonderful seminars for you to attend this year. Conveniently, they are all in town, which will permit you much more time for all your other activities given that there will be no travel time required.

As always, I am here to help you. Please feel free to come to me with any concerns, suggestions or questions.

Sincerely,
The Partner

P.S. – I am still waiting on that research we talked about last night.

EXPERT EVIDENCE BILL CONT. FROM PAGE 14

(C) These disclosures must be made at the times and in the sequence directed by the court. In the absence of other direction from the court or stipulation by the parties, the disclosures must be made at least ninety days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence of an expert on the same subject matter identified by another party pursuant to subsection (B), within thirty days after the disclosure made by the other party.

(D) A party may depose a person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required pursuant to subsection (B), the deposition may not be conducted until the report is provided.

Section 19 12 180. In interpreting and applying the provisions of this chapter, the courts of this State must be guided by the opinions of the Supreme Court of the United States in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); Weisgram v. Marley, 528 U.S. 440 (2000), and their progeny. In addition, the courts of this State may draw from other precedents binding in the federal courts of this State applying the standards announced by the Supreme Court of the United States in the foregoing cases.

Section 19 12 190. (A) As the proper construction of the expert evidence admissibility framework prescribed by this chapter is a question of law, the appellate courts of the State shall apply a de novo standard of review in determining whether the court fully applied the proper legal standard in considering the admissibility of expert evidence.

(B) As the application of this chapter to determine the admissibility of expert testimony is a question of fact, the appellate courts of the State shall apply an abuse of discretion standard in determining whether the court properly admitted or excluded particular expert evidence."

SECTION 2. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 4. This act takes effect upon approval by the Governor and applies to all actions commenced on or after the effective date of this act.

Case Notes

State

Marcum v. Bowden and Barnes v. Cohen Dry Wall Inc., Op. No. 26259 (S.C. Feb. 5, 2007).

As the result of petitions for rehearing in each of these cases, they were consolidated and an opinion addressing them both refiled on February 5, 2007, substituting for the original opinions.

These cases present the issue whether an adult social host who serves alcohol to persons between the ages of 18-20 – individuals who in all aspects other than consumption and purchase of alcohol are treated by the law as adults – owes a duty to that guest or to third parties injured or killed by the guest in an alcohol related accident. The Court answers that question in the affirmative, recognizing a new duty on the part of social hosts:

> An adult social host who knowingly and intentionally serves, or causes, to be served, an alcoholic beverage to a person he knows or reasonably should know is between the ages of 18 and 20 is liable to the person served and to any other person for damages proximately resulting from the host's service of alcohol.

The duty recognized was a common law duty. The Court majority refused to base its conclusion on various statutory mandates governing the provision of alcohol to those under the legal drinking age. The Court also refused to hold a social host to a higher standard than commercial vendors or alcohol providers.

The Court, however, did not apply this newly identified duty to the present cases. Instead, the duty only applies to future cases and has no retrospective application. Chief Justice Toal, who concurred in the recognition of the duty, disagreed with the majority's refusal to apply the new duty to the very litigants whose efforts resulted in its recognition. Interestingly, the extended duty recently recognized by the Court in *Hardee v. Bio-Medical Applications of S.C., Inc. d/b/a Conway Dialysis Center* was applied retroactively to the case in which the duty to third persons at risk of injury from an outpatient after leaving the center was recognized.

Armstrong v. Food Lion, Inc., Op. No. 26235 (S.C. Dec. 11, 2006).

Plaintiffs, a mother and son, were shopping at the Winnsboro Food Lion. As the son, Ronnie Armstrong, walked down a store aisle, three men dressed in Food Lion uniforms spoke to the young man and then one of the men, Byron Brown, attacked him with box cutter. When the mother approached to try to stop the altercation, she was injured as well. The evidence established that Ronnie Armstrong and Brown had a history, having had a prior altercation a couple years earlier during which Brown threatened to kill Ronnie. Moreover, Plaintiffs admitted that the three apparent Food Lion employees did not appear to be "working" but were "goofing off" just prior to the attack. Ronnie and his mother sued Food Lion asserting causes of action for assault, battery, outrage, premises liability, negligence and negligence per se. The trial court granted Food Lion's directed verdict on most claims, but a jury returned a verdict in favor of Plaintiffs. Plaintiffs appealed the trial courts directed verdict on their claims of assault, battery, and outrage.

The trial court based its decision as to directed verdict on the fact that the three men did not appear to be acting within the scope of their employment at the time of the attack. The Court of Appeals affirmed that decision. The Supreme Court also affirmed, explaining that "[t]he only reasonable inference from the testimony is that Brown and Cameron [one of the other attackers] attacked Ronnie for their own personal reasons and not for any reason related to their employment. They were acting 'to effect an independent purpose of their own.'"

The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc., Op. No. 4198 (S.C. Ct. App. Jan. 16, 2007).

This action involved claims that Orkin failed adequately to perform annual inspections of the church's property pursuant to the contract between the parties resulting in the failure to detect termite infestation. After a long trial, the jury found in favor of Orkin. The church filed a motion for a new trial based on juror misconduct. Following the trial court's denial of that motion, the church appealed and the Court of Appeals reversed and remanded this matter for a new trial.

Continued on page 24

Case Notes Cont.

During the course of the trial the judge instructed jurors not to discuss the case prior to being instructed to do so or attempt to investigate the case on their own. Despite these instructions, one juror apparently discussed the merits, with fellow jurors and others, throughout the presentation of the evidence and attempted to investigate the church and inform the other jurors of what she found. An alternate juror reported this misconduct to the judge who ultimately concluded the juror's failure to follow the relevant instructions did not influence the other jurors. The trial judge focused his inquiry into the misconduct on the other eleven jurors rather than on the one problem juror.

The appellate court did not agree with this focus. The court explained the following in connection with juror misconduct:

> The question, however, of whether the offending juror's comments and actions had any influence upon the other jurors is not the sole determining factor as to whether the misconduct warrants a new trial. A jury, after all, is composed of twelve, not eleven, jurors, and it acts as a unit; thus, 'the misconduct of any juror, actual or implied, which . . . prevents a fair and proper consideration of the case is misconduct of the entire jury, vitiating its verdict and requiring a new trial.

The appellate court further stated that "[t]he prohibition against jurors discussing a case until the trial judge submits it to them for deliberation and decision involves, our supreme court has held, a matter of fundamental fairness." Where, as here, the juror's misconduct included talking about the fact that everyone knew the church had the money to fix the building, that old buildings fall down simply because of age, that her mother confirmed that "the historic people have money and should clean up their own mess," talking with jurors about an inquiry of a painter friend of the juror's regarding the possibility the walls collapsed due to hidden termite damage, and the like, it was clear that juror was unconcerned about granting the litigants a fair and impartial trial. Thus, a new trial was warranted.

Judge Stilwell dissented from the court's opinion. The primary basis of this dissent rested on the fact that the misconduct was reported by an alternate juror who was not in a position to opine as to the influence the juror's misconduct had on the actual jury deliberations and decision.

Wright v. Craft Auto Mart, Inc., Op. No. 4181 (S.C. Ct. App. Nov. 27, 2006).

Wright purchased a Ford F-150 truck from Craft Auto Mart. Craft represented to Wright that the truck had never been wrecked, that Craft purchased the truck at a State Farm auction and then repaired it for sale. The truck, however, had been wrecked. Craft understood that the wreck resulted only in sheet metal damage. After purchasing the truck at the auction, Craft had it repaired at Bestway Body Shop, which repairs used genuine Ford parts as well as non-Ford parts.

While test driving the truck, Wright noticed the check engine and seat belt lights were illuminated. Craft took the truck to Bob Bennett Ford in connection with the warning lights. At the dealership, Craft learned that any parts damaged in the wreck and painted would not be covered by any manufacturer's warranty remaining on the vehicle and that the warranty would not cover any parts not replaced by genuine Ford parts. Thus, the used airbags and other non-Ford parts used to repair the truck would not be covered by any manufacturer's warranty.

At the time Wright purchased the truck, he received a Buyer's Guide that state the truck was sold "as is-no warranty." Wright asked Craft about this notation, Craft's having represented there was a manufacturer's warranty. Upon that inquiry, Craft noted on the paperwork, "factory warranty, if applicable." When Wright further inquired as to the "if applicable" qualification, Craft explained he added that language because he was not sure how much time was remaining on the warranty. Craft never mentioned that many of the parts would not be covered by the warranty regardless of time.

Wright sued after experiencing numerous difficulties with the truck. Wright's suit included causes of action for negligence, unfair trade practices, and violation of the Dealers Act. A jury returned a verdict in favor of Wright on all three causes of action. Being required to choose his remedy, Wright chose to recover under the UTPA under which he sought and was awarded treble damages and attorneys' fees. Craft appealed.

The Court of Appeals upheld the jury's verdict and the trial court's award of treble damages, fees and costs. This decision was based, in part, on the legal question whether Craft had a duty to disclose the truck had been wrecked and repaired. The trial court found such a duty and the appellate court agreed, though asserting that no such duty to disclose was necessarily required to succeed under the UTPA: "With reference to the particular transaction in question, we conclude from the circumstances of the case and the nature of their dealings a duty to disclose existed because of the trust and confidence Wright reposed in Craft's representations."

Hardee v. W.D. McDowell and S.E. Smith Constr. Co., Op. No. 4206 (S.C. Ct. App. Feb. 12, 2007).

S.E. Smith Construction's insurer appealed a decision of the Workers' Compensation Committee that it must provide coverage for injuries sustained by an employee of one of S.E. Smith Construction's subcontractors, McDowell. McDowell regularly acted as a subcontractor for S.E. Smith Construction. At the outset S.E. Smith Construction offered to pay the premium for workers compensation insurance and to deduct payments for that premium on a weekly basis from funds owed to McDowell. McDowell, however, presented a certificate of insurance it procured directly. That certificate of insurance represented coverage during the period January 30, 2002 to January 30, 2003. Following presentation of this certificate, McDowell worked on several jobs for S.E. Smith Construction. No other certificate of insurance or proof of coverage was requested by S.E. Smith Construction.

In summer 2002, McDowell began working on a job for S.E. Smith Construction related to the construction of the Socastee library. During that job, one of McDowell's employees was injured. As it turned out, without the prior knowledge of either the contractor or subcontractor, the McDowell policy had been canceled the day prior to the employee's injury. S.E. Smith Construction, as the employee's statutory employer, sought indemnification from the South Carolina Uninsured Employers' Fund. To be entitled to such indemnification, however, the employer must comply with section 42-1-415.

Section 42-1-415 provides that a contractor may recover from the fund if the contractor submits "documentation to the commission that a . . . subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the . . . subcontractor was engaged to perform work." The trial and appellate courts interpret this statute to require proof of coverage be obtained at the start of each individual job – "at the time the . . . subcontractor was engaged to perform work." This requires proof of insurance be obtained at the start of each new job rather than on a periodic – e.g., yearly – basis. S.E. Smith Construction failed to obtain documentation of coverage at the start of the Socastee library job and, thus, did not comply with the statutory prerequisites for indemnification from the fund.

Barton v. lyanel Enterprises and Total Home Exteriors, Inc., Op. No. 4197 (S.C. Ct. App. Jan. 16, 2007).

In this workers' compensation matter, the South Carolina Uninsured Employers' Fund appealed an order that it provide coverage for an injured employee based on the statutory employer/contractor Total Home's compliance with 42-1-415, requiring the collection of documentation of the subcontractor's insurance. The subcontractor, lyanel, provided a certificate of insurance issued by the Jackie Perry agency. Unfortunately, the insurance agent providing the certificate failed to actually obtain coverage. The Fund challenged whether Total Home complied with 42-1-415 given that the certificate of insurance was not signed.

As the appellate court explained, though, "the statute does not require a signed Certificate of Insurance. It merely states, '**a standard form acceptable to the commission**.'" The commission accepts certificates of insurance, as evidenced by the Commission and the Appellate Panel's conclusions that Total Home did comply with the statutory requirements necessary to trigger the Fund's obligation.

Federal

Eckelberry v. ReliaStar Life Ins. Co., No. 06-1020 (decided November 17, 2006).

Earl Eckelberry was fatally injured when he crashed into a parked tractor trailer. His blood alcohol level at the time of the crash was above the legal limit. Eckelberry's ex-wife was still the named beneficiary on an ERISA life insurance policy provided to Eckelberry by his employer. She requested payment to her of the benefits provided under the policy. ReliaStar Life, both the administrator and insurer, denied the claim.

Benefits were payable, per the insurance contract, when an insured dies "due to an accident." An accident was defined as "an unexpected and sudden event which the insured does not foresee." Neither "unexpected" nor "foreseeable" are defined in the policy. The policy provides that the administrator has final discretion to determine questions of eligibility for benefits and to construe the plans terms. ReliaStar Life determined that Eckelberry's death was not an accident and denied benefits. Eckelberry's ex-wife filed suit. The district court agreed with the beneficiary's claims that Eckelberry did not expect to crash and that serious injury was not highly likely when he decided to drive. The Fourth Circuit reversed.

The Fourth Circuit recognized that when an ERISA plan vests the administrator with discretion to determine benefits eligibility, as this plan did, courts review the administrator's decisions merely for abuse of discretion. Where the plan administrator is also the insurer a modified abuse of discretion standard is applied by lessening the deference to the

Continued on page 26

administrator/insurer's determination to the degree necessary to "neutralize" any conflict of interest. Under this standard of review, the court analyzed the meaning of "unexpected" and "foreseeable," using a test adopted by the First Circuit in *Wickman v. Northwestern Nat. Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990). The Wickman test requires the court to determine, if possible, the subjective expectations of the insured and whether a reasonable person in the insured's position would have expected the injury as highly likely to occur as a result of the insured's conduct. In this case, the court was unable to determine the subjective expectations of Eckelberry and was forced to move to the second part of the Wickman test – the objective expectation of injury given the insured's conduct.

Federal courts being nearly unanimous in concluding that alcohol-related injuries are not "accidental" under insurance contracts governed by ERISA, the Fourth Circuit concluded that it was not an abuse of discretion in this case for the plan administrator to deny the benefits. However, the court refused to adopt a per se rule that in all circumstances involving drunk driving there will be no accident triggering benefits under a relevant policy.

Korotynska v. Metropolitan Life Ins. Co., No. 05-1613 (decided December 13, 2006).

Plaintiff was insured under her former employer's ERISA plan for short and long term disability. While still employed, she collected short term disability benefits and when those benefits expired she filed for long term disability benefits. Benefits were paid for two years, but upon review of her claim she was determined to be no longer eligible for additional benefits. Plaintiff filed suit seeking equitable relief via an order that Defendant cease engaging in improper claims procedures.

Affirming the district court's decision, the Fourth Circuit concluded that individualized equitable relief under § 1132(a)(3) is normally appropriate only for injuries that cannot be adequately redressed by ERISA's other provisions. Given Plaintiff's continued assertion that she was not renouncing any rights to pursue her individual claim for benefits and admitted that her whole purpose in this case was to recover the benefits she was owed.

Section 1132(a)(1)(B) provides that a plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." With this recourse available to her, Plaintiff could not seek individualized equitable relief. Simply characterizing the relief sought as the reform of "the systemic improper and illegal claims handling practices" used by Defendant does not alter the fact that recourse existed under ERISA for the Plaintiff's actual denial of benefits claim and it was through that legal process she must proceed rather than seeking equitable relief.

Steelman v. Hirsch, No. 06-1007 (decided January 10, 2007).

Steelman and Hirsch lived together as romantic partners. Hirsch, having started a business, Hair of the Dog, permitted Steelman to work for her. Steelman alleged that the two agreed to share the business. As evidence of her claimed ownership interest in the business Steelman asserted that the two used the business to pay their joint personal living expenses and that she was promised a portion of the business. Steelman worked full-time at Hair of the Dog for four years. She received health insurance through the company and was occasionally, though not regularly, provided pay checks to substantiate the company's claim she was on its payroll for insurance eligibility purposes. When the romantic relationship soured, Steelman claimed her "promised share" of the business. Hirsch claimed that she operated the business as a sole proprietorship at all times and never promised any type of partnership or other ownership interest to Steelman. Hirsch further claimed that the expenses the couple incurred far exceeded the earnings of the business, causing Hirsch to borrow approximately $100,000 from her parents.

Steelman claimed alternatively asserting that she either had a partnership interest in the business or that she was an employee and, therefore, due additional wages under the Fair Labor Standards Act. As there was clearly no employment relationship between the two, the FLSA claim was dismissed. "The intended lifetime partnership [Steelman] described was not 'the bargained-for exchange of labor for mutual economic gain that occurs in a true employer-employee relationship.'"

HEMPHILL AWARD

Call For Nominations

CRITERIA

1. ELIGIBILITY

(a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.

(b) The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.

2. CRITERIA/BASIS FOR SELECTION

(a) The award should be based upon distinguished and meritorious service to legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.

(b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.

(c) The candidate may be honored for recent conduct or for service in the past.

3. PROCEDURE

(a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community and the reasons why the nominee is being put forward. Nominations should be directed to the President of the Association prior to the joint meeting each year.

(b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association at its Annual Meeting of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."

(c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee, deems an award appropriate, but not more frequently than annually.

4. FORM OF AWARD

(a) The recipient shall receive an appropriately engraved plaque commemorating the award at the annual meeting.

(b) The family of the late beloved Robert W. Hemphill; in the person of Harriet Hemphill Crowder of Mt. Pleasant has consented to having the award named for the late United States District Judge, Robert W. Hemphill. When possible, the Association shall have a member of the Hemphill family present whenever this award is presented.

South Carolina Defense Trial Attorneys' Association
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Columbia, SC 29223

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