



The DefenseLine



JOINT MEETING

JULY 23-25, 1998

GROVE PARK INN, ASHEVILLE, NC

<http://www.scdtaa.com>

DRI Mid Atlantic Region to Meet with SCDTAA

The Mid Atlantic Region of the Defense Research Institute will hold its annual meeting at the Grove Park Inn in Asheville in conjunction with the joint meeting of the South Carolina Defense Trial Attorneys' Association and the South Carolina Claims Management Association.

State Defense Association officers from Maryland, DC, Virginia, and North Carolina as well as representatives from DRI will attend some of our sessions (both judges and the ethics seminar) while having separate meetings otherwise. They will attend all of our social functions. The regional meeting will be held during the day on Saturday, July 25, 1998, with dinner following on Saturday evening.

JOINT MEETING
July 23-25, 1998
Grove Park Inn • Asheville, NC

ANNUAL MEETING
November 5-8, 1998
Kiawah Island Resort • Kiawah, SC

The Trial Academy July 8-10, 1998

The Trial Academy will be held Wednesday, July 8 through Friday, July 10, 1998 at the USC School of Law in Columbia, SC.

Anyone interested in the Academy, either as a student or instructor, should call Carol Davis at the SCDTAA Headquarters at (800) 445-8629 or Clarke McCants at (803) 649-6200.

Association to Form Practice Area Committees

Building upon the popularity of the breakout sessions at last year's annual meeting, the SCDTAA is forming Practice Area Committees. The program at the 1997 annual meeting included focused breakout sessions which provided an opportunity for the sharing of ideas by members and judges with similar interests. "The feedback was overwhelmingly positive," notes Bill Davies, President of the Association. "The success of this experiment suggests that the time has come to organize substantive Practice Area Committees."

"Our membership now includes many who do not fit the mold of the 'traditional' defense practitioner," adds Davies. Recognizing the increased level of specialization of the Association's member attorneys, the Long Range Planning Committee has recommended the formation of four new Practice Area Committees: Workers Compensation, Commercial Litigation, Employment Law, and Products Liability. The organizational meetings for these committees will be held at the Joint Meeting in July.

"We have, for many years offered focused educational programs to our members who practice in the field of worker's compensation," Long Range Planning Committee Chairman, John Wilkerson, points out. "The new substan-

tive committees will provide the organizational framework to expand this service to other practice areas," he adds.

While the primary responsibility of these new committees will be to plan and present educational programs during "breakout sessions" at the Association's meetings, "they are likely to have a positive impact in many other areas," observes Wilkerson. "Membership recruitment, 'The Defense Line' and legislative activities are only a few of the Association's programs that are likely to benefit from the work of these committees."

Davies has appointed the following members to chair the new committees: Workers Compensation—Jeff Ezell & Roy Howell, Commercial Litigation—TBA, Employment Law—Phillip Kilgore & Scott Justice, Torts and Insurance—TBA, and Products Liability—Elbert Dorn. "We are happy for this opportunity to expand the leadership base of the Association," notes Davies.

Anyone interested in participating in the Practice Area Committees should contact the committee chairs or Bill Davies. The organizational meetings at Grove Park will be primarily devoted to planning programs for the annual meeting.



The DefenseLine

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Terry B. Millar
James D. Nance
Lawrence B. Orr
Reynolds Williams

Term Expires 1999

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STAFF EDITOR

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Ten Years Ago

In the April, 1978, issue of *The Defense Line*, President MARK BUYCK reported on the Executive Committee Meeting held April 14, 1978. Report was received from BARRON GRIER and JIM ALFORD of the Legislative Committee. STEVE MORRISON reported for the Amicus Curiae Committee, BRUCE SHAW made a report on the National Defense Attorneys' Association Conference in Des Moines, Iowa. JIM PRESSLY, Membership Chairman, reported that we had 280 members and were hoping to have 400. PRESIDENT BUYCK reported that he and ED MULLINS had attended the First Annual Meeting of the North Carolina Defense Attorneys' Association at Pinehurst, March 30, 1978. The South Carolina Claims Association reported DEWEY EASLER as their new President, and the Claims Managers Association reported F.M. TIMMONS, JR. was their new President.

Twenty Years Ago

President CARL EPPS reported that BILL COATES, Social Chairman, along with DAVE NORTON and JOHN WILKERSON, Program Chairman, were working on the final details for the Joint Meeting of Claims Managers in Asheville, NC in August. He reported that TIM BOUCH had completed the social program for the Annual Meeting at Kiawah, October 27th. He reported GLENN BOWERS and MARK WALL had arranged for our Association to sponsor a CLE, November 11, 1988. PRESIDENT EPPS also reported a Tort Reform Bill had been agreed upon by members of the Coalition and our Association which would reduce the statute of limitations from 6 to 3 years, tolling period for infants and minors to 7 years. The reform also provided that punitive damage could only be obtained if there was "clear and convincing proof" of entitlement. Also, the right of contribution among joint feasons. ED POLIAKOFF, THOM SALANE, BILL GRANT and MARK WALL worked tirelessly in this area.

**1998 JOINT MEETING - SCDTAA AND CMA
GROVE PARK INN • JULY 23-25, 1998**

FRIDAY, JULY 24, 1998

- 8:15 - 8:30 a.m. Welcome
8:30 - 9:00 a.m. Insurance Law Update - Changes in Affirmative Defenses Since
Nelson - From Pleadings to Trial Strategy - Hugh W. Buyck
9:00 - 9:30 a.m. Update on ADR
Karl A. Folkens
9:30 - 10:15 a.m. Great Ways to Lose Your Motions
Honorable William B. Traxler, Jr.
10:15 - 10:30 a.m. Break
10:30 - 11:15 a.m. Employment Law Breakout
Molly Hood Craig and Kenneth L. Childs
10:30 a.m. - 12:15 p.m. Workers' Compensation Breakout
Roy A. Howell, III
10:30 a.m. - 11:15 a.m. Evaluation of Soft Tissue Injuries -
An Orthopaedist's Perspective
Dr. C. Dayton Riddle
11:15 a.m. - 12:15 p.m. Analyzing Psychological Injury Claims
Dr. David Price

SATURDAY, JULY 25, 1998

- 8:15 - 8:30 a.m. Welcome
8:30 - 9:15 a.m. Handling the Bad Faith Claim
J. Bradish Waring
9:15 - 10:00 a.m. Courtroom Technology Now and the Future
Honorable Henry M. Herlong, Jr.
10:00 - 10:30 a.m. Legislative Update
Jay Courie and Mike Ey
10:30 - 10:45 a.m. Break
10:30 - 11:15 a.m. How to Select the Best Jury for Your Case
Doug Cohen
11:15 a.m. - 12:15 p.m. Ethics - Third Party Audits
Confidentiality of Medical Records
Robert M. Wilcox

**Call for Nominations
1998 Hemphill Awards**

Deadline: Wednesday, July 22, 1998

Mail To:

**SCDTAA Headquarters
3008 Millwood Avenue
Columbia, SC 20205**

FaxTo:

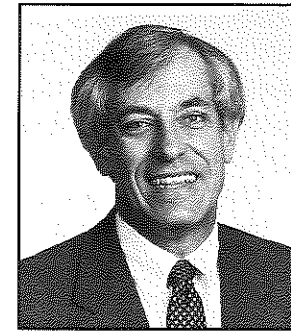
**SCDTAA Headquarters
1-803-865-0860**

CONTACT SCDTAA FOR MORE INFORMATION: 1-800-445-8629

President's Letter

Bill Davies

The 31st Joint Meeting of the Claims Management Association of South Carolina and the South Carolina Defense Trial Attorneys' Association will be held July 23 - July 25, at the



Grove Park Resort Hotel in Asheville, North Carolina. The plan for the meeting this year has been a joint effort on the part of representatives of both organizations. The continuing legal education and the social programs are

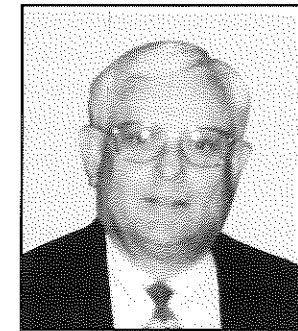
outstanding. I strongly support the comments of Mitch Hardwick, President of the Claims Management Association, in which he describes this meeting as a good forum to accomplish the goals of members of both Associations. I hope to see all of our members in Asheville.

The Joint Meeting presents another important opportunity for members of the South Carolina Defense Trial Attorneys' Association. At the business meeting in Asheville, we will consider a number of changes to the bylaws of this Association. Those proposed changes, already approved by your Executive Committee, are quoted elsewhere in this publication. There are some very significant changes which will be considered and, if passed, will become effective prior to elections for 1999. It is important that we have maximum participation from members of the Association in considering these significant proposals. Please review the changes and come prepared for a meaningful business meeting.

It will come as no surprise that the Association is facing escalating financial challenges as we approach the end of this century. One of the greatest opportunities for members of our Association has become our greatest financial problem. I refer to our delightful opportunity to host our state and federal judiciary at our Annual Meeting. As an example, the budgeted loss for the Annual Meeting of 1997 was \$35,500. The actual loss was over

S. Mitch Hardwick, Sr.

Eager to begin our year of work and service, the officers and directors of the Claims Management Association met in November, 1997, to make plans for 1998. Our agenda is full and all continue to accomplish our goals to make the Claims Management Association of South Carolina one of the best professional insurance organizations in the industry.



I started out as a rookie adjuster in 1969, the same year the Claims Management Association was organized. As a young adjuster, I met many young defense and plaintiff lawyers. Many of those lawyers are now the giants of the legal profession in South Carolina, and I am proud to be associated with them. I remember how eager those young lawyers were to get a new insurance case. They would stop by the office to solicit defense work and would even solicit subrogation claims. They wanted any kind of insurance defense work to start and boost their careers. In those early days, they would take defense assignments and handle subrogation defense work and other small cases. Sometimes, those cases are put on the back burner to slow cook, and eventually evaporate. What happened to those times, when all and any of our business was welcome? What happened to quality claims investigations that we used to send those young lawyers in to defend? Have we slowly and surely become desk adjusters and desk lawyers? Maybe we should all drop back and take a long look and evaluate our professions. Look at where we are headed. Have we climbed the ladder of success all these years to find ourselves at the top, but on the wrong roof?

I am fortunate that at my company, our claims managers and our defense attorneys statewide all know each other by first name. We still meet and talk. We attend depositions and EUO's with our attorneys. We work together. We believe in loyalty, professionalism, and strong bonds of

Davies, Continued from page 5

\$48,000. While other programs are designed to support large losses on our Annual Meeting, nothing can balance this sort of debit. We will have to make significant changes to continue to operate in a manner similar to that to which we have grown accustomed.

With this financial problem in mind, your Executive Committee has decided that for the Annual Meeting of 1998, and in the foreseeable future, our state and federal judges will be invited for two nights only. By eliminating one night's expenses for this many guests, we are hopeful that we can bring the budget back into balance and continue all of the significant programs of this organization. The Executive Committee debated alternate solutions at several meetings and believes that this is the best option available to us at this time. Additional information will be distributed at the business meeting in Asheville. Those attending will have an opportunity to question members of the Executive Committee on this decision. Of course, any of you can contact any Executive Committee member on any matter at any time.

After long discussion, the Executive Committee has decided to form substantive law committees within the Association. During 1998 these will be established on an ad hoc basis so that we may determine whether they should be adopted permanently. In another portion of this publication, there is an outline of the various committees and chairs for 1998. These individuals will be shaping the future of the committees and the Association with their proposals and work this year. Please support them and sign up for at least one substantive law committee.

The Young Lawyers' Committee of the Defense Research Institute has recognized a need for a bond between DRI's young lawyers and the young lawyers of the state and local defense organizations. In response to this need, DRI has created a committee to represent young lawyers from these state and local associations. In response to a request from DRI, Darryl Smalls of Nelson Mullins has been appointed as the DRI Young Lawyers' liaison for our Association. As such, Darryl has asked that young lawyers with suggestions for either organization contact him.

I hope to see you all in Asheville.

Hardwick, Continued from page 5

friendship. If we win our case, we all win. If we lose our case, we all lose. We don't exchange blame or excuses. It's teamwork! We have a forum to learn how to be a TEAM. This forum is the relationship between the South Carolina Defense Trial Attorneys' Association and the Claims Management Association of South Carolina. We have been working together now for many years. We are working hard to provide educational programs that are designed for members of both associations at the Joint Meeting. The 1997 program at the Joint Meeting in Asheville was excellent. We believe the 1998 program will be even better. Insurance and legal professionals must work and learn together. The Joint Meeting is a good forum and program to accomplish this goal and is important to both Associations. The 31st Annual Joint Meeting will be July 23-25, 1998 at the Grove Park Inn, Asheville, North Carolina. I encourage all members of both Associations to attend and participate if called upon to work or serve.

What do people think of us as claims managers or attorneys? How do we rate? Does it matter? Again, I recommend we drop back and take a close look at where we've been and where we are headed.

There is strength in numbers. Working together gets things done. This will be great year and a great Joint Meeting if we all work hard and serve as a TEAM both insurance and legal.

**A. WILLIAM ROBERTS, JR. & ASSOCIATES
COURT REPORTING**

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- Columbia803-731-5224
- Greenville864-234-7030
- Charlotte704-573-3919
- WATS1-800-743-DEPO

Proposed By-Law Changes

The executive committee proposes that the by-laws of the Association be changed. The changes are necessary for several reasons: (1) Several provisions of the by-laws are antiquated, (2) There are several errors in the context of the by-laws, (3) Changes are required to provide fair representation of all Association members in the administration and formulation of the policy of the Association.

Set forth below are the existing by-laws with the proposed changes immediately following each Article. The changed or deleted portion of each Article is highlighted.

The major change is to Article V which sets forth the manner in which the membership of the executive committee is established. The existing by-laws utilize the 1992 congressional districts as the boundaries for establishing districts for the selection of members of the Executive Committee. The by-laws do not allow additional members for those districts who have an extraordinary number of Association members. The proposed change deletes the congressional districts as the boundaries and reestablishes the districts in a manner which provides more equitable representation. In addition, the proposed change allows those districts which have one hundred members or more to have an additional member on the Executive Committee for each one hundred association members in that district.

The change in the by-laws will be voted upon by the Association membership at the meeting in Asheville.

SCDTAA BY-LAWS

ARTICLE I

Name:

The organization shall be named "South Carolina Defense Trial Attorneys' Association".

ARTICLE II

Purpose:

The purpose of this Association shall be to bring together by association, communication and organization, lawyers of South Carolina who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense; to provide for the exchange among the members of this Association of such information, ideas, techniques or procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers, to elevate the standards of trial practice in this area and, in conjunction and with similar associations in other areas, to develop, establish and secure courts adoption or approval or a high standard code of trial conduct and courtroom manner; to support and work for the improve-

ment of the adversary system of jurisprudence in our court; to work for the elimination of court congestion and delays in civil litigation; and in general to promote improvements in the administration of justice and to increase the quantity and quality of service and contribution which the legal profession renders to the community, state and nation.

ARTICLE III

***Qualifications for Membership:**

Those persons shall be qualified for the membership who (1) Are members in good standing of the South Carolina Bar; (2) Are actively engaged in the private practice of civil law, or employed by governmental bodies; and (3) Individually devote a substantial portion of their time in litigated matters to the defense of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or (b) the representation of management in labor disputes.

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

the Executive Committee, shall accompany the application.

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

Qualifications for Membership:

Those persons shall be qualified for the membership who (1) Are members in good standing of the South Carolina Bar; (2) Are actively engaged in the private practice of civil law, or are employed by governmental bodies; and (3) Individually devote a substantial portion of their time in litigated matters to the defense of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or (b) the representation of management in labor disputes.

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

ARTICLE IV

*** Officers**

The officers of the Association shall be a President, a President-Elect, a Secretary and a Treasurer.

Officers

The officers of the Association shall be a President, a President-Elect, a Treasurer and a Secretary.

ARTICLE V

*** Executive Committee:**

There shall be an Executive Committee which shall consist of two officers, immediate past president and twelve executive committee members made up of two representatives from each congressional district and three at large executive committee members. For the purposes of the election of officers of the Executive Committee, the congressional districts shall have those boundaries existing immediately prior to the 1992 reorganization of congressional districts, and shall not be affected by subsequent reorganization or redistricting of the congressional districts. Eight members of the Executive Committee shall constitute a quorum. The state chairman of the Defense Research Institute shall be an ex-officio member of the Executive Committee provided this person is a member of the Association in good standing.

There shall be an Executive Committee which shall consist of the officers, the immediate past president and a minimum of fifteen executive committee members made up of two representatives from district as set forth herein and three at large executive committee members. For the purposes of the election of the members of the Executive Committee, the districts shall have those boundaries set forth in Appendix A. Each district shall have one additional member of the Executive Committee for each 100 members of the Association in the District. Sixty percent (60%) of the members of the Executive Committee shall constitute a quorum.

Executive Committee:

The state chairman of the Defense Research Institute shall be an ex-officio member of the Executive Committee provided this person is a member of the Association in good standing.

ARTICLE VI

*** Election of Officers and Terms of Office:**

The first election of officers shall be held at the meeting in which these By-Laws are adopted in general session by those present at said meeting. Thereafter, the election of officers shall take place at the Annual Meeting of the Association, the date to be determined by the Executive Committee. Officers shall be elected by a majority vote of the members present. The fifteen members of the executive Committee who are not officers or the immediate past-President shall be elected in the same manner.

The terms of each officer and member of the Executive Committee shall begin on the date of the election and end on the election of his successors. No person shall be eligible to succeed himself or herself as President except as provided in Article VII.

The term of each member of the Executive Committee who is not an officer or an immediate past president shall be three years. Five members shall be elected at each annual meet-

ing. Vacancies in office, other than the President and President-Elect, shall be filled by the Executive Committee. The terms of office of the at large members of the Executive Committee elected at the 1984 Annual Meeting shall be staggered so that one at large member shall serve for one year, one member for two years and one member for three years.

Election of Officers and Terms of Office:

The election of officers shall take place at the Annual Meeting of the Association, the date to be determined by the Executive Committee. Officers shall be elected by a majority vote of the members present. The members of the executive Committee who are not officers or the immediate past-President shall be elected in the same manner.

The terms of each officer and member of the Executive Committee shall begin on the date of the election and end on the election of his or her successor. No person shall be eligible to succeed himself or herself as President except as provided in Article VII.

The term of each member of the Executive Committee who is not an officer or an immediate past president shall be three years. Five members shall be elected at each annual meeting. Vacancies in office, other than the President and President-Elect, shall be filled by the Executive Committee.

ARTICLE VII

*** Duties of the Officers:**

THE PRESIDENT shall preside at all meetings of the Association and of the Executive Committee. The President shall, with the assistance of the Secretary, present to each meeting of the Association and of the Executive Committee an agenda of the matters to come before such meeting. The President shall perform such other duties and acts as usually pertain to his or her office and as may be prescribed by the Association and/or the Executive Committee.

THE PRESIDENT-ELECT shall succeed to the office of President upon the expiration of the President's term or upon the President's death, disability, or resignation. In event of succession to the office of President by reason of death, disability or resignation of the incumbent, the

President Elect shall serve out the remainder of that term and the term for which he was elected. While serving as President-Elect, he or she shall assume the duties of the President upon the President's request or when the president is absent or otherwise unable to perform the duties of his or her office.

THE SECRETARY shall be custodian of all books, papers, documents and other records of the Association. The Secretary shall keep a true record of the proceedings of the Association and the Executive Committee and do and perform all acts usually pertaining to his or her office and as may be prescribed by the Association and/or Executive Committee - all under the supervision and direction of the Executive Committee. He shall make reports of the Association's activities at every meeting of the Association and of the Executive Committee.

THE TREASURER shall be the custodian of all books, documents, funds and other property relating to the financial aspects of the Association. The Treasurer shall perform the usual duties of a treasurer in associations of this kind: collect dues, keep accounts and except for current expenses shall disburse the money of the Association only upon direction of the Executive Committee of the Association at every meeting of the Association and of the Executive Committee. If required by the Executive Committee, he shall have a good and sufficient bond for the performance of his or her duties.

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THE PRESIDENT shall preside at all meetings of the Association and of the Executive Committee. The President shall, with the assistance of the Secretary, present to each meeting of the Association and of the Executive Committee an agenda of the matters to come before such meeting. The President shall perform such other duties and acts as usually pertain to his or her office and as may be prescribed by the Association and/or the Executive Committee.

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Proposed By-Law Changes

Continued from page 9

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ARTICLE VIII

* Meetings

The Association shall meet annually at such time and place as the Executive Committee may determine. Special meetings may be called by the President or by a majority of the members of the Executive Committee, upon five days' written notice to the membership.

Those present at any meeting shall constitute a quorum except for the purpose of the changing the By-Laws, for which purpose there shall be at least one-third of the members of the Association present to constitute a quorum.

Meetings

The Association shall meet annually at such time and place as the Executive Committee may determine. Special meetings may be called by the President or by a majority of the members of the Executive Committee, upon five days' written notice to the membership.

Those present at any meeting shall constitute a quorum except for the purpose of the changing the By-Laws. For the purpose of changing the By-Laws, after fifteen (15) days written notice as required in Article XII, those Association members present at the meeting shall constitute a quorum.

ARTICLE IX

* Committees:

The following committees shall be appointed annually by the President, by and with the advice and consent of the Executive Committee: Amicus Curiae Committee, *The Defense Line* Committee, Judiciary Committee, Legislative Committee, Long Range Planning Committee, Membership Committee, Programs and Conventions Committee, Seminars Committee, Defense Research Institute Association Committee, Finance Committee, Ethics Committee, By-Laws Committee and Practice and Procedures Committee. The President shall have the authority to appoint, from time to time, such other standing or special committees as he or she deems advisable. Each standing and special committee shall consist of a number of members to be determined by the President, one of whom, when feasible, shall be a member of the Executive Committee.

A Nominating Committee composed of the immediate past president and at least three (3) other past presidents of the Association, chosen by the President prior to the business meeting at the Annual Meeting, shall recommend and report to the membership at the Annual Meeting names of candidates nominated by such Nominating Committee to serve as officers and members of the Executive Committee. In the event of the inability of the immediate past president to serve on the Nominating Committee, the past president or past presidents most recently having served as president and available to serve shall be appointed to the Nominating Committee. If less than three (3) past presidents are available to serve, the President may appoint other members of the Association in their stead.

Committees:

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Defense Line Committee, Judiciary Committee, Legislative Committee, Long Range Planning Committee, Membership Committee, Programs and Conventions Committee, Seminars Committee, Trial Academy Committee, Finance Committee, Ethics Committee, By-Laws Committee and Practice and Procedures Committee. The President shall have the authority to appoint, from time to time, such other standing or special committees as he or she deems advisable. Each standing and special committee shall consist of a number of members to be determined by the President, one of whom, when feasible, shall be a member of the Executive Committee.

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ARTICLE X

* Removal of Members:

A member may be removed or expelled from membership by the Executive Committee or by a majority vote of the Association at any regularly called meeting, for conduct which is adverse to the best interest of the Association. A member shall have the right to a full hearing before the Executive Committee before expulsion.

ARTICLE XI

* Fiscal Year

The fiscal year of the Association shall be from January 1 through December 31.

ARTICLE XII

* Amendments

These By-Laws may be amended or rescinded at any meeting of the Association by an affirma-

tive vote of two-thirds of the members present, provided further, that the notice of the proposed change be given by the Secretary to the members by mail at least fifteen (15) days before the meeting at which such action is proposed.

ARTICLE XIII

* Dissolution

Upon dissolution of the Association, the assets of the Association must be distributed exclusively to another eleemosynary corporation which is exempt from South Carolina income tax and will in no event inure benefit of any private individual.

* = Present By-Laws

= Proposed By-Laws.

Proposed Districts for Election for the South Carolina Defense Trial Attorneys' Association

District I

Charleston
Colleton
Dorchester

District II

Richland
Calhoun

District III

Beaufort
Anderson
Abbeville
Greenwood
McCormick
Saluda
Edgefield
Aiken

District IV

Barnwell
Allendale
Bamberg
Orangeburg
Lexington
Hampton
Jasper

District V

Greenville
Oconee
Pickens

District V

Spartanburg
Cherokee
Union
Laurens
Newberry
York
Chester
Fairfield
Lancaster
Kershaw
Sumter
Lee
Chesterfield

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Darlington
Dillon
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Marion
Horry
Williamsburg
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Georgetown

Recent Order

In the Court of Common Pleas. The State of South Carolina, County of Anderson. Southern Pilot Insurance Company, Plaintiff, versus, Betty R. Hosea, as Representative for the Estate of David R. Hosea, and Hosea Refrigeration, Inc., Defendants.

Order

This matter came before the Court on motion by Plaintiff Southern Pilot Casualty Insurance ("Southern Pilot") for summary judgment. After considering briefs and arguments of counsel, and affidavits and exhibits submitted by the parties, the motion is granted.

Background

The following facts are not in dispute.

On April 14, 1996, a 1995 Harley Davidson motorcycle owned and driven by David Hosea collided with a vehicle driven by Joe B. Mason. The accident occurred on a Sunday when a group of motorcyclists (including Hosea) were returning from an outing to the mountains. Mr. Hosea died in the collision. Mason's liability insurer has tendered its policy limits.

At the time of his death, David Hosea was the President and sole shareholder of Hosea Refrigeration, Inc.

The motorcycle owned and being driven by David Hosea was insured under a motor vehicle policy issued to David Hosea by Allstate Ins. Co. The Allstate policy did not contain any underinsured motorist coverage.

At the time of the accident, Southern Pilot had in effect a Business Auto Policy (the "Policy") issued to Hosea Refrigeration, Inc., which included underinsured motorist coverage. The Policy contains a schedule of covered autos - 1984 Chevrolet C10 pickup and a 1994 Dodge D2500. No motorcycle is listed. The Policy says that "covered autos" for underinsured motorist coverage are:

Owned "autos" subject to a compulsory uninsured motorists law. Only those "autos" you own that because of the law and the state where they are licensed or principally garaged

are required to have and cannot reject uninsured motorist coverage. This includes those "autos" you acquire ownership after the policy begins provided they are subject to the same state uninsured motorists requirement.

The Policy says that the words "you" and "your" refer to the named insured shown in the declarations (Hosea Refrigeration, Inc.). The Underinsured Motorist Coverage Endorsement also says:

B. WHO IS AN INSURED?

1. You;
2. If you are an individual, any "family member";
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.

As used in this endorsement:

1. "family member" means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

The personal representative of the estate of David Hosea has served Southern Pilot in a wrongful death action as a potential underinsured motorist insurer.

Applicable Law

Summary judgment is appropriate, as a matter of law, if upon viewing the evidence and inferences therefrom in a light most favorable to the non-moving party, there is no genuine issue of material fact. *Employers Ins. of Wausau v. Construction Management Eng'rs of Florida, Inc.*, 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989). Summary judgment should be granted when "plain, palpable and indisputable facts exist on which reasonable minds cannot differ." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 406 (1984). "The trial court should grant

summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case." *Fender & Latham, Inc. v. First Union Nat. Bank*, 316 S.C. 48, 50, 446 S.E.2d 448, 449 (Ct. App. 1994).

The parties agree this is an issue of first impression in South Carolina. Many other jurisdictions have considered this question. The majority rule is that corporate employees, to be covered under the corporation's auto policy, must be using vehicles owned by the corporation and scheduled under the corporation's policy. If the employee is using a vehicle not owned by the corporation, the corporation's underinsured motorist provisions do not apply. Further, a corporate employee or shareholder cannot qualify as a corporation's "family member."

In several instances, the claimant has argued, as do the defendants here, that status as a key employee, president of insured, etc. somehow conferred coverage. The majority of other courts considering the issue have confirmed the general rule that, for purposes of uninsured and underinsured benefits, officers and employees of a corporation do not qualify as insureds when the corporation is listed as the named insured and, thus, they are covered only when using vehicles which are scheduled under the corporation's policy. *See, Grain Dealers Mutual Insurance Company v. McKee*, 943 S.W.2d 445 (Tex. 1997) (president and sole shareholder of company); *Hogan v. Mayor & Aldermen of Savannah*, 171 Ga.App. 671, 320 S.E.2d 655 (1984) (corporate officer and shareholder); *Busby v. Simmons*, 406 S.E.2d 628 (N.C. Ct. App. 1991) (Plaintiff owned two-thirds of company's stock). *See also Ott v. Fireman's Fund Ins. Co.*, 936 S.W.2d 165 (Mo. Ct. App. 1996) ("the majority of jurisdictions have held that an officer or shareholder of a close corporation...is not a named insured of a policy issued to the corporation"); *Martinelli v. Travelers Ins. Co.*, 687 A.2d 443 (R.I. 1996) ("a corporate shareholder or an employee is not eligible for uninsured motorist benefits under a policy in which the corporation is the named insured").

At her deposition, Betty Hosea testified that the decedent's trip to the mountains on the day of his death may (she had no personal knowledge) have been partially business-related (one other member of the motorcycle group was a client of Hosea). Even assuming that this fact is

true, there is no coverage.

Jurisdictions which have considered the issue have not altered their decision based upon the fact that the employee was injured within the scope of employment. *Sproles v. Phillips*, 407 S.E.2d 497 (N.C. 1991). In *Sproles*, a group of employees was injured in an accident with an underinsured motorist when returning from a business trip. Although the injury was the result of the employee's completion of job-related tasks, the North Carolina Supreme Court held that they could not recover under the corporate policy because the corporation was the named insured and the van in which they were riding was not a scheduled auto under the corporation's policy.

See also, American States Ins. Co. v. C & G Contracting, Inc., 924 P.2d 111 (Ariz. 1996) (co-founder and half-owner of company denied coverage when injured on the job); *Bryant v. Protective Casualty Ins. Co.*, 554 So.2d 177, 179 (La. Ct. App. 1990) ("[t]he deceased was not a named insured under this policy even though he was an employee of the corporate named insured and was in the course and scope of his employment at the time of the accident"); *Jacobs v. United States Fidelity & Guaranty Co.*, 627 N.E.2d 463 (Mass. 1994) (employee injured while walking across the street in the course of employment denied coverage under the company policy); *Cutter v. Maine Bonding & Casualty Co.*, 579 A.2d 804 (N.H. 1990) (court denied coverage to company vice-president, secretary and bookkeeper injured while using personal vehicle for business pursuits).

In the present case, defendants have offered no compelling reason to disregard the corporate entity. David Hosea purchased the motorcycle in question in October, 1994. It was purchased in his name and insured by him under a policy issued to him by Allstate Insurance Co. The motorcycle was never an insured vehicle under the Southern Pilot policy.

Defendants argue the language in Plaintiff's policy is ambiguous. I find no such ambiguity. The policy clearly defines "you" as the named insured (Hosea Refrigeration, Inc.), and makes only the named insured and anyone occupying a "covered vehicle" insured for underinsured motorist coverage. "Covered vehicles" is defined as vehicles owned by "you" - the name insured, Hosea Refrigeration, Inc. The language in Plaintiff's policy (which is the same form

language construed in many of the cases cited herein) makes it clear that only persons occupying one of Hosea Refrigeration's vehicles are insured. That was not the case here.

Defendants also raise issue of stacking but, before stacking may even be considered, there must be coverage under Plaintiff's policy. As there is no coverage, stacking is not an issue here.

The named insured in Plaintiff's policy was Hosea Refrigeration, Inc. David Hosea was not an insured under the corporate policy while operating his own personal vehicle. The corporation's policy provided coverage only for persons using the two corporate vehicles. Hosea was using his personal vehicle and, in that capacity, was not insured under Plaintiff's policy.

It is, therefore,

ORDERED that Plaintiff's Motion for summary judgment is granted, and that Plaintiff's policy does not provide coverage for the April 14, 1996 motorcycle accident.

The Honorable Gary E. Clary
Presiding Judge
Tenth Circuit
February 5, 1998
Anderson, South Carolina

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¹ See, e.g., *American States Ins. Co. v. C & G Contracting, Inc.*, 924 P.2d 111 (Ariz. 1996) ("in light of purposes and declarations of a corporation's business auto policy, [there is no bases for] an objective impression in the mind of a reasonable insured that he was a "family member" of the corporation or otherwise "covered by the policy while occupying a non-covered auto"); *General Insurance Company of America v. Smith*, 874 P.2d 412 (Col. Ct. App. 1993); *Pearcy v. Travelers Indemnity Co.*, 429 So.2d 1298 (Fla. Dist. App.), *review denied* 438 So.2d 833 (Fla. 1983) ("where an uninsured motorist policy issued to a corporation, in standard form language, includes as an insured any 'family member...', the language is a nullity, as the corporation can have no such relative:"); *Hogan v. Mayor & Aldermen of Savannah*, 320 S.E.2d 655 (Ga. Ct. App. 1984); *Economy Preferred Insurance Company v. Jersey County Construction, Inc.*, 615 N.E.2d 1290 (Ill. App. 1993); *Sears v. Wilson*, 704 P.2d 389 (Kan. App. 1985); *Bryant v. Protective Casualty Insurance Company*, 554 So.2d 177 (La. Ct. App. 1990); *Jacobs v. United States Fidelity & Guaranty Company*, 627 N.E.2d 463 (Mass. 1994) ("for purposes of uninsured and underinsurance benefits, officers and employees of a corporation do not qualify as named insureds when the corporation is listed as the named insured"); *Cutter v. Maine Bonding & Casualty Company*, 579 A.2d 804 (N.H. 1990) ("[i]n circumstances where an automobile insurance policy has been issued to a corporate entity, most of these courts have held that underinsured motorist benefits are available only if the Plaintiff seeking the benefits qualifies under another section of the person insured definition [besides the 'family member' section]"); *Continental Insurance Company v. Velez*, 520 N.Y. S.2d 824 (1987) ("a corporation cannot suffer bodily injury or have a spouse, relative or household as designated in an uninsured motorist endorsement of an insurance policy...To hold that the policy covers officers and shareholders of the corporation, when they are not occupying corporate vehicles, and when none are mentioned or alluded to in the policy, would be to reach beyond the plain meaning of the policy"); *Buckner v. Motor Vehicle Accident Indemnification Corporation*, 486 N.E.2d 810, 495 N.Y. Supp.2d 952 (Ct. App. N.Y. 1985); *Dixon v. Gunter*, 636 W.W.2d 437 (Tenn. App. 1982); *General Ins. Co. of America v. Icelandic Builders, Inc.*, 604 P.2d 966 (Wash. App. 1979) (court ruled that there was no policy ambiguity and denied child of sole stockholder of closely held corporation coverage under the corporate policy).

Evidence Matters

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Evidence Exam for Advanced Trial Lawyers

How long has it been since you have taken an evidence exam? (Not long enough?) This installment focuses on unusual questions that fall into the cracks of evidence jurisprudence and the applicable rules or cases construing them. The answers are on the following page.

Question 1:

It's Friday. The judge is in a bad mood. She wants to get back to her home circuit, but she has to try your silly little case first. In order to move the case forward quickly, she orders that all exhibits be exchanged and marked before trial. You assume the plaintiff will testify consistently with a letter that he knows he had previously written to your client, so you do not mark it or exchange the letter before trial. The statements in that document are critical impeachment evidence. To your surprise, at trial the plaintiff denies he ever wrote the letter. The judge angrily excludes it, and you lose the trial. On appeal, what is the result?

Question 2:

The plaintiff's drinking buddy Scott is an ex-con. One night Scott was with him at a strip joint you represent. Although your client's employees say the plaintiff got drunk and took a swing at the bouncer, the plaintiff claims he was unilaterally attacked. Scott exclaimed to the bouncer during excitement that he shouldn't have "jumped on [the plaintiff] for nothing." A customer at a nearby table heard the statement, but because she was looking at the stage, she doesn't know who swung first. By the time of trial, Scott has "disappeared." The plaintiff testifies by denying any close personal relationship with Scott or knowledge of his past dealings. The judge admits Scott's statement through the customer under rule 803(2) as an excited utterance. The plaintiff forgot to mention on direct examination that Scott is back in jail for a murder conviction.

- (A) Can you attack Scott's credibility?
(B) If so, what evidence rule do you cite?

Question 3:

A law clerk and investigator working in the office of the plaintiff's attorney took some photographs of the plaintiff's vehicle the day after your client rearended his car in a minor accident. The photos show absolutely no damage. Your client suffered a seizure, so he does not know whether the pictures are accurate. The plaintiff cannot "recall" whether the pictures are accurate. He is claiming a ruptured disc, however, and there is the chance of an excess verdict. Thus, it is critical that you get the photos into evidence.

- (A) Can you call the law clerk and investigator to authenticate the pictures?
(B) What rule do you cite?

Question 4:

You are defending your client for injuries resulting from a serious attack by her bulldog Petunia. The plaintiff's story will be strongly supported by the investigating police officer's testimony. During *voir dire* before a federal judge, you want the prospective jurors to be asked whether they would be more likely to believe the officer over another witness. Although the judge appears willing to ask the question, your opponent objects.

What is the ruling?

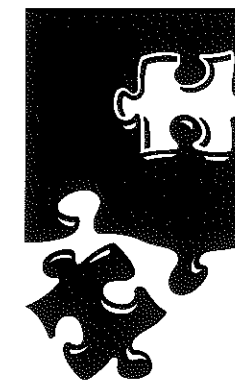
Question 5:

Same question, except you are now in state court.

Question 6:

Your grocery store defendant in a false-arrest case is a corporation with a "past"; in 1994 it was convicted of fraud. During your false-arrest trial, the plaintiff's lawyer begins to cross-examine the bag boy who had reported the plaintiff to the police as a shoplifter. (He had been hired only a month when the incident with the plaintiff occurred.) You object when the bag boy is asked the following question: "Isn't it true your company was convicted of a felony last year?"

- (A) What should be the judge's ruling?
(B) What rule controls this situation?



ANSWERS TO EVIDENCE QUESTIONS

Answer to Number 1:

You win a reversal. The trial judge should have known that the evidence did not become relevant until the plaintiff denied making the harmful statements in the letter. See *Marshall & Williams Co. v. General Fibers and Fabrics, Inc.*, 270 S.C. 247, 241 S.E.2d 888 (1978)(citing *Middlebrooks v. Curtis Pub. Co.*, 413 F.2d 141 (4th Cir. 1969)). But cf. *McKee v. Atlantic Women's Center, P.A.*, 283 S.C. 435, 323 S.E.2d 533 (Ct. App. 1984)(failure to disclose expert's medical report regarding care of another patient until confronted with document on witness stand was reversible error).

Answer to Number 2:

(A) The credibility of a non-testifying hearsay declarant can be attacked by prior and subsequent statements and conduct just as if he were on the witness stand. The foundation requirements for prior-inconsistent statements do not apply. Extrinsic evidence may be used. See *United States v. Friedman*, 854 F.2d 535, 570 (2d Cir. 1988) (allowing extrinsic evidence for such impeachment). Thus, a copy of the friend's criminal convictions may be read into evidence, and a witness may be called to testify that the plaintiff and the ex-con are best friends. (B) Rule 806 controls this situation.

Answer to Number 3:

(A) Assuming that the court believes the photos are important to your case, the non-professional members of the adverse lawyer's staff are not barred by the witness-advocate rule from testifying. The matter is within the judge's discretion. See *United States v. Nyman*, 649 F.2d

208, 211 (4th Cir. 1980)(cited in Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence Manual 10.01[3], at 10-8 n.3 (1997)). (B) Rule 501 deals with privileges.

Answer to Number 4:

The judge probably should ask the question. See *United States v. Lancaster*, 78 F.3d 888, 892 (4th Cir. 1996). But cf. *id.* at 898 (failure to ask this question not always reversible error). At least, this is the case in criminal trials.

Answer to Number 5:

In state court, the judge should not ask the question. See *State v. Adams*, 279 S.C. 228, 306 S.E.2d 208 (1983), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) *and limited on other grounds*, *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992).

Answer to Number 6:

(A) The bag boy probably may not be questioned about the corporation's conviction. There have been only two appellate decisions since the federal evidence rules were adopted twenty eight years ago that discussed this situation. See *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 524 n.16 (3d Cir. 1997). The cases are consistent, however, in that they require some involvement or connection by the individual witness in the corporation's crime. See *id.* 126 F.3d at 524; *CGM Contractors, Inc. v. Contractors Envtl. Servs., Inc.*, 181 W. Va. 679, 383 S.E.2d 861 (1989)(decision based upon state rules essentially identical to federal rules). (B) Rule 609 applies to criminal convictions.

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