S.C. Defense Trial Attorneys' Association
Volume 27 Number 3 • Fall, 1999

The DefenseLine

The Admissibility of Expert Testimony after *State v. Council*

topic.
and Defense

http://www.scdtaa.com

1999 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 activites 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 meeting immediately preceding the 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.

PLEASE SUBMIT NOMINATIONS BY OCTOBER 10, 1999 TO

SCDTAA HEADQUARTERS • 3008 MILLWOOD AVE. • COLUMBIA, SC • OR FAX (803) 765-0860

I NOMINATE ______________________

OF THE FIRM OF ______________________

____

____

CITY and STATE ______________________

BECAUSE ______________________

____

____

____

____

(ATTACH A SHEET OF PAPER IF NECESSARY)

OFFICERS

PRESIDENT
John S. Wilkerson, III
Post Office Box 5478
Florence, SC 29501
(843) 662-9008 FAX (843) 667-0828
jsw@tpgl.com

PRESIDENT ELECT
W. Francis Marion, Jr.
Post Office Box 2048
Greenville, SC 29602
(864) 240-3200 FAX (864) 240-3300
wfmarion@hmmg.com

TREASURER
H. Michael Bowers
Post Office Box 993, 28 Broad Street
Charleston, SC 29402
(843) 577-4000 FAX (843) 724-6600
hmb@yrct .com

SECRETARY
H. Mills Gallivan
330 E. Coffee St., P.O. Box 10589
Greenville, SC 29603
(864) 2719580 FAX (864) 2717502
mgallivan@ggwb.com

IMMEDIATE PAST PRESIDENT
William S. Davies, Jr.
Post Office Box 11070
Columbia, SC 29211
(803) 733-9406 FAX (803) 256-7500
wsd@nmrs.com

EXECUTIVE COMMITTEE

Term Expires 1999
Stephen E. Darling
Susan B. Lipscomb
Clarke W. McCants, III
G. Mark Phillips
L. Lee Plumblee

Term Expires 2000
Beverly A. Carroll
William H. Davidson, II
Phillip A. Kilgore
John A. Massalon
Samuel W. Outten

Term Expires 2001
James R. Courie
William L. Duncan
Matthew H. Henrikson
Michael P. Horger
Lawrence B. Orr
T. David Rheney
Darryl D. Smalls
Bert G. Utsey
Wm. Reynolds Williams

EX OFFICIO
William A. Coates

EXECUTIVE DIRECTOR
MaryAnn Crews

EDITOR
John Massalon

STAFF EDITOR
Nancy H. Cooper

JOHN WILKERSON
President's Letter 4

ANNUAL MEETING AGENDA 5

FEATURE ARTICLE
The Admissibility of Expert Testimony after *State v. Council* 7

ARTICLE
The Latest ADA Decisions: Helpful or Harmful? 11

COLUMN
Evidence Matters 14

Ten Years Ago

President **FRANK H. GIBBS, III**, and **DON WRIGHT**, President of the Claims Management Association of South Carolina extended an invitation to their respective members to attend the 27th Annual Joint Meeting of the Defense Atttorneys and Claims Managers at the Grove Park Inn, July 27th - 30th, 1989. In the Summer Issue of *The Defense Line*, **DAVIS HOWSER**, Columbia, and **TOM HESSE**, American Mutual Fire Insurance Company, addressed the issue of conflicts of interest in the defense practice. **W. HUGH McANGUS** was monitoring the legislative front. **MARK WALL**, President-Elect, had attended the 22nd National Conference of Defense Bar Leaders held in New Orleans, Louisiana, March 2nd. Our Association continued to gain prestige.

Twenty Years Ago

President **BRUCE SHAW** in his report in the June, 1979, *The Defense Line* commented, "It looks like the Legislature is going to stay in session permanently." We were closely monitoring legislative activity as usual.

The Joint Meeting with the Claims Managers was set for August 8 - 10, 1979, at the Grove Park Inn, **BARRON GRIER**, Program Chairman, **JACK BARWICK**, Convention Chairman. **JOHN LINDSEY**, South Carolina Insurance Commissioner, was to be followed on the program by **HAROLD TRASK**, South Carolina Industrial Commissioner, and **DAVE HOWSER**, one of our own. Saturday morning, following the business meeting with the Claims Managers, there was a panel discussion with **BRUCE SHAW**, Senator **HEYWARD McDONALD** and Representative **JEAN TOAL**. Courtesy of the President of the Claims Managers Association **JOHN DUNN**, President Elect, lead the Claims Managers contingency and actively participated in the program.

Thirty Years Ago

Our Association, formed in 1968, was planning its first Annual Convention for October 10th-11th, 1969, at the Sheraton Hilton Inn in Columbia. An outstanding program was being put together as **KEATON-O'CONNELL** was a hot topic. The **WADDELL** Bill was a concern of the South Carolina Insurance and Defense establishment.

President's Letter

by John Wilkerson

What a great meeting in Asheville! Sam Outten, David Rheney and Phillip Kilgore put together a very impressive program — by all accounts, one of the best ever.

The combined meeting of the Executive Committee and the CMASC Board was very productive. The purpose of the meeting was to evaluate the future direction of the joint meeting. We are all concerned over the escalating costs and dwindling attendance in Asheville. The strong consensus of the assembled boards was to do what we could to keep the meeting at the Grove Park Inn which will require us to try to find ways to underwrite the expenses. Funding options including corporate sponsors and vendors were discussed. We also discussed opening the meeting to other claim management organizations. A joint committee is being formed to further develop these ideas and prepare a plan of action. Please submit your input on this important issue to Mills Gallivan, co-chair of this committee.

The Trial Academy was once again a major success. Twenty students attended the program this year and gained valuable training and experience in courtroom techniques. Many thanks to Judges Goode, Lockemy, Manning, McKellar, Pleicones, and Westbrook for the donation of their time and talent to this program. Their participation provides tremendous realism for the students and offers an opportunity for constructive criticism not available in any other forum. The Academy is one of the most important services we provide to our membership and could not be accomplished without the efforts of dozens of volunteers to whom we owe a debt of gratitude.

The subject of third party audits remains a hot topic for all defense lawyers. The joint meeting program offered a panel discussion led by Bill Coates and Jim Echnoz of Allstate Insurance Company which highlighted some of the ethical and practical concerns regarding this issue. While DRI continues to assume a leadership role in maintaining lines of communication with the insurance industry, the SCDTAA is actively pursuing ways to assist its membership deal with these concerns. At the July meeting, the Executive Committee approved the development of proposed standard practices for use by the defense bar in dealing with third party audit issues, particularly regarding procedures for obtaining informed consent from insureds. This project has been referred to the Industry Relations-Ethics committee, chaired by Larry Orr. Please contact Larry with your input on this important effort.

One of the primary initiatives this year has been to promote and strengthen the Substantive Law Committees. These groups were formed in part to promote participation in our organization by a broader base of "defense lawyers." Thanks to the hard work of Frankie Marion and the Committee Chairs, these groups are "up and running hard." Please contact Frankie or me if you have not yet signed up for one of the committees. Focused CLE breakouts presented by these committees will be a featured component of our annual meeting at Sea Island.

Speaking of Sea Island.....you won't want to miss this years annual meeting, November 4-7. In addition to the many offerings of The Cloister, Mark Phillips and Steve Darling have made arrangements for us to be entertained at the closing banquet by "The Fantastic Shakers." We will again host members of the state and federal judiciary, and hope to have record attendance by our membership. Please plan to attend.

IN MEMORIUM

PAUL J. FOSTER of Greenville, long-time and faithful member of the South Carolina Defense Trial Attorneys, passed away unexpectedly April 6, 1999. Our condolences to his wife, Lois, and son, Robert P. (Robin), and the rest of Paul's family.

SCDTAA Annual Meeting

The Cloister, Sea Island, GA
November 4 - 7, 1999

Mark Phillips and Steve Darling, Annual Meeting Co-chairs

Final plans for this year's Annual Meeting at The Cloister in Sea Island are underway. Our featured speaker will be U.S. Congressman Lindsey Graham. Congressman Graham had a major, visible role in this year's trial after the impeachment of President Clinton. The state and federal judiciary will be invited to our meeting.

We will have seperate panel discussions provided by our state and federal judges. The ethics hour will be presented by a trial specialist in the defense of legal malpractice claims. New Federal ADR Director Danny Mullis (formerly with Holmes & Thomson) will present an address on arbitration and mediation.

Our Substantive Law sections are offering seven different break-out sessions. Those include health care, product liability, employment law, commercial law, torts, worker's compensation, and young lawyers. The section chairs have arranged for federal and state judges to participate in the presentation of the break-out sessions. The Chief Industrial Commissioner will be present for the worker's compensation break-out.

As always, we will enjoy The Cloister's fine facilities and restaurants. There will be golf and tennis tournaments on Friday and a fully-appointed hospitality room for most of the weekend. During our black-tie dance on Saturday evening, our entertainment will be provided by The Fantastic Shakers.

Please sign up early so that the SCDTAA can finish its final arrangements with The Cloister. We look forward to having you.

Keynote Speaker: Representative Lindsey O. Graham

Lindsey O. Graham is the first Republican to represent the Third District of South Carolina in the United States House of Representatives since 1877. The district includes ten counties and runs along the western border of the state encompassing pristine national forests and parks. It also is home to the state's largest employer - the Savannah River Site.

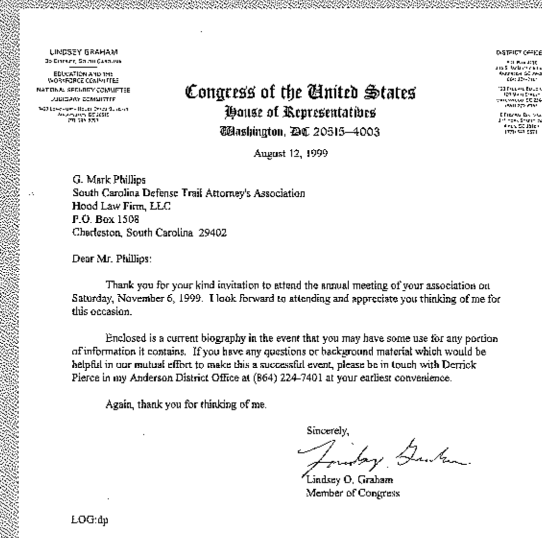
During his two terms in Congress, Graham has worked to bring fiscal responsibility to the federal government, eliminate the excessive tax burden on American families and reduce federal regulations which restrict local governements and businesses. He is a member of three House Committees including Education and the Workforce, Judiciary, and Armed Services.

An Operational Desert Shield and Storm veteran, Graham had a distinguished legal career in the United States Air Force. From 1989 until his election, he served as Base Staff Judge Advocate at McEntire Air National Guard Base in Eastover. He maintains his military status as a Lieutenant Colonel in the Air Force Reserves.

Graham established a private law practice in 1988 and served as attorney for the town of Central and assistant attorney for Oconee County. His political career began in 1992 when he was elected to represent Oconee County's Second District in the South Carolina House of Representatives where he served until 1994.

A native South Carolinian, Graham was born in Central in 1955. After his graduation from Daniel High School in Central, he attended the University of South Carolina. He received a Bachelor of Arts in Psychology in 1977 and was awarded a Juris Doctorate from the University of South Carolina in 1981.

He lives in Senaca and is a member of Corinth Baptist Church.



LINDSEY GRAHAM

EDUCATION AND THE WORKFORCE COMMITTEE
NATIONAL SECURITY COMMITTEE
JUDICIARY COMMITTEE

DISTRICT OFFICES:

Congress of the United States
House of Representatives
Washington, DC 20515–4003

August 12, 1999

G. Mark Phillips
South Carolina Defense Trail Attorney's Association
Hood Law Firm, LLC
P.O. Box 1508
Charleston, South Carolina 29402

Dear Mr. Phillips:

Thank you for your kind invitation to attend the annual meeting of your association on Saturday, November 6, 1999. I look forward to attending and appreciate you thinking of me for this occasion.

Enclosed is a current biography in the event that you may have some use for any portion of information it contains. If you have any questions or background material which would be helpful in our mutual effort to make this a successful event, please be in touch with Derrick Pierce in my Anderson District Office at (864) 224-7401 at your earliest convenience.

Again, thank you for thinking of me.

Sincerely,

Lindsey O. Graham
Member of Congress

LOG:dp

SCDTAA Annual Meeting Agenda

Continued from page 5

Annual Meeting Schedule of Events

Thursday, November 4, 1999

3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 6:30 p.m.	Registration
5:00 to 6:00 p.m.	Nominating Committee Meeting
7:00 to 8:00 p.m.	President's Welcome Reception
	Dinner at the Cloister on Your Own

Friday, November 5, 1999

8:00 a.m. to Noon	Late Registration
8:00 to 9:00 a.m.	Coffee Service
8:15 to 8:30 a.m.	Welcome and Announcements - *John S. Wilkerson III, President, SCDTAA*
8:30 to 9:30 a.m.	Ethics Hour: *Susan Lipscomb, Esq.*
9:30 to 10:15 a.m.	Judges Panel
10:15 to 10:30 a.m.	Coffee Break
10:30 a.m. to Noon	Substantive Law Breakouts
	A. Employment Law - *Phillip Kilgore and Scott Justice*
	B. Healthcare Law - *Jennifer Johnsen and Dan Westbrook*
	C. Products Liability - *Elbert Dorn*
12:30 p.m.	Golf Tournament - *David Rheney*
1:00 p.m.	Fishing
2:30 p.m.	Tennis Tournament - *David Traylor*
7:00 to 8:00 p.m.	Cocktails
	Dinner at the Cloister on Your Own

Saturday, November 6, 1999

8:00 to 9:00 a.m.	Coffee Service
8:00 to 8:30 a.m.	SCDTAA Annual Business Meeting/DRI Report
8:30 to 9:00 a.m.	ADR in the Federal Court - *Danny H. Mullis, Esquire, ADR Program Director*
9:00 to 9:45 a.m.	Judges Panel
9:45 to 10:00 a.m.	State of the Judiciary - *Chief Justice Ernest A. Finney, Jr.*
10:00 to 10:15 a.m.	Coffee Break
10:15 to 11:15 a.m.	Substantive Law Breakouts
	A. Workers Compensation *Jeff Ezell and Patrick Fant*
	B. Insurance and Torts *Glen Elliot and David Rheney*
	C. Commercial Litigation *Skip Martin*
11:15 a.m. to 12:15 p.m.	Constitutional Crisis Redux - *The Honorable Lindsey O. Graham, Member of Congress*
	Afternoon on Your Own
7:00 to 8:00 p.m.	Cocktail Reception (Black Tie Optional)
	Dinner at the Cloister on Your Own
9:00 p.m. to 1:00 a.m.	Dance to the Music and Entertainment of *"The Fantastic Shakers"*

The Admissability of Expert Testimoney After *State v. Council*

Gray T. Culbreath, Esquire
Collins & Lacy, P.C.

While the United States Supreme Court has continued to refine the standard for the admissibility of expert witness testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* through its decisions in *General Electric Co. v. Joiner* and most recently in *Kumho Tire Co. Ltd. v. Carmichael*, the standards for the admissibility of expert witness testimony in South Carolina have evolved gradually. At the present time, *Kumho Tire* stands for the proposition that the trial court must analyze both the reliability and relevance of both scientific and nonscientific expert testimony. This analysis includes not only an examination of the expert's methodology, but also the expert's ultimate conclusion. The purpose of this article is not to analyze *Daubert* and its progeny . Rather its purpose is to analyze the path taken by South Carolina courts culminating in the recent decision of *State v. Council*, and to conclude with a practical approach to challenging the Plaintiff's expert witness in light of the holding of Council.

The History of Expert Admissibility in South Carolina

Prior to the adoption of the South Carolina Rules of Evidence, the first opinion addressing the admissibility of expert witness testimony by the Supreme Court was *State v. Jones*. Like the majority of expert testimony cases, the court announced a rule applicable to the specific expert testimony at issue in the case. In addressing the admissibility of bite mark testimony, the Court held:

> ". . . we think admissibility depends upon . . . the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." The *Jones* opinion also restated the rule that "[t]he admissibility of expert testimony in this state is a matter within the discretion of the trial court."

In 1990, the Supreme Court revisited the *Jones* rule by addressing the admissibility of DNA expert testimony for the first time in *State v. Ford*. As noted in subsequent decisions, "the *Jones* inquiry focuses more on the methods and techniques the expert relies upon, rather than the purpose for which the expert testimony is offered." However, South Carolina courts have not uniformly accepted the *Jones* holding: both the Court of Appeals and the Supreme Court have applied a different standard for non-scientific expert testimony. For example, in *State v. Whaley*, the Supreme Court held that eyewitness identification testimony was not "required to meet the *Jones* test." Although the Court concluded *Jones* was inapplicable, both *Jones* and *Whaley* have a common threshold inquiry:

> Whether the expert's methods and techniques even fall within *Jones*' central purpose: to prevent the aura of infallibility which surrounds scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom from misleading the fact finders.

Jones remained the rule in South Carolina as restated by the court in its holding in *State v. Ford*. Those decisions adopted a standard which represents a liberal approach to the admissibility of scientific evidence and not the "general acceptance" standard of admissibility set forth in *Frye v. United States* and rejected by the *Jones* court.

The South Carolina Rules of Evidence were adopted effective September 3, 1995. Of partic-

Continued on page 8

The Admissibility of Expert Testimony After *State v. Council*

Continued from page 7

ular relevance are S.C.R.Evid. 702, "Testimony by Experts," and S.C.R.Evid. 703, "Bases of Opinion Testimony by Experts." These rules supplanted, to a certain extent, the common law standards adopted by the holdings of *Jones* and *Ford*.

South Carolina Rules of Evidence 702 states:

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

Rule 702 is identical to the former Rule 24(a) South Carolina Rules of Criminal Procedure, which was the subject of analysis in *Jones* and *Ford*. As noted by the advisory committees' notes to the S.C.R.Evid. 702 and 703, both are identical to the Federal Rule.

South Carolina Rules of Evidence 703 provides:

> 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 of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

A. WILLIAM ROBERTS, JR. & ASSOCIATES
COURT REPORTING

WHEN RELIABILITY COUNTS . . .

- REALTIME, HOURLY, DAILY & EXPEDITED COPY
- MULTIPARTY LITIGATION
- NATIONWIDE REFERRAL SERVICE
- VIDEOTAPE DEPOSITIONS
- DISCOVERY ZX & CATLINK LITIGATION SOFTWARE
- CASEVIEW & LIVENOTE REALTIME SOFTWARE
- WORD PERFECT AND ASCII DISKETTES
- COMPRESSED TRANSCRIPTS
- DEPOSITION SUITE
- REGISTERED PROFESSIONAL REPORTERS

AWR
Professionals Serving Professionals

Charleston 803-722-8414
Columbia 803-731-5224
Greenville 864-234-7030
Charlotte 704-573-3919
WATS 1-800-743-DEPO

Similarly, South Carolina Rules of Evidence 703 is identical to the former South Carolina Rule of Criminal Procedure 24(b).

Shortly before the adoption of the South Carolina Rules of Evidence, the United States Supreme Court decided *Daubert*. In *State v. Dinkins*, the Supreme Court had its first opportunity to analyze and apply the holding of *Daubert* but declined to do so. The only mention of *Daubert* is the citation to the Court's admonition that "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." The Court was silent on the impact of *Daubert* on South Carolina practice.

Two years later, the Court of Appeals cited *Daubert* and addressed the admissibility of testimony on sexual abuse in *State v. Morgan*. In *Morgan*, a child molestation prosecution, the expert testimony at issue was that of a physician and a mental health counselor. The criminal trial took place prior to the adoption of the South Carolina Rules of Evidence or the *Daubert* decision. As a result, *Morgan's* appellate arguments regarding the applicability of either did not have full force and effect.

The Court of Appeals began its decision holding that "*Morgan's* reliance on the federal standard for admitting scientific evidence, *Daubert*, is misplaced, because at least prior to the adoption of the South Carolina Rules of Evidence, *State v. Jones* was the standard for determining the admissibility of novel scientific evidence." In the footnote accompanying this statement, Judge Howell noted that "*Daubert* was defined, not solely by Fed.R.Evid. 702, but also by the breadth of the entire Federal Rules of Evidence themselves."

Morgan is illustrative of the decisions governing expert witness admissibility in South Carolina. In most of the reported decisions, a single area of expert evidence and testimony was analyzed, typically in a criminal context, and that decision controlled that category of expert testimony, until a new issue arose. No decision by the South Carolina appellate courts has issued a uniform holding designed to control all expert witness testimony. The *Morgan* court noted that it was bound by the holding in *State v. Shumpert* as to sexual assault cases, but held "where any expert (not just behavioral science) opinion is based upon scientific methods and techniques, reliability could impact admissibility, depending on novelty and general acceptance of the expert's underlying methods."

The *Morgan* opinion held that *Jones* may or may not be applicable, and it formulated two rules:

1) If *Jones* applies to the testimony, the court must make a finding of reliability before the testimony is admitted; or If the court uses Rule one, and *Jones* applies, Footnote 4 of the *Morgan* opinion indicates "reliability and general acceptance may be established by judicial notice, reliance on prior precedent, and evidentiary hearings."
2) If *Jones* does not apply, questions about reliability go to the weight, and not the admissibility of the expert's testimony. Based on the holding in *Morgan*, the holding in *Jones* appears to apply only to "scientific evidence."

Later that same year, the Court of Appeals issued its opinion in *State v. Henry*, which was also a child molestation case. There, the court was faced with the admissibility of psychiatric testimony and testimony regarding post-traumatic stress disorder. The court first addressed the abuse of discretion standard adopted by the United States Supreme Court decision in *Joiner* and held:

> There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge.

The *Henry* decision provides an excellent discussion of the standards applicable to an expert's qualifications to give opinions.

The New South Carolina Standard: *State v. Council*

On April 5, 1999, the Supreme Court decided *State v. Council*, a four to one decision authored by Justice Burnett with Justice Finney dissenting. The *Council* case arose from the murder of Elizabeth Getty. In conjunction with the prosecution of Donney Council, the state sought to introduce testimony from an FBI laboratory expert regarding the results of mitochondrial DNA (mtDNA) analysis performed on hairs found at the murder scene. While South Carolina courts had previously deemed DNA evidence admissible in *Ford*, the use of mtDNA analysis was novel and presented new issues which were not resolved by the holding in *Ford*. As a result, Judge Henry Floyd held an in-camera hearing to determine the reliability and admissibility of the evidence pursuant to *Jones*.

After conducting his in-camera hearing, Judge Floyd found the mtDNA evidence admissible under Rules 702 and 703, S.C.R.Evid. and further found the evidence admissible under *Jones* and *Daubert*.

"The trial judge noted the process had been subjected to peer review and publication; a known potential rate of error existed; standards controlled the techniques and operations; the F.B.I. laboratory validated the process; this technology and underlying science has been accepted in the scientific community; and while forensic application of this technology was a recent development, the technology had been used for other purposes."

Mr. Council received a death sentence and appealed, among other issues, the admission of the mtDNA expert testimony.

On appeal, Council argued the admission of the mtDNA expert testimony was error because the forensic application of the process was novel and had not gained general acceptance in the scientific community. This was the question presented for review at the Supreme Court.

Justice Burnett's opinion began with a general discussion of the history of expert witness testimony admissibility in South Carolina. After noting the *Frye* standard had never been adopted by the South Carolina Supreme Court, he reiterated the standards set forth in Jones, which are more liberal than the *Frye* standard. Under the *Jones* analysis, the Court considers several factors related to the admissibility and reliability of the expert's opinions:

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

The Court then specifically discussed the four factors of reliability suggested in *Daubert*:

Continued on page 10

Continued from page 9

(1) scientific methodology;
(2) peer review;
(3) consideration of general acceptance; and
(4) the rate of error of a particular technique.

In addition, the Court noted that *Daubert* required the equivalent of S.C.R.Evid. 403 analysis: whether the probative value is outweighed by its prejudicial effect once the evidence is deemed reliable and admissible. Significantly, the opinion noted that *Daubert* also required an analysis under Federal Rules of Evidence 703 but did not place such a requirement on South Carolina courts.

With this background outlined, Justice Burnett then set forth the rule which now controls the admissibility of expert witness testimony in South Carolina. First, the majority held "this Court does not adopt *Daubert* . . ." Instead, "the proper analysis for determining admissibility of scientific evidence is now under the SCRE."

To resolve the question of admissibility the Court set forth a test to be applied. The initial issue to be resolved in a South Carolina court is whether the evidence is admissible pursuant to South Carolina Rule of Evidence 702. The trial court must find that the evidence will assist the trier of fact, that the expert witness is qualified and the underlying science is reliable. In assessing reliability, "[t]he trial judge should apply the *Jones* factors to determine reliability."

Once the court has found the evidence admissible under S.C.R.Evid. 702, the trial judge should determine whether the probative value is outweighed by the prejudicial effect of the evidence pursuant to Rule 403, S.C.R.Evid. An analysis pursuant to South Carolina Rule of Evidence 703 is not required. Justice Finney's dissent acknowledged the majority created a new test to be applied in determining the admissibility of scientific evidence. However, rather than attack the "newly formulated test," Justice Finney instead argued the trial court be given an opportunity to apply the rule.

In Council, the Supreme Court explicitly rejected *Daubert* and created a new test for the admissibility of expert testimony. It appears that South Carolina has not moved any closer towards adopting the *Daubert* standard, instead explicitly rejecting *Daubert*. The new test set forth by the majority opinion focuses on the standards set forth by *Jones* and S.C.R.Evid. 702. The South Carolina Supreme Court's interpretation of Rule 702 provides a relevancy standard that is similar to, but more exacting than that of *Daubert*, which the Court rejected. In order to determine reliability under 702, the four *Jones* factors are to be used to determine reliability. Assuming the expert testimony is admissible under S.C.R.Evid. 702, it must then be analyzed under S.C.R.Evid. 403.

The Future of Expert Witness Admissibilty in South Carolina

The Council holding sets forth a new standard for the admissibility of expert witness testimony in South Carolina courts. Under the Council framework, the first inquiry is made pursuant to S.C.R.Evid. 702 and *Jones*. The first prong requires the trial court to "find the evidence will assist the trier of fact, the expert witness is qualified and the underlying science is reliable."

To access the reliability of the evidence, the Court should apply the factors set forth in *Jones*, not *Daubert*. Therefore, the practitioner should analyze the expert testimony under *Jones* but to the extent possible argue that the Court should look to *Daubert* and its progeny where South Carolina law is silent or unclear.

Once the court is satisfied that the requirements of S.C.R.Evid. 702 have been met, the next step is a challenge under S.C.R.Evid. 403. Even where evidence is admissible under Rule 702, the evidence "is also subject to attack for relevancy and prejudice." In conducting such an analysis, the guidance is the probative value versus prejudicial effect test of S.C.R. Evid. 403. While not a part of the Council holding, the practitioner should also subject the expert testimony to a Rule 703 analysis consistent with *Daubert* and its progeny.

The *Council* decision raises more questions than it answers. The rejection of *Daubert*, coupled with the *Morgan* opinion which holds that *Jones* applies only to "scientific" testimony calls into question whether the principles of *Kumho Tire* will be applied in South Carolina. It remains an open question as to whether or not *Council* will be applied to engineers, economists and other nonscientific expert testimony. Therefore, defense counsel should carefully analyze and challenge "nonscientific" expert testimony pursuant to Council and argue the principles of *Kumho Tire* as an extension of *Council*.

The Latest ADA Decisions: Helpful or Harmful to Employees and Employers?

by William H. Floyd, III, Esquire

Within the past several weeks, the United States Supreme Court made several significant rulings involving the Americans with Disabilities Act (ADA). Three of them are particularly controversial and relevant to employers. Some disability advocacy groups claim that the Court deprived millions of the ADA's protections, while other pro-business groups have applauded some of the Court's decisions as being reasonable and true to the ADA's real intent. Some employers are more concerned, though, over one of the Court's decisions permitting an employee to receive total disability income from the government while still complaining that the employer should allow the employee to continue working.

Have the Supreme Court's recent ADA decisions tipped the balance in favor of employers versus the disabled? No. Truly disabled applicants or employees remain protected by ADA. Similarly, employers may still cry foul when an employee seeks total disability benefits and employment at the same time. Nevertheless, based on the Court's rulings, an employer should consider some new issues or action.

Eye Glasses and Medication: Disability Mitigation

Two of the Supreme Court's decisions dealt with the issue of disability mitigation. Simply put, does the wearing of eyeglasses, taking of medicine, or similar measures make an otherwise disabling condition not protected by the ADA? The Court concluded that mitigation is a very important factor when deciding an individual's rights and employer's responsibilities under the ADA. In *Sutton v. United Airlines, Inc.* and *Murphy v. United Parcel Service, Inc.*, the Court ruled that the ADA does not protect individuals with physical or mental impairments that are corrected through mitigating measures such as glasses or medication.

In *Sutton*, twin sisters alleged that United Airlines violated the ADA by declining to hire them as global airline pilots because of their severe myopia. Without glasses or contacts, both sisters had very poor vision and did not meet the airline's vision requirements. On the other hand, with corrective lenses, their vision became 20/20 or better. After initially hiring them, United Airlines quickly dismissed the sisters after learning that they did not meet the vision requirements. They sued, claiming that they were disabled and that they had been discriminated against in violation of the ADA.

In response to the sisters' lawsuit, United Airlines argued that they did not have a "disability" as defined by ADA, because both admitted that with the use of corrective lenses their vision was at least 20/20. That argument prevailed before the trial court and the initial appellate court. When the case was appealed to the Supreme Court, that Court also held that the sisters were not "disabled" under the ADA.

The Supreme Court based its holding on three grounds. First, the Court reasoned that because the definition of disability under the ADA requires that an impairment "substantially limit" a major life activity, it necessarily follows that a "person be presently - - not potentially or hypothetically - - substantially limited in order to demonstrate a disability." Thus, according to the Court, a person whose physical or mental impairment is presently corrected by medication or other measures is not substantially limited and does not have a disability.

Second, the Court rejected the EEOC's position to the contrary. The EEOC had issued guidelines stating that a person is to be judged in his uncorrected or mitigated state. The Court

Continued on page 12

Continued from page 11

rejected these guidelines, however, ruling that they contradicted the individualized inquiry mandated by the ADA.

Third, the Court reasoned that when enacting the ADA, Congress intended that the Act only covered individuals whose impairments are not mitigated by corrective measures, and that this intent is demonstrated by Congress' reference in the ADA that there were "some 43,000,000 Americans . . . with disabilities." According to the Court, "Had Congress intended to include all persons with corrected physical limitations . . ., it undoubtedly would have cited a much higher number of disabled persons."

In affirming the dismissal of the case, the Supreme Court also rejected the argument that the sisters were "regarded as" having a disability under the Act. The Court reasoned that there was no evidence that United Airlines regarded the sisters as being substantially limited in any major life activity, including that of working. Rather, United Airlines only precluded them from holding the position as "global airline pilot," and the Court observed that there were a number of other positions available, such as regional pilot or pilot instructor. The Court noted that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."

In *Murphy v. United Parcel Service, Inc*, the Court followed its holding in *Sutton* and concluded that UPS did not violate the ADA when it terminated a mechanic-driver who had extreme hypertension (high blood pressure), a condition that contradicted certain Department of Transportation requirements. Like the glasses that improved the two sisters' vision, the mechanic-driver could regulate his hypertension through medication. The Supreme Court reasoned that the mechanic-driver was not "disabled" under the ADA, because through medication he "functions normally doing everyday activities that an everyday person does." The Court also rejected the argument that UPS regarded the mechanic-driver as "disabled." According to the Court, UPS did not view him as disqualified from a class of jobs, but only from one particular job which required driving.

Based on the *Sutton* and *Murphy* decisions, whether and to what extent an applicant's or employee's physical or mental impairment can be controlled through mitigation, such as medication or similar measures, is critical to determining whether the person is "disabled" under the ADA and, therefore, entitled to the Act's protections.

Totally Disabled, but Able to Work

A third decision by the Supreme Court dealt with another aspect of the ADA's protections. The Court's resolution, however, was not as welcomed by employers as the two other decisions. In *Cleveland v. Policy Management Systems Corp.*, an employee suffered a disabling stroke and lost her job. She filed for and eventually obtained Social Security Disability Insurance (SSDI) benefits, claiming to be unable to work due to her condition. While her claim for SSDI benefits was still pending, however, she also asserted that her former employer had discriminated against her by not allowing her to continue working with our without reasonable accommodation.

Her former employer answered her allegations by pointing to her apparently inconsistent position: she claimed to be unable to work in order to receive SSDI benefits, but at the same time she claimed to be able to work in her lawsuit against her former employer. The trial court and initial appellate court recognized the contradiction of her claims and ruled for her former employer. On the other hand, the Supreme Court did not.

The Supreme Court held that the pursuit or receipt of SSDI benefits does not automatically stop the recipient from pursuing an ADA claim. According to the Court's analysis, the ADA and SSDI are not inherently inconsistent. Depending on the circumstances, an individual could be unable to work in a general sense for SSDI purposes, but able to work on a specific job with or without reasonable accommodations under the ADA. The Court refused to automatically dismiss an ADA plaintiff who has also sought and received SSDI benefits. Instead, the Court held that an ADA plaintiff can do both (state an ADA claim while seeking SSDI benefits) provided that the ADA plaintiff can adequately explain that despite the SSDI claim, the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation.

Before the Court's decision in *Cleveland*, employers were finding a quick way out of an ADA lawsuit where the plaintiff was pursuing SSDI benefits. Now, that defense is still available, but less decisive.

ADA "Score Card"

In light of these three recent ADA decisions by the Supreme Court, did employers "win" more than disabled applicants or employees? Contrary to critics on both sides, there were no big winners or losers here. The Supreme Court took a middle-of-the-road approach in all three cases. In *Sutton* and *Murphy* the Court rightly refused to ignore that some situations, specifically physical or mental impairments, can be temporarily and dramatically improved through medicine or other mitigating measures. To have decided otherwise would have ignored years of medical advances and stretched the ADA's protections too far. Similarly, the Court recognized that seeking SSDI benefits does not automatically remove ADA protections, preferring instead a more individualized inquiry into the situation.

While the Court's decisions may remain controversial, they do provide an employer with some new issues to consider. Here are a few.

- Review the "essential functions" of each job. Every job is comprised of some essential and some non-essential or marginal functions. According to the ADA, an applicant, whether disabled or not, must be able to perform the essential functions of the job with or without reasonable accommodation. Determining those essential functions now will help an employer make the best selections and help an employer defend its actions if necessary.

- Comply with regulatory requirements. Some, but certainly not all, businesses must retain only certified or licensed employees. For example, the mechanic-driver in *Murphy* needed to meet certain DOT requirements. Ignoring regulatory requirements, even those that deal with physical or mental conditions, can lead to problems with the government agency or general liability problems if there is an accident.

- Recognize the advantages of "disability" mitigation. With unemployment rates reaching new lows, many employers desperately need qualified employees. By properly taking medication, wearing glasses, or using other mitigating devices, a person with an otherwise disabling condition can enter or stay in the workforce. Employers should cooperate in this effort and, thereby, gain a good employee and minimize ADA claims.

- Present an aggressive defense if necessary. If wrongfully accused of disability discrimination, an employer has every right during a lawsuit to discover whether the plaintiff has made potentially inconsistent statements or claims in order to get SSDI benefits or other similar types of disability benefits. This information could still help the employer win.

Based out of the firm's Columbia office, William Floyd is a shareholder with the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. He works exclusively with employers and helps them deal successfully with such issues as the ADA. He can be reached by either calling (803) 252-1300 or e-mailing William.Floyd @ODNSS.com.

CREEL COURT REPORTING

1116 Blanding Street, Suite 1B • Columbia, SC 29201
(803) 252-3445 • (800) 822-0896 • FAX: (803) 799-5668
E-mail: creelct@ix.netcom.com

RITA L. CREEL, CCR, OWNER
Large Professional Staff

FULL SERVICE COURT REPORTING
"Consider Us Your Satellite Office"

Depositions • Arbitrations • Hearings • Expedited Service
Video Depositions and Professional Frame by Frame Editing
Medical/Technical Testimony
ASCII & Word Perfect Diskettes • CAT-Links and Discovery ZX
In-house Conference Rooms Available

No charge for Transcript Condensing & Key Word Indexing
No charge for travel time or mileage in South Carolina

—Member—
National Stenomask Verbatim Reporters Association
South Carolina Certified Reporters Association

Evidence Matters

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

DIRTY LAUNDRY: PART II

In the last issue, several theories for admissibility of prior bad acts were discussed, specifically under rules of evidence 402, 404(b), 608(b), and the *res gestae* rule. Other theories for admissibility of bad acts are given below.

A. Opening the Door

Even when a bad act would otherwise be irrelevant, it can become admissible if the witness (or attorney in opening statement) mentions the matter. The theory is the common-law rule regarding opening the door into otherwise inadmissible evidence.[1] For example, when a witness volunteers that he has "never been in any trouble before," the door may have been opened into an exploration of his prior bad dealings with the law, such as arrests or convictions. When the door has been opened, the language of the court opinions would appear to permit extrinsic evidence to rebut the evidence.

B. To Rebut Good-Character Evidence Admitted Under Rule 404(a)

In criminal trials and those few civil trials where general character evidence is admissible, the adverse party under rule 405(b) may rebut the good-character evidence by a contrary showing. Specific instances of conduct may be shown. This might include prior bad acts which otherwise would have been inadmissible. The cross-examination often follows the lines of "Did you know that the defendant did [a certain prior bad act]?"

C. To Rebut Testimony of Truthfulness or Untruthfulness Evidence Admitted Under Rule 608(b)

When a character witness testifies under rule 608(a) that a witness has a reputation for truthfulness (or untruthfulness) or gives an opinion that he would believe the witness under oath, the adverse party may rebut the evidence by a "Did you know" type cross-examination[2] similar to that used under rules 404 and 405. The prior instances of conduct must relate to **truthfulness or untruthfulness** only. The theory behind this type cross-examination is that the instances of prior acts are used to show the testifying witness is unfamiliar with the reputation of the witness about whom he has testified.

One question unaddressed by the courts is whether in a personal-injury case a treating doctor's opinions that he believed his patient, that the patient was not malingering, or that the patient was actually in pain are in fact merely just opinions under rule 608(a) that the patient was being truthful. If so, the other attorney would be able to cross-examine about prior bad acts reflecting upon the patient's character for telling the truth.

D. To Show Bias or Reason to Lie

Every party is entitled to show that an adverse witness is not credible. Although the South Carolina Rules of Evidence directly address this through rule 608(c) and allow extrinsic evidence to show bias and motive to misrepresent, such evidence also is admissible under the federal rules. Thus a party who attempts with narcotics to bribe a witness to testify favorably to him can have his possession of drugs admitted. The rule is flexible and may be applied to numerous scenarios.

E. To Show Impaired Personal Knowledge

A witness's prior alcohol or drug usage generally is not admissible. However, if it impairs his ability to perceive the facts about which he testifies, it can become relevant under rule 602. For example, if the witness had been under the influence of alcohol, narcotics, or hallucinogens and the drug affected his mental state, this might be allowed in a proper case.

F. To Show Habit

Rule 406 provides that when a witness's conduct is a regular response to a repeated situation (or put another way, semiautomatic), his prior acts might be admitted. For example, if a driver instinctively and invariably uses turn signals, such evidence might be admissible in a proper case. A plaintiff whose habit is to bound down the stairs of the defendant landlord's building might have his habit admitted against him in a negligence action where he alleges injuries from a fall from the stairs.

G. Criminal Convictions

Rule 609 generally allows evidence of prior bad acts that resulted in a conviction. Mere arrests do not apply under this rule. Moreover, some courts disallow under rule 403 prior convictions otherwise admissible but which are very similar or identical to the acts that the defendant allegedly committed in the trial. This theory might be applied to torts or other causes of action where the act at issue in the trial is very similar to or the same as the prior crime.

Footnotes

[1] *See United States v. Ellis*, 121 F.3d 908 (4th Cir.)(Currie, J.)(noting use of doctrine for rehabilitation of witness); *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971)(allowing inquiry after witness opened door into issue on direct examination). *See generally* G. Ross Anderson, Jr., Opening the Door in *South Carolina Trial Lawyer Bulletin* 7, 8 (Fall 1997).

[2] *See Deary v. City of Gloucester*, 9 F.3d 191, 196-97 (1st Cir. 1993). *See also* 2 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, *Federal Rules of Evidence Manual* 848-49 (6th ed. 1994)(discussing this issue).

QUICK-REFERENCE CHART: ADMISSIBILITY OF BAD ACTS PRIOR TO TRIAL

• CRIMINAL CONVICTIONS (Rule 609)
➻ Must meet requirements in Rule 609, and some courts exclude if *too similar to charged crime* ➻ ADMISSIBLE

• BAD ACT AN ELEMENT OF THE CHARGED CRIME,CLAIM,OR DEFENSE (RULE 402)
➻ Act is not too remote ➻ Extrinsic Evidence ➻ ADMISSIBLE
E.g., Prior sexual acts when victim's chastity is element of crime of seduction, Unfair trade practices act, negligent entrustment, Burglary 2d.

• BAD ACT PART OF RES GESTAE (RULE 402)
➻ Remote act not "res gestae" ➻ Extrinsic Evidence ➻ ADMISSIBLE
E.g., Acts constituting the crime, including preparatory and "wind-up acts"

• BAD ACT USED TO SHOW MOTIVE, INTENT, ETC. (RULE 404(b))
➻ Must be similar and lay foundation under Federal/State case law
➻ Extrinsic Evidence ➻ ADMISSIBLE
E.g.., Prior drug sales to show knowledge of drug trade to rebut entrapment and due process defenses.

• BAD ACT USED TO SHOW UNTRUTHFULNESS (RULE 608(b))
➻ *No* Extrinsic Evidence ➻ ADMISSIBLE
E.g., Credit card fraud, prior lies, failure to report income, reversing odometer mileage before a sale, using a false name.

• BAD ACT IN REBUTTAL WHEN WITNESS TESTIFIES ABOUT THE GOOD CHARACTER (RULE 404(a)) OR TRUTHFULNESS (608(a))
➻ Must be relevant to bad character trait/untruthfulness, extrinsic evidence: Yes (404(a)); No (608(a)) ➻ ADMISSIBLE
"Do you know" type cross examination allowed.

• BAD ACT TO SHOW BIAS OR REASON TO LIE (FEDERAL/STATE RULES 402 & STATE RULE 608(c))
➻ Some courts might require witness opportunity to explain or admit statements (but not conduct) before extrinsic evidence is allowed ➻ ADMISSIBLE
E.g., Personal relationships, promises or possiblity of reward, fear.

• BAD ACT IN REBUTTAL WHEN WITNESS OPENS THE DOOR UNDER COMMON-LAW DOCTRINE
➻ Limited to evidence regarding topic first brought up by adversary, but may use extrinsic evidence ➻ ADMISSIBLE
E.g., "I've never been in trouble before". "I didn't return to the doctor because I couldn't afford it."

• BAD ACT USED TO SHOW HABIT WHEN CONDUCT IS A REGULAR RESPONSE TO A REPEATED SITUATION (RULE 406)
➻ Extrinsic Evidence allowed ➻ ADMISSIBLE
E.g., Bounding down stairs, giving turn signals.

• BAD ACT USED TO SHOW IMPAIRED PERSONAL KNOWLEDGE OF A WITNESS (RULE 602)
➻ Extrinsic Evidence allowed ➻ ADMISSIBLE
E.g. Prior drug/alcohol use

South Carolina Defense Trial Attorneys' Association

Visit your Website at: http://www.scdtaa.com

The board is upgrading the Website and we need every member's up-to-date information and e-mail address.

Please send SCDTAA your:
Name • Address • Phone • Fax • E-mail Address • URL

Also suggestions on what you would like to see on the Website or how it could be more beneficial are welcome and appreciated.

SCDTAA
3008 Millwood Ave., Columbia, SC 29205
(803) 252-5646 • Fax (803) 765-0860 • E-mail: info@scdtaa.com

South Carolina Defense Trial
Attorneys' Association
3008 Millwood Avenue
Columbia, SC 29205

Address Service Requested

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