S.C. Defense Trial Attorneys' Association Volume 32 Number 3 ▸ Fall, 2004

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

Spring

TRIAL ACADEMY

April 21 - 23, 2004

Charleston, SC

Summer

JOINT MEETING

July 22 - 24, 2004

Grove Park Inn Asheville, NC

Fall

ANNUAL MEETING

November 11-14, 2004

Château Élan Braselton, GA

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

President's Letter

by Samuel W. Outten

The SCDTAA, as well as many of our individual members, followed with the interest the debate on tort reform during the most recent legislative session. As one might expect, the discourse was heated, as it is in any state when this subject is introduced.

Vigorous debate on public policy issues is an important part of our political system. The debate should be concerned with the merits of the proposals made, and should not degenerate into hyperbole. There are, indeed, competing interests in tort reform, and all meritorious arguments should be considered.

The mission of the SCDTAA is as follows:

> The purpose of the South Carolina Defense Trial Attorneys Association is to Promote justice, professionalism and integrity in the civil justice system by Bringing together attorneys dedicated to the defense of civil actions.

Consistent with this mission, the SCDTAA supports having a system in which corporate defendants and insurance companies receive fair and impartial trials. Certainly no one can argue that we should only be concerned with the treatment of individual plaintiffs. Corporations and insurance companies should enter the courtrooms of our state with confidence that any verdict will be rationally based on the facts and the law, not some improper bias or other irrelevant considerations.

It seems likely that tort reform will come up again in the upcoming legislative session. During the legislative session, the goal of all interested parties should be to improve the civil justice system. Any legislation passed should be the product of careful consideration of competing interests, and result in renewed confidence that our civil system administers justice fairly to all of our citizens.

Switching gears, I would like to thank John T. Lay, Glenn Elliott and Aimee Hiers for all of their hard work in putting together an excellent Joint Meeting. During and after the meeting, I heard many favorable comments. I would also like to thank all of the excellent speakers. Finally, I would like to thank the CMASC for their participation and involvement in this successful meeting.

The Annual Meeting of the SCDTAA will be November 11 – 14 at Château Élan in Braselton, Georgia. Matt Henrikson, David Rheney and Donna Givens are planning an excellent program. Two years ago our annual meeting was held at Château Élan and it was very well received by all who attended. This is an excellent venue, which has many amenities, including golf, tennis, a spa, a winery, etc. I look forward to seeing you all there.

Venue Resolution

by James R. Courie

At the July business meeting the members voted to play an active role in changing the current venue laws in South Carolina. After several years of providing a support and informational role to various tort reform groups the members of the South Carolina Defense Trial Attorneys' Association is proud to play a leadership role in working to change the venue laws and create a more equitable and fair judicial system. The following resolution was unanimously adopted:

A RESOLUTION

Whereas the mission of the South Carolina Defense Trial Attorneys' Association is to promote justice, professionalism and integrity in the civil justice system; and

Whereas the venue of a legal action can affect the actual or perceived procedural fairness of a trial, the ultimate outcome of a case, and the integrity the entire civil justice system; and

Whereas proper venue is a fundamental question of fairness, reasonableness, and justice; and

Whereas the existing civil venue laws in South Carolina are unbalanced and inequitable; and

Whereas more reasonable and balanced venue laws would improve the South Carolina civil justice system and promote integrity and fairness, and engender greater in faith in the judicial process.

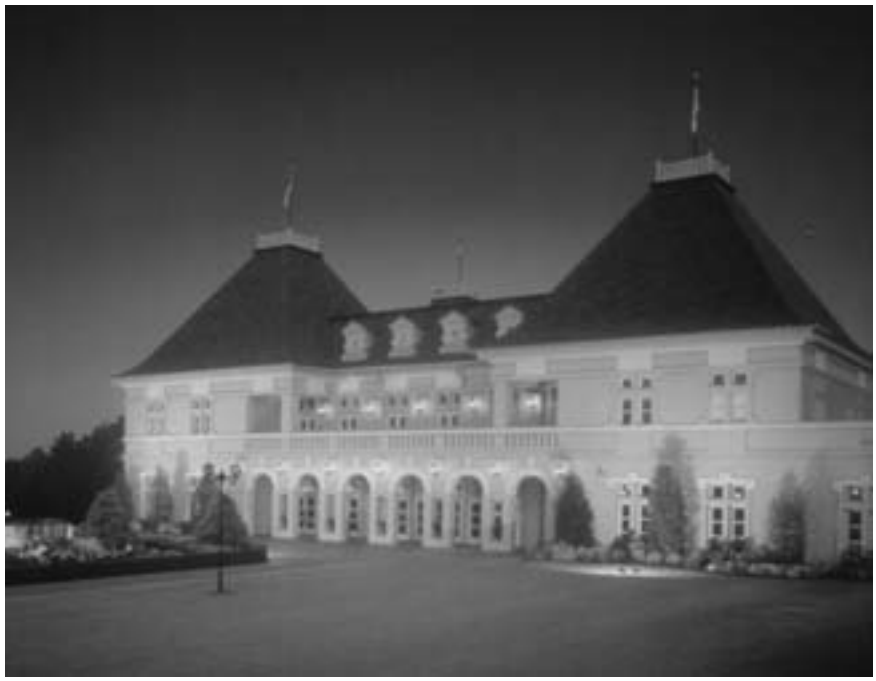
Therefore, be it resolved that the South Carolina Defense Trial Attorneys' Association supports and actively advocates amending the existing civil venue laws in South Carolina to ensure the fair and equitable treatment of all parties.

37th Annual SCDTAA Meeting
November 11 - 14, 2004 • Château Élan
by Donna S. Givens

Mark your calendars now and make your plans to attend the 37th Annual Meeting on November 11-14, 2004 at the Château Élan, located conveniently just across the Georgia border. We will return to Château Élan following a wonderfully well-received meeting at the Winery and Spa two years ago.

The Annual Meeting Committee is well on the way to completing the program, which promises something of interest for everyone, regardless of your practice area or sub-specialty. We will begin with our traditional President's Welcome Reception Thursday evening.

Friday and Saturday mornings will be devoted to our educational program, which is slated to include speakers on the coverage issue arising out of the World Trade Center "Twin Towers" collapse. We will also hear from a lawyer deployed to Iraq, who returned recently and will give us an insight into the many war crime issues arising out of his service there. He will share compelling photographs and will chronicle his experience in the dessert.



Our own Chief Justice will favor us with her annual State of the Judiciary address and participate in panel discussion on hot topics. As a result of some lively discussion among the attendees at the Joint Meeting, several current and important topics will be revisited for the purpose of allowing the membership and the Judiciary input into mechanisms for dealing with important issues to our membership. These include the duty to defend and plaintiff's right to contact the named defendant in an underinsured/uninsured case (*Crawford v. Henderson*), the punitive damages analysis (*State Farm v. Campbell*), the new ADR rules and the time frame for implementation and other timely topics.

A panel consisting of legislators on both sides of the Tort Reform debate will participate in a moderated panel discussion. Of obvious interest will be discussion and explanation of the failed tort reform efforts of this legislative session, and a preview of what will be upcoming this year.

A presentation on cutting edge evidentiary issues will be made by one of the state's premier authorities on evidence. And, as a different topic, a Quality of Life speaker will address issues relative to our uniquely billable hour and therefore time driven practice.

These are just a few of the highlights of the program, which will also include breakout on substantive issues, and a special Young Lawyer's section roundtable.

The social activities include golf, shopping in nearby Atlanta or Commerce. The Château Élan features a renowned Spa facility, so make your spa reservations early. Evening activities include a casual wine tasting and dinner on Friday evening, and our Black-Tie Dinner on Saturday night, featuring the music of the Fabulous Kays. We look forward to seeing you for enjoyment of fellowship with our fellow lawyers and judiciary. Registration information and agendas will be sent to you soon.

2004 Joint Meeting Recap
Held July 22 - 24 • Asheville, NC

by E. Glenn Elliott

The 37th Annual Joint Meeting of the SCDTAA and the Claims Managers Association of South Carolina was held July 22-24 at the Grove Park Inn in Asheville, NC. 128 lawyers and 33 claims professionals attended the meeting, an increase of approximately 15% over last year attendance. Also attending the meeting for the first time were several of our self-insured members, including representatives of Blue Cross and SCANA.

Attendees were both enlightened and entertained by a number of enthusiastic speakers. Jeff Warren of The Warren Group, Judge John Few, John Wilkerson, Carl Epps, and Tom Salane all gave insightful presentations. We were also treated to panel discussions on such topics as Trial Tips (featuring several of our own "Trial Masters"), Ethical Dilemmas in Mediation, and a legislative update featuring State Representative Jim Harrison and State Senator Larry Martin. Federal Judge Henry Floyd also presided over a mock hearing on punitive damages centered on the interpretation of *State Farm v. Campbell*. A number of breakout sessions were also held issues related to Workers' Compensation, Construction law, and Employment Law. The Young Lawyers committee also held its own breakout session on the trial of the soft tissue personal injury case. This year's seminar qualified for a total of 6.5 CLE hours, including 2.5 hours of ethics.

Another annual tradition which continued was the SCDTAA Pro Bono Committee silent auction. Every year we raise money for a worthy, law-related organization. As a result of the hard work of that committee, the generous donors of the auction items, and your bids, we raised approximately $4,200.00 which will be donated to this year's beneficiary, the South Carolina Bar Foundation Children's Fund. Well done!

Of course, the Joint Meeting would not be complete without golf, tennis, and white water rafting. The team of Mike Chase, Bert Dooley, Jonathan Roquemore, Tom Salane and Clent Campbell won the golf tournament which was played at Reems Creek Golf Club. Steve Anthony and Todd Coleman were our tennis tournament champions, respectively. We understand that the white water rafting competition was a tie as everyone ended up all wet.

Many thanks to our Exhibitors and Sponsors, without whom the Joint Meeting would not have been possible:

- Concentra Integrated Services
- Dixon Hughes, PLLC
- R and D Strategic Solutions
- The Warren Group
- WEST, A Thompson Company
- Womble Carlyle Sandridge and Rice
- Black Diamond Transportation and Language Services
- IKON Office Solutions
- South Carolina Bar Foundation
- SWK Consulting LLC

Please patronize our sponsors whenever possible!

Next year's Joint Meeting is scheduled for July 28 –30, 2005.

Mark your calendars to attend!

Silent Auction

by Eric K. Englebardt

The Silent Auction at the Grove Park was a wonderful success! Thanks to exceptional help from Elizabeth Brady, Catherine Templeton, and Aimee and her staff, the SCDTAA/SCCMA members and their guests were greeted at the cocktail party Friday night with a wide array of interesting items on which to bid. These ranged from a weekend in Charleston with the use of a BMW convertible to Atlanta Falcons tickets to a rocking chair to a telescope (and a bunch of stuff in between!). Thanks to the generosity of those in attendance, we were able to raise over $4200 for the South Carolina Bar Foundation's Children's Fund. The Pro Bono committee would also like to express it's gratitude to all those in the Association who worked hard to gather the items put up for bid.

The Grove Park Inn
Asheville, NC

Order on Plaintiff's Motion for Summary Judgment

South Carolina District Court • Columbia Division

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SC
COLUMBIA DIVISION
C/A No.: 3:02-2093-17

Auto-Owners Insurance Company and Owners Insurance Company, Plaintiffs,

v.

Carl Brazell Builders, Inc., Essex Homes Southeast, Inc., Rex Thompson Builders, Inc.Marc Homebuilders, Inc., Garryle Deas, Veronica Deas, Alma E. Owens, Toni C. Yarber, Ron Thomas, and Candace R. Thomas, Henry O. Jacobs Builders, Inc., Vantage Builders, Inc., James Waldon, Lela Waldon, Reginald Perry, Jeanette Perry, Theodore Cole, Susan Irwin, Mike Irwin, Webb Thompson and Diane Thompson, Defendants

This matter is before the court on the plaintiffs' Motion for Summary Judgment. The plaintiffs, Auto-Owners Insurance Co. and Owners Insurance Company ("Insurers"), filed this declaratory judgment action pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. Section 2201 seeking a judicial determination of whether the insurance policies the Insurers issued to Carl Brazzell Builders, Inc., Essex Homes Southeast, Inc., Rex Thompson Builders, Inc., Marc Homebuilders, Inc., Henry O. Jacobs Builders, Inc., and Vantage Builders, Inc. ("Corporate Defendants") provide coverage for damages alleged in an underlying action in state court brought by Garryl Deas, Veronica Deas, Alma E. Owens, Tonic C. Yarber, Ron Thomas, Candace R. Thomas, James Waldon, Lela Waldon, Reginald Perry, Jeanette Perry, Theodore Cole, Susan Irwin, Mike Irwin, Webb Thompson, and Diane Thompson ("Claimants"). The Claimants filed the state action against the Corporate Defendants in the Richland County Court of Common Pleas alleging that the Corporate Defendants failed to disclose to the Claimants the presence of hazardous materials in the Claimants' neighborhood.

The parties fully briefed the issues, and, after considering the briefs and hearing oral argument, the court grants the Insurers' motion for summary judgment and declares that the insurance policies at issue provide no coverage for the damages alleged by the Claimants against the Corporate Defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to 1990, several builders and developers started work on the Summit Development ("Summit"), an upscale multi-use planned residential development in Columbia, South Carolina. During construction, numerous military bombs were discovered on the development site. It turns out that the Summit development site was formerly the "Pontiac Precision Range," a Department of Defense training site for aerial bombing used from 1944 to 1947. In 1995, a Department of Defense assessment and evaluation of the site disclosed the presence of hazardous materials.[1]

On August 23, 2001, the Claimants, all Summit property owners, filed an amended complaint in the Richland County Court of Common Pleas against the Corporate Defendants seeking to recover for their properties' alleged "diminution in value." On June 19, 2002, the Insurers filed this declaratory judg-

ment action against all the parties in the underlying state action. On November 18, 2002, this court certified to the South Carolina Supreme Court the question of whether the insurance policies at issue covered losses associated with "diminution in value." While the Supreme Court held that losses due to "diminution in value" were not covered by the subject policies, the court left open the question of whether damage due to "loss of use" of the property was covered.

On February 3, 2004, the Insurers filed an Amended Complaint, which explicitly stated that the Claimants "allege they cannot enjoy the full use of their property as a result of the Corporate Defendants' actions." Along with the Amended Complaint, the Insurers filed this Motion for Summary Judgment.

With this motion before it, the question left open by the Supreme Court (whether "loss of use" is covered) is squarely before this court. For the reasons stated below, this court finds that the insurance policies at issue do not provide coverage for "loss of use" under the facts alleged in the state action and, therefore, the Insurers' Motion for Summary Judgment is granted.

II. DISCUSSION

Although there are several insurance policies at issue here, the language relevant to the coverage question is contained in a Commercial General Liability Coverage Form ("Coverage Form") that is common to all the policies. The Coverage Form provides that "property damage" is covered only if, "[t]he 'property damage' . . . is caused by an 'occurrence' which takes place in the 'coverage territory'; and . . . occurs during the policy period." Furthermore, an "occurrence" is defined in the Coverage Form as "an accident, including the continuous or repeated exposure to substantially the same general harmful conditions." Finally, "property damage" is defined as:

> Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or [in the case of] [l]oss of use of tangible property that is not physically injured[,] . . . at the time of the occurrence that caused it.

The Insurers argue that the insurance policies at issue here do not provide coverage because there was no "occurrence"[2] that *caused* "property damage." According to the Coverage Form, "property damage" is covered only if "[t]he 'property damage' . . . is *caused by an 'occurrence'* which takes place in the 'coverage territory'; and . . . *occurs during the policy period."* (Emphasis added). In this case, the Insurers argue that the only events that the Corporate Defendants could possibly point to as "occurrences" under the policy are the bombing (which occurred between 1944 and 1947) and the Corporate Defendants' alleged negligent misrepresentation and negligent failure to inform the Claimants of the contamination. Furthermore, the Insurers argue that regardless of which event the court chooses to look at as the "occurrence," since the occurrence did not *cause the property damage during the policy period*, there is no coverage.

This court agrees with the Insurers that regardless of which event is deemed the "occurrence" (the bombing or the Corporate Defendants' alleged actions or inactions) there is no coverage. If the court were to decide that the bombing was the "occurrence" under the policy, there would be no coverage because the bombing took place 50 years ago, not "during the policy period," as required by definition of "property damage." If the court were to decide that the Corporate Defendants' alleged failure to inform the Claimants of the contamination was the "occurrence," there would be no coverage because the failure did not "cause" the property damage.

In response, the Corporate Defendants argue, citing *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318 (S.C. Ct. App. 1995), and *Boggs v. Aetna Casualty and Surety Co.*, 252 S.E.2d 565 (S.C. 1979), that their allegedly negligent inspection of the property and failure to inform the Claimants of the contamination can serve as "occurrences" that trigger coverage. In *Isle of Palms*, an insured exterminator sought a declaration that a general liability insurance policy provided coverage for a home buyer's claims against the exterminator alleging negligent preparation of a termite inspection report. *See Isle of Palms*, 459 S.E.2d 318. The South Carolina Supreme Court found that the insured exterminator's negligent issuance of a termite inspection letter to a prospective homeowner was an "occurrence" under the policy and thus triggered coverage. *See id.* at 320. In *Boggs*, an insured construction contractor who settled a suit brought by a homeowner for negligent construction of a home, brought suit against his insurance company (after the insurance company denied coverage and refused to defend) seeking reimbursement for the settlement costs and attorney's fees. 252 S.E.2d at 566-67. Apparently, as the house neared completion, it developed drainage problems as a result of the contractor's negligence. *Id.* at 566. The South Carolina Court of Appeals found that the contractor's negligent construction of the house was an "occurrence" that triggered coverage. *See id.* at 567.

Both *Isle of Palms* and *Boggs*, however, are easily distinguishable. In both of these case, unlike in the instant case, the "property damage" was *caused by and occurred after* the insured's negligence. In *Isle of Palms*, the South Carolina Supreme Court noted that "here, the faulty workmanship *did* cause an accident" and that "the improperly performed

Continued on page 10

inspection resulted in *continued* termite damage." 459 S.E.2d at 320 (emphasis added). The *Isle of Palms* court went so far as to draw a distinction between the case it was presented with and a hypothetical case in which there existed termite damage at the time of inspection "but no active termite infestation." *Id.* If that were the situation, the court noted that "[t]here would be no possibility of coverage for such a claim because, under that factual scenario, Isle of Palms' improper inspection *would not have caused property damage.*" *Id.* (emphasis added).

In *Boggs*, the South Carolina Court of Appeals concluded that "the allegedly negligent location of the house on the lot which created the exposure to a condition *which resulted in property damage* constituted an 'occurrence.'" 252 S.E.2d at 567. The damage occurred after, and as a result of, the contractor's negligent placement of the house.

The instant case is factually very different from both *Isle of Palms* and *Boggs*. The "property damage" here did not occur *because of* anything the Corporate Defendants did or failed to do. The damage unquestionably occurred when the land was used as a bombing range between 1944 and 1947. The Corporate Defendants strenuously argue that the Claimants have alleged below that the Corporate Defendants' failure to inform the Claimants of the contamination *caused* the property damage in this case. This court disagrees.[3] There is no allegation that the condition of the land changed, vis-a-vis the contamination, during the policy period.[4] Because there was no change in the condition of the property during the policy period, there was no "occurrence" that caused the "property damage," and thus, there is no coverage.

III. CONCLUSION

Having determined that there was no "occurrence" that caused the "property damage" in this case, the court finds that the insurance policies at issue provide no coverage and the Insurers' Motion for Summary Judgment is, therefore, granted.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge
April 26, 2004
Columbia, South Carolina

Footnotes

1 In 1994, the Army Corps of Engineers concluded, based on a preliminary assessment, that "there is hazardous waste at the site eligible for remediation." The Corps of Engineers also noted that the "category of hazardous waste at the site is Ordinance and Explosive Wastes (OEW)." OEW is defined as "unwanted and abandoned ammunition or components thereof, which contains energetic, toxic, or radiological materials." In 1995, the Defense Environmental Restoration Program for Formerly Used Defense Sites issued a report on the Pontiac Bombing Range that stated unequivocally that the land upon which the Summit development was being built was used as a bombing range and that 2 lb. or 3 lb. bombs "could be present" on the site.

2 As an initial matter, the Insurers first argue that there has been no "occurrence" at all. Because an "occurrence," by definition, must be "accidental," and the complaint in the underlying state action fails to allege an accident, the Insurers assert there has been no "occurrence." However, because this court finds that there is no coverage regardless of whether there was an "occurrence," the court need not resolve this initial question.

3 The instant case would be more analogous to *Isle of Palms* and *Boggs* if the ordinance in the ground was harmless at the time the Claimants' homes were constructed, the Corporate Defendants negligently thought the ordinance would remain harmless and failed to remove it, and the ordinance began to decompose and contaminate the soil after the Claimants purchased the land and during the policy period. In that case, it could be argued that the property damage (in the from of contamination) occurred *after and as a result of* the Corporate Defendants' negligent failure to remove the ordinance.

4 To the contrary, the "loss of use" allegation in the Claimants' Second Amended Complaint clearly implies that the Claimants' "loss of use" is due to the presence of the contamination, not any act or omission of the Corporate Defendants. See Claimants' Second Amended Complaint at ¶ 52 ("Plaintiffs and members of the Plaintiff Class further can not enjoy the full use of their property without first conducting geographical surveys to determine the extent of the [ordinance] contamination on their property and taking steps to remove such materials.").

The State of South Carolina
In the Court of Appeals
REVERSED

S.C. Judicial Department - Opinion Number 3850

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

South Carolina Uninsured Employer's Fund, Respondent,

v.

Roy R. House, Claimant,

and Jack Clark and Vaughn Homes, Inc. and/or Jack Clark Constructions

and Travelers/Zurich, Defendants,

of whom Roy R. House is Respondent.

and Vaughn Homes, Inc. is Appellant.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3850
Heard April 8, 2004 • Filed August 2, 2004

REVERSED

Kirsten Leslie Barr, of Mt. Pleasant, for Appellant.

Edgar W. Dickson, of Orangeburg, for Respondent.

STILWELL, J.: In this workersí compensation case, Vaughn Homes, Inc. appeals the circuit courtís order reversing the full commission and concluding Vaughn was liable for injuries sustained by an employee of its subcontractor. We reverse.

FACTS

Vaughn Homes, a housing contractor, subcontracted with Jack Clark Constructions for framing work. Roy House, an employee of Clark, filed a workers' compensation claim after he was injured in the course and scope of his employment with Clark. At the time of Houseís accident, Clark did not have workersí compensation coverage.

When he was initially engaged to perform the work, Clark presented Vaughn with a certificate indicating he had workersí compensation coverage from June 5, 1997, to June 5, 1998. Upon the expiration of the original term, Clark provided a certificate indicating continued coverage until June 7, 1999. The history of the policy indicates several instances of cancellation and reinstatement, all based on nonpayment of premiums, until, in March 1999, Clark received notification from his agent that the policy was due to expire in June. A notice of cancellation was served on Clark prior to the date of expiration, but Clark failed to pay the renewal premium.

Clark applied for a new policy with another insurance agency on July 1, 1999, but coverage was declined. Clark continued to perform work for Vaughn, but admitted he neither notified Vaughn that his coverage had lapsed for nonpayment nor advised Vaughn that his application for other coverage was declined. Clark, however, continued to verbally advise Vaughn that he did have coverage.

Following hearings on Houseís workers' compensation claim, the single commissioner transferred Vaughnís liability to the South Carolina Uninsured Employer's Fund, concluding Clark committed fraud by failing to notify its higher-tier contractor of a lapse in coverage pursuant to South Carolina Code section 42-1-415(C) (Supp. 2003). The full commission affirmed but the circuit court reversed, finding Vaughn had notice of the expiration of Clarkís policy and failed to require proof of coverage after the policy expired.

SCOPE OF REVIEW

When reviewing an appeal from the workersí compensation commission, the circuit and appellate courts are proscribed from weighing the evidence or substituting their judgment for that of the full commission on questions of fact. However, the reviewing court may reverse when a decision is predicated on an error of law. *Pratt v. Morris Roofing*, Inc., 353 S.C. 339, 344-45, 577 S.E.2d 475, 477-78 (Ct. App. 2003), *affíd as modified*, 357 S.C. 619, 594 S.E.2d 272 (2004). Statutory interpretation is a question of law. *Stewart v. Richland Memíl Hosp.*, 350 S.C. 589, 593, 567 S.E.2d 510, 512 (Ct. App. 2002).

LAW/ANALYSIS

Vaughn argues it may transfer liability for Houseís injuries to the fund pursuant to South Carolina Code Ann. section 42-1-415 (Supp. 2003). Vaughn

Continued on page 12

Reversed Order...

continued from page 11

contends the circuit court erred by interpreting section 42-1-415 to require a higher-tier contractor to continue to collect proof of insurance coverage from its subcontractor after originally collecting documentation at the time of hire.

We agree. The full commission affirmed the single commissionerís decision to relieve Vaughn of liability based on the finding Clark committed fraud pursuant to section 42-1-415(C) (Supp. 2003). In reversing, the circuit court concluded Vaughn had notice that Clarkís policy would expire, and reasoned the burden fell upon Vaughn to require appropriate evidence of continued coverage. The court further determined the commission erred as a matter of law in finding Clark committed fraud, based essentially on two premises. The first premise was that Clark never represented to Vaughn that he had insurance coverage for any period of time subsequent to June 7, 1999, and therefore could not be guilty of fraudulently representing that he did. As a second premise, the circuit court concluded the expiration of a policy at the end of its term was not the type of "lapse" contemplated by the provisions of section 42-1-415.

However, neither the commissionís finding of fraud nor the circuit courtís focus on notice is determinative of whether liability may be transferred under section 42-1-415. Under subsection 42-1-415(A), a statutory employer, such as Vaughn, may transfer liability to the fund when a subcontractorís employee is injured if the statutory employer submits documentation to the fund that the subcontractor has represented himself as having workersí compensation coverage "at the time the . . . subcontractor was engaged to perform work." S.C. Code Ann. Section 42-1-415(A) (Supp. 2003); *see also Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 330, 523 S.E.2d 766, 774-75 (1999) (noting that pursuant to section Section 42-1-415(A),"a statutory employer is no longer directly liable for workersí compensation payments whenever documentation is presented to the commission that a contractor or subcontractor represented himself to the statutory employer as having workersí compensation insurance"). Subsection (B) permits a higher-tier contractor to qualify for reimbursement of benefits paid if it collects documentation of insurance coverage "at the time the . . . subcontractor is engaged to perform work." S. C. Code Ann. Section 42-1-415 (B).

When the language of a statute is plain, unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are unnecessary and the court may not impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Under these circumstances, the court will not resort to subtle or forced construction in an attempt to limit or expand a statuteís scope. *Paschal v. State Election Comm'n*, 317 S.C. 434, 436-37, 454 S.E.2d 890, 892 (1995).

Subsections (A) and (B) of section 42-1-415 set out the procedure the higher-tier contractor must follow in order to relieve itself of responsibility for workplace injuries to the employees of its subcontractors. Vaughn complied fully with the mandate of subsections (A) and (B) when it collected documentation of insurance at the time Clark "was engaged to perform work." The statute does not require a prime contractor to continue collecting proof of its subcontractorís insurance coverage after the subcontractor is engaged to perform the work. We are loath to read such a requirement into a statute that otherwise contains such straightforward language.

Subsection (C) of section 42-1-415 is directed toward the subcontractor, places upon it the duty to notify the higher-tier contractor of any lapse in coverage, and sets forth the consequences of the subcontractorís failure to do so when it provides, in relevant part:

> Knowing and wilful failure to notify, by certified mail, the higher tier . . . contractor . . . who originally was provided documentation of workers' compensation coverage of a lapse in coverage within five days after the lapse is considered fraud and subjects the . . . subcontractor who represented himself as having workersí compensation insurance to the penalties for fraud provided by law.

S.C. Code Ann. Section 42-1-415(C).

The use in subsection (C) of the word "originally" lends support to the reasoning that the information given at the inception of the engagement is the controlling factor, negating any statutory requirement on the part of the higher-tier contractor to continue collecting proof of insurance.

> Statutes which are part of the same legislative scheme should be construed together. In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.

State v. Gordon, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) (internal citation omitted).

We hold that because Vaughn complied with the provisions of section 42-1-415(A) and (B), it is entitled to shift the burden of paying workersí compensation benefits to the fund. The order of the circuit court is, therefore,

REVERSED

HUFF, J., and CURETON, A.J., concur.

Recent Order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
C/A No. 3:02-1474-17

Lisa Lesavoy, as Successor Trustee of the Trust under agreement dated 11/9/93 f/b/o Stephanie Mennen Petit; as Successor Trustee of the Trust under agreement dated 11/9/93 f/b/o Craig Mennen Keefer, Plaintiff,

v.

John B. Lane, Janet Lane, Rufus B. Land, Preston R. Burch, Brian R. Samson, First South Bancorp, Inc., Scott McElveen, LLP, 3-I, Inc., Kestrell, LLC, and the Mennen-Keefer Partnership, Defendants.

First South Bancorp, Inc., Third-Party Plaintiff,

v.

Craig M. Keefer, Third-Party Defendant.

Brian R. Samson, Third-Party Plaintiff,

v.

Craig M. Keefer, Third-Party Defendant.

John B. Lane, Third-Party Plaintiff,

v.

Craig M. Keefer and Rebecca Keefer, Third-Party Defendants.

Craig M. Keefer and Rebecca Keefer, Fourth-Party Plaintiffs,

v.

Tyler Cassell Jackson Pearce & Silver, LLP, First South Bancorp, Inc., and Brian R. Samson, Fourth-Party Defendants.

Craig M. Keefer and Rebecca Keefer, Fourth-Party Plaintiffs,

v.

Tyler Cassell Jackson Pearce & Silver, LLP, and John B. Lane, Fourth-Party Defendants.

This case comes before the court on motion by the plaintiff, Lisa Lesavoy (as Successor Trustee) to amend the Second Amended Complaint to add claims against Fourth-Party Defendant Tyler, Cassell, Jackson, Pearce & Silver, LLP ("Tyler Cassell") pursuant to Rule 15 of the Federal Rules of Civil Procedure. For the reasons set forth herein, the court denies the motion.

RELEVANT FACTS & PROCEDURAL HISTORY

Lesavoy commenced this action on May 6, 2002. In her Original Complaint, Lesavoy asserted causes of action against various defendants for breach of fiduciary duty, breach of trust, civil conspiracy/RICO, negligence, fraud, breach of contract, and for an accounting of assets remaining in the Trust at issue in this case. On June 27, 2002, Lesavoy moved for leave to amend the Original Complaint. The court granted the motion, and Lesavoy filed her Amended Complaint on July 18, 2002. On November 26, 2002, Lesavoy moved for leave to amend the Amended Complaint. The court granted the motion, and Lesavoy filed her Second Amended Complaint on December 12, 2002.

By way of his Amended Answer to the Second Amended Complaint and via the Third Party Complaint against Craig M. Keefer and Rebecca C. Keefer ("the Keefers"), defendant John B. Lane ("Lane") sought contractual and equitable indemnification from the Keefers for costs and expenses incurred in defending this action. In the Third Party Complaint, Lane alleged that the Keefers requested that he, in his capacity as Trustee, obtain a loan from a financial institution, and, in turn, re-loan these funds to the closely held corporation known as Island Industries, Inc. Lane alleges that the Keefers, in making this request, "knowingly, voluntarily, and willingly, agreed to indemnify Lane for any liability . . ." arising from such loan.On November 12, 2003, the Keefers responded to Lane's allegations by filing two Fourth Party Complaints against Tyler Cassell. The Fourth Party Complaints alleged breach of fiduciary duty and legal malpractice, and also sought declaratory relief with respect to indemnification of Lane. On December 24, 2003, Tyler Cassell answered the allegations in the Fourth Party

Continued on page 14

Order...

continued from page 13

Complaints, pointing out that Lesavoy's Second Amended Complaint contained no allegations whatsoever against Tyler Cassell. Now, in her third motion to amend, Lesavoy seeks to assert two causes of action against Tyler Cassell—one for aiding and abetting a breach of fiduciary duty and another for professional negligence. Tyler Cassell argues that these two claims, however, encompass a panoply of acts of misconduct which greatly expands the allegations set forth in the Fourth Party Complaints.

DISCUSSION

I. Requirements of Rule 15

Pursuant to Rule 15, once responsive pleadings have been filed in a case, "a party may amend . . . only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires." Fed. R. Civ. P. 15(a). The decision to grant or deny leave to amend the pleadings is committed to the sound discretion of the trial court. *See, e.g., Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1148 (4th Cir. 1988); *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987). Although Rule 15 generally supports amendment, the Rule nevertheless "has its limits, and courts properly exercise caution in reviewing an application of the Rule that would increase a defendant's exposure to liability . . ." *Intown Prop. Mgmt. Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir. 2001). "[A] motion to amend the pleadings comes too late if it unduly prejudices the opposing party." *Id.* at 170 (citing *Hill v. BASF Wyandotte Corp.*, 782 F.2d 1212, 1214 (4th Cir. 1984)). "[D]elay alone, [however] without prejudice, does not support the denial of a motion for leave to amend." *The Pittson Co. v. United States*, 199 F.3d 694, 706 (4th Cir. 1999) (quoting *Deasy*, 833 F.2d at 41)).

The United States Supreme Court has stated:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires;" this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.— the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). This Circuit has held that denial of leave to amend a complaint must be based on "a showing of prejudice, bad faith, futility, or dilatoriness associated with the motion." *Ward Electronics Serv. v. First Comm'l Bank*, 819 F.2d 496, 497 (4th Cir. 1987).

II. Undue Delay, Repeated Failure to Cure, Undue Prejudice, and Futility

Tyler Cassell argues that the motion to amend must be denied because: (1) Lesavoy has failed to explain why she has waited more than two years to assert these claims; (2) Lesavoy has repeatedly failed to cure any purported deficiency in the Second Amended Complaint; (3) the proposed amendment will unduly prejudice Tyler Cassell; and (4) the proposed amendment is futile because the statute of limitations has run.

Lesavoy counters that the proposed amendment does not prejudice Tyler Cassell because it has only recently been added as a party. Lesavoy explains that she failed to assert the claims against Tyler Cassell before now because: (1) Tyler Cassell acted as an agent for First South Bank during the loan transactions at issue in this case, First South Bank was already named as a defendant, and First South Bank is liable for Tyler Cassell's actions; and (2) Lesavoy was unaware that Tyler Casell had an attorney-client relationship with the Trust itself until Tyler Cassell answered the Fourth Party Complaint.

First, the court is not persuaded that Tyler Cassell will suffer no prejudice from the proposed amendment because it is a new party to the case. Tyler Cassell's late entrance into this lawsuit, rather, gives it less time to prepare for trial—which is now just three months away—putting it at a disadvantage. Furthermore, Lesavoy admits that she knew Tyler Cassell acted as agent for the loan transactions in question from the outset, yet she chose not to join Tyler Cassell as a direct defendant until now. Lesavoy has not sufficiently explained that two-year delay in asserting the claims. Finally, even if Lesavoy had first learned about the purported attorney-client relationship between Tyler Cassell and the Trust for the first time when Tyler Cassell filed its answer to the Fourth Party Complaints, the answer was filed seven months ago. "A motion to amend the complaint under Rule 15(a) should be made 'as soon as the necessity for altering the pleading becomes apparent . . . .'" *Dilmar Oil Co. v. Federated Mut. Ins. Co.*, 986 F. Supp. 959, 980 (D.S.C. 1997). Failure to seek leave to amend contemporaneously with the discovery of information justifying the amendment has been viewed as a fatal defect in this Circuit. *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1150 (4th Cir. 1988) (denial of leave to amend affirmed where plaintiff should have known of the claim from the outset of the litigation, but failed to file a timely motion seeking leave to amend the complaint); *see also Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993) (movant's access to

relevant information early in the proceedings barred amendment after scheduling order deadline).

The court finds that Lesavoy unduly delayed asserting her claims against Tyler Cassell, and that Tyler Cassell would be unfairly prejudiced by the proposed amendment at this late date. As a matter of policy as well, granting this motion at this time would necessitate revising the already revised Scheduling Order, reopening discovery, and further postponing the trial date. In light of this, the court finds Lesavoy's reasons for her delay in asserting claims against Tyler Cassell insufficient to justify the cost of essentially starting all over again. This court has granted two prior motions to amend; therefore, any defect remaining in the Second Amended Complaint is the product of Lesavoy's own repeated failure to cure.

Finally, Tyler Cassell argues that the motion should be denied because the statute of limitations has run and the proposed amendment is thus futile: The latest events complained of in the Proposed Third Amended Complaint occurred in August 2000; the three-year statute of limitations pursuant to S.C. Code Ann. Section 15-3-530(a) (Law Co-op. 1976) (West Supp. 2003) applies; and the "relate back" provision of Rule 15(c) does not save Lesavoy's claims. Because Lesavoy did not file a reply brief, the court is unaware of her position on the limitations question. However, because the court has already found that Lesavoy unduly delayed seeking leave for the proposed amendment and that the proposed amendment would unfairly prejudice Tyler Cassell, the court need not reach the futility question.

CONCLUSION

Accordingly, the court denies Lesavoy's motion to amend the Second Amended Complaint. Lesavoy has failed to demonstrate that justice requires amending the complaint at this late date. This case has been pending for more than two years, and the trial is scheduled to commence in November; yet, Lesavoy has not sufficiently explained her undue delay in asserting these claims against Tyler Cassell. Moreover, to allow the proposed amendment just three months before trial would unfairly prejudice Tyler Cassell. Finally, because the court has granted Lesavoy's requests to amend her complaint twice before, any purported defect now present in her Second Amended Complaint is the product of her own repeated failure to cure.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge
August 4, 2004
Columbia, South Carolina

SCDTAA
Young Lawyers Division

by Richard L. Hinson

The Young Lawyers Division of the SCDTAA held its mid-year meeting on the first day of the Joint Meeting at the Grove Park Inn in July. The meeting was well attended by young lawyers from all parts of the state. In addition to planning for the remainder of the year, the Division elected a new president and district representatives.

Elizabeth J. Brady completed two years as the inaugural president of the YLD. Under her direction, the organization grew to become a vital part of the SCDTAA. We appreciate Elizabeth's dedication, which laid the foundation for the YLD.

The YLD elected Jennifer S. Barr of Womble Carlyle Sandridge & Rice to succeed as president for the coming year. Jennifer is a 2001 graduate of the USC School of Law and a former law clerk to the Honorable G. Ross Anderson, Jr. She practices in the area of professional negligence and commercial litigation. As president, she will assume a position on the SCDTAA executive committee as the liaison to the YLD.

The new district representatives will be: Anne Marie Hagood (Charleston); Jonathan Hammond (Greenville); Chad Abramson (Columbia); Molly & Jay Lee (Florence); and Shane Massey (Aiken).

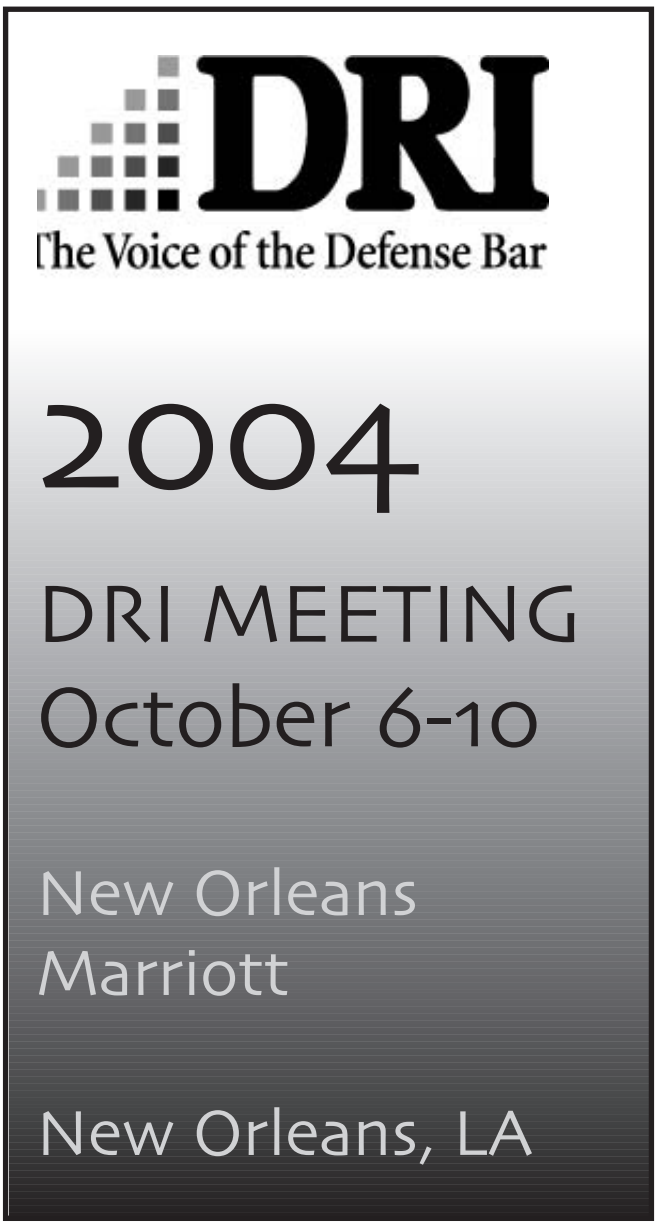
Anyone interesting in serving the YLD, please contact your district representative or Jennifer Barr at jbarr@wcsr.com or 864.255.5420.

The DRI Report

by William S. Davies, Jr.
South Carolina State Representative

In the closest race in memory, Robert B. "Chip" Delano, Jr. of Richmond's Sands, Anderson, Marks & Miller defeated F. Ford Loker, Jr. of Baltimore's Miles & Stockbridge for the privilege of serving as the Mid-Atlantic Regional Director on the Board of Directors of DRI. The margin of victory was reportedly less than 50 votes. This confirms that these were two highly qualified candidates that had each given many quality hours of service to our profession. Chip will replace our own William A. "Bill" Coates of Greenville's Roe, Cassidy, Coates & Price in this important position after the October Annual Meeting. Bill, a Past President of the South Carolina Defense Trial Attorneys' Association, has been an outstanding representative from our organization to the national organization. The Mid-Atlantic Region of DRI is made up of the local and state organizations in South Carolina, North Carolina, Virginia, Maryland and the District of Columbia. Delano will be the first regional director from Virginia. Coates followed in the footsteps of past highly qualified representatives including Richard Boyette of Raleigh (the rising President of DRI), David Dukes of Columbia (who will succeed Boyette as President next year) and Carl Epps of Columbia.

All are encouraged to attend the Annual Meeting of DRI in New Orleans October 6 through October 10. The professional and social events planned are outstanding. Hope to see you there.



South Carolina Defense Trial Attorneys' Association
1 Windsor Cove, Suite 305
Columbia, SC 29223

Address Service Requested

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