SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

http://www.scdtaa.com

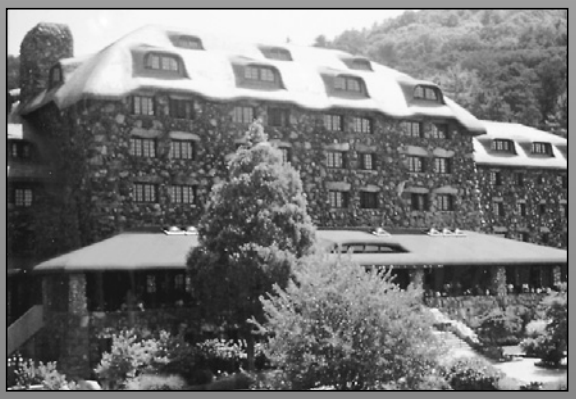
Spring

TRIAL ACADEMY

June 8 - 10, 2005

Columbia, SC

Summer



JOINT MEETING

July 28 - 30, 2005

Grove Park Inn Asheville, NC

Fall

ANNUAL MEETING

November 3 - 6, 2005

Pinehurst Resort Pinehurst, NC

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

Make your plans now!
2005 Trial Academy
June 8 - 10 · Columbia, SC

President's Letter

by James R. Courie

In January, we held our Executive Committee Long Range Planning Retreat at Pinehurst, North Carolina. Interestingly, corporate America frowns on the word "retreat." As a matter of fact, I was sitting in a meeting one day when the chair adamantly refused to call a planning session a retreat. His corporate lingo and mindset was, "Always advance – never retreat." As I return from our meeting in Pinehurst, I realize that having a "retreat" is really not such a bad thing. As an organization, it provides time to relax, reflect and consider what is important to our membership. That is exactly what our committee was able to accomplish during our two day "retreat." Pinehurst is a fabulous resort, and I am thrilled about the opportunity to have our annual meeting there in November. More about Pinehurst later, but first let me tell you about the substance of our planning retreat.

As you might expect, the Executive Committee spent the majority of its time discussing old and familiar topics. I am proud to say that most of our discussion focused upon raising the value of membership in our organization for defense attorneys. We are fully committed to increasing member benefits. We must continue to provide improved educational opportunities, better communication through the web site and list serves, more opportunities to interact with our state and federal judges, and greater exposure and leadership opportunities for young lawyers.

A significant amount of time was also spent discussing the appropriate role of our organization in the legislative process. The great debate continues to be, "Who are we lobbying for and what's in it for us." Although it's easy to see how tort reform affects our clients, it is more difficult to pinpoint how lobbying for tort reform and other issues positively impacts our personal financial situation or even our quality of life. Should we be lobbying for our clients or for our members? It always seems to come back to who we are and what we believe. Our mission as an organization is to protect and advance a fair and balanced civil justice system. From experience, our lawyers have firsthand knowledge of how things such as venue and joint and several liability impact the civil justice system. It is important that our perspective be heard. If we don't speak up for a better system, the decision makers won't have the benefit of both sides of the story. To that end, we have adopted two separate resolutions supporting tort reform efforts in the General Assembly. In addition to our role as advisors, we must also be leaders for change. Our system deserves no less.

I am truly excited about how this year is shaping up. Our Joint Meeting in Asheville, North Carolina July 28th through 30th and our annual meeting in Pinehurst on November 3rd through 6th are going to be great events. Many of you are probably wondering why we aren't following our normal pattern and going to the Cloister this year. As you may have heard, the Cloister is in the midst of a multi-million dollar renovation. Although we were originally told the resort would be able to accommodate us this year, construction delays prevented it. We will return to the Cloister in 2007; however, this year, we are fortunate to have a wonderful opportunity to enjoy Pinehurst. If you have not been to Pinehurst recently, it is a superb resort full of southern charm and beauty, and the accommodations and service are outstanding. Amenities include a new spa and New England-style shopping village, and in case you haven't heard, the golf isn't so bad either. Our golfers will be able to enjoy one of the finest golf venues in the country only three months after the 2005 US Open is played on Pinehurst #2. For those of you up to the challenge, you may contact Pinehurst and reserve a tee time on the Open course.

In addition to our conventions, our Trial Academy is set for June 8th through 10th in Columbia. We are pleased to be returning the Trial Academy to Columbia, and excited that Friday's trials will be held in the new Matthew J. Perry, Jr. Federal Courthouse. We have already received phone calls seeking an application. To reserve a spot for yourself or someone in your firm, I urge you to act quickly. The application can be found on page 8 of this issue and on the website at www.scdtaa.com, or by calling Aimee at (803) 252-5646.

Finally, let me extend a personal word of thanks for the opportunity to lead this organization. I have never been involved with a finer group of professionals. One of my objectives this year is to spread the word about the merits of our organization, and to ensure our general membership understands how important it is to be involved. The SCDTAA has been recognized nationally as one of the very best State and Local Defense Organizations. My goal is to make sure our members feel the same way.

Legislative/Tort Reform Update

by Gray T. Culbreath

When we wrote the first update on tort reform in the Winter 04 edition of *The DefenseLine*, we were approaching the beginning of the first year of a two-year session. While the momentum for meaningful tort reform was there, few believed that we would be able to effect a change in the first year. However, as of the writing of this article, the Governor has signed into law the business or "black eye" bill and the medical bill is close to resolution. The SCDTAA has provided links to the full text of each bill at www.scdtaa.com. The following are summaries of the recently enacted law and the pending bill.

General Business Tort Reform Bill

H. 3008

The House and Senate adopted the General Tort Reform bill, H. 3008. The Senate passed it unanimously on a voice vote on March 8, 2005 and the House voted 115-0 to concur in the Senate version on March 16, 2005. It was signed into law March 21, 2005. The law consists of the following:

• 50 % Joint and Several Liability

There is a 50% threshold on joint and several liability. A defendant has to be 50% at fault to be required to pay 100% of the damages. A defendant less than 50% at fault only pays his percentage of liability.

Effective date - takes effect July 1, 2005, and shall only apply to causes of action arising on or after that date except for causes of actions relating to construction torts which would take effect on July 1, 2005, and apply to improvements to real property that first obtain substantial completion on or after July 1, 2005. For purposes of this section, an improvement to real property obtains substantial completion when a municipality or county issues a certificate of occupancy in the case of new construction, or completes a final inspection in the case of improvements to existing improvements.

The House and Senate added a technical amendment on the medical malpractice bill (S. 83) to ensure the plaintiff's percentage of liability will not be counted twice. The plaintiff's bar believed H. 3008 allowed the plaintiff's liability to be counted against the plaintiff twice in the joint and several section. S. 83, with its Joint and Several clean-up amendment, will be pending the House's concurrence when they come back in session the week of March 28, 2005.

• Venue reform

As to domestic and foreign corporations, lawsuits can only be brought where the most substantial part of the action arose or at the defendant's principal place of business at the time the cause of action arose. However, if it is a foreign corporation that does not posses a certificate of authority (pursuant to Section 33-15-101 et seq.) in SC or a non resident defendant there is the additional option of the plaintiff's residence at the time the cause of action arose. The effective date is July 1, 2005 and only to causes of action arising on or after that date. Therefore the *Whaley v. CSX* holding is controlling until then.

In addition the long-arm statute was clarified to make clear that the statute does not prohibit foreign corporations from moving to change venue based upon the convenience of the witnesses and the ends of justice. Effective July 1, 2005 (consistent with *Whaley*)

- Motor Carrier Statute is repealed (S.C. Code Ann. Section 58-23-90) Effective July 1, 2005
- Statute of Repose - reduced from 13 years to 8 years. Effective July 1, 2005 for final inspections received after that date.
- Post Judgment Interest Rates reduced from 12% to prime plus 4%. Effective upon the Governor's signature.
- Frivolous Lawsuits sanctions lawyers and parties bringing frivolous claims including reporting lawyers to the Commission on Lawyers Conduct and requires the Supreme Court to keep a public record of frivolous sanctions. Effective July 1, 2005.
- Makes using a nickname in lawyer advertising a violation of the Unfair Trade Practices Act.

It warrants mentioning that is very possible that both the Medical Malpractice Bill and possibly the Business Tort Reform Law will be subject to constitutional challenges. Equal protection issues and inappropriate "bobtailing" will be the main arguments asserted in support of the claim tort reform is unconstitutional.

Medical Malpractice Legislation Summary S. 83 – Pending concurrence in the House

Non Economic Damages Awards

Damages against an individual health care provider or health care institution cannot exceed $350,000 per claimant for non economic damages regardless of the number of separate causes of action on which the claim is based.

A plaintiff can name any number of providers or institutions as defendants but the total non economic damages are capped at $1,050,000.00.

Effective July 1, 2005, for claims arising after July 1, 2005.

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Update

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Offers of Judgment in ANY civil action (but not domestic relations)

In any case (other than domestic relations cases) any party to a dispute may make a written offer of judgment filed with the clerk of court to an opposing party. There are specific deadlines that must be observed.

If the offer is rejected and the offering party obtains a later verdict or determination at least as favorable to the rejected offer, the offeror shall be allowed to recover:

1. Any administrative, filing or other court costs from the date of the offer until judgment.

2. If the offeror is the plaintiff, 8% interest compounded on the amount of verdict from the date of the offer until the date of the verdict

3. If the offeror is a defendant, a reduction in the amount of the judgment or award of 8% interest compounded from the date of the offer until the date of the verdict

Expert Witness

The expert witness must be licensed by an agency to practice in his or her profession and is board certified in the area of practice or specialty in which the expert is offering testimony or have professional knowledge and experience in the area. Another way to qualify as an expert witness is to be an individual that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both.

In an action for professional negligence the plaintiff must file with the original complaint an affidavit of an expert witness certifying with specificity at least one act of professional negligence and the factual basis for each claim. There are several procedural issues associated with the filing of an affidavit.

This section applies to 22 listed professions.

Mediation

This section requires that at any time before a medical malpractice action is brought to trial, the parties shall participate in mediation governed by procedures established in the South Carolina Circuit Court Alternative Dispute Resolution Rules. Parties may also agree to participate in binding arbitration.

Potential plaintiffs must file a Notice of Intent to bring a suit in the county where venue would be proper. The filing of notice will toll the statute of limitations. All parties to the potential action will have 90 (and no more than 120 days) days limited discovery and at the end of those 90 days must mediate the dispute. Only after the Mediator declares that the mediation has failed, the parties are at an impasse, or that the mediation should end will the Plaintiff be allowed to file a complaint with the circuit court. The complaint must be filed within 60 days of the mediator's determination of prior to the expiration of the statute of limitations, whichever is later.

The Joint Underwriting Association Provisions

The bill takes control of funds of the JUA and PCF from the State Treasurer and requires that the funds be managed by the JUA/PCF Board. This ensures in the future that funds cannot be used by the General Assembly for general budget issues.

The bill requires all medical malpractice insurance carriers issuing policies of insurance within South Carolina for licensed health care providers to provide and maintain coverage to all qualified applicants who timely remit payments for the coverage period and who meet and comply with all underwriting criteria of the policy and with applicable federal and state statutes and regulations.

The policies must be written on either a 'claims-made' or 'occurrence' basis in compliance with the standard set by the board of directors of the Joint Underwriters Association. The insurance carrier provisions apply only to policies written on or after January 1, 2006."

The Medical Disciplinary Commission

This would add 12 new lay members to the Commission for a total of 48. Two lay members with no ties to the health care industry would be added from each of the six congressional districts.

The efforts by SCDTAA and particularly its lobbyist, Jeff Thordahl, were important in bringing these bills to the floor. In doing so, we were able to raise the profile of the association within the General Assembly. We believe these efforts will be of benefit to the SCDTAA in the future.

2005 SCDTAA Trial Academy

June 8 - 10 • Columbia, SC

by Curtis L. Ott and T. David Rheney

Planning is well underway for the Fifteenth Annual South Carolina Defense Trial Attorneys' Association Trial Academy to be held in Columbia during June 8-10, 2005. We would like to thank the following members of the organization committee for their involvement: Catherine B. Templeton, A. Johnston Cox, William S. Brown, Diedra Y. Wilson, Arthur C. Pelzer, Andrew S. Culbreath, Elizabeth J. Brady, M. Kyle Thompson and Brian G. O'Keefe. The Academy returns to Columbia after being held in Charleston for the past two years and Greenville the previous two years.

Attendees will undergo two days of extensive training sessions at the South Carolina State Museum by some of the most experienced defense attorneys in South Carolina on topics including opening statements, direct and cross examination of lay witnesses, direct and cross examination of expert witnesses, closing statements and use of depositions during trial. In addition, there will be instruction by an

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A G E N D A

Wednesday, June 8, 2005

9:00 – 9:15 am
Welcoming remarks
James R. Courie, Esquire, SCDTAA President

9:15 – 10:15 am
Opening Statements / Voir Dire

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

11:30 am – 12:30 pm
Ethics
Henry Richardson

12:30 – 1:30 pm Lunch on your own

1:45 – 2:45 pm
Direct and Cross of Lay Witnesses
Kay G. Crowe, Esquire

2:45 – 3:00 pm Break

3:00 – 4:00 pm
Practice / Breakout Session:
Direct/Cross – Lay Witnesses

4:00 – 5:00 pm
Preserving the Record on Appeal
Chief Justice Jean H. Toal

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

6:30 pm
Cocktail Reception sponsored by South Carolina Defense Trial Attorneys' Association Young Lawyer's Division

Thursday, June 9, 2005

9:00 – 10:00 am
Direct and Cross of Expert Witnesses

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

11:00 – 11:15 am Break

11:15 am – 12:15 pm
Deposition Strategy and use at trial

12:15 – 1:15 pm Lunch on your own

1:30 – 2:30 pm
Closing Arguments/Post Trial Motions
John S. Wilkerson, III, Esquire

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

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

6:30 pm
Dinner & Cocktails
Nelson Mullins Riley & Scarborough
Meridian Building, 17th Floor

Friday, June 10, 2005

9:00 am – 4:30 pm
Mock Trials
Matthew J. Perry, Jr. Federal Court House

Trial Academy

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appellate court judge on preserving the record for appeal.

Social activities will include a cocktail reception on the evening of Wednesday, June 8th, hosted by the Young Lawyers Division of the SCDTAA, and the SCDTAA judicial reception on Thursday, June 9th, at Nelson Mullins Riley and Scarborough. The receptions will be a valuable opportunity for the students to get to know other young defense lawyers, as well as other members of the SCDTAA and judges from around the state.

The Trial Academy will culminate with six mock trials on Friday, June 10th. The Honorable Joseph F. Anderson, Jr., graciously offered the courtrooms and facilities of the spectacular new Matthew J. Perry, Jr. Federal Courthouse for the trials. We welcome your attendance at the judicial reception and any assistance you could offer during the mock trials the following day.

Enrollment will be limited to the first 24 registrants. Spaces fill quickly, so those who are interested should get their applications is soon. An application is included in this edition of The Defense Line, or can be obtained online at www.scdtaa.com.

South Carolina Defense Trial Attorneys' Association
Fifteenth Annual Trial Academy
June 8 - 10, 2005
The South Carolina State Museum
Columbia, South Carolina

NAME (as to appear on name tag):_____

FIRM NAME: _____

BUSINESS ADDRESS:_____

CITY, STATE, ZIP: _____

PHONE: _____ **FAX:** _____

EMAIL: _____ **SC BAR NUMBER:** _____

A block of rooms have been reserved at the Hampton Inn Downtown Historic District in Columbia. Contact Hampton Inn directly for hotel reservations
▪ By May 9, 2005 at (803) 231-2000 ▪

***** Trial Academy Cancellation Policy*****

1. Any cancellation more than 30 days before the first date of the Trial Academy will be entitled to a full refund.
2. Cancellations from 15-30 days before the first date of the Trial Academy will be entitled to a 50 percent refund. However, if the canceling party succeeds in finding a replacement for himself/herself, he/she will be entitled to a full refund upon payment by the replacement.
3. Cancellations less than 15 days shall not be entitled to any refund. However, if the canceling party succeeds in finding a replacement for himself/herself, he/she will be entitled to a full refund upon payment by the replacement.
4. Law firms who reserve a spot for one attorney in the firm may substitute another attorney of that firm at any time without any penalty.

Registration fee is $900.00 (including a $50.00 non-refundable processing fee)

Return this form with payment to:South Carolina Defense Trial Attorneys' Association
1 Windsor Cove, Suite 305 ▪ Columbia, South Carolina 29223
(803) 252-5646 ▪ Fax (803) 765-0860

SC Supreme Court Decision Curbs Forum Shopping

by Ronald K. Wray and John Bell

On February 2, 2005, the South Carolina Supreme Court issued a significant decision clarifying venue law in South Carolina as it pertains to corporate defendants. The decision in Whaley v. CSX Transportation, Inc., Op. No. 25935 (South Carolina Supreme Court decided February 2, 2005) should help curb the venue shopping abuses that had earned Hampton County, South Carolina, the notorious distinction as the American Tort Reform Association's third worst judicial hell hole of 2004. The South Carolina Defense Trial Attorneys' Association filed an amicus brief supporting CSX in the appeal.

Underlying Facts

Whaley arose from an incident that occurred on May 24, 2000 while the plaintiff, Danny Whaley, was working as a locomotive engineer for CSX. Whaley claimed that while working on a hot South Carolina day he became ill and required medical treatment, allegedly due to excessive heat on the locomotive. He alleged that his illness caused him to lose his ability to perspire and also caused heart problems that ultimately required installation of a pacemaker. Whaley filed suit against CSX under the Federal Employer's Liability Act (FELA) and the Federal Locomotive Inspection Act (LIA).

Despite the fact that Whaley lives in Abbeville County, where his family has resided since the 1760s, and despite the fact that the incident at issue occurred while Whaley was working a local job that ran from Greenwood to Laurens and then back to Greenwood, Whaley chose to file his suit in Hampton County. In pre-trial hearings, CSX sought a transfer of venue, arguing that venue was improper in Hampton County because it did not reside in Hampton County as required by Section 15-7-30, the general venue statute. Additionally, CSX argued that even if the case could properly be filed in Hampton County, it should be transferred to Greenwood County pursuant to Section 15-7-100(3) based on the convenience of witnesses and ends of justice.

The trial judge denied CSX's motion to transfer venue, finding that CSX did reside in Hampton County because it owned property and transacted business there. In reaching his decision, the trial judge relied upon the 1980 decision in *In re Asbestosis Cases*, 274 S.C. 421, 266 S.E.2d 773 (1980), in which the Supreme Court had construed language formerly found in a service of process statute, Section 15-9-210, to find venue proper in any county in which a corporate defendant owns property and transacts business. The trial judge also found that he did not have discretion to transfer the case based on the convenience of witnesses and ends of justice because a provision in Section 36-2-803(2), South Carolina's long arm statute, provides that when jurisdiction is based solely on the long arm statute, a trial judge is not permitted to transfer venue for the convenience of witnesses and ends of justice.

Ultimately, the case was tried to a jury in Hampton County and the plaintiff was awarded a $1 million verdict. CSX appealed.

Appellate Proceedings

As with most cases, CSX filed its notice of appeal with the South Carolina Court of Appeals. However, following initial briefing, CSX filed a motion pursuant to Rule 204(b), SCACR, asking the South Carolina Supreme Court to certify the case for review because determining the proper venue for trials involving corporations had become an issue of significant public interest and major importance in South Carolina that needed to be resolved by the Supreme Court. CSX also argued that trial courts had issued inconsistent rulings as to whether the long-arm statute prevented a party with a substantial presence and actively doing business in South Carolina from seeking a transfer of venue based on convenience of witnesses and ends of justice. Over objection by Whaley, the Supreme Court granted the motion and certified the case for direct review. The Court then heard oral argument in October 2004, approximately one year after the original trial concluded.

On February 2, 2005, the Court issued its opinion. The Court concluded that the trial court had erred in denying CSX's motion to transfer venue under Section 15-7-30 since CSX is not a resident of Hampton County. Equally importantly, the Court held that the trial court erred in finding that the long-arm statute prevented it from transferring venue under Section 15-7-100(3), and held venue also should have been transferred based on convenience of witnesses and ends of justice. Finally, the Court issued an important evidentiary ruling regarding admission of evidence of other accidents, transactions or happenings that has significance for defense attorneys beyond the Whaley case. Each of these rulings is discussed in more detail below.

Continued on page 10

Decision...

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Venue of Actions Against Corporations

Under South Carolina law, an action "shall be tried in the county in which the defendant resides at the time of the commencement of the action." S.C. Code Ann. § 15-7-30 (Supp. 2003). A defendant's right to a trial in the county of its residence is a substantial right and is not to be lightly denied. *Carroll v. Guess*, 302 S.C. 175, 177, 394 S.E.2d 707, 708 (1990). Further, the question of proper venue is a matter of law, not discretion. *Chestnut v. Reed*, 299 S.C. 305, 306, 384 S.E.2d 1713, 1714 (1989). Thus, when the facts concerning a defendant's residence are uncontradicted, the trial court must, as a matter of law, change venue to the county where the defendant resides. *McKissick v. J.F. Cleckley & Co*., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996).

The long-standing rule in South Carolina has been that a foreign corporation "establishes a residence for venue purposes by having an office and agent in the county for the transaction of business." *Tucker v. Ingram*, 187 S.C. 525, 198 S.E. 25 (1938); *Shelton v. Southern Kraft Corp.*, 195 S.C. 81, 10 S.E.2d 341, 342 (1940) ("To maintain the contention that it has a residence for venue purposes, it must be shown more than it has an agent in that county; it must have offices for the transaction of its corporate business."). In Whaley the South Carolina Supreme Court reiterated this rule, holding that for purposes of venue, a defendant corporation resides in any county where it (1) maintains its principal place of business or (2) maintains an office and agent for the transaction of its business. In so ruling, the Court rejected the expansive definition of residence applied by the trial court, finding this was no longer a viable test because the "owns property and transacts business" language previously found in Section 15-9-210 had been deleted when the statute was substantially rewritten in 1981. Moreover, the Court found that the test had been improperly created in the first place by reading two statutes, in tandem, that addressed the separate and distinct concepts of jurisdiction and venue. Thus, the Court rejected the notion that venue is proper anywhere a corporation owns property and transacts business, and the Court adopted a much more tangible, and more easily applied, test of residence that restores fairness to South Carolina's venue law.

Transfer of Venue Based on Convenience of Witnesses and Ends of Justice

Another important aspect of the Court's decision was its holding that the trial court erred in finding that it did not have discretion to transfer venue based on the convenience of witnesses and ends of justice, and the Court's reversal of the trial court's ruling that the evidence did not justify a transfer of venue on this basis. The Court's stated reason for addressing this issue, even though it had already concluded that venue in Hampton County was improper because CSX does not reside there, is important. The Court noted that it sought to issue a comprehensive decision that clarified the law of venue. The Court also commented that "because the incidents and parties involved in the underlying lawsuit had no rational connection to the county in which this case was tried, we cannot ignore a trial court ruling that fails to base venue on principles of convenience and justice, particularly when such rulings may undermine the public's confidence in our judicial system." Opinion at n. 7. The Court's language appears to send a strong signal that the Court wants venue shopping in South Carolina's trial courts to cease, and that no longer should cases be permitted to be tried in counties having no rational connection to the case.

Addressing the merits, the Court first held that the trial judge had erred in finding that personal jurisdiction over CSX was based solely on the long arm statute. The Court held that the trial court should have found that it had personal jurisdiction based on Section 36-2-802, which permits South Carolina courts to exercise personal jurisdiction over persons doing business in the state. Because the court found that CSX was doing business in the state, it held that the trial judge erred in ruling that jurisdiction was based solely on the long arm statute, and that he did not have discretionary authority to transfer the case based on the conveniences of witnesses and the ends of justice.

Examining the evidence submitted in support of CSX's motion, the Court next concluded that CSX had made a prima facie showing that Hampton County was not a convenient place for trial since neither the plaintiff, the treating physicians (with the

exception of an expert retained by Whaley's counsel), or any of the fact witnesses lived in or near Hampton County, while all lived either in Greenwood or the contiguous counties of Abbeville and Laurens. Indeed, at oral argument before the Supreme Court, Whaley's counsel responded to a question from the Court about why the case had been filed in Hampton County by stating that it was because "we're the lawyers." As the Supreme Court correctly noted, the location of a lawyer's office has nothing to do with the analysis of where venue is proper. Moreover, the Court held that the ends of justice were not promoted by having this case tried in Hampton County.

Evidentiary Rulings

Finally, in addition to its rulings on venue, the Court also made a significant ruling with regard to the admissibility of evidence of similar accidents, transactions or happenings. The Court found that the trial court had improperly admitted evidence of previous injuries and complaints about heat made by CSX employees because the plaintiff had failed to lay an evidentiary foundation that the previous complaints and injuries had occured under substantially similar circumstances. "Because evidence of other accidents may be highly prejudicial, a plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue." The Court's ruling on this issue should have significant impact on efforts by plaintiffs to introduce this type evidence in other cases where there is no evidentiary showing of similarity between the other incidents sought to be introduced and the incident being litigated.

Conclusion

The decision in Whaley is a significant victory for the civil justice system in South Carolina. Although a petition for rehearing has been filed and was pending as of the time this article was submitted, the petition does not challenge the Court's venue rulings. Thus, regardless of the Court's ruling on the petition, the venue rulings will not be altered.

2004 Hemphill Award Criteria

1. Eligibility

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

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

2. Criteria/Basis for Selection

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

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

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

3. Procedure

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

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

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

4. Form of Award

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

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

Nominations due to Aimee Hiers at SCDTAA Headquarters, 1 Windsor Cove, Ste 305, Columbia, SC 29223 by July 15th

Frazier v. Badger
Opinion by Chief Justice Toal

THE STATE OF SOUTH CAROLINA
In The Supreme Court

E'Van Frazier, Respondent,
v.
Athaniel Badger, Jr., Petitioner.

ON WRIT OF CERTIORARI

Appeal From Orangeburg County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 25876

Heard January 6, 2004 -
Filed September 27, 2004

AFFIRMED

Andrea E. White, of Duff, Turner, White and Boykin, LLC, and Andrew F. Lindemann, of Davidson, Morrison and Lindemann, P.A., both of Columbia, for Petitioner.

Lawrence Keitt, of Keitt and Associates, of Orangeburg, for Respondent.

CHIEF JUSTICE TOAL: This review stems from an action by E'Van Frazier ("Frazier") against Athaniel Badger, Jr. ("Badger") for the tort of outrage. The jury awarded Frazier $400,000 in actual damages and $400,000 in punitive damages. The trial judge reduced the award to $200,000 in actual damages and $200,000 in punitive damages. The Court of Appeals affirmed in an unpublished opinion. *Frazier v. Badger*, Op. No. 2002-UP-513 (Ct. App., filed August 20, 2002). We granted certiorari and affirm the Court of Appeals.

Factual/Procedural Background

During the 1995-96 school year, Frazier was employed to supervise the in-school suspension lab at Clark Middle School. At that time, Badger was the assistant principal of Clark Middle School and was Frazier's direct supervisor. Around the beginning of the school year, Badger began visiting Frazier's classroom and making explicit, sexual advances towards her. When Frazier refused Badger's propositions, he told her that eventually he was going to "break her." As the school year progressed, Badger's visits became more frequent, and his advances became physical. Frazier testified that Badger would grab her legs and breasts and that she had to "fight him off" of her on several occasions.

As part of Badger's duties as assistant principal, he received requests for building repairs. Frazier repeatedly asked Badger to send someone to repair the heating and air conditioning in her classroom. Despite Badger's promises, the heating and air conditioning were never repaired.

At the end of the school year, Badger told Frazier that if she came back to work in the fall, he would move her class into a portion of the basement known as the "dungeon."

As a result of Badger's behavior, Frazier suffered emotionally and physically. She became severely depressed. Her weight plummeted below 100 pounds, and she began having anxiety attacks and losing her hair. Her physician referred her to a psychiatrist who proscribed her medication for depression and insomnia. Frazier also testified that her fiancé left her because of her emotional condition.

On August 1, 1996, Frazier wrote Priscilla Robinson ("Robinson"), Principal of Clark Middle School, about Badger's conduct, which led to a meeting between Robinson, Badger, and Frazier. After the meeting, Robinson wrote Frazier a letter acknowledging that Badger had admitted to and apologized for making inappropriate comments. She also wrote in her letter that it appeared that Badger had submitted work orders for the heating and air conditioning.

Frazier wrote Robinson another letter because she was dissatisfied with the investigation. As a result, District Superintendent, Dr. Walter Tobin assigned three people to investigate the matter further. The investigators found that (1) Badger made inappropriate comments to Frazier; (2) Badger sent Frazier's requests to the maintenance department, requesting that the heating and air conditioning be repaired, but the units were not repaired in a timely manner; and (3) Robinson, not Badger, decided to move Frazier into the "dungeon."

At the beginning of the next school year, Frazier's class was relocated to the basement, and she was told that her old classroom would be used for a computer lab. [1] Robinson also told Frazier that until her downstairs classroom was ready for use, her classroom would be located on the cafeteria stage. This temporary location made Frazier's job increasingly

difficult. Though the stage curtains were drawn, Frazier had a hard time keeping the students in class. It was only after Frazier filed a complaint with the Department of Human Affairs that Frazier was given a regular classroom.

At trial, Badger testified that he was Frazier's basketball coach fifteen years ago, and that their relationship was "playful." He admitted to making inappropriate remarks and inviting her to dinner, but he denied making sexually explicit comments or grabbing her. He also testified that he did not recall refusing to process any work orders to repair the heating and air conditioning in Frazier's classroom. Finally, he denied that he ever threatened to relocate Frazier's classroom to the basement.

The jury found that Badger's sexual advances towards Frazier, combined with his retaliatory conduct, met the elements for the tort of outrage. The Court of Appeals affirmed the trial court's ruling in an unpublished opinion. Frazier v. Badger, Op. No. 2002-UP-513 (Ct. App., filed August 20, 2002). Badger now presents the following issues for review on certiorari:

I. Did the Court of Appeals err in affirming the trial court's refusal to charge the jury on the law of tort immunity for government employees?

II. Did the Court of Appeals err in affirming the trial court's denial of the motion for mistrial?

III. Did the Court of Appeals err in affirming the trial court's ruling that Frazier was not barred from bringing an outrage action in lieu of an action for sexual harassment?

IV. Did the Court of Appeals err in affirming the trial court's refusal to submit special interrogatories to the jury?

V.Did the Court of Appeals err in affirming the punitive damages award?

Law/Analysis

I. Governmental Immunity

Badger argues that he is immune from tort actions stemming from conduct within the scope of his official duties pursuant to South Carolina Code Ann. section 15-78-70 (Supp. 2003), [2] and therefore the trial court abused its discretion when it refused to charge the jury on the law concerning immunity. We disagree.

South Carolina Code Ann. section 15-78-70 specifically provides that government employees may be liable in tort actions:

> (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).
>
> (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.
>
> …

(Emphasis added).

Immunity under the statute is an affirmative defense that must be proved by the defendant at trial. *Tanner v. Florence City-County Bldg. Comm'n*, 333 S.C. 549, 552, 511 S.E.2d 369, 371 (Ct. App. 1999).

The trial judge is required to charge only the current and correct law of South Carolina. *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998). The law to be charged to the jury is determined by the evidence at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). In reviewing jury charges for error, appellate courts must consider the charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. *Foster v. Greenville Hosp. Sys.,* 334 S.C. 488, 497, 514 S.E.2d 570, 574 (1999).

This Court has held that the term "scope of employment" as used in an insurance policy is broader than the term "scope of official duties" as used in the Tort Claims Act. *South Carolina State Budget and Control Bd. v. Prince*, 304 S.C. 241, 245, 403 S.E.2d 643, 646 (1991). If "scope of employment" is a broader term than "scope of official duties" – the term used in the governmental immunity statute – it follows that acts not within the "scope of employment" are not within the "scope of official duties."

We recognize that whether an act is within the "scope of employment" may be determined by implication from the circumstances of a particular case. *Hamilton v. Miller*, 301 S.C. 45, 48, 389 S.E.2d 652, 653 (1990); *Wade v. Berkeley County*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998). In *Prince*, we held that the course of someone's employment requires some "act in furtherance of the employer's business." 304 S.C. at 246, 403 S.E.2d at 647.

Our jurisprudence includes three cases that consider whether sexual advances were within the "scope of an employee's employment." Because the cases did not relate to governmental immunity, the court of appeals declined to apply them. Nonetheless, we find that "scope of employment" is a term of art, and therefore we look to the cases involving insurance policies for guidance.

In the first case, this Court held that a police officer's sexual assaults of women during traffic stops were not within the scope of his official duties, and therefore the acts were not covered under the state's

Continued on page 14

general tort liability policy. *Doe v. South Carolina State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999). In the second case, the court of appeals held that a professor was not acting within the scope of his employment when he sexually harassed a student. Therefore, the professor's conduct was not covered under the university's liability insurance policy. *Padgett v. South Carolina Ins. Reserve Fund*, 340 S.C. 250, 253, 531 S.E.2d 305, 307 (Ct. App. 2000). In the third case, the court of appeals held that a sheriff's sexual advances toward three of his female officers was not within the scope of the sheriff's official duties. *Loadholt v. S.C. State Budget and Control Bd.*, 339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000).

According to these cases, sexual harassment by a government employee is not within the employee's "scope of employment." Therefore, in the present case, we hold that Badger's sexual advances toward Frazier were outside the scope of his official duties or employment.

The more difficult question is whether Badger's retaliatory conduct was within the scope of his official duties or employment. Under the particular circumstances of this case, we find no evidence that any of Badger's retaliatory conduct was done in furtherance of his employer's business. This is not to say that a jury charge on the law of governmental immunity is inappropriate in every case where allegations are made against a governmental official for retaliatory conduct. What a plaintiff may call "retaliatory conduct" may be justified by some independent employer interest, warranting a charge on governmental immunity. We find Badger's moving Frazier's class to the school's stage and basement furthered none of the school's legitimate interests because Frazier's old classroom was left unused. In addition, none of the school's legitimate interests were furthered by Badger's failure to repair Frazier's air and heating unit or Badger's repeated threats to fire Frazier.

We find that Badger's retaliatory conduct was a continuation of his improper sexual advances toward Frazier and was a product of personal, not occupational, motives. The principle of governmental immunity is not intended to protect a defendant such as Badger who has used his authority for nothing more than to personally retaliate against an employee. In addition, section 15-78-70(b) denies governmental immunity for defendants whose actions involve actual malice and an intent to harm. We find that Badger's retaliatory conduct involved actual malice and an intention to harm Frazier.

Accordingly, we hold that the trial judge did not err in rejecting Badger's request to charge the jury on the defense of governmental immunity because the evidence did not support such a charge.

II. Motion For Mistrial

At pretrial, the trial judge granted a motion in limine excluding evidence of Badger's alleged attempted rape of Frazier approximately fifteen years ago. At trial, Badger testified that he and Frazier had a "playful" relationship when he coached her in basketball. When Frazier took the stand, she testified that Badger began making sexual advances toward her when he was her high school basketball coach. Badger argues that this evidence was inadmissible, and thus the trial judge should have granted his motion for mistrial. We disagree.

A litigant cannot complain of prejudice by reason of an issue he has placed before the court. *See State v. Brown*, 344 S.C. 70, 543 S.E.2d. 552 (2001) (petitioner cannot complain of prejudice from evidence he has brought before the jury); *State v. Robinson*, 305 S.C. 469, 409 S.E.2d. 404 (1991) (a party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door).

Whether a motion for mistrial should be granted is within the trial judge's sound discretion, and the trial judge's ruling will not be disturbed unless an abuse of discretion is shown. *Tucker v. Reynolds*, 268 S.C. 330, 334, 233 S.E.2d. 402, 404 (1977).

Badger, not Frazier, first testified that he and Frazier had a "playful" relationship when he was her basketball coach. Once Badger introduced the nature of the relationship, he opened the door, allowing Frazier to testify as to her perspective of the past relationship. According to Brown, Frazier's testimony was admissible and non-prejudicial since Badger himself introduced the matter. Therefore, we find that Badger's motion for mistrial was properly denied.

III. Outrage in lieu of Sexual Harassment

Badger argues that Frazier should have brought a claim against Badger for sexual harassment, not the tort of outrage, citing *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 175, 321 S.E.2d 602, 613 (Ct. App. 1984), quashed on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985), in which this Court held: "[t]he tort of outrage was designed not as a replacement for the existing tort actions. Rather, it was conceived as a remedy for tortious conduct where no remedy previously existed."

We recognize that Frazier had a statutory right to file a civil rights complaint against Badger for sexual harassment. However, because this is a right created by statute and not the common law of torts, we find no reason to restrict Frazier's right to sue Badger based upon the common law tort of outrage.

IV. Special Interrogatories

Badger argues that the Court of Appeals erred in affirming the trial judge's denial of his request to submit special interrogatories to the jury. We disagree.

The trial judge has the discretion to determine whether to submit special interrogatories. Rule 49(b) SCRCP; *Constant v. Spartanburg Steel*

Products, Inc., 316 S.C. 86, 90, 447 S.E.2d 194, 196 (1994). To warrant a reversal, a party must show that he was prejudiced by the trial court's refusal to submit special interrogatories. *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 279-80 (Ct. App. 1997). In *Anderson v. West*, this Court held "that where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed." 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978).

Here, Badger requested that the trial judge require the jury to make specific findings of fact as to Frazier's allegations of Badger's sexual misconduct and retaliation. Instead, the trial judge gave a general jury charge on the tort of outrage.

We agree with the Court of Appeals' analysis on this issue:

> [t]here was no need to submit special interrogatories to the jury for specific findings of fact, as the two parts of her claim cannot be compartmentalized. As Frazier's only claim before the jury was that of outrage, the jury would have simply found for Badger if the jurors believed the elements of outrage had been met.

Frazier v. Badger, Op. No. 2002-UP-513, page 6 (Ct. App., filed August 20, 2002).

Badger was unable to show that he suffered prejudice from the trial judge's general jury charge on outrage. Further, we find no reason to believe that the jury misunderstood the trial judge's charge on outrage and recognize the existence of evidence warranting Frazier's recovery on this claim. Therefore, we hold that the trial judge did not abuse his discretion in denying Badger's request to submit special interrogatories to the jury.

V. Excessive Punitive Damages

Badger argues that the Court of Appeals erred in upholding the jury's punitive damage award because Frazier failed to introduce evidence of Badger's ability to pay, which he argues is the most important factor in a constitutional review of an award of punitive damages. We disagree.

First, a defendant's inability to pay does not prohibit a jury from awarding punitive damages. In *Gamble v. Stevenson*, this Court established eight factors for a trial court to apply in a post-verdict review of punitive damages. 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991). The ability of the defendant to pay the punitive damages awarded is only one of eight factors. As part of its holding in *Gamble*, this Court opined, "the trial court shall conduct a **post-trial** review and **may** consider the following…" *Id.* (emphasis added). The word "may" signifies that the *Gamble* factors are to provide guidance, not "hard and fast" requirements. Further, "post-trial" signifies that the *Gamble* factors are to be applied after a verdict, by the judge, not the jury.

Second, this Court has consistently held that an award of punitive damages will not be overturned because a defendant is unable to pay. While a defendant's wealth is a relevant factor in assessing punitive damages, it is not necessarily controlling. *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965). There is "no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages." *Norton v. Ewaskio*, 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963). A jury may consider a defendant's financial worth in determining the amount of punitive damages to award, but a jury is not required to make this consideration before it may award punitive damages. *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958).

Third, the United States Supreme Court recently refused to include the defendant's ability to pay in its due process analysis of punitive damages. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Instead, the Campbell Court held that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id* at __, 123 S. Ct. at 1521 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598 (1996)).

According to the Campbell analysis, the award in this case is constitutional: the award fairly reflects Petitioner's reprehensibility; represents a 1 to 1 ratio to actual damages; and is comparable to punitive damages awards in other cases involving the tort of outrage. *See Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)(In determining the constitutionality of a punitive damages award, the reviewing court must look to three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.)

Therefore, the punitive damages award in this case does not offend Badger's due process.

Conclusion

We affirm the ruling of the Court of Appeals, upholding the jury's award of $200,000 actual damages and $200,000 punitive damages for Frazier.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

Footnotes

[1] The school never transformed Frazier's original classroom into a computer lab.

[2] Section 15-78-70 is a provision within the South Carolina Tort Claims Act titled, "Liability for act of government employee; requirement that agency or political subdivision be named party defendant; effect of judgment or settlement."

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