S.C. Defense Trial Attorneys' Association Volume 34 Number 1 • Spring, 2006

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

http://www.scdtaa.com

We Need Your Help!

by G. Mark Phillips, SCDTAA President

We Need Your Help!

Thanks so much to each of the SCDTAA members who have been assisting the SCDTAA Board in accomplishing a number of tasks.

Many of you have volunteered to serve on various SCDTAA Committees and each such volunteer will be put to work. As many hands make light work, your efforts will not be too demanding and the pay-off to everyone will be conspicuous.

E-Mail Addresses and Such

Please be sure that someone from each of the member firms contacts SCDTAA Executive Director Aimee Hiers (800-445-8629; aimee@jee.com) and provides her with current e-mail addresses for each of the firm's SCDTAA members. Many firms (including my own) have changed the e-mail addresses and web addresses for their firms over the last few years. As mentioned previously, we may go on-line with *The Defense Line*. Having good e-mail addresses will allow the SCDTAA Board to have instant access to each of you. This can be important, particularly when, as lately, a state legislative committee votes to limit defense attorney fees in workers' compensation cases. We also intend, some day, to get everyone on board as active users of the SCDTAA's website.

You have recently received a dues statement for the 2006 SCDTAA year. That billing would normally have gone out in late November of last year. The 2007 dues will be billed at the end of this year. Please do give these member dues your immediate attention. Our financial house has been in good order for the last several years and I certainly aim to keep things that way in 2006. I believe that the services that everyone should enjoy will be well worth it.

You will also see that *The Defense Line* editors Gray Culbreath and Wendy Keefer are soliciting your recent verdict information and other newsworthy items about SCDTAA members. We would like to publish all such items of interest in coming issues of *The Defense Line*.

Current Tasks

2006 has started off busy as the SCDTAA has already been asked to compose two amicus curiae briefs. One involves the novel issue of whether a medical provider owes a duty to a third-party. Amicus Chair Stephanie Burton and board member Wendy Keefer are working closely with Conway attorney (and SCDTAA member) Mary Ruth Baxter to draft and file this brief. The firm of Collins and Lacy assisted in this effort. Another amicus brief that we are working on involves issues that are unique to the many workers' compensation specialists who are SCDTAA members.

The Legislative Committee, headed up by Eric Englebardt, is nearly swamped with some prickly bills. At press time, the SCDTAA has issued its own resolution in connection with the workers' compensation reform bill. A legislative subcommittee added an amendment that proposed to limit defense fees in contested workers' compensation cases. Eric successfully worked with SCDTAA legislative consultant Jeff Thordahl and with several past-presidents and other SCDTAA members to weigh-in on the legislation. Other legislative items include a proposal to assign a single resident judge to each county to replace the current system of assigning a number of judges to a judicial circuit. A final item is a filed bill which would repeal the "Dead Man's Statute." The entire board is watching all of these legislation issues carefully.

Glenn Elliot and William Brown are meanwhile working to deliver a first-rate Trial Academy. As you can see herein, Defense Line editors Gray Culbreath and Wendy Keefer have really transformed the SCDTAA's periodic publication. Everyone has enjoyed these improvements. We are trying to focus a lot of the SCDTAA's efforts on our relationships with the judiciary, potential clients, and our worthy opponents at the S.C. Trial Lawyer's Association. Look to hear soon from Judiciary Committee chairmen Mitch Griffith and Hugh Buyck, both of whom are planning judicial receptions around the state this year. David Rheney, Curtis Ott, and Ron Wray promise to deliver a first-rate Joint Meeting at The Grove Park Inn in July.

All Oceanfront Rooms!

Do make budgetary plans, right now, to attend the Annual Meeting on Amelia Island Plantation. This year, we will bring the judges down for a long weekend beginning November 9. Matt Henrikson, Molly Craig, and Sterling Davies are already hard at work. Everyone will be both informed and entertained.

Letter From The Editors

by Gray T. Culbreath & Wendy J. Keefer

Welcome to the new (and hopefully improved) publication of the South Carolina Defense Trial Attorneys' Association. This issue of *The Defense Line* is the first to include several new sections – a judicial profile, case notes, and verdict reports to name a few. The survival of these new sections depends on feedback and participation from our membership. Not only do we rely on all of you to provide the information included in *The Defense Line*, but we also rely on you to let us know when the information provided is not useful or could be better presented.

Already we have received a good response to our request for information on recent verdicts. As you will see in this issue, the information about your colleagues' trial experiences provides not only information on the outcome, but identification of the presiding judge and expert witnesses used. This kind of information may come in handy in your own trials before the same judges, involving the same expert witnesses, and even in identifying and retaining experts to aid your clients in their defenses. Let's keep these reports coming. Plaintiffs' attorneys long ago mastered the art of sharing information about judges, about witnesses, and even about us. Isn't it about time we capitalize on the same information sharing to level the playing field?

In addition to trial verdicts and settlements, all of us struggle just to keep up with the most notable decisions of our appellate courts. It is for that reason that a case notes section now appears in *The Defense Line*, with the goal of reporting noteworthy appellate decisions, both federal and state, that may impact our membership or their clients. But we cannot monitor these cases alone. We seek a committee of individuals who can work together as a team, dividing responsibility and effort, to ensure our members do not miss any important decisions. If you are interested in assisting in this effort, please contact us at the email addresses or telephone numbers below.

The Defense Line is a wealth of information and we hope to make it more relevant to the practices of defense attorneys across the state with each issue. Equally important, however, is that you note information about upcoming SCDTAA events. In this issue you will find information on the 2006 SCDTAA Trial Academy. Any attorney who has participated in this event, including those who come as students and those who come as instructors, witnesses or organizers, can attest to the great contribution it makes to the mentorship and development of young lawyers. Perhaps one of our most notable contributions to the bar, it also provides a wonderful networking opportunity. As you will learn from the insightful profile of Judge P. Michael Duffy of the United States District Court for South Carolina, the mentorship of young lawyers is the professional responsibility of us all. SCDTAA takes that responsibility head on every year with the Trial Academy. If you have not been involved before, this is the year to do it.

Gray T. Culbreath

Wendy J. Keefer

Our goal is to make this publication more relevant. But that relevance lies not only in the information provided about the Association, but also in the substantive legal knowledge provided. Which one of us hasn't at some point, perhaps early in our careers, asked ourselves what objecting to the form of the question really means and what its purpose is? That question is answered in this issue.

We hope in the coming year to answer many more questions and to become a publication you look forward to receiving. If you can think of any way to help us achieve that goal or are interested in helping monitor caselaw, wanting to provide information about a verdict or settlement you obtained, or to share information about your firm, yourself or your colleagues please do not hesitate to contact us. Gray can be contacted at gculbreath@collinsandlacy.com or 803-255-0421 and Wendy can be contacted at wkeefer@bancroftassociates.net or 202-714-9605.

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THE DefenseLINE

The SCDTAA Docket

Zoe Sanders Nettles Receives the 2005-2006 National Association of Women Lawyers Service Award

Nelson Mullins Riley & Scarborough LLP Partner Zoe Sanders Nettles received the 2005-2006 National Association of Women Lawyers Service Award at the organization's midyear meeting in March. This award recognizes Ms. Nettles' efforts to "move along the path that emphasizes professional development, a mission that unites women attorneys regardless of practice setting or political leanings," according to NAWL President Lorraine Koc, who presented the award. A longtime NAWL member, Ms. Nettles served as the organization's president from 2003-2004 and has received several awards for her service to the organization. She pioneered the National Directory of Women Lawyers and is credited with increasing NAWL membership, particularly among firms. Based in the Columbia office of Nelson Mullins, Ms. Nettles currently practices administrative law and business litigation with an emphasis on class actions and pharmaceutical litigation. Ms. Nettles earned a Juris Doctor from the University of South Carolina School of Law in 1992 and a Bachelor of Arts in English Literature from the University of Virginia in 1989.

Thad Westbrook Receives Mullins Client Development Award

Nelson Mullins Riley & Scarborough honored Thad H. Westbrook with the 2006 Edward W. Mullins, Jr. Client Development Award during the Firm's annual retreat on Friday, Feb. 24.

Mr. Westbrook practices in Columbia in the areas of business litigation, consumer finance litigation, and class action defense. Mr. Westbrook is a member of the American Bar Association (Young Lawyers Division, Section of Antitrust Law and Section of Business Law). In the Young Lawyers Division, Mr. Westbrook serves as Chair of its Business Law Committee. He also serves as Chair of the South Carolina Bar's Law Related Education Committee and Chair of the Professionalism Committee for the South Carolina Bar's Young Lawyers Division. Mr. Westbrook is also a member of the Defense Research Institute, the Federal Bar Association, the Richland County Bar Association, and the South Carolina Defense Trial Attorneys' Association.

The Mullins Award is named for Edward W. Mullins, Jr., a senior partner with Nelson Mullins who joined the Firm in 1959. Mr. Mullins, who served as Firm chairman from 1997-2000, has long set an example with his business development efforts.

D. Nathan Hughey and J. Blanton O'Neal, IV

have become partners at the Hood Law Firm, LLC. Hughey practices in the areas of medical malpractice defense, health care law and civil litigation. Hughey holds an undergraduate degree from the College of Charleston and a J.D. degree from the University of South Carolina School of Law. O'Neal practices in the areas of construction law, environmental law, civil and commercial litigation. O'Neal holds an undergraduate degree from the Georgia Institute of Technology and a J.D. degree from the University of South Carolina School of Law.

2006

Spring

TRIAL ACADEMY

June 14 - 16

Columbia, SC

Summer

JOINT MEETING

July 27 - 29

The Grove Park Inn

Asheville, NC

Fall

ANNUAL MEETING

November 9-12

Amelia Island Plantation

Amelia Island, FL

Workers Compensation Update

by Jeffrey N. Thorndahl, MG&C Consulting

History

At the end of July, Governor Mark Sanford appointed a Workers' Compensation Reform Task Force in response to a 33% rate increase filed by the National Council on Compensation Insurance. It was the third consecutive double-digit rate increase filed by the NCCI in as many years. The Department of Insurance denied the request, and the NCCI appealed the decision to the Administrative Law Court. An April hearing is anticipated. The rising cost of workers' compensation insurance was compounded two months later when the South Carolina Second Injury Fund more than doubled its annual assessment.

By the end of the year, the task forced finished its study and called for comprehensive reform ranging from abolishing the Second Injury Fund, to limiting the discretion of commissions, to statutorily overturning recent SC Supreme Court decisions. Running parallel with the task force is a coalition of businesses, insurance companies, trade associations, self-insurers, and medical professionals intent on passing reform legislation during the current session of the General Assembly which ends on June 1.

As a result of the efforts of both groups, comprehensive reform legislation was introduced by legislative leaders and multiple co-sponsors in the both the Senate (S.1035) and the House (H.4427). The battle to reform the system has resulted in a hard-fought, classic struggle between the interested parties. H.4427 was endorsed with amendments by a House subcommittee and is currently being debated by the full House Labor, Industry and Commerce Committee.

Recent Developments

The full House Labor, Commerce and Industry Committee will debate the comprehensive reform bill (H. 4427) again the week of March 13, 2006. Observers are guardedly optimistic that the committee will reach a consensus and report out H.4427 (Bill) favorably with amendments. In order to do this, it is expected that some compromises must be reached in sections dealing with the AMA guides and questions of impairment versus disability, caps on claimant and defense attorney fees, and the Second Injury Fund. It is widely anticipated and expected that the sections dealing with caps on both claimant and defense attorney legal fees will be stricken from the bill.

At this point in the session it is likely that if the Full House debates H. 4427 it will be after the budget debate which will be held the week of March 27. If it passes the House in April there will be less than two months for the Senate to debate the bill and come up with their version.

Commission

Meanwhile in the Senate, Andrea Pope (Andrea C. Pope) of the Columbia defense firm of Barnes, Alford, Stork, & Johnson was confirmed for a six year term on the Workers' Compensation Commission. She will replace Commissioner Lisa Glover on July 1, 2006.

The Senate Judiciary Committee set for second reading S.1174 (Bill) which deletes the out-dated references to the Commission's Executive Assistant and Administrative Director in favor of the current title of Executive Director. The Commission has not used the former titles since it reorganized in 1986.

SCDTAA: A Resolution

WHEREAS the South Carolina Defense Trial Attorneys' Association represents over 900 members practicing law in South Carolina, and

WHEREAS members of the South Carolina Defense Trial Attorneys' Association are actively involved in representing business, industry, employers, self insured businesses and associations, and insurance carriers in the practice of workers' compensation law, and

WHEREAS the South Carolina Defense Trial Attorneys' Association membership has actively followed, studied and considered the workers' compensation debate over the last several years, and

WHEREAS the South Carolina General Assembly is currently debating several workers' compensation reform bills, and

WHEREAS the South Carolina Defense Trial Attorneys' Association membership believes that some changes to the procedural, statutory and recent case law would make for a more balanced, effective and efficient workers' compensation system.

THEREFORE BE IT RESOLVED that the South Carolina Defense Trial Attorneys' Association urges the General Assembly to carefully consider all available information, including recommendations from the Governor's Workers' Compensation Task Force, written submissions from those involved in the system, and testimony from lawyers involved in the daily practice of workers' compensation law and pass measures that will result in a more balanced, efficient and equitable system for all parties involved.

Approved February 20, 2006, SCDTAA Executive Committee

2006 SCDTAA Trial Academy
June 14 - 16 • Columbia, SC

by William S. Brown and E. Glenn Elliott

The 16th Annual South Carolina Defense Trial Attorneys' Association Trial Academy will be held in Columbia during June 14-16, 2006. Work is well under way and we are looking forward to making this year's Trial Academy an incredible experience for all involved. As in years past, we believe this year's Trial Academy will be a tremendous learning opportunity for the participants. To achieve the most benefit from the Trial Academy, hard work and preparation is required. The participants will undergo two days of extensive training sessions to be held at the Marriott in Columbia. These training sessions will be provided by some of the finest and most experienced defense attorneys in South Carolina on all phases of a trial and trial preparation. In addition to the presentations, there will be significant time in practice or breakout sessions in which small groups of participants can work closely with experienced defense attorneys on aspects of the trial problem. For the participants, we will be providing them advance information as to which party in the case they will represent. This will allow for some advanced preparation and understanding of the facts of the case to be presented at the mock trial.

The Trial Academy will culminate, of course, with mock trials to be held on Friday, June 16. The Honorable Joseph F. Anderson, Jr. has again graciously allowed us to use the courtrooms and facilities in the beautiful Matthew J. Perry, Jr. Federal Courthouse for the mock trials. Last year we enlisted the service of 6 of the most experienced defense trial counsel in the South Carolina (one for each mock trial) to provide comments and constructive criticism of the conduct of the students. We plan again to provide this added feedback to enhance the learning experience of the Trial Academy.

Another important part of the Trial Academy program is the social activities. These activities provide the younger attorneys, who are participants, with the opportunity to interact with experienced trial attorneys and members of the judiciary. The social activities will include a reception hosted by the Young Lawyers Division on Wednesday, June 14, and the SCDTAA Judicial Reception on Thursday, June 15, at Nelson Mullins Riley & Scarborough. The receptions will be a valuable opportunity for students to get to know other young defense lawyers, members of the SCDTAA, and judges from around the state.

Enrollment in the Trial Academy will be limited to the first 24 registrants. Spaces fill up quickly, so those who are interested or who have associates in their firms who would be interested, should get these applications in soon. Registration information will be sent out soon or you can visit www.scdtaa.com to obtain an application.

We look forward to the participation and attendance at the Trial Academy and its related activities and welcome the assistance of any SCDTAA member during the mock trials of the Trial Academy.

Plan to Attend the DRI Regional Meeting

The annual DRI Mid-Atlantic Regional meeting will be held April 21 and 22, 2006 in Greensboro, North Carolina. This is an excellent opportunity to network with other DRI members in our region and to share ideas on defense practice and state defense organizations. The Mid-Atlantic Region is comprised of defense organizations in South Carolina, North Carolina, Maryland, Virginia, and the District of Columbia.

This year's meeting is being held at the O. Henry hotel, a modern "retro" style hotel located about 2 miles from downtown Greensboro. Amenities at the hotel include large guest rooms, hot breakfast, a courtyard, a cloister garden and outstanding business and fitness centers. The meeting will kick off on Friday evening with cocktails and dinner at the hotel's highly regarded restaurant. Saturday morning's meeting will include discussion topics relevant to state defense organizations. Golf will be available on Saturday afternoon at one of Greensboro's fine courses.

This meeting is for anyone involved or interested in the improvement of state defense organizations, and sharing ideas with colleagues from neighboring states. This is always a great meeting and one that you will not want to miss. The registration cost is nominal and the location makes it easy for South Carolina folks to attend. For further details, and to obtain a registration form, please contact Aimee Hiers at SCDTAA headquarters (aimee@jee.com or (800) 445-8629).

2006 SCDTAA Annual Meeting
November 9-12 • Amelia Island, FL

On 1,350 acres between the beaches of the Atlantic and the marshes of the Intracoastal Waterway lies a secluded island paradise offering an unsurpassed resort experience– Amelia Island Plantation.

Florida's Premier Island Resort boasts accommodations ranging from luxurious hotel rooms in the all oceanfront Amelia Inn & Beach Club to an array of choices of 2- and 3- bedroom villas featuring ocean, golf or marsh views.

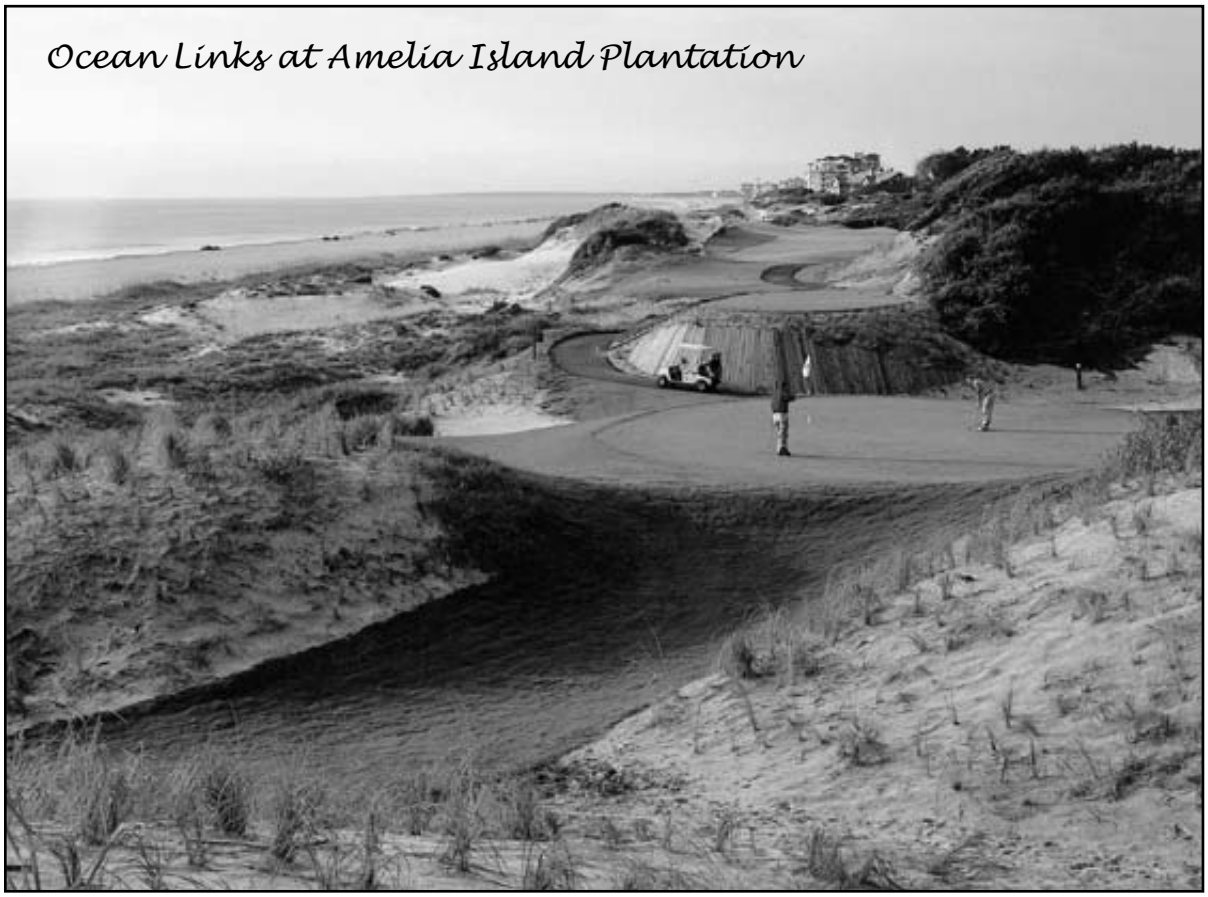
The resort's 72 holes of championship golf have received numerous awards and distinctions, including being recognized as a "Silver Medal Golf Resort" by Golf Magazine. Oak Marsh, Ocean Links, Royal Amelia and Long Point offer something for all golfers from pristine marsh views to the challenge of seven holes playing directly along the ocean.

Other resort amenities include 23 tennis courts, Health & Fitness facility, 24 swimming pools, and a supervised and age-specific Youth Program. There are also endless amounts of shaded biking and walking trails and miles of secluded Atlantic beach for shelling and swimming.

And for those who just want to relax, the Spa features 25 individual treatment rooms with sweeping views of lagoons and moss-draped oaks. Treatments include everything from massage, hydrotherapy, facials, reflexology, and more.

When you are finished on the courts, greens or beaches, a variety of restaurants offer sophisticated resort dining, the freshest in local seafood, or a casual poolside grill.

With championship sports and gracious island living, it's easy to see why Amelia Island Plantation is the only Florida Resort to receive AAA's prestigious 4-Diamond award every year since 1980.



Ocean Links at Amelia Island Plantation

JUDGE PROFILE

Inside the Judge's Chambers: A Profile of Judge P. Michael Duffy

by Stephanie E. Lewis*

Following law school, I had the pleasure and honor of serving on behalf of the Honorable P. Michael Duffy as one of his law clerks for two years. It quickly became apparent that the most valuable aspect of the clerkship was being privy to Judge Duffy's advice, observations, legal judgment, and wisdom, all borne out of his extensive and colorful experience as a trial lawyer and judge. Now more than ever as a practicing attorney, his advice and wisdom have continued to contribute to my personal and professional development. On the tenth year anniversary of Judge Duffy's appointment to the federal bench, it is a fitting time to reflect on Judge Duffy's legal contributions and to share a measure of his advice and wisdom.

Judge Duffy is at the pinnacle of a long career of private practice and public service. He received his undergraduate degree in 1965 from The Citadel and his law degree in 1968 from the University of South Carolina School of Law. He was awarded an Honorary Doctor of Law degree from The Citadel at the 2000 commencement. From 1969 until 1971, Judge Duffy served on active duty with the U.S. Army in Germany and, from 1973 to 1974, was the Assistant County Attorney for Charleston County, South Carolina. Judge Duffy was a partner in the law firm of Hollings & Hawkins and later a principal in the McNair Law Firm until his appointment to the federal bench on December 27, 1995.

During his ten years on the federal bench, Judge Duffy has never shied from taking on the most controversial and important of issues. In Judge Duffy's landmark opinion *United States v. Charleston County, South Carolina*, 316 F.Supp.2d 268 (D.S.C. 2003), he held that the county's at-large election of its council diluted minority voting strength in violation of the Voting Rights Act. This decision is one of many that embody Judge Duffy's commitment to identify that which is correct under the law and his courage to implement it without reference to policy-laden judgment. Despite local resistance to the decision, see, e.g., Editorial, Defend At-Large Elections, Post & Courier, August 18, 2003, at A10, Judge Duffy held fast to his commitment to the law, and his decision was upheld by a unanimous three-judge panel of the Fourth Circuit Court of Appeals, *United States v. Charleston County, South Carolina*, 365 F.3d 341 (4th Cir. 2004) (Wilkinson, J.).

Any observation of Judge Duffy's style as a jurist must emphasize his exceptional intellect, vivid personality, and his innate sense of fairness and decency. Judge Duffy's boundless humor, enthusiasm, compassion, pragmatism, and wit combine to assure that every argument is fully and objectively considered and that justice has truly been served. Indeed, very few lawyers or judges inspire as much affection among those who know them as has Judge Duffy. Prisoners, prosecutors, plaintiffs, and defendants alike hope their day in court arrives on his watch. Regardless of the outcome, they know their particular story will be given unbiased and thoughtful consideration by a man dedicated to the rule of law and interested as much in their character as in their claims.

Included in Judge Duffy's approach to every case is his expectation that those appearing before him should exhibit the highest standards of professionalism, courtesy, and civility. He regularly advises that, while we must represent our clients vigorously, we must never forget our professionalism and our unique status as officers of the court. He professes a feeling of deep obligation to nourish the profession of law. In today's debate regarding judicial nominees and their fitness for service, one often hears judicial temperament cited as among the highest of virtues. Judge Duffy reminds us to expect the same temperament from other practitioners and to strive to exercise such temperament in our own practice. In that vein, one of Judge Duffy's first questions will often include what efforts have been made to resolve the dispute. And counsel would be well served to have made the simple, but too frequently overlooked, effort of calling opposing counsel (or better yet, meeting in person) to discuss whatever issue is impeding progress in the case. Such civility not only serves the profession, but it also ultimately serves one's clients to resolve disputes and reach as much common ground as possible with little to no court intervention. For Judge Duffy expects that professionalism will exist both inside and outside the courtroom, just as our respect for each other as professionals should reach beyond our own practices to the assistance and guidance of newer lawyers.

Judge Duffy's commitment to his law clerks is a testament to the tradition of mentorship that, along

Continued on page 12

FEATURE ARTICLE

Footnote Eight and the Objection to the Form of the Question

by Andrew N. Cole, Collins & Lacy PC

A child should always say what's true
And speak when he is spoken to,
And behave mannerly at table;
At least as far as he is able.

Robert Louis Stevenson, *A Child's Garden of Verse: Whole Duty of Children* (1885).

Like any good parent figure, the Supreme Court of South Carolina wants its attorneys practicing in South Carolina to play fairly with one another. The Court reminded the Bar as much with its amendment to Rule 30(j), SCRCP in 2000. "The intent of the amendment [was] to help eliminate conduct tending to interfere with or impede depositions." Rule 30, SCRCP (Note to 2000 Amendment). "The net effect of the rule has been to restore the truth-seeking function of depositions and to ensure that the 'witness comes to the deposition to testify, not to indulge in parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record.'" Sidebar, The Hon. Gary Hill, *Rule 30(j), Charlie McCarthy and the potted plant*, S.C. Lawyer p. 26 (September 2005), quoting *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). The principal example of this change is the intended disappearance of the speaking objection and the elevation of the "objection to the form of the question" in the listening attorney's repertoire for making objections at a deposition. But what does this objection mean?

After several, very informal surveys at depositions, of co-workers, and over lunches, I can safely conclude that no two attorneys define the objection to the form of the question the same. Nonetheless, the general consensus to this unnatural objection is that one knows the objection when they hear the offending question that compels the listening attorney to object to the form of the question preceding it. Indeed, an objection to the form of the question is an objection to the mode, errors, or irregularities as to the taking of depositions only—it does not address content. *See* Rule 32(d)(3), SCRCP. Unless specifically restricted by an applicable privilege or to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, the scope of discovery is very broad to include "any matter… which is relevant to the subject matter involved in the pending action…. [including information that is] inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), SCRCP; *and see generally* Rule 26(c), SCRCP. "Evidence is relevant if it has any tendency to make more likely, or less likely, any fact that is of consequence to the litigation." *Boyd v. Univ. of Md. Med. Sys.*, 173 F.R.D. 143, 148 (D. Md. 1997) (Emphasis in original). (Referencing the Federal Rule of Evidence 401 which is identical to Rule 401, SCRE.).

Although the objection to the form of the question is not a gatekeeper restricting the introduction of certain testimony in a deposition, it serves the important role of preparing the deposition for its eventual use at trial. The purpose for requiring objections to the form of questions and answers in depositions is "to give questioning counsel an opportunity to rephrase the question, lay a better foundation, or clarify the question so that evidence will not be rejected at trial because of inadvertent omissions or careless questions." *Hemeyer v. Wilson*, 59 S.W.3d 574, 581 (Mo. Ct. App. 2001) (citation omitted). Stated another way, requiring objections to the form of questions and answers made during the process of taking a deposition ensures "that the deposition retains some use at the time of trial; otherwise counsel would be encouraged to wait until trial before making any objections with the hope that the testimony, although relevant, will be excluded because of the manner in which it was elicited." *State v. Bailey*, 714 N.E.2d 1144, 1151 (Ind. Ct. App. 1999) (citation omitted); *see also Mundy v. Angelicchio*, 623 N.E.2d 456, 461n.7 (Ind. Ct. App. 1993) (citation omitted). Indeed, although some testimony from the deposition transcript may be addressed at trial regarding admissibility, the *way* a question is asked at the deposition must be contemporaneously objected to or the right to challenge the form of the question may be waived. *Cooks v. O'Brien Properties, Inc.,* 710 A.2d 788, 796 (Conn. Ct. App. 1998) ("[U]nless reserved by agreement, objections as to form (leading questions, opinion, or unresponsive answers)… are generally waived if they could have been cured by prompt presentment."). Both the South Carolina and the Federal Rules of Civil Procedure state that:

> Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obvi-

> ated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

Rules 32(d)(3)(B), FRCP & SCRCP.

In this light, the Maryland District Court in the case of *Boyd v. University of Maryland Medical System* outlined ten examples of proper objections to the form of questions at a deposition. The source of these proper objections comes in part from the Local Discovery Guidelines from the Federal District Court in Maryland. *See* "Local Rules" at http://www.mdd.uscourts.gov/. The *Boyd* court states in footnote eight of the opinion that the "most frequent grounds for objecting to the form of a question," in order to prevent waiver of the objections, are:

(1) the question is too broad or calls for an excessive narrative answer;
(2) the question is compound;
(3) the question has been asked and responsively and completely answered;[1]
(4) the question calls for conjecture, speculation or judgment of veracity;
(5) the question is ambiguous, imprecise, unintelligible or calls for a vague answer;
(6) the question is argumentative, abusive or contains improper characterization;
(7) the question assumes as true facts in dispute or not in evidence;
(8) the question misquotes a witness' earlier testimony;
(9) the question calls for an opinion from a witness not qualified to give one; and
(10) the question is leading under circumstances where leading questions would not be permitted by Rules 611(c) of the South Carolina and Federal Rules of Evidence.[2]

Boyd, 173 F.R.D. 143, 148 (D.Md 1997). And while it is presumptively improper for an attorney to state his or her reason behind the objection to the form of a question, he or she should be prepared to state specifically the reason behind the objection if asked. An improper objection to the form could open the door for sanctions. Everyone should be familiar with the case of *In the Matter of Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001). Those who are not should find a copy and read it at least twice before their next deposition. The Court in *Anonymous* made it clear that improper conduct warrants sanctions against the offending attorney and, in some instances, the supervising attorney as well. These sanctions can include:

(1) all penalties available to the judge upon a finding of contempt of court;
(2) specifying that designated facts be taken as established for purposes of the action;
(3) precluding the introduction of certain evidence at trial;
(4) striking out pleadings or parts thereof;
(5) staying further proceedings pending the compliance with an order that has not been followed;
(6) dismissing the action in full or in part;
(7) entering default judgment on some or all the claims; or
(8) an award of reasonable expenses, including attorney fees.

Anonymous at 194, 552 S.E.2d at18. The basis for this and other rules of civil procedure is to preserve civility in the profession. At least one court commented on the difficulty of maintaining proper decorum in a setting outside the presence of a judge:

> The setting for a deposition mimics trial, with one important difference: a court reporter is present, testimony is taken under oath, counsel are present to zealously represent their clients, yet when the inevitable occurs, a difference of opinion regarding the propriety of a question, there is no judge to rule on the dispute. Instead, counsel are expected to rise above their roles as advocates for a particular party, and, acting as officers of the court, resolve their differences on the spot without outside intervention.

Boyd v. U. of Md. Medical System, 173 F.R.D. 143, 144 (D.Md 1997).

The following are examples of **improper** objections to make at a deposition:

- "speaking" objections (to prevent witness coaching);
- brief suggestive interjections (to prevent witness coaching);
- interjections by the witness's attorney such as "if you remember" and "don't speculate" (because they suggest to the witness how to answer the question);
- a witness's attorney cannot object to a question just because the attorney does not understand the question;
- a witness's attorney cannot state for the record his or her interpretations of questions (because they are "irrelevant and improperly suggestive to the deponent");
- witness's attorney cannot rephrasing questions for the witness;
- the objection "asked and answered" is improper unless the witnesses attorney believes the repetitive questioning is approaching the level of harassment and the attorney will be making a motion for a protective order Rule 30(d), SCRCP.

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FEATURE ARTICLE CONT.

Anonymous, at 191-193, 552 S.E.2d at 17-18. Notably, the objections to the form of the question as outlined by Boyd are not precluded by *Anonymous*.

So, speak your objection to the form of the question at your next deposition if you must, but think before you speak.

Footnotes

1 The Boyd court specifically references the Local Discovery Guidelines, Guideline 5(d) (D. Md. 1995) as the principal behind this example of a proper objection. Guideline 5(d) states that it is "presumptively improper to instruct a witness not to answer a question during the taking of a deposition unless [a privilege or protective order is being asserted]." The guideline continues by stating that it is "also presumptively improper to ask questions clearly beyond the scope of discovery permitted by [the general rules of discovery], particularly of a personal nature, and continuing to do so after objection shall be evidence that the deposition is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party," which itself is prohibited.

2 Rule 611 is identical in the South Carolina and Federal Rules of Evidence:

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

JUDGE PROFILE. CONT. FROM PG 9

with civility, sets our profession apart. As Judge Duffy has remarked, these traditions are our treasure to keep and our duty to pass. Judge Duffy's own professional life draws much inspiration from his mentors, including Judge Falcon B. Hawkins and Judge Sol Blatt, Jr. From these and countless other mentors, Judge Duffy learned to practice law and serve as a jurist in a way that sets an example from which we all can profit.

An unapologetic defender of our profession, Judge Duffy understands that his role is not only to apply the rule of law to resolve the particulars of any given lawsuit, but also to instill in the parties who appear before him confidence in the legal system. Always respectful and thoroughly prepared, he never embarrasses an attorney or diminishes a litigant. His legacy is an inspiration to the veteran litigator as well as a young associate - that a gracious attitude, sympathetic ear, and youthful spirit are the hallmarks of a successful life and career. For Judge Duffy's service, we are all thankful. From Judge Duffy's example, we have much to aspire to.

** Stephanie E. Lewis is an associate with Nelson Mullins Riley & Scarborough in their Charleston, South Carolina office and practices in the areas of employment and labor law and pharmaceutical and medical device litigation.*

ATTENTION SCDTAA MEMBERS

The SCDTAA is relying more and more on email to communicate with the membership. Prime examples are the email information sharing system and announcements about SCDTAA events.

A number of emails are being returned as "undeliverable" or "blocked". If you have changed your email address or if you aren't sure the SCDTAA has the correct address please notify the SCDTAA office today.

If your firm is "blocking emails" or if you do not want to receive email communications, please contact the SCDTAA office at (803) 252-5646 or (800) 445-8629.

Opinion and Order

3:05-cv-02399-MBS
Date Filed 02/14/2006 Entry Number 22

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
C.A. No. 3:05-2399-MBS
Opinion and Order
William M. Gregg, II, Plaintiff,
vs.
GI Apparel, Inc., Defendant.

Plaintiff William Gregg is the assignee of a contract between South Carolina Tees, Inc. ("SCT") and Defendant GI Apparel, Inc. ("Defendant"). Plaintiff filed this action on August 18, 2005, alleging, inter alia, breach of contract, breach of the implied covenants of good faith and fair dealing, and violations of the South Carolina Unfair Trade Practices Act. Defendant asserts that venue is improper and filed a motion to dismiss on September 20, 2005. More specifically, Defendant requests that the court enforce a forum selection provision in the subject contract. Plaintiff filed a response in opposition to Defendant's motion to dismiss on October 10, 2005. Defendant filed a reply to Plaintiff's response on October 17, 2005. The court heard arguments from the parties on December 2, 2005.

FACTS

SCT is a corporation engaged in the business of manufacturing and selling t-shirts. On September 18, 2002, Defendant entered into a purchase order with SCT to purchase 203,057.34 dozen t-shirts for a total price of $2,789,716. Complaint, Exhibit B. The purchase order provides that all the goods would be subject to inspection by Defendant's representative. *Id.* The purchase order also requires that the goods be of the "finest quality." *Id.* The purchase order provides that the contract "shall be enforced solely in the State or Federal Courts situate in the State of New Jersey. The parties acknowledge jurisdiction of the State and Federal Courts in the State of New Jersey over their persons and waive any claim for dismissal or transfer of the action on the ground that New Jersey would be an inconvenient forum to adjudicate the dispute." Complaint, Exhibit C.

At some point, Defendant cancelled the purchase order with SCT.[1] Complaint ¶ 11. Plaintiff, as assignee of the purchase order, alleges that Defendant's cancellation of the purchase order was without cause. *Id.* Defendant asserts that the goods were not of the finest quality and that it was entitled to rescind the contract.

DISCUSSION

Defendant seeks to dismiss the within action based on the forum selection clause in the purchase order and argues that the case should have been brought in federal or state court in New Jersey pursuant to FED. R. CIV. P. 12(b)(1), 12(b)(3), or 12(b)(6). As such, the court regards the motion as one to specifically enforce the forum selection clause.

Forum selection clauses are governed by federal law. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988). Generally, choice of forum and choice of law provisions are presumptively valid and should be enforced. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991). The presumption of validity is not absolute and may be overcome by a clear showing that the clause is "'unreasonable under the circumstances." *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (quoting *The Bremen*, 407 U.S. at 10). Choice of law and forum selection provisions may be found unreasonable "if (1) their formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state." *Allen*, 94 F.3d at 928 (4th Cir. 1996) (quoting *Carnival Cruise Lines*, 499 U.S. at 595). In its opposition to Defendant's motion to dismiss, Plaintiff only argues that enforcement of the forum selection provision would contravene a strong public policy of the state of South Carolina.[2]

Plaintiff contends that S.C. CODE ANN. § 15-7-120(A) provides a statutory indication that

forum selection clauses are against the public policy of South Carolina. In relevant part, § 15-7-120(A) provides

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> [n]otwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.

S.C. CODE. ANN. § 15-7-120(A). Plaintiff essentially argues that § 15-7-120(A) makes all mandatory forum selection provisions permissive under South Carolina law and gives a plaintiff the right to bring an action in South Carolina despite his previous agreement to litigate a matter in another jurisdiction.[3] According to Plaintiff, § 15-7-120(A) is evidence that forum selection clauses are against the public policy of South Carolina.

Plaintiff's claims are without merit. First, South Carolina appellate courts have enforced forum selection clauses on several occasions and have never suggested that forum selection clauses violate the public policy of South Carolina. *See Sec. Credit Leasing, Inc. v. Armaly*, 529 S.E.2d 283, 290 (S.C. Ct. App. 2000); *see also, Firestone Fin. Corp. v. Owens*, 419 S.E.2d 830 (S.C. Ct. App. 1992).[4] Without a clearer pronouncement from the South Carolina legislature or courts, this court is unable to find that the enforcement of a forum selection clause contravenes a strong public policy of the state of South Carolina.

CONCLUSION

Both parties are free to pursue their remedies in the courts in New Jersey in accordance with the forum selection clause in their agreement. It is hereby ordered that the captioned case be **dismissed without prejudice**.

IT IS SO ORDERED.
/s/ Margaret B. Seymour
United States District Court
Columbia, South Carolina
February 13, 2006

Footnotes

1 Plaintiff's complaint does not include the date of any of the relevant events in this case. From the face of the complaint, the court cannot determine whether the relevant statute of limitations is implicated. Plaintiff also failed to discuss statute of limitations issues in its brief and at oral argument. As such, this issue is not before the court.

2 Plaintiff does not allege that the purchase order was procured by fraud or overreaching. Plaintiff intimates that the parties had unequal bargaining power because SCT was on the verge of bankruptcy at the time that it contracted with Defendant. Without more, unequal bargaining power does not justify holding the forum selection provision of a contract invalid. *See Scott v. Guardsmark Sec.*, 874 F. Supp. 117, 120 (D.S.C. 1995); *see also, Atlantic Floor Services v. Wal-Mart Stores, Inc.*, 334 F. Supp. 2d 875, 877 (D.S.C. 2004).

3 In support of its opposition to Defendant's motion to dismiss, Plaintiff relies heavily on the case of *Consolidated Insured Benefits, Inc. v. Conseco Medical Insurance Co.*, 370 F. Supp. 2d 394 (D.S.C. 2004), and argues that Consolidated Insured is controlling because it is the most recent case. However, since the intracourt comity doctrine is discretionary, the court views the decisions of its fellows judges as persuasive but is not bound by their decisions. *See American Silicon Technologies v. United States*, 261 F.3d 1371 (Fed. Cir. 2001).

4 In addition, the South Carolina legislature has never indicated that forum selection clauses are void and against the public policy of the state. The South Carolina legislature has made broad public policy pronouncements in other circumstances. See S.C. CODE ANN. § 1-34-10 (declaring that "[t]he public policy of South Carolina is to maintain reasonable and consistent standards of construction in buildings and other structures in the state . . ."); S.C. CODE ANN. § 6-9-5 (declaring that "[t]he public policy of South Carolina is to maintain reasonable standards of construction . . .").

Order

Consolidated Insured Benefits, Inc., and Ronald F. English v. Conseco Medical Insurance Company

Civil Action No.: 6:03-3l l-RBH : ORDER
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION
Consolidated Insured Benefits, Inc.,
and Ronald F. English, Plaintiffs,
v. Conseco Medical Insurance Company, Defendant.

Presently before the court is the defendant's motion for leave to file a renewed motion to reconsider the court's Orders of February 23, 2004 and December 21, 2004. The plaintiffs have filed a response in opposition to this motion and the defendant has filed a reply. Thus, the matter is ready for consideration and the court will rule as follows.

Background Facts and Procedural History

The plaintiffs filed a complaint against the defendant on October 8, 2003, alleging causes of action for fraud, negligent misrepresentation, and breach of fiduciary duty. On November 24, 2003, the defendant filed a motion to dismiss for improper venue pursuant to Fed.R.Civ.P. 1 2(b)(3). Specifically, the defendant argued that a forum selection clause in the agreement between defendant and plaintiffs requires that all claims arising under the agreement would be under the exclusive jurisdiction of the courts of Hamilton County, Indiana. Alternatively, the defendant requested that the court transfer the case to the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C. § 1404(a).

On February 23, 2004, The Honorable Henry M. Herlong, Jr., denied the defendant's motion to dismiss because he found the forum selection clause in the agreement "unreasonable," as enforcing the clause would contravene a "strong public policy of the forum state." *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Circuit 1996). Specifically, Judge Herlong found that S.C. Code Ann. § 15-7- 120(A) is evidence of a strong public policy in South Carolina of non-enforcement of a forum selection clause that would deprive a South Carolina litigant of his choice of forum. The defendant's alternative motion to transfer venue pursuant to 28 U.S.C. § 1404(a) was also denied.

On October 26, 2004, the defendant filed a motion to reconsider. The defendant raised three arguments in the motion. First, that South Carolina has no public policy against out-of-state forum selection clauses. In support of that argument, the defendant pointed out that the undersigned had made such a finding in *Atlantic Floor Services, Inc. v. Wal-Mart Stores, Inc.*, 334 F.Supp.2d 875 (D.S.C. 2004). Second, the defendant argued that because the United States District Court for the District of Georgia considered the identical forum selection clause in a recent case and transferred the case to the District of Indiana, thus Judge Herlong should do the same. Finally, the defendant argued that the precedent in the United States Court of Appeals for the Fourth Circuit required Judge Herlong to enforce the out-of-state forum selection clause, regardless of the convenience of the parties and the witnesses.

On December 21, 2004, Judge Herlong denied the defendant's motion to reconsider. In the Order, when specifically addressing the defendant's argument that South Carolina has no public policy against out-of-state forum selection clauses, Judge Herlong stated that he disagreed with the undersigned's decision in the *Atlantic Floor* case. Judge Herlong then proceeded to analyze the undersigned's decision in the *Atlantic Floor* case and explain why he thought it was not the correct decision.

On June 21, 2005, the defendant filed a motion for summary judgment. Additionally, on July 20, 2005, the defendant filed a motion to exclude the testimony of one of plaintiffs' experts. Before either motion was ruled on, the case was transferred from Judge Herlong to the undersigned on August 15, 2005.

On August 22,2005, the defendant filed the instant motion requesting that the undersigned grant it leave to file a renewed motion to reconsider the court's Orders of February 23, 2004 and December 21, 2004.

Discussion

In support of its motion for leave to file a renewed motion to reconsider, the defendant asserts, respectfully, that Judge Herlong's earlier opinion regarding the proper venue of this case was erroneous and that, in fact, the holding of the undersigned in *Atlantic Floor* controls. The defendant notes that the undersigned held in *Atlantic Floor* that, "despite numerous opportunities, South Carolina's appellate courts have not suggested, much less declared, that forum selection clauses violate the public policy of the State." 334 F.Supp.2d at 880-881. Accordingly, the defen-

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ORDER CONT.

dant argues that based on the undersigned's holding in *Atlantic Floor*, this case should be transferred to the United States District Court for the Southern District of Indiana. The defendant further notes that the other pending substantive motions have not been ruled on in this case. Thus, the defendant argues that were this case transferred to Indiana, the new judge would be able to render meaningful decisions in this case on matters including the defendant's motion for summary judgment and motion to exclude testimony of one of plaintiffs' experts.

On September 6, 2005, the plaintiffs filed a response in opposition to the defendant's motion for leave to file a renewed motion to reconsider. The plaintiffs argue that the undersigned's decision in *Atlantic Floor* does not control this case. The plaintiffs note that when denying the motion for reconsideration, Judge Herlong carefully considered and respectfully disagreed with this court's decision in *Atlantic Floor*, and thus has established, as the law of the case, that *Atlantic Floor* does not control. The plaintiffs further state that because Judge Herlong's decision denying the defendant's motions was made in this case, it is controlling under federal law in this case, and may not be overruled. The plaintiffs cite to the Fourth Circuit's decision in *Prack v. Wessinger*, 276 F.2d 446, 450 (4th Cir. 1960) (emphasis added), in which the court held that "in federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other."

The defendant filed a reply on September 13, 2005, in which it cites to multiple cases that stand for the proposition that a latter judge has discretion to overrule rulings made by an earlier judge in the same case. The defendant argues that these courts have held, contrary to the plaintiffs' assertion, that there is no absolute rule forbidding such.

At the outset, it must be noted that the instant motion places the undersigned in an awkward position. The defendant is requesting leave to file a motion to reconsider an Order which takes specific objection to a position the undersigned has very recently taken in another case. This is a unique situation in which one Judge in a District enters an Order that specifically takes issue with a position taken by another Judge in the same District and then the case is transferred to the latter Judge.

This court stands by its recent decision in the *Atlantic Floor* case and continues to find that South Carolina has no strong public policy against out-of-state forum selection clauses. This position makes it almost incumbent upon this court to grant the defendant's motion. To hold otherwise, would be to ignore the fact that this court has taken a position in direct contrast to the holding in the Order which this court is being asked to reconsider.

The court notes that in the case of *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287,290 (fn. 3) (4th Cir. 1982), the Appellant took the position that Judge G. Ross Anderson was without power to "reverse" Judge Robert Chapman's earlier rulings because those rulings constituted the "law of the case." With regard to this position, the Fourth Circuit stated as follows:

In view of our disposition of the case, it is not necessary to get into the complexities of that general problem. With the matter raised, however, it bears observing that whether rulings by one district judge become binding as "law of the case?! upon subsequent district judges is not a matter of rigid legal rule, but more a matter of proper judicial administration which can vary with the circumstances. It may sometimes be proper for a district judge to treat earlier rulings as binding, sometimes not. *See Gallimore v. Missouri Pacific R.R.*, 635 F.2d 1165 (5th Cir.1981). Our decisions in *Prack v. Weissinger*, 276 F.2d 446 (4th Cir.1960), and *United States v. Whiting*, 311 F.2d 191 (4th Cir. 1962), cert. denied, 372 U.S. 935 (1963), relied upon by BWC [the Appellant], are not to the contrary. In each case, this court affirmed as proper a district judge's application of an earlier ruling by another judge as "binding" upon him on the facts of the case. But we have not held that the "law of the case" doctrine is so related to the very power of the second judge that we must in review affirm even a legally erroneous ruling because it was compelled as "law of the case." *See Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794, 797 (7th Cir.), cert. denied, 368 U.S. 944 (1961). That, of course, reveals the true nature of the doctrine as not being jurisdictional.

Id.

While this court does with regularity adhere to the decisions of other Judges where a case has been subsequently transferred to its docket, as mentioned above, this case is a unique situation and the question which this court has been asked to revisit is a pivotal and crucial one.

Conclusion

After careful consideration of the motion, memoranda, and the applicable law, it is hereby ORDERED that the defendant's motion [Entry # 80] is GRANTED. Therefore, the defendant shall have ten (10) days to file the renewed motion to reconsider. Furthermore, the Clerk of Court is instructed to remove from the docket the defendant's two other pending motions [Entry #s 61 & 64] while this court considers the defendant's renewed motion for reconsideration. After the defendant's renewed motion for reconsideration is ruled upon the court will restore the pending motions to the docket.

AND IT IS SO ORDERED.

s/ R. Bryan Harwell

United States District Judge

February 17, 2006 , Florence, South Carolina

South Carolina Case Notes

State

Stone v. Roadway Express, Op. No. 26113 (S.C. Feb. 13, 2006).

Walter Stone suffered injury to his foot and leg. He filed a workers' compensation claim and in October 1999 a single commissioner determined Stone was totally and permanently disabled, entitling him to 500 weeks of compensation. In December 1999, Stone died of a brain tumor. In a subsequent full panel hearing, the Commission determined that Stone's entitlement to benefits – and thus his surviving wife's entitlement – did not end upon Stone's death. This decision was affirmed by the circuit court. The employer appealed seeking apportionment between the work-related foot and leg injury and the tumor in order to decrease any benefits due. The court of appeals, however, in an unpublished opinion, affirmed the full award.

The South Carolina Supreme Court disagreed, refusing to adopt the lower courts' application of res judicata or collateral estoppel in connection with adjudication of the benefits owed Stone. Furthermore, the Court explained that the Commission's reliance on S.C. Code § 42-2-90 as evidence of legislative intent that workers' compensation benefits serve to protect both the employee and his dependents was misplaced as the statutory provision relied upon – § 42-2-90 – was applicable to situations where the employee died as a result of his work-related injuries. Where the employee dies of a separate cause, as with the brain tumor in this instance, that statute is not applicable. According to the Court, pursuant to the proper statute – § 42-9-280 – benefits terminated upon Stone's death from the tumor. Chief Justice Toal dissented on the grounds of the employer's failure to raise the § 42-9-280 issue during earlier proceedings that took place over a two year period after Stone's death.

Avant v. Willowglen Academy, Op. No. 26102 (S.C. Jan. 30, 2006).

This case arises out of a dispute as to which of the employer's insurers was responsible for workers' compensation benefits. A single commissioner determined United Heartland to be the responsible insurer; the appellate panel of the commission held both United and Travelers Property Casualty Co. equally responsible; the circuit court concluded Travelers was solely responsible; and the court of appeals reverted to the initial decision of sole responsibility on United.

The Travelers policy was an assigned-risk policy. After procuring that policy, however, the employer obtained voluntary insurance from United. The employer failed to inform Travelers of its procurement of voluntary insurance, despite that an employer able to obtain voluntary insurance is not eligible for assigned-risk insurance. The policies issued by both Travelers and United were effective when, on September 6, 1997, the employee claimant was injured. Travelers, unaware of the policy with United, began paying benefits. Upon learning of the existence of the United policy, however, Travelers filed a motion with the Commission to identify United as the sole insurer responsible for payment of any benefits.

In addition, Travelers canceled its assigned risk policy, retroactive to its last renewal date of July 1, 1997, prior to the injury at issue, and refunded all premiums paid. This cancellation was effective because, as explained in more detail in *Rodriguez v. Romero*, 363 S.C. 80, 610 S.E.2d 488 (2005), once an employer chooses to and successfully obtains voluntary insurance, the assigned risk coverage will "automatically terminate as of the effective date of the voluntary insurer's policy."

Explaining that an assigned risk plan has the force of law, the Supreme Court concluded United was solely responsible for the benefits at issue. The assigned risk plan has the force of law, despite the absence of any regulations governing same, because the legislature delegated implementation to the Director of the Department of Insurance without requiring such implementation be achieved via regulations. Thus, the mechanism for implementing the assigned-risk agreement executed by the state's insurers attains the force of law when approved by the Director. And, provisions of the assigned risk plan prevail over any contrary workers' compensation regulations.

David v. McLeod Regional Med. Ctr., Op. No. 26020 (S.C. Jan. 23, 2006).

Plaintiff underwent surgery to conduct a biopsy on a lesion on Plaintiff's lung. While still anesthetized, pathologists concluded the lesion was cancerous and the surgeon decided to remove the lower left portion of Plaintiff's lung. A final pathology report issued three days later concluded the lesion was not cancerous. Plaintiff filed this medical malpractice suit against the hospital, the surgeon, and the pathologists, along with their related medical groups. The trial court granted summary judgment to all defendants.

The sole affidavit upon which Plaintiff relied to prove commission of malpractice was that of Dr.

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Brian Frist, a pathologist. But the Court agreed with the lower courts that Plaintiff failed to establish that Dr. Frist was familiar with the standard of care for the physicians involved, nor did the "expert" provide an explanation of the proper standard of care. The only other issue on appeal related to whether the McLeod Medical Center had any vicarious liability for the actions of the independent contractor physicians. Having concluded there was no liability for the physicians the Court did not address this issue.

Federal

Toll Bros., Inc. v. Dryvit Systems, Inc., et al., No. 05-1077 (decided Dec. 21, 2005).

Plaintiff real estate developer and builder sued Dryvit Systems, Inc. (the manufacturer of synthetic stucco, EIFS) and Imperial Sutcco, Inc. (the EIFS applicator). Homeowners who purchased from the developer claimed they were not informed that synthetic stucco, rather than real stucco, would be used on their homes. When the homeowners learned of the use of the synthetic stucco (EIFS), they lodged complaints with the developer regarding their concerns about product defects and sought information on the product warranty. The developer eventually agreed to remove the EIFS and reclad the homes with a different material, but then sued the EIFS manufacturer and applicator seeking indemnification and asserting claims for negligent and intentional misrepresentation and under the Connecticut Product Liability Act (CPLA). The district court granted the defendants, Dryvit and Imperial, summary judgment concluding that the homeowners' claims, which gave rise to any claims of the developer, were a result of the developer's own misrepresentation as to the material to be used and not of any defect in the EIFS product. The Fourth Circuit disagreed, concluding instead that the homeowners complaints to the developer raised concerns not only about what they believed would be used on their homes but also as to the water damage that may arise due to defects with EIFS. Thus, the court concluded that indemnification could be appropriate, even where no actual water damage had yet occurred based on the developer's legal duty to minimize damages. The district court's grant of summary judgment was reversed as to all claims but the CPLA claim. Unlike the other common law causes of action, the CPLA required actual damage as a result of the EIFS before a claim will accrue. Judge Niemeyer dissented from the panel's opinion and would have affirmed the district court's grant of summary judgment on all claims.

Twin City Fire Ins. and Hartford Cas. Ins. Co. Co. v. Ben Arnold-Sunbelt Beverage Co. of SC, No. 04-2048 (decided Dec. 27, 2005).

The insured company (both parent and subsidiary company) and some of its officers were sued for sexual harassment and related claims by a former employee. The companies were insured by Twin City Fire Insurance Company and Hartford Casualty Insurance Company under general commercial liability policies. Those policies expressly covered claims for "personal injury," the definition of which included claims of defamation and false imprisonment. The suit included causes of action for defamation and false imprisonment, but also included uncovered claims for intentional infliction of emotional distress, assault and battery, and civil conspiracy. Those remaining claims were not covered by the insurance policies. An attorney was retained by the insurers on the insureds' behalf to defend against all claims, but a reservation of rights letter was issued in connection with the uncovered claims. Believing the reservation of rights to create a conflict of interest, the insured informed its insurers that separate counsel was being retained and that the insurance companies were expected to pay legal fees incurred as a result of this separate counsel. The insurance companies sought approval for the two retained attorneys to share control of the litigation, but the insured rejected that proposal. The insured then excluded the insurance companies and the counsel retained by the insurer from the underlying litigation. The underlying claims were then settled. A declaratory judgment action was then filed by the insurers seeking a decision that they were not required to indemnify for the settlement or for the $1.4 million incurred in legal fees by the insured. The district court granted the insurance companies' motion for summary judgment as to indemnification on the settlement and defense costs as to the insured company. In connection with the CEO, who had been sued individually, the court concluded a separate trial was necessary to determine whether that defendant's defense costs were reasonable, as separate counsel was indisputably necessary for the CEO, whose interests were divergent from the other defendants. The remaining defendants in the underlying suit appealed.

The Fourth Circuit agreed with the district court that though the issue had not yet been addressed expressly in South Carolina, that state's Supreme Court would not adopt a per se disqualification rule that would entitle insureds to select independent counsel at the insurer's expense any time a defense is tendered by the insurer under a reservation of rights. The Court explained that it was "unable to conclude that the Supreme Court of South Carolina would profess so little confidence in the integrity of the members of the South Carolina Bar" to adopt such a per se rule. However, the Court did explain that the insured must consent to counsel selected by the insurer. Moreover, having breached the duty to cooperate the insureds were not entitled to indemnification for the settlement. And, the only insured potentially entitled to indemnification as to defense costs would be the CEO, who despite the conflict with the other defendants, was never offered separate counsel. His refusal to cooperate, however, did not entitle him to indemnification for the actual settlement amount.

Verdict Reports

Margaret J. Fort and Alton Fort v. David Rogerson Baird, M.D., et al.

Court:	Charleston County, Common Pleas
Case Number:	02-CP-10-4502
Type of Action:	Professional negligence/medical malpractice
Injuries Alleged:	Death
Tried Before:	Jury
Judge:	Honorable J.C. Nicholson, Jr.
Verdict:	$0 (for Defendants)
Date of Verdict:	April 22, 2005
Helpful Experts:	C. Thomas Fitts, M.D. (Charleston) E. Arden Weathers, M.D. (Orangeburg)
Defense Attorneys:	Robert H. Hood, Sr. Molly Hood Craig James B. Hood

Plaintiff alleged that the defendants deviated from the standard of care in the care and treatment of the decedent, causing her death. A chest x-ray of the decedent was ordered prior to a bilateral mastectomy. Defendants did not follow-up on the x-ray, which allegedly showed a cancerous lesion. No further tests were performed on the decedent. Several years later the plaintiff/decedent was diagnosed with lung cancer and subsequently died as a result.

Anita O'Connell v. Bondex International and Georgia Pacific

Court:	Madison County, Illinois
Type of Action:	Products Liability (asbestos)
Injuries Alleged:	Mesothelioma
Tried Before:	Jury
Verdict:	$0 (for Defendant)
Date of Verdict:	March 2006
Defense Attorneys:	Mark Phillips for Georgia-Pacific
Non-SC Counsel:	Jeff Hebrank, Burroughs Firm, Edwardsville, Ill.

Plaintiff alleged she contracted mesothelioma as a result of contact with asbestos when Plaintiff washed her husband's and children's clothes. Plaintiff's husband owned a plastering company and Plaintiff alleged he and their children came in contact with asbestos working in that business and that she then came in contact with asbestos containing materials when she washed their clothes. Plaintiff's three sons, who all worked in the family plastering business did not testify.

Mindy Heilman v. The Sherwin-Williams Co.

Court:	Horry County, Common Pleas
Case Number:	04-CP-26-6909
Type of Action:	Premises liability
Injuries Alleged:	Fractured right foot
Tried Before:	Jury
Judge:	Honorable Michael J. Baxley
Verdict:	$0 (for Defendants)
Date of Verdict:	February 7, 2006
Defense Attorney:	James B. Hood

Plaintiff alleged that the defendant store failed adequately to warn the plaintiff, a customer, that the store floors were wet. The plaintiff further alleged that the wet condition caused her to fall and that she sustained a fractured foot as a result. The defendant acknowledged that its employees were mopping the store and that the plaintiff did fall. The defendant proved, however, that the plaintiff's injuries were not proximately caused by her fall as the plaintiff did not seek medical attention until five days after the fall and the medical records contained no reference to the fall.

Susan Butler and James Butler v. Harry Tuten, Jr., M.D.

Court:	Dorchester County, Common Pleas
Case Number:	04-CP-18-1117
Type of Action:	Professional negligence/medical malpractice
Injuries Alleged:	Injury to laryngeal nerve and parathyroid glands
Tried Before:	Jury
Judge:	Honorable Lee Alford
Verdict:	$0 (for Defendant)
Date of Verdict:	February 9, 2006
Helpful Experts:	Jeffrey Fenwick, M.D. Thomas Appleby, M.D.
Defense Attorney:	M. Dawes Cooke, Jr.

Plaintiff alleged medical malpractice following a total thyroidectomy. The injuries suffered – injury to recurrent laryngeal nerve and to parathyroid glands resulting in hypocalcemia – are well-known complications of the thyroidectomy procedure. In addition, the defense argued that Plaintiffs morbid obesity, status as a former smoker, and multiple other health problems could have been the actual cause of the injuries suffered.

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