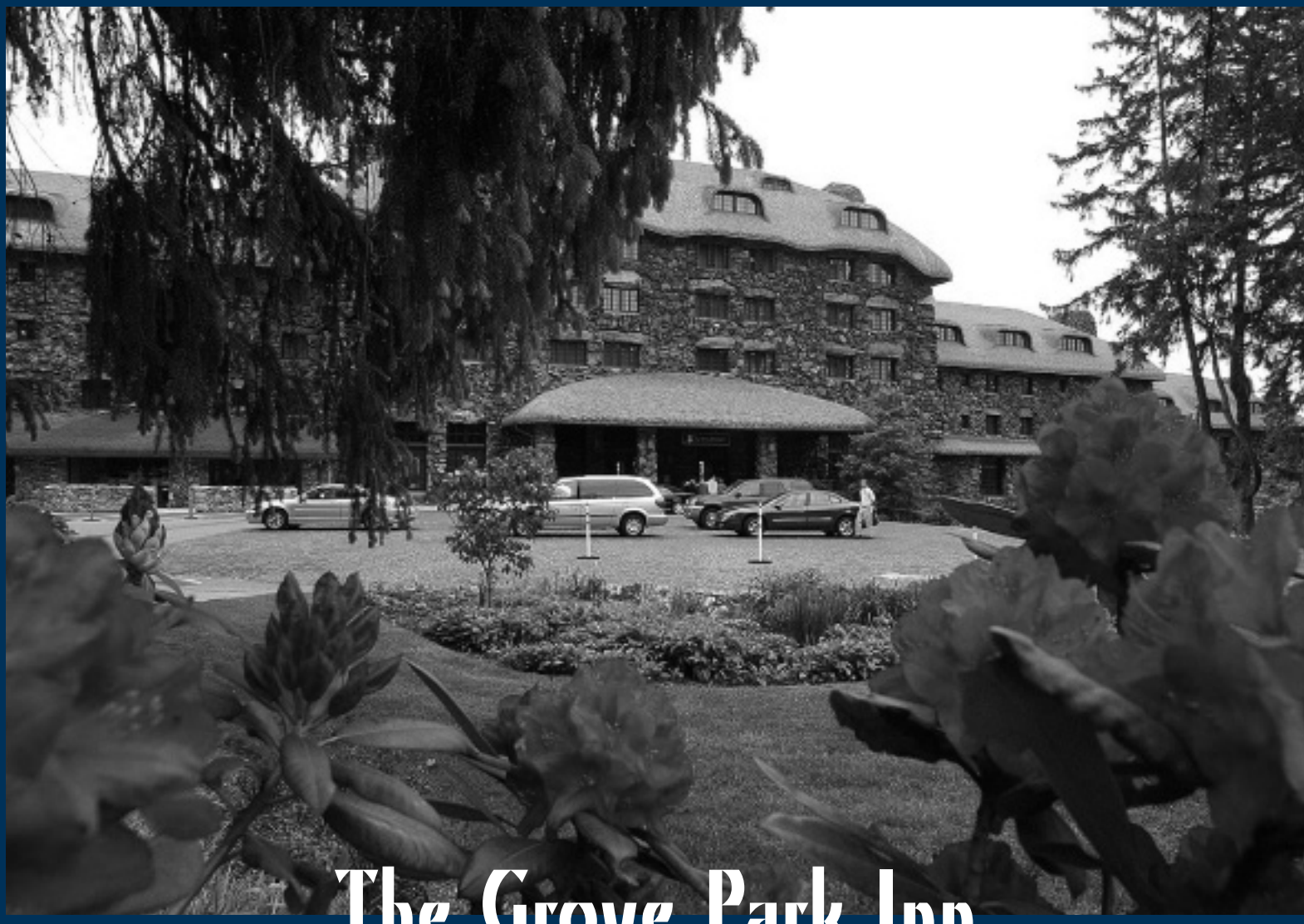
SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



The Grove Park Inn

http://www.scdtaa.com

Effective Use of Your Non-Billable Time

by G. Mark Phillips, SCDTAA President

We must ensure that courtroom agility does not become a lost art. We must cultivate the continued development of unique but attainable skill-sets. We must instill the courage to state the obvious. We must encourage those persons who are willing to take a bold step rather than a safe bet while in an uncomfortable setting. We must preserve our members' collective ability to achieve favorable outcomes through the jury trial system.

I know of three ways.

Mentor a Colleague

DRI Vice-President John Martin wrote, in *For The Defense* in February 2006, about "the vanishing trial phenomenon." John Martin worries that "the defense trial lawyers of today's younger generations, with some exceptions to be sure, are not able to hone their courtroom skills to the same extent as their predecessors." Martin fears that the dearth of trials can cause the haphazard development and poor refinement of our common law.

Warren Moise addressed the same subject in a recent *Defense Line*. Warren illustrated how many who are defense litigators might practice for years without getting much jury trial experience.

Maybe this has been the adverse effect of our landing high-volume, high-dollar work from big clients.

I urge those of us with trial skills to seek out those who are eager to learn. We should proactively search for trial experiences that others might be able to handle. We should invest our non-billable time in helping these folks develop the talents necessary to handle their own jury trials.

So many aspects of a successfully-conducted trial are those that must be experienced and which cannot be adequately taught beforehand. Our aspiring trial attorneys must have the requisite knowledge of the facts and the law of a given case. We must instill the skills, finesse, and subtleties which can provide ease in the courtroom. We must instruct on the mechanics of a trial and eliminate the fear of the unknown.

Bobby Hood held my hand during my first Common Pleas trial, a false imprisonment case before Judge Bill Traxler. The liability carrier had offered enough money on behalf of my client, a convenience store, and the stakes were not huge. Both Bobby and Judge Traxler were most patient and empathetic and I came through the successful experience with a bit of new confidence. We later tried a wrongful death case together and then tried a significant injury case for a big client. In each trial, Bobby gave me the lead role. He then insisted that future cases be handled on my own, freeing him up to train other lawyers and to handle his own cases.

I was privileged to sit with Hugh Buyck, Rob Varnado, and Ryan Earhart as they tried (and won) their first solo jury trials. They have all become successful trial attorneys despite their experiences with the Moose. I urge all who are able to find an aspiring trial attorney at your respective firms, find a jury trial that they he or she can handle, and help get those persons into the courtroom. It may mean a non-billable day for you if the case does not warrant the time of two lawyers, but the investment will pay off in spades.

My second recommendation is that you find a compatible colleague with whom to try the bigger cases. Some trials really command the attention of more than one trial lawyer. If another's skills are complimentary to your own, the two of you can accomplish some powerful things together. John Blincow and I handled two week-long trials together and got some remarkable results, in part because our prior experiences were similar and also because we managed to dance well together. Robert Meriwether and I enjoyed a similar success in a rather landmark case against a Philadelphia firm in 2001. Edwardsville (Madison County), Illinois attorney Jeff Hebrank (this year's President of the Illinois Defense Trial Lawyers) and I have handled two multi-week trials within the last twelve months, both in a jurisdiction dubbed as a "Judicial Hell-Hole". The synergies between two able lawyers can be quite powerful.

The third occurrence will be in taking your game to the next level. Mike Cole of my firm took a chance on letting me try a career-defining case several years ago. His confidence in my abilities was better than my own. He traveled to watch and support me for a couple of the trial days. Bruce Shaw guided me from afar throughout the ordeal, providing useful, time-tested advice. Sara Turnipseed has provided me with similar opportunities for a different client and Bill Davies has provided the necessary hand-holding from a distance. I look forward to one day providing a similar opportunity to someone else.

Continued on bottom of page 6

Letter From The Editors

by Gray T. Culbreath & Wendy J. Keefer

As we publish the third edition of the new and improved *The Defense Line*, we have to thank all of you who contributed to its success thus far. We particularly extend thanks to Kay West of Nelson Mullins, Clay Custer of Womble, Carlyle, Sandridge and Rice and Ray Moore of Murphy and Grantland for their contributions to this edition. *The Defense Line* only succeeds when members participate. We are nothing more than editors/facilitators and rely on the members of the Association to contribute the content. As we started the process of revitalizing *The Defense Line* after the Annual Meeting, we looked to the membership to see what information was important to your practice. In response to that feedback we added judicial profiles, case summaries and verdict reports. We encourage each of you to make a submission to *The Defense Line*. For those of you looking for ways to get your younger lawyers more involved and known in our Association, *The Defense Line* is an excellent opportunity for those young lawyers to showcase their skills and talents. No effort is too small and every contribution is meaningful and recognized.

We have two issues left for 2006. The Fall 2006 issue has a content deadline of August 4th and the Winter 2006 issue has a content deadline of November 3rd. While we realize that everyone's minds are thinking about vacation plans at this point, please look at your calendars and talk to lawyers in your offices about what articles, case summaries, judicial profiles or verdict reports your firm could contribute to the upcoming editions of *The Defense Line*. Our goal is to continue to improve *The Defense Line* and to make it the flagship publication among the state and local defense organizations in the United States. Given the quality of our membership, it should not be hard to reach that goal.

While the practice of law slows in the summertime, it is one of the busiest times of the year for the Association. Over the next several months there are a number of opportunities for you and your firm to participate in the Association and network with other members. The first opportunity is June 14 –June 16 in Columbia at the Trial Academy. Glen Elliott and William Brown put together another phenomenal opportunity for our young lawyers to learn how to try a case. They need experienced lawyers to serve as breakout leaders and trial observers. On the night of June 15, the Columbia Judicial Reception will take place at Nelson Mullins and that event is not to be missed. Several years ago when the Board looked at ways that we could add value to membership dollars, we implemented Judicial Receptions to provide our members another opportunity to interact with members of the Judiciary in their area. If you are in Columbia or the surrounding areas, there is no reason why you should not be at Nelson Mullins on the night of the 15th to have cocktails with the Judges. Finally, Glen and William need your help in getting your staff members, friends and neighbors to serve as jurors for the mock trials at the Matthew J. Perry, Jr. Federal Courthouse on Friday, June 16th. If you can help with the Trial Academy, please let Glen or William know as soon as possible.

Gray T. Culbreath

Wendy J. Keefer

Of course, the summer would not be complete without the joint meeting, scheduled for July 27th through July 29th at The Grove Park Inn. As you can see from the article in this issue of *The Defense Line*, the program is top rate and should not be missed. The education and fellowship are first class and it is a great opportunity for younger lawyers to become involved in the Association.

As we take our summer hiatus, we hope that everyone has a great vacation but please be thinking about contributions that you can make to *The Defense Line* to make it an even better publication.

We look forward to hearing from you.

ATTENTION 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.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

The SCDTAA Docket

The Business Advisory Council has appointed William H. Foster III, a Nelson Mullins Riley & Scarborough partner in the Greenville office, to serve on the group that assures small business has a voice in Washington.

Mr. Foster's practice focuses on advising and defending management on all issues of employment law, employee benefits and human relations on a local, regional and national basis. He has tried jury and non-jury cases in both state and federal courts throughout the Southeast and has argued cases in both the federal and state courts of appeal. Since 1993, Mr. Foster has also worked with Firm clients on numerous employment law and employee benefits class actions.

The Business Advisory Council is part of the National Republican Congressional Committee. Mr. Foster will serve the state of South Carolina and is expected to play a crucial role in the party's efforts to involve top business people in the process of government reform.

Columbia Attorney Mark Barrow Named to Lead Transportation Committee of National Organization

Mark S. Barrow of Sweeny, Wingate & Barrow, P.A. has been named chairman of the transportation committee of USLAW, a national organization comprised of 58 law firms who become part of the USLAW NETWORK by invitation only. Sweeny, Wingate & Barrow is the only Columbia firm that holds membership in the network.

Barrow will lead 115 member attorneys from across the nation as chairman of the Transportation Committee, including speaking to them and their corporate clients at seminars in various parts of the country and sharing up-to-date information on legislation and best practices. His duties include leading the development of a nationwide emergency response team that transportation and trucking companies can contact for immediate response to legal issues and accidents.

Barrow has 19 years of experience in truck and transportation litigation, insurance coverage, medical malpractice, product liability, and toxic torts. His practice includes appellate proceedings before the South Carolina Supreme Court and the U.S. Court of Appeals. He maintains an AV® rating by Martindale-Hubbell.

The USLAW NETWORK is comprised of firms subjected to a rigorous peer review process to ensure they attain the highest quality of professional ability and ethics. The highest rating is an AV® Peer Review Rating as administered by Martindale-Hubbell, which indicates a law firm and its attorneys have reached the height of professional skill and ethical excellence. USLAW NETWORK attorneys are experienced in litigation and have substantial trial experience.

Mary ("Molly") L. Hughes, a Member in Nexsen Pruet's Charleston office, has been named to the Charleston Regional Business Journal's "40 Under 40" list for 2006.

Hughes represents management on a broad range of issues. She is a Certified Specialist in Employment Law by the South Carolina Supreme Court, focusing her practice on employment law and litigation matters.

The recognition, given annually by the Journal, honors 40 of the region's "brightest business stars" under the age of 40.

Before joining Nexsen Pruet, Hughes clerked for the Honorable David C. Norton of the U.S. District Court for the District of South Carolina, Charleston Division. A graduate of the University of South Carolina School of Law, she is also an adjunct professor at the Charleston School of Law.

John C. von Lehe Receives the Order of the Palmetto

For his lifetime of exceptional, dedicated service to the Palmetto State, John C. von Lehe Jr., a Nelson Mullins Riley & Scarborough partner in the Charleston office, has received the Order of the Palmetto, South Carolina's highest civilian honor. In presenting the award, the governor cited, among other things, Mr. von Lehe's service with honor and integrity as a former assistant attorney general assigned to the S.C. Tax Commission and also his service to Governor Carroll Campbell as co-chair of his Economic Development Committee.

Mr. von Lehe's law practice focuses on taxation, estate planning and appellate law, with a strong concentration in matters of property tax (including fee-in-lieu of property tax), sales tax, state income tax and economic and tax incentives for new and existing businesses. He has been listed in The Best Lawyers in America from the date of the book's inception to present.

Cinderella Project

Suzanne C. Boulware and The Young Lawyers Division of the South Carolina Bar sponsored the Cinderella Project again this year. The Cinderella Project provides gently worn formal, bridesmaid and prom dresses for young women who lack the financial resources to buy a gown for their high school prom. Over 90 girls from 24 participating high schools selected a gown for prom.

Continued on page 6

Member News

Mark C. Fava to teach Aviation Law at USC

Mark C. Fava, an experienced Naval flight officer and former chief operations attorney for Delta Air Lines Inc. will bring his skills and experience to his alma mater this fall where he will teach Aviation Law as an Adjunct Professor at the University of South Carolina School of Law. This will be the first time the school has offered Aviation Law in several years. Mark Fava is a partner at Nelson Mullins Riley & Scarborough LLP and is in the firm's Charleston office. He practices aviation law nationally, has considerable experience in national litigation management and aviation regulatory law from his years at Delta and in his current practice. As a Naval flight officer with more than 3,300 flight hours and a former commanding officer of a Navy Reserve squadron, he brings an aviator's perspective to the classroom as well.

McAngus Goudelock & Courie, LLC Welcomes New Members

McAngus Goudelock & Courie, LLC is pleased to announce that John M. "Mac" Tolar has joined the firm's Columbia office. His area of practice is workers' compensation.

The firm is also pleased to announce Paul Koch has joined the firm's Columbia office. Paul practices primarily in the areas of administrative and regulatory law, governmental relations, public procurement, state taxation, telecommunications, and local government law.

The firm also welcomes Carl Edwards to the firm's Columbia office. His practice areas include wrongful death, auto liability, construction defects, premises liability, commercial litigation, mediation, business disputes, financial matters, wreck cases, survival actions, defamation, and negligent hiring and training.

McAngus Goudelock & Courie, LLC is pleased to announce that John H. Tiencken has joined the firm's Charleston office. His practice areas include utility, corporate, and environmental law.

Derrick L. Williams Joins Nelson Mullins Riley & Scarborough

Derrick L. Williams has joined Nelson Mullins Riley & Scarborough as an associate in the Columbia office, bringing with him experience as a defense litigator who handles cases ranging from premises liability and workers' compensation to employment and labor related issues. He will practice in the areas of business and franchise litigation, as well as employment and labor litigation.

Williams earned a Juris Doctor from the University of South Carolina School of Law, where he was a member of the S.C. Environmental Law Journal. A Florence native, he has a Bachelor of Arts in English from the Honors Program at the College of Charleston.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

Pres. Message cont. from pg 2

Patronize an SCDTAA Sponsor

The SCDTAA is blessed to be receiving some exquisite support from three world-class Sponsors this year. These three, all of whom will be providing us with significant financial support, are DecisionQuest, RandD Strategic Solutions, and A. William Roberts & Associates. Each of these organizations is working to further the goals of our members and clients, both through their direct support of SCDTAA and through their litigation support services throughout the year.

I have worked closely with all three entities and I commend each of them to you. DecisionQuest will be with us at The Grove Park. Many SCDTAA lawyers have worked with Angela Abel and her colleagues to develop witnesses and themes and to draw trial juries. Her skills, results, and follow-through are remarkable. RandD Strategic Solutions will be with us on Amelia Island Plantation. One of its principals, Rick Fuentes, Ph.D., is a brilliant strategist and a superb communicator. His firm provides a full range of litigation support services, ranging from the design and execution of mock trials, excellent assistance in picking trial juries, and wonderful guidance in developing trial themes. Bill Roberts operates a regional court reporting service and litigation support firm. He and his staff can provide literally anything that you need to prepare for and try a case. They are completely abreast of all developments of technology in the courtroom. They can make you look good. When I was a baby lawyer twenty years ago, Bill Roberts endured my very first deposition. We have traveled to many events since then. He and his firm are fabulous.

Reserve an All-Oceanfront Room

Now is the time to make your budgetary and travel plans for Amelia Island Plantation during the weekend of November 9. We are working to ensure that both judges and clients are there for you. As mentioned before, every room in this newly-renovated hotel faces the ocean. The weekend will be a real treat.

Rededication Ceremony of the Marc H. Westbrook Judicial Center

The following is a copy of the prepared remarks provided by Thad Westbrook at the recent ceremony rededicating the Lexington County Courthouse in honor of his father:

Madame Chief Justice, Mr. Chairman, ladies and gentlemen.

Seven and a half months ago my family and I were shocked and sad to learn that my father died in a terrible car accident. We were also sad to learn that Randall Davis died a few hours later from injuries he sustained in that same accident.This was a dark moment in many of our lives, but from this tragedy many wonderful things have been produced. Scholarships have been endowed, memorial gifts made to charities, and tributes made in honor of two wonderful people. For those things, we are thankful. Today, as we remember my father and Randall, we cannot forget those that have made this day possible.

My family and I are deeply touched that the Lexington County Council has decided to recognize my father and his service by placing his name on the magnificent building standing before us. For all of us who knew him, it would come as no surprise that my father would be humbled and amazed that you found his name worthy of this Judicial Center. Words cannot adequately express our gratitude to the Lexington County Council for bestowing such a tremendous honor on my father. However, on his behalf, we say "Thank you," and we hope you know how grateful we are for your decision to rename the County's Judicial Center after him. Thank you.

We would be remiss if we did not take a moment to thank Katherine Doucett and everyone who helped organize this ceremony today. We understand County Council asked Katherine to lead this project, and she has done a wonderful job. If her handling of this event is any indication of how she will serve as our next County Administrator, we know Lexington County's Administration will continue to be in very good hands.

As you may know, the South Carolina General Assembly elects the judges for our state. Therefore, we want to thank the Lexington County Legislative Delegation, the delegations from Edgefield, McKormick and Saluda Counties, and other members of the South Carolina General Assembly who elected my father to the bench—first to the Family Court, then to the Circuit Court. When he asked for your vote, he promised to serve faithfully and not to embarrass you. He understood the responsibilities of serving as a judge, and he worked every day at being the best jurist he could be for our state. He wanted the citizens of South Carolina and the Eleventh Judicial Circuit to know that their legislators had made a good decision when they gave him this high honor. To you, we are thankful for your confidence in him and for giving him the opportunity to serve.

In addition, it is incumbent upon us to extend our thanks, on behalf of my father, to the citizens of Lexington County for electing him to serve on Lexington County Council and in the South Carolina House of Representatives. You demonstrated your confidence in him at the ballot box, allowing him to serve as your representative in county and state government. I can assure you that he did not take that responsibility lightly and it was his honor to serve you.

A little more than two years ago, my father stood before you to help dedicate this grand courthouse. He was proud, not of himself, but of how far our county and community had come. During his speech at the Dedication Ceremony, he spoke about the history of Lexington County and eagerly spoke of its future. He was excited about the development and installation of courtroom technology that would aid all attorneys and their clients as they presented their cases to the court. He also explained how every citizen must know that the courthouse is a place for justice and fairness.

As some of you may recall, the courthouse project was a real labor of love for my father. Many of you saw him strolling around the project site with his blueprints under arm, wearing his own special hardhat. My mother started to think that he was considering a second career in architecture or construction. Also, during the construction process, my father took pictures of the project on a weekly basis, as soon as they started moving some dirt. It was akin to how he was as a grandfather taking pictures of his granddaughter, Abby, when she started crawling and taking her first steps. In fact, he had so many pictures of the courthouse developed at CVS, I think the President of CVS probably should have sent him a letter thanking him for helping their company make its budget that year. This really was

Continued on page 8

WESTBROOK REDEDICATION CONT.

a special project for him, and he felt it was important for our community. He wanted to watch over this project from beginning to end because he saw the Judicial Center as a memorial to our spirit of cooperation and the growth of our community.

It is appropriate that the Judicial Center, now named for my father, was primarily constructed of brick. As you know, brick is a very common and basic building material, but it can be molded into something beautiful and magnificent. My father had very common and basic beginnings. However, with the support of his parents, siblings, my mother and many of you, he was able to pull himself up from those humble beginnings and dedicate himself to an effective and meaningful life of public service.

My father believed in the Biblical admonition that to those who have been given much, much is required. He was talented, blessed with many wonderful gifts. He had a sharp intellect, warm personality and a strong work ethic. For him, there was always another service project or initiative that he wanted to lead for the betterment of our community. While I am sure my father had plans to continue serving our community for many more years, he placed his faith and trust in God, knowing that his maker could have a change of plans.

It is custom in the legal profession for lawyers to end their pleadings to the Court with a request for relief, which we refer to as a "Prayer for Relief." Many people who enter this building before us will have prayers on their lips and in their written documents, seeking many forms of justice from those who sit in judgment of them. For my father, court has adjourned for the last time, and he is sitting with God in a higher court probably wondering what he has done to deserve all this attention. However, before we depart today, I am sure he would want to share one final prayer for each of you. He would pray for you to prosper and have high ambitions and hopes for our community. He would want you to remember those who have come before us, and to honor the traditions and values that have brought us this far. And he would pray that this building will not be seen as a memorial to him, but that you would recognize it as a symbol of justice, fairness and truth, benefiting everyone in our community.

Thank you for being here today to remember my father, thank you for all of the very kind and generous presentations that have been made in his honor, and thank you for renaming the Judicial Center after him. May God bless you all.

Legislative Reception Recap 2006

by Gray T. Culbreath

The SCDTAA held its Second Annual Legislative Reception at The Oyster Bar in Columbia on Wednesday, April 5th. Following the success of last year's reception, which was a huge hit with members of both the House and the Senate Judiciary Committee, this year's reception proved to be an even bigger success. Thanks in large part to the efforts of our lobbyist, Jeff Thordahl, and our legislative chair, Eric Englebardt, over thirty members of the House and Senate Judiciary Committees and their staffs attended the event. Among the members of the House Judiciary Committee who attended were Representative Carl Allen, Representative Ben Hagood, Representative Thayer Rivers, Representative Jim Sewart, Representative James Smith, Representative Fletcher Smith, Representative Thad Viers, Representative Seth Whipper, Representative Alan Clemmons and the Chairman of the House Judiciary Committee, Representative Jim Harrison of Columbia. Members of the Senate Judiciary who attended the event included Senator Chip Campsen, Senator Gerald Malloy, Senator Kent Williams, Senator Ronnie Cromer, Senator Jake Knotts, Senator Larry Martin, and Senator Luke Rankin. For those of you who have not been able to attend this event, I encourage you to attend next year. Not only are the food and the company outstanding, it is an excellent way for you to meet the members of the Judiciary Committees who draft and vote upon many of the laws with which we deal in court every day. If you have any questions about the reception or our legislative efforts, please do not hesitate to contact Jeff Thordahl or Eric Englebardt.

39th Annual Joint Meeting
July 27 - 29 • Asheville, NC

by Ronald K. Wray, II

The Thirty-Ninth Annual Joint Meeting of the South Carolina Defense Trial Attorneys' Association and the Claims Management Association of South Carolina will be held July 27-29, 2006. Once again, the beautiful Grove Park Inn Resort and Spa in Asheville, North Carolina will provide the setting for the meeting. Exciting educational and social programs are scheduled, so make plans now to attend. The deadline for room reservations at The Grove Park Inn is June 16, 2006. Please make your reservations early to take advantage of the group discount rate.

Our meeting will begin on Thursday, July 27, 2006 with the Registration Desk open from 4:00 p.m. to 7:00 p.m. The SCDTAA Executive Committee will meet from 3:00 p.m. to 5:00 p.m., while the CMASC business meeting will take place from 4:00 p.m. to 5:00 p.m Additionally, our Young Lawyers' Committee will meet from 5:00 p.m. to 6:00 p.m. Thursday's activities will be topped off by the Welcome Reception.

Friday's educational program is highlighted by a live summary trial. In addition to the presentation by two preeminent trial lawyers, the live summary trial will include actual juror deliberations. We are in need of spouses and other guests to serve as jurors for this presentation. If you know of anyone who may be interested, please contact program chairs David Rheney, Curtis Ott or Ron Wray, or you may call Aimee Hiers at Association Headquarters.

In addition to the live summary trial, Friday's educational program includes a presentation from one of our platinum sponsors, William Roberts, as well as an update on the Twin City Fire case by Gary Parsons. Mr. Parsons represented Twin City Fire Insurance Company in this case which addressed whether reservation of rights letters automatically create conflicts of interest in connection with the insurer's selected counsel. Mr. Parsons successfully argued both the summary judgment motion before the district court and the appeal before the Fourth Circuit. Bifurcation and consolidation, two topics of increasing importance in this day of runaway punitive damages verdicts, and a review of 2005-2006 ethics opinions, will conclude Friday's educational program.

On Saturday, following the SCDTAA business meeting, one of our sitting circuit judges will start things off with an enlightening presentation on the effective use of technology in the State Court system. DecisionQuest, another of our platinum sponsors, will teach us how to effectively use jury consultants in trial preparation and trial. Finally, Saturday's educational program will wrap up with presentations on effective offers of UIM Coverage, enforceability of agreements between counsel, the latest tips on removal practice, and an ethics segment focusing on the new rules of lawyer advertising.

Both Friday and Saturday our members who specialize in Workers' Compensation will have the opportunity to participate in special break-out sessions focusing on Workers' Compensation practice. All the Workers' Compensations Commissioners have been invited to attend, so this program will also present a rare opportunity for individual time with the Commissioners.

Not only do we have these wonderful educational opportunities, but our social program promises to be one of our best ever. In addition to the traditional golf tournament on Friday afternoon, which is again being played at Reems Creek Golf Club, we also have numerous other activities that are sure to provide plenty of opportunity for fun and relaxation for all. White water rafting, horse back riding and a Chimney Rock Park excursion are all on tap for Friday afternoon. Moreover, Friday evening features a reception and silent auction at The Grove Park Inn. Those traveling with small children may choose to take advantage of the children's program provided by The Grove Park Inn (with dinner included) lasting from 6:30 p.m. until 10:00 p.m. on Friday.

Dinner each night is on your own. Dining and reservation information will be included in your information packet. Once again our meeting coincides with Bele Chere, so be sure to make reservations early to take advantage of the many wonderful restaurants both at The Grove Park Inn as well as nearby Asheville.

As always, the Joint Meeting provides a terrific opportunity to spend time with old friends, make new ones, and network with members of the Claims Management Association. We look forward to seeing everyone in Asheville!

FEATURE ARTICLE

Never Underestimate the Seriousness of Fraud Allegations

by K. Michael Barfield*

After the first several years of law practice, nearly every lawyer realizes how much was not learned in law school. Each case brings different challenges and provides the lawyers involved with new lessons. These lessons are also learned through listening to experienced lawyers tell you about their early years. Below I share one of my experiences, and what I learned from it.

A couple of years ago, I was involved in a partnership dispute between two business people. As with many business disputes, the case was most appropriately characterized as a "business divorce," having all the bile and bitterness of the worst domestic litigation. The Plaintiff's Complaint was a classic parade of horribles, accusing our client of just about every kind of misfeasance and malfeasance imaginable, ranging from contract to tort, and with several statutory causes of action thrown in for good measure. As discovery progressed and trial loomed large on the horizon, the case began to focus largely on the plaintiff's claims for conversion and trademark infringement. We, the defense attorneys, felt confident that we should fair well at trial with respect to these two claims and that the rest of the case would fall neatly into place. We were correct on the first count but not the second.

What was to be a weeklong trial began without much fanfare. Working in our favor was the perception that the jury did not seem to be buying the plaintiff's case for conversion. Then the judge directed verdict in our favor on the trademark cause of action. A lesser plaintiff's attorney may have started to have serious doubts. Unfortunately, we were facing a seasoned veteran. So at the moment that the tide was beginning to turn in our favor, the plaintiff's counsel changed the landscape of the case altogether. Suddenly, and through the cross examination of our own client, the focus shifted to the plaintiff's claim for fraud.

Up until that point in the trial, we viewed the fraud allegations as almost a throw-away cause of action. Indeed, the single allegedly fraudulent statement made by our client to the plaintiff was a mere footnote in their long and stormy business relationship, hardly enough around which to build an entire case. Unfortunately, the jury, as I learned juries often do, saw things differently. Fraud and unjust enrichment were the two causes of action for which the jury found in the plaintiff's favor. The actual damages award was not overwhelming, but the punitive damages were less palatable.

That trial left me with new insights into the nature of fraud as a cause of action and the way jurors perceive and deal with fraud claims. Up until the jury hit our client with a fraud judgment, the power of a viable fraud claim was lost on me, but I will never again take such claims lightly. What follows is a short list of the lessons learned from that experience.

1. Jurors take fraud very seriously.

Jurors pay particular attention to fraud claims because they are already familiar to some degree with the concept, or at least they think they are. Unlike causes of actions with strange sounding names, like conversion or tortious interference with contract, jurors have heard of fraud and they associate the word with particularly bad behavior. Consider for a moment what the average person might be likely to associate with the word itself. The news media keeps the public current on the trials of corporate ne'er do wells, charged with criminal fraud for lying to stockholders and the public about the financial health of their companies. These CEO's turned defendants were all purportedly driven by their unmitigated personal greed.

"But those are criminal cases," the astute reader is apt to say. "What do they have to do with a civil claim for fraud?"

My contention is that within the collective consciousness of the pool of potential jurors, otherwise known as the public, there is no distinction. Fraud is fraud. Indeed, I have heard several very seasoned civil trial attorneys use the phrase "guilty of fraud" in the civil context. Lest we forget, one may be held liable for fraud in a civil case but never guilty. However, the very language used to describe these claims demonstrates that even lawyers can make the mistake, or purposefully and strategically confuse the civil and criminal distinctions, equating civil and criminal fraud. Thus, if my very unscientific theory about the public's perception of fraud is correct, the stakes are very high indeed. Jurors may very well equate the actions of any defendant with those of the Ken Lays and Dennis Koslowskis of the world and punish them accordingly.

2. Do not ever expect to get mileage out of the heightened standard of proof for fraud.

Our legal system understands the significance of accusing one of fraud and the abhorrent connotation of even an allegation of fraudulent behavior. Thus, fraud must be proven by clear, cogent and convincing evidence. Anyone conducting research on the meaning of this elevated standard of proof is likely to come away disappointed. It is something more than the greater weight of the evidence but less than beyond a reasonable doubt. However, the law provides us with no further direction. If we as lawyers cannot put a finer point on it, how can we expect jurors to apply such a standard with any confidence? As I gave the closing argument in my own trial, I realized that I sounded like I was making excuses for my client as I argued to the jury that the plaintiff had to prove more to prevail on the fraud claim. At best, the jury was confused; more likely, they were suspicious. I suddenly felt like I was trying to hide behind some nuance of the law in order to mask my client's misconduct. That was certainly not the case. As any young lawyer is apt to do, I wanted to give the jury as many reasons as I could to find in favor of my client. In hindsight, it may have been more effective had I simply mentioned the heightened standard of proof but let the judge do the heavy lifting with his instructions to the jury. At least in that scenario, it is the presumably unbiased court emphasizing some legal nuance and not the lawyers.

3. Expect punitive damages to accompany a fraud verdict.

I discovered the hard way that if a jury finds in favor of the plaintiff on a fraud claim, punitive damages are all but obligatory. The following language, taken from the case of *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996), was used as a jury charge:

> In an action for fraud, punitive damages are warranted where the Defendant knows the representation to be false, or where a false representation is recklessly made, as a positive assertion, without knowing or caring whether it is true or false. In the latter instance, liability for punitive damages is dependent upon whether the Defendant was conscious or chargeable with consciousness of his wrongdoing.
>
> The recovery of punitive damages is not limited to cases where the false representations were actually known to be false at the time of the making of the representations. That is to say, knowledge by the Defendant that his representations were false is not required for an award of punitive damages. It is only necessary that the Defendant was conscious, or chargeable with consciousness, of his wrongdoing.

The threshold for punitive damages is practically identical to the elements of the cause of action. Faced with such an instruction, how can jurors not award punitive damages once they conclude the plaintiff was the victim of some fraud by the defendant?

4. Fraud has nine elements- use them to your advantage.

To establish fraud, the plaintiff must prove the following nine elements:

(1) a representation;
(2) the falsity of the representation;
(3) the materiality of the representation;
(4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity;
(5) the speaker's intent that the representation be acted upon by the person hearing the representation;
(6) the hearer's ignorance of its falsity;
(7) the hearer's reliance on its truth;
(8) the hearer's right to rely thereon; and
(9) the hearer's consequent and proximate injury.

Each and every one of these elements must be proven by clear, cogent, and convincing evidence. The failure to prove any element of fraud is fatal to recovery. Fraud is never presumed in the law. *See*, *Hansen v. DHL Lab., Inc.*, 319 S.C. 79, 459 S.E.2d 850 (1995).

Fraud is not a tort that law professors tend to spend a lot of time discussing. But young lawyers should learn quickly to scan fraud allegations in complaints for legally deficient pleading. A plaintiff must clearly plead all nine elements of fraud in order to survive even a motion to dismiss. However, after the pleading stage of a case is over, it is very easy to forget that plaintiffs must not only plead all nine elements of fraud, but must prove each element.

Considering the nine factors and based on my own experience, a fraud trial tends to focus on two questions: 1) Was there a misrepresentation? and 2) Did the defendant intend to deceive the plaintiff? In my opinion, those are the only questions that truly matter to jurors. If they determine that a defendant intentionally misled the plaintiff, they are not likely to spend a lot of time deliberating whether the lie touched on a material issue. Indeed, why would someone lie about something that was not material?

With that said, there is salvation to be had in the "lesser" elements of fraud. Again my trial experience provides an example: When the jury returned its verdict in favor of the plaintiff, replete with puni-

Continued on page 12

tive damages, I got that sinking feeling that comes with defeat. I assumed that we were stuck with the judgment because sufficient evidence was presented to prove that our client stretched the truth while negotiating with the plaintiff. Within a couple of days, however, it became clear to the defense team that the plaintiff may not have sufficiently proven that any of the damages could reasonably be traced to the misrepresentations. Furthermore, our research indicated that the plaintiff had probably not proven the existence of any right to rely on the defendant's statement at the time it was made. This was especially true because the parties were sophisticated business people engaged in an arms length negotiation.

To recover for fraud, the plaintiff must have relied on the misrepresentation. If the plaintiff knew the misrepresentation was false, there is no cause of action because there could not have been any reliance on the truth of the statement. A victim of fraud has a right to rely on a misrepresentation so long as his reliance is not reckless or grossly negligent. The legitimacy of the plaintiff's reliance on the misrepresentation is an issue to be decided by you, the jury. There is no cause of action for a fraudulent statement unless the plaintiff is injured. *See, Hansen v. DHL Lab., Inc., 319 S C 79, 459 S E 2d 850 (1995).*

While I did my best to make these points in my closing argument, I do not believe I successfully sold them to the jury. I felt like it sounded like I was saying that my client may indeed have lied, but it was not an important lie. In other words, I was making excuses. However, I learned that what may not carry any weight with a jury may carry great weight with the judge. After the initial impact of the verdict dissipated, we moved for a new trial based on the plaintiff's failure to prove the right to rely or damages stemming from fraud. The judge granted us a new trial as to damages based on the latter.

This trial taught me, and by relating it here I hope particularly to highlight for those who may not yet have faced a trial involving fraud, to take any claim for fraud seriously. Develop a multilevel defense strategy to combat a fraud allegation from pleading all the way through trial, and even post-trial proceedings. And finally, be mindful that sometimes the end of a trial is the real beginning of a case. Fraud is a legal concept that appears simple at first blush. Its apparent simplicity creates a minefield for jurors. And anyone who has spent much time in a courtroom understands that jurors strive to act according to the law but they are expected to understand and apply law after an often incoherent cram session we call jury instructions.

No matter what happens at each stage of the proceedings, we remain tasked with ensuring our clients are competently represented and that means that at least as lawyers we need to know and understand all aspects of the law at hand. Each of the nine elements of fraud is the subject of its own body of case law. Be familiar with the underlying law going into a trial, and not just on those issues you believe will be key, but on all legal issues that may arise during the course of the trial. Jurors may not understand or care about the complexities of the law once they have made up their mind that the defendant is a scoundrel, but the law does not simply give a free pass to anyone to whom a lie has been told. If you are unsuccessful explaining this legal issue to the jury, the court remains the gatekeeper. If the issues are properly framed, an unsupported, adverse outcome at trial can quickly become success in post trial motions or appeal.

** Michael Barfield is an associate at Barnwell Whaley Patterson & Helms in Charleston, South Carolina.*

FEATURE ARTICLE

Federal District Court Gives Teeth to the "Open & Obvious" Defense in Inclement Weather Slip and Fall Cases

by Christian Stegmaier*

Slip and fall incidents are the bane of the retail and hospitality sector. Often, these incidents arise on days with inclement weather when floors at entrances can accumulate moisture due to patrons and employees tracking water in from the outdoors. Not surprisingly, claimants (and their lawyers) frequently take the position the establishments where the falls allegedly occurred are completely responsible for the subsequent alleged injuries and demand high dollar recovery.

When making these demands, these claimants often close their eyes to the fact they knew it was inclement and that common sense and experience would tell them precipitation sometimes gets tracked inside and may be in their pathway. In other words, these claimants ignore the fact that water on the floor during a rainy day is an "open and obvious" condition, which they should have taken steps to appreciate and avoid.

Recently, the federal district court for the District of South Carolina issued a decision, which gives teeth to the "open and obvious" defense in inclement weather slip and fall claims – at least in the federal venue. This opinion, *Hackworth v. United States*, 366 F. Supp. 2d 326 (D.S.C. 2005), may prove to be of great assistance to hospitality establishments defending these type of claims.

In *Hackworth*, it had been raining in Charleston for several days and was raining when the plaintiff approached a convenience store at the Naval Weapons Station. As the plaintiff moved toward the door of the convenience store, she stopped to stomp her feet and shake the water off of herself before entering. The plaintiff contended that, on her first step inside the convenience store, as soon as she stepped off a rubber mat, she slipped and fell.

The plaintiff sought recovery for alleged permanent injuries, physical and mental pain and suffering, limitations on her ability to earn a living, loss of enjoyment of life, and future medical costs. The United States government, the owner of the convenience store, moved for summary judgment, asserting it was not liable for the plaintiff's purported damages.

The federal district court granted the government's motion. The court bottomed and premised its order upon the finding that water at the entrance of a retail location during or near a time of inclement weather is an expected condition that is "open and obvious." The judge held recovery for injuries arising from an "open and obvious condition" is not permitted in South Carolina. Specifically, the court explicated:

> Even assuming that a puddle existed before Hackworth's fall, and that the Government had constructive notice of the puddle, under South Carolina law, the owner of property owes no duty to use reasonable care to take precautions against or to warn guests of open and obvious dangers. In such situations, the guests themselves have a duty to discover and avoid the danger. *See Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615, 616 (S.C. 1986).
>
> . . . .
>
> [G]iven Hackworth's knowledge of the rainy conditions, the close attention Hackworth says she was paying to the floor, and the fact that a three foot wide puddle could not be entirely obstructed by overhead lights, the Government had no duty to warn.

Id. at 330-31 (emphasis added).

The *Hackworth* Court determined that rain water found at the entrance of the store is a known or "open and obvious" condition, which experience teaches a person to employ due care when approaching and negotiating the same. Our law holds that injuries arising from the failure of a patron to recognize and negotiate a known or "open and obvious" danger, when encountering it in a circumstance such as the one in the case at bar, precludes recovery. *Id.*; *Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615 (1986); *House v. European Health Spa*, 269 S.C. 644, 239 S.E.2d 653 (1977); *see also The Santa Barbara Canton Co. of Baltimore v. Brown*, 299 F. 147, 151 (4th Cir. 1924) ("Generally one who uses or enters on the property of another with full knowledge of [a] dangerous condition cannot recover for injuries to

Continued on page 16

FEATURE ARTICLE

The Return of No Harm, No Foul Jurisprudence: The Retreating Tide of "No Injury" Claims in Class Action Litigation

by James T. Irvin, III and Peter T. Phillips*

During law school, most of us were present the day our professor explained that damages were an essential element of almost any cause of action. This basic principle made sense because no one wants or should have to spend time and money litigating over what *might* have happened, but did not, or what *could* happen in the future. However, some apparently missed that day of class and did not bother to get a copy of the notes. As a result, there are a number of examples of lawyers attempting to turn our no-harm, no-foul system on its head by seeking compensation for situations in which the plaintiffs have suffered no actual injury. These attempts have become particularly prevalent in the consumer class-action context with plaintiffs suing for *potential* product failures that may never occur. Lately, however, the tide appears to have turned, and courts are viewing these cases with a healthy skepticism. We hope this discussion of these trends will be useful to the practitioner who encounters these types of claims.

The Emergence of Non-Injury Consumer Class Actions

Consumer class actions sometimes involve products in which the alleged defect in the product has yet to manifest. These actions seek compensation for injuries that *may* occur in the future and attempt to redefine what injury or harm means under our product-liability jurisprudence. *See, e.g., Rivera v. Wyeth-Ayerst Labor.*, 283 F.3d 315 (5th Cir. 2002) (attempt to recover for "economic injury" when plaintiffs suffered no physical or emotional injuries from a drug that was later pulled from the market); *Schiffner v. Motorola, Inc.*, 697 N.E.2d 868, 870-71 (Ill. App. Ct. 1998) (suit against cellular phone manufacturer for designing and manufacturing cellular phones that had never malfunctioned but were alleged to be defective due to uncertain safety that resulted in diminished value of the product).[1]

Non-injury claims are no recent phenomena. *See, e.g., McCall v. United States*, 206 F. Supp. 421, 426 (E.D. Va. 1962) (permitting recovery for a 3% to 25% chance of developing epilepsy in the future); *Feeney v. Long Island R.R.*, 22 N.E. 402, 404 (N.Y. 1889) (holding that a woman struck by a railroad gate could recover for the risk of future pain and suffering). However, both anecdotal and empirical evidence suggest that non-injury consumer class actions have become more prevalent in the last ten years. *See* Elizabeth J. Cabraser, *Recent Developments in Nationwide Products Liability Litigation: The Phenomenon of Non-Injury Products Cases, the Impact of Amchem, and the Trend Toward State Court Adjudication, and the Continued Viability of Carefully Constructed Nationwide Classes in the Federal Courts*, ALI-ABA Course of Study Materials: Products Liability (Feb. 12-13, 1998), [hereinafter "Cabraser, *Recent Developments*"]; Deborah M. Russell & Robert L. Hodges, *Emerging Issues in Noninjury Class Litigation Targeting Product Lines*, 39 TORT TRIAL & INS. PRAC. L. J. 137, 152 (2003), [hereinafter "Russell & Hodges, *Emerging Issues*"]; Edward F. Sherman, *Consumer Class Actions: Who are the Real Winners?*, 56 ME. L. REV. 223, 225-26 (2004) (citing DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, 58-59 (2000)).

This increase is attributed to various factors such as: (1) the growing restrictions on class certification in mass tort situations in the wake of asbestos and tobacco litigation; (2) "the resulting trend toward contract theories of recovery;" and (3) product-liability developments in the nineties synthetic building materials. *See* Russell & Hodges, *Emerging Issues*, at 151-52; Cabraser, *Recent Developments*, at 1. The success in some jurisdictions of medical monitoring claims, despite plaintiffs' lacking any present, physical injury, also likely contributed to the increased emergence of non-injury, consumer claims.[2]

The Rising Tide of Non-Injury Class Actions Lifts Few Boats

Despite the increase in recent years of non-injury consumer class actions, the reported cases demonstrate that these actions fail more often than not. The overarching theory of these cases is that the consumer's product suffered some diminished value in light of the alleged defects. This supposed defect has not yet manifested, therefore the plaintiffs seek alleged injuries such as "inflated sales price, loss of resale value, unexpected exposure to risk, and other

intangible losses." *See* Russell & Hodges, *Emerging Issues*, at 153 (citing *Garza v. Sporting Goods Prop., Inc.*, No. CIV. A. SA-93-CA-108, 1996 WL 56247 (W.D. Tex. Feb. 6, 1996); *Anthony v. Kelsey Hayes Co.*, 102 Cal. Rptr. 113, 115 (Cal. Ct. App. 1972); *Am. Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 527 (Cal. Ct. App. 1995); *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 289 (4th Cir. 1989)). Plaintiffs bring these claims under a myriad of legal theories including negligence, strict liability, breach of express and implied warranties, fraud and misrepresentation.

The most common, and most compelling, justification for dismissing such claims is the basic principle opening this article: a plaintiff must suffer some actual harm in order for any claim to arise. This premise remains the same whether couched in terms of standing, as the Sixth Circuit in *Rivera*, 283 F.3d 315, highlighted,[3] or the failure to plead or establish the essential element of damages, as the court decided in *Briehl v. General Motors Corp.*, 172 F.3d 623, 627 (8th Cir. 1999).

Federal and state courts have resoundingly held true to this basic principle in cases involving alleged defects that never manifested. *See, e.g., Angus v. Shiley Inc.*, 989 F.2d 142, 147-48 (3d Cir. 1993) (affirming dismissal on the pleadings of claims for intentional infliction of emotional distress caused by allegedly defective implanted heart valve which had not malfunctioned or caused any direct physical harm, because the plaintiff had not "suffered a compensable injury"); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 631 (Ala. 1998) (affirming dismissal of class claims for costs to repair alleged design defect that caused sport utility vehicles to roll over, when none of the vehicles had actually rolled over because "an alleged product defect that has not manifested itself in such a way as to cause any observable adverse physical or economic consequences [does not] constitute any 'injury' that will support a claim of fraudulent suppression"); *Pfizer, Inc. v. Farsian,* 682 So. 2d 405, 406-07 (Ala. 1996) (holding that the belief that a product could fail in the future is not, without more, a legal injury sufficient to support a claim); *Am. Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 527 (Cal. Ct. App. 1995) (decertifying class because no cause of action for breach of implied warranty exists "[w]here class-action plaintiffs allege they have suffered no personal injury or property damage from a vehicle they claim is defectively designed, and it is impliedly conceded that their vehicles have--since the date of purchase--remained fit for their ordinary purpose"); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 17 (N.Y. App. Div. 2002) (affirming dismissal of class action for negligence, strict liability, breach of implied warranty, negligent concealment and misrepresentation, fraud, unfair or deceptive trade practices and civil conspiracy based on allegedly defective front seat back rests because plaintiffs "fail [ed] to plead any actual injury . . . . plaintiffs have not been involved in any accidents and have not suffered any personal injuries or property damage. Moreover, plaintiffs do not allege that any seat has failed, been retrofitted or repaired, nor have plaintiffs attempted to sell, or sold an automobile at a financial loss because of the alleged defect."); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 565 (N.D. 2002) (holding that when a plaintiff had not sold vehicle at a diminished value or incurred any costs to repair the alleged defect, the alleged damages were too speculative).[4]

Moreover, the fact that an alleged defect may never manifest demonstrates that the threat of future harm is insufficient. *See Zamora v. Shell Oil Co.*, 63 Cal. Rptr. 2d 762, 766 (Cal Ct. App. 1997). To allow otherwise would require the court to improperly speculate as to what *might* happen in the future.

Non-injury claims also fail for various other reasons such as the economic-loss doctrine, which eliminates any tort claims in this context. *See, e.g., Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 172-73 (S.D. Miss. 1996); *see also Brewer v. Gen. Motors Corp.*, 926 S.W.2d 774, 780 (Tex. Ct. App. 1996); accord *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Lit.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law.").

While the economic loss doctrine may eliminate tort claims, non-injury actions usually include breach-of-warranty claims. However, courts have found these claims improper because a breach of the implied warranty of merchantability can only occur if the defect manifests and "renders the [product] unfit for its ordinary purpose." *See, e.g. Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 297 (4th Cir. 1989); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 100 (S.D.N.Y. 1997). Moreover, the implied warranty of merchantability does not encompass claims for lost resale value. *See Carlson*, 883 F.2d at 298.

Conclusion

Despite the historical and continued success in defeating non-injury class actions, plaintiffs likely will continue to file these actions because of their potential for return. One unknown is the number of these cases that settle before trial (and before any opinion is reported) providing plaintiffs with an incentive to attempt such lawsuits. Nevertheless, courts confronting these issues, as demonstrated by the cases cited in this article, have a sound basis for following the long-standing no-harm, no-foul principle that is so central to American jurisprudence. Continued adherence to that principle may, and should, stem the tide of non-injury consumer class actions.

Footnotes

1 While not germane to the purposes of this article, the Sixth Circuit in *Rainer v. Union Carbide Corp.*, 402 F.3d

Continued on page 16

No Harm, No Foul
cont. from pg 15

608 (6th Cir. 2005), recently addressed a compelling and similar issue regarding lawyers' attempts to redefine our traditional notions of injury in light of ever present technological advances. In *Rainer*, the plaintiffs were exposed in various capacities to nuclear substances and that exposure allegedly caused chromosomal damage. Plaintiffs argued unsuccessfully that such damage at the sub-cellular level alone was sufficient to create a cause of action, despite the absence of any physical symptoms. *Id*. For further discussion of this case, *see, e.g., Maya Sen, Defining the Boundaries of "Personal Injury*": *Rainer v. Union Carbide Corp.*, 58 Stan. L. Rev. 1251 (2006).

2 Only eleven states and the District of Columbia allow medical monitoring claims absent a present injury. *See* Victor E. Schwartz, et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 361 n. 70 (Spring 2005), [hereinafter "Schwartz, *Medical Monitoring*"]. South Carolina joins those states that do not permit medical monitoring claims absent a present physical injury. *See Rosmer v. Pfizer, Inc.*, No. Civ. A. 9:99-2280-18, 2001 WL 34010613 (D.S.C. Mar. 30, 2001) (Norton, J.); see also Schwartz, *Medical Monitoring*, at 361 n.71 (listing other states that do not allow medical monitoring absent present, physical injury and collecting cases).

3 To establish an injury in fact, one must show "an invasion of a legally protected interest which is . . . concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

4 *See also Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (dismissing claims for common law fraud, negligent misrepresentation, unjust enrichment, breach of warranty, RICO violations, and civil conspiracy because plaintiff failed to adequately plead a failure in the product performance and therefore lacked damages); *In re Air Bag Prod. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La.1998) (dismissing claims because "plaintiffs have failed to advance any allegation of manifest injury or defect, both central tenets of their tort and implied warranty claims"); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 100 (S.D.N.Y. 1997) (dismissing class action claiming common law fraud, negligent misrepresentation, and breach of implied warranty regarding allegedly defective integrated child safety seats which had not malfunctioned because "[w]here, as here, a product performs satisfactorily and never exhibits the alleged defect, no cause of action lies."); *Walus v. Pfizer, Inc.*, 812 F. Supp. 41, 44 (D.N.J. 1993) (dismissing claims for negligence, strict liability, failure to warn, fraud, misrepresentation, and negligent and intentional infliction of emotional distress regarding allegedly defective heart valve which worked properly since implanted, because "a cause of action based on a claim that a normally functioning product might fail at some unknown time" is improper); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986) (dismissing class action alleging breach of warranty and common law fraud due to engines' tendency to mix oil and water in crank case, although this never caused the engine to malfunction in any way, failed to allege any damages and plaintiff never tried to sell car but instead asserted "the bald conclusion that its value in that market has decreased"); *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 171-74 (S.D. Miss. 1996) (dismissing plaintiffs claims of inherently defective detachable fiberglass roofs for failure to plead sufficient damages); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (no cause of action for defect which never manifests itself).

**James T. Irvin, III is a partner with Nelson Mullins Riley & Scarborough in their Columbia, South Carolina office practicing in the areas of commercial litigation and products liability defense. Peter T. Phillips is an associate with Nelson Mullins Riley & Scarborough in their Charleston, South Carolina office and also practices in the areas of commercial litigation and products liability defense.*

Slip and Fall
cont. from pg 13

his person or property arising from the known danger."). Accordingly, the plaintiff's claim in *Hackworth* failed as a matter of law.

Hackworth arguably gives traction to the contention that a retailer's or hospitality provider's liability is limited (or even eliminated) for slip and fall claims occurring at entrances on days with inclement weather. As a result, defendants fighting these slip and fall claims may be able to assert tenable arguments supporting pretrial dismissal, directed verdict at trial, or nuisance value out-of-court settlements. However, landowners (and their lawyers) should not treat *Hackworth* as an absolute "get out of jail free" card. Our law still holds that landowners are responsible for keeping their premises in reasonably safe condition for their invitees and there are judges who may not be so inclined to hold a defendant harmless when the evidence shows there were no efforts undertaken to safely maintain the entrance area. Commercial landowners should still continue to establish and implement protocols for managing inclement weather situations, such as conducting periodic mopping, installing "wet floor" signs in plain view, placing industry-standard mats on the floor, and keeping a close eye out for dangerous conditions and rectifying the same once identified. Evidence of such efforts, in addition to the holding in *Hackworth*, would conceivably give an entity defending an inclement weather slip and fall claim that much more strength to its position in the litigation of such a matter.

** Christian Stegmaier is a member of the Retail and Hospitality Liability Practice Group of Collins & Lacy, P.C., a Columbia-based defense litigation firm with a statewide practice. Christian welcomes your questions or comments regarding issues of liability in the retail and hospitality sector by either calling him at (803) 256-2660 or emailing him at cstegmaier@collinsandlacy.com. This material is intended to provide information on noteworthy legal issues and is not a substitute for legal advice.*

Order and Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
C/A No. 2:05-2916

Owners Insurance Company,Plaintiff,
vs.
Lang's Heating & Air Conditioning, Selective Insurance Company, Harleysville Insurance Company, and Federated Insurance Company,
Defendants.

I. BACKGROUND

This action is before the court on plaintiff Owners Insurance Company's ("Owners") request for partial summary judgment as to defendant Selective Insurance Company's ("Selective") obligations under a CGL policy issued to their mutual insured, Lang's Heating & Air Conditioning ("Lang"). In the underlying state action, homeowners filed a lengthy complaint against several subcontractors who worked on their house. Lang, one of the subcontractors, installed the HVAC system. Homeowners purchased the house around October 9, 1994, but subsequent inspections revealed a variety of latent defects, negligently performed work and property damage. The complaint generally alleges Lang's negligent workmanship permitted water infiltration, which has caused damage to other parts of the house.

On October 12, 2005, Owners filed a complaint in this court, naming Lang, Selective, Harleysville Insurance Company, and Federated Insurance Company, seeking a declaratory judgment as to Owners' obligation to defend and/or indemnify Lang in the underlying suit. Alternatively, Owners requests a determination of the obligations of Lang's other insurers (Selective, Harleysville and Federated). Selective has filed a counterclaim also seeking a determination of its obligations to defend and/or indemnify Lang in the state action. In the meantime, Owners has provided a defense for Lang in state court; Selective has not.

On January 30, 2006, Owners filed this motion for partial summary judgment, seeking a determination that Selective's duty to provide a defense is triggered. The Selective policy ran from October 7, 1994 to October 7, 1995. The Owners policy ran from April 1, 1993 to April 1, 1994. Harleysville has been dismissed from the suit.

II. STANDARD OF REVIEW

Summary judgment is appropriate when, after considering the full evidentiary record, there are no genuine issues of material fact. Fed. R. Civ. P. 56(c). Evidence should be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, a "mere scintilla" of evidence will not preclude summary judgment. The court's inquiry is "not whether there is literally no evidence, but whether there is any [evidence] upon which a jury could properly . . . find a verdict for the party" resisting summary judgment. *Id.* at 251.

III. DISCUSSION

Selective challenges Owners' motion on three grounds.

a. Standing

Selective contends Owners lacks standing to seek a determination of a co¬insurer's obligation to defend. Owners is not seeking reimbursement for the costs of the defense,[1] but rather, seeks a determination of Selective's obligation to defend. Owners contends Selective's duty to defend will be an issue in future discussions regarding Selective's duty to indemnify. Owners has a stake in the outcome of that latter determination because both policies could be triggered under the continuous trigger doctrine.[2]

As a practical matter, Selective is challenging the court's ability to resolve an issue Selective itself raises in its counterclaim. Selective's counterclaim seeks a determination of its obligation to defend. Owners' motion seeks the same determination. Since Owners' motion requests the same analysis as is sought in Selective's own counterclaim, Selective's standing objection is unavailing.[3]

b. Judicial Estoppel

Selective contends Owners is estopped from alleging Selective owes a duty to defend. Selective notes that both insurers' policies are nearly identical. While Owners has provided a defense for Lang, Owners' complaint argues its policy does not trigger a duty to defend or indemnify. Selective contends that it is inconsistent for Owners to deny its own obligations but argue Selective incurs those obligations. In reply, Owners concedes it has the duty to defend. With this concession, there is no inconsis-

Continued on page 18

tency between Owners' actions and argument.

Selective cannot satisfy the elements of judicial estoppel. "The application of judicial estoppel is controlled by federal law and is invoked at the court's discretion as the equities of the case demand." *Hansen v. North Trident Regional Hosp., Inc.*, 60 F. Supp. 2d. 523, 528 (D.S.C. 1999) (Norton, J.). The elements of judicial estoppel include:

> 1) The party to be estopped must be asserting a position that is factually incompatible with a position taken in a prior judicial or administrative proceeding; (2) the prior inconsistent position must have been accepted by the tribunal; and (3) the party to be estopped must have taken inconsistent positions intentionally for the purpose of gaining unfair advantage.

King v. Herbert J. Thomas Memorial Hosp., 159 F.3d 192, 196 (4th Cir. 1998). The second and third element cannot be met because Owners' prior position has not been accepted by a tribunal and there is no evidence that Owners has intentionally taken inconsistent positions to gain an unfair advantage. As such, this challenge is unpersuasive.

c. Duty to Defend

Finally, Selective contends it has no duty to defend because the claims against Lang's are not covered under the policy. As a general matter, the determination whether a liability insurance company is obligated to defend an action under the policy provisions is based on the allegations of the complaint. If the alleged facts in the complaint fail to bring the case within the policy coverage, the insurer is free of the obligation to defend. *First Fin. Ins. Co. v. Sea Island Sport Fishing Soc., Inc.*, 327 S.C. 12, 14, 490 S.E.2d 257, 258 (1997). However, "if the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318 (Ct. App. 1994). An insurer may not defend only covered claims; even if there is only one aspect of the claim that could possibly be covered, the insurer must defend the entire suit. *Id.* Selective argues at least one, if not more, exclusions apply to defeat coverage, and thus there is no possibility of coverage. Generally, Selective contends (1) Lang's claims are not occurrences because they are for faulty workmanship, (2) the claims against Lang are for Lang's own work product, and therefore do not amount to property damage as specified in the policy; and (3) the claims against Lang are actually for breach of contract, which is not covered.

Selective suggests that "if the court is inclined to resolve this issue by summary judgment, there exists material facts in controversy as to whether a covered claim exists." (Selective mot. in opp. at 10.) Discovery has not been initiated in this case. If there are material facts in dispute regarding coverage, then it is unlikely Selective can state with certainty that there is no possibility of coverage. As Owners notes, the fact that there is a dispute as to coverage demonstrates there is the possibility of coverage.[4]

Further, Selective's substantive arguments are unpersuasive. The underlying complaint alleges:

> 59. As a direct and proximate result of the failure of the defendant . . . Lang's Heating and Air Conditioning . . . , the plaintiffs have suffered and/or will suffer damages arising out of the need to remove the existing EIFS and the need to replace it with a new finishing, and/or siding, as well as the need to repair damaged wood, sheetrock and other damaged materials within the house plus any additional damages determined....
>
> 62 The warranty of workmanlike service was breached in that the residence has experienced leaking and water infiltration into the interior and underlying surfaces causing wood rot and other severe property damage.

Compl. ¶¶ 59, 62. Homeowners' negligence count incorporates paragraphs 59 and 62 and generally alleges the home was negligently designed and constructed. *See* compl. ¶¶ 66 - 78. Selective contends the underlying action is truly one in contract, not tort, and thus not covered by the policy. However, the facts of the state supreme court's latest decision in *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), refute this assertion. As in *L-J*, the underlying complaint in this action alleges damage resulting from faulty workmanship, and states claims for breach of contract, breach of warranty, and negligence.

Further, the claims against Lang's constitute an "occurrence" as defined by even the most restrictive interpretations of *L-J*. *L-J* considered "whether property damage to the work product alone, caused by faulty workmanship, constitutes an occurrence." *L-J*, 366 S.C. at 121, 621 S.E.2d at 34. The court noted that "a CGL policy may . . . provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, not in cases where faulty workmanship damages the work product alone." *Id.* at 123, 621 S.E.2d at 36. Other courts have questioned whether *L-J* permits an insured general contractor, responsible for an entire building, to claim coverage for damage to a structure caused by water intrusion resulting from its own faulty workmanship. *See Okatie Hotel Group, LLC v. Amerisure Ins. Co.,* No. 04-2212, 2006 WL 91577 (D.S.C. Jan. 13, 2006); *Pennsylvania Nat. Mut. Ins. Co. v. Ely Wall & Ceilings, Inc.*, No. 04-1547, 2006 WL 569589 (D.S.C. March 6, 2006). However, the faulty workmanship of a subcontractor resulting in damage to another part of the building (not worked on by the subcontractor) does amount to an "occurrence" under *L-J*. The homeowners allege Lang's faulty workmanship led to damage to property on which Lang's did not

perform work. *See* compl. ¶¶ 59 (damaged wood, sheetrock) and 62 (wood rot). As such, homeowners' allegations are consistent with the underlying complaint in *L-J*. The facts and holding of *L-J* belie Selective's contention that the homeowners' claims can never amount to an "occurrence."

True to its name, Selective advances the novel argument that carriers are free to "select" which claims to defend, notwithstanding *First Financial*, *Isle of Palms*, and over twenty-five years of state insurance law. Selective suggests that insurers' decisions would be tempered by the possibility that a court would ultimately find coverage, leaving the carrier liable for reimbursement of defense costs and possible tort claims and punitive damages. In actuality, an insurer taking this approach would incur little risk, since neither the co-insurer nor insured could seek reimbursement for defense costs. *See Sloan*, 269 S.C. at 186, 236 S.E.2d at 820. However, Selective's argument is unavailing. For almost thirty years courts of this state have held that the duty to defend and duty to indemnify are "separate and distinct" obligations. *Id.* (noting the "duty to defend exists regardless of the insurer's ultimate liability to the insured"). South Carolina law is clear on the insurer's obligation to defend when the underlying complaint creates the possibility of coverage. This court will not overturn decades of state insurance law at Selective's request.

IV. CONCLUSION

Viewing the evidence in the light most favorable to Selective, the court finds there is a possibility of coverage for the underlying claim. For the reasons stated above, it is therefore ORDERED that plaintiff's motion for partial summary judgment as to defendant Selective's obligation to defend Lang's in the underlying state court action is GRANTED.

AND IT IS SO ORDERED.

April 10, 2006

Charleston, South Carolina

Footnotes

1 *Sloan Construction Co. v. Central National Insurance Co.*, 269 S.C. 183, 236 S.E.2d 818 (1977) generally precludes an insurer from seeking contribution for the cost of defense from another insurer.

2 The continuous trigger doctrine provides that "coverage is triggered at the time of an injury-in-fact [whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent] and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage." *Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co.*, 326 S.C. 231, 237, 486 S.E.2d 89, 90 (1997).

3 Prior to the hearing, Lang's counsel emailed the court noting it was in favor of Owners' motion. At the hearing Selective stated it would concede the standing objection if Lang were to raise or join in the motion.

4 For thousands of years, western civilization has recognized that "nothing is impossible." Luke 1:37 (New International Version).

JUDGE PROFILE

Inside the Judge's Chambers: A Profile of Judge Kaye G. Hearn

by Tanya Gee*

In December of 1976, Kaye Gorenflo, one of approximately fifty female law students in her class at the University of South Carolina, received a letter that would change her life forever. It was from Judge Julius B. Ness of the South Carolina Supreme Court, inviting her to interview for his law clerk position. Although Kaye had already accepted a permanent position with the law firm for which she had clerked during the school year, she was flattered, and scheduled an interview. Kaye's ego, which she admits expanded considerably after receiving the letter, deflated as soon as she walked into Judge Ness's chambers and he announced: "I have a lot of problems with you … for one thing, you're a girl." Unsure how to respond and unable to deny the obvious, Kaye retorted: "Well, you're going to have to talk to God about that." Later, Judge Ness claimed that it was this gutsy reply that won him over. He offered Kaye the job, and she accepted – a decision that set into motion her own journey to the bench.

That girl, who Judge Ness initially "had a lot of problems with," is now Chief Judge Kaye G. Hearn of the South Carolina Court of Appeals. "Thank God I went to that interview!" she exclaimed, recalling her experiences with Judge Ness. "Going to law school taught me the law, but working for Judge Ness is what made me a lawyer." By including her in his decision-making process and being genuinely interested in her input on issues, Judge Ness helped her believe she too might have what it takes to become a judge.

After a two-year clerkship, Judge Hearn, who was still Kaye Gorenflo at the time, went to work for James P. Stevens, a trial lawyer in Loris, South Carolina. Shortly thereafter, she married George Hearn, a classmate of hers from law school. James Stevens hired George as well, and eventually the firm became known as Stevens, Stevens, Thomas, Hearn & Hearn. That first Hearn in the firm's name, as the judge likes to remind her husband, referred to her. While in private practice, Judge Hearn tried numerous types of cases, but was particularly drawn to family law. In 1986, she decided to run for the family court bench, where she proudly served for nine years. Since 1995, she has been on the South Carolina Court of Appeals, and in 1999, she was elected chief judge. Most recently, she was elected president of the Council of Chief Judges, a national forum through which chief judges of intermediate state courts can collaborate on issues such as improving the operation and efficiency of the appellate process.

Talking with the judge, it is obvious that she truly loves discussing the law. She readily describes herself as "that kind of geek" who thinks reading cases is interesting and discussing issues is fun. She sees the law as a means to make the world a fairer and hence better place. A history major, Judge Hearn points out that it was lawyers, such as John Adams, Abraham Lincoln, Thurgood Marshall, and Clarence Darrow, who helped shape the world we live in today.

As passionate as she feels about the law, the judge's first true love is family. She and George have been married for twenty-six years. "Through all those years," Judge Hearn said of her husband, "he has supported my career choices and has been a true partner to me. But the best part about George is that he makes me laugh." The couple has one daughter, Kathleen, who is a senior at Kent School in Connecticut, and next year, she will attend Wofford College. When talking about Kathleen, Judge Hearn's whole body seemed to smile. "I once heard someone described as having been 'born on a sunny day.' That's Kathleen." Asked what bit of advice she might have for parents, Judge Hearn offered this: "Never discourage; always encourage, because that is what my parents did for me.They always believed that I could do and be anything I wanted. Even though there were no lawyers in my family and very few female lawyers at all in the early seventies, my parents were totally supportive when I announced to them that I wanted to go to law school."She chuckled then, remembering how she tried to instill the same attitude in Kathleen:

One day when Kathleen was about three years old, the judge and George were giving her a bath. The phone rang.Judge Hearn answered it and told George that it was one of his clients. George took the call in the other room, and Kathleen asked, "What's a client, Mommy?" The judge explained to her very matter-of-factly: "Well, Kathleen, you know that Daddy is a lawyer, and that means he helps people. The people that he helps are clients."Then, Judge Hearn pointed out that Dottie Jones and Lisa Kinon, two women Kathleen knew well, were also lawyers. Kathleen looked perplexed and said, "But Mommy, girls can't be lawyers!"And, just when she was about to receive a lecture on how girls can be anything they want to be, Kathleen added: "Girls have to be JUDGES!" Beaming, Judge Hearn told Kathleen she made a good point. If only Judge Ness would have been there to hear it!

** Tanya Gee is clerk to Chief Judge Hearn.*

Case Notes

State

***Brandt v. Gooding*, Op. No. 26135 (S.C. April 10, 2006)**

In a legal malpractice action arising out of a land transaction in Allendale County, Donald Brandt sued for breach of fiduciary duty, negligence, and civil conspiracy. During discovery, Brandt produced a letter which was purported to have been sent by one of the parties to the underlying land transaction. Brandt's malpractice expert, Professor John Freeman, relied on the letter in forming his opinions that Brandt's former lawyer had committed malpractice.

The letter, if authentic, imputed knowledge to Brandt's attorney of a conflict of interest related to her representation of Brandt in the land transaction. The defendant attorney claimed that the document was fraudulent and requested a hearing to determine the authenticity of the letter. Her handwriting expert, Marvin Dawson, testified that the letter was printed on paper that was not developed until five years after the letter was allegedly sent. Further, Dawson found that the letter did not contain a watermark that should have appeared on the paper.

The trial court found Brandt had introduced a fraudulent document to a court proceeding and sanctioned Brandt by dismissing the complaint, granting summary judgment, holding Brandt in criminal contempt, and awarding attorney's fees.

The South Carolina Supreme Court affirmed the trial court, holding that the trial court had authority to hold a contempt proceeding even though a prior judge had ruled that a contempt hearing should be delayed. The Supreme Court also held that summary judgment was appropriate because Brandt had not suffered any injury as a result of the alleged malpractice. The Supreme Court affirmed the sanction of dismissal for civil contempt because dismissal of the complaint is a proper sanction against a complainant who submits fraudulent documents to the court. The Supreme Court affirmed sanction of criminal contempt against Brandt because of the introduction of the fraudulent letter. The Supreme Court also affirmed the trial court's issuance of a restraining order against Brandt to prevent Brandt from harassing his former attorney and other parties involved in the litigation because Brandt had testified that he would spend ten years and a million dollars to get justice against the parties and had used threatening conduct toward the parties.

Finally, the Supreme Court upheld the award of attorney's fees to the defendant attorney, holding that an award of attorney's fees for civil contempt was appropriate because the party used unnecessary litigation related to the letter.

***Collins Entertainment Corp., v. Coats & Coats Rental Amusement*, Op. No. 26136 (S.C. April 10, 2006)**

Collins Entertainment Corporation ("Collins") sued Coats & Coats Rental Amusement and American Bingo after American purchased the assets of two bingo halls. It had a six-year lease with Collins to lease video poker machines. The lease required that any purchaser of the premises assumed the lease. Collins alleged American engaged in unfair trade practices, civil conspiracy and intentional interference with contract. In trial before the master in equity, the master awarded Collins actual damages of $157,449.66 and punitive damages of $1,569,013.00 on Collins' claim for intentional interference with contract.

The Court of Appeals affirmed that decision. *Collins Ent. Corp. v. Coats & Coats Rental Amuse.*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003). The Supreme Court, per Justices Waller and Moore with Justices Pleicones concurring separately, affirmed the Court of Appeals, holding that a "lost volume seller" allows a seller with excess capacity who would, in any event, have made multiple sales, to recover for the lost volume of sales in order to place it in the same position it would have been in had the buyer not repudiated. The Court found tacit approval of the lost volume seller doctrine in § 36-2A-528(2) of the South Carolina Code.

The Supreme Court also favorably cited Professor Robert J. Harris' tests to determine whether a party is entitled to recovery as a "lost volume seller": (1) the person who bought a resold entity would have been solicited by the plaintiff had there been no breach or resale; (2) the solicitation would have been successful; and (3) the plaintiff would have performed that additional contract.

In a dissent authored by Justice Toal and concurred in by Justice Burnett, Justice Toal indicated that, in her opinion, damages to a lost volume seller should not be available in a tort action for interference with contract, but should apply to breach of contract cases only.

Continued on page 22

***Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, Op. No. 4101 (S.C. App. April 10, 2006)**

Palmetto Dunes Resort, Inc. developed Palmetto Dunes, a resort development including various single- and multi-family residences, commercial establishments, and resort facilities. Between 1968 and 1972, Palmetto Dunes Resort filed and recorded various covenants related to planned single-family and multi-family developments throughout Palmetto Dunes. In 1972, Palmetto Dunes Resort recorded a "Declaration of Covenants" that set forth rights, conditions and restrictions concerning "all multi-family dwelling areas within Palmetto Dunes," including "lands conveyed in the future in Palmetto Dunes." These covenants imposed restrictions throughout Palmetto Dunes including covenants related to oceanfront property, golf courses, etc. Under the 1972 covenants, Palmetto Dunes Resort agreed to maintain community areas in the resort only to the extent maintenance could be provided with proceeds or assessed against individual owners.

In 1974, Queen's Grant II Horizontal Property Regime was created and became subject to the Declaration of Covenants. Queen's Grant was subject to the assessments under the 1972 covenants to fund Palmetto Dunes Resorts' maintenance obligations throughout the resort. Subsequently, Greenwood Development acquired Palmetto Dunes Resort and, in 1981, amended the covenants and increased the annual maintenance assessment.

In December of 2000, Queen's Grant paid for a road repair and sought payment for the repair from Greenwood Development, which was refused. Queen's Grant brought an action for breach of contract seeking to recover monies paid for road repair and "expanded" the action to challenge Greenwood Development's ability to amend the covenants and increase the annual maintenance assessments. The trial court granted Greenwood Development's motion for summary judgment regarding the maintenance assessment, but denied its motion with regard to the road repair. The trial court based its ruling on doctrines of estoppel and laches and held that the assessment under the later covenants was valid as a matter of law.

The Court of Appeals affirmed the result in part, reversed in part, dismissed Greenwood Development's interlocutory appeal for denial and summary judgment related to the road repair, and remanded. The Court of Appeals held that the developer may reserve to itself, in its sole discretion, the right to amend restrictive covenants running with the land or to impose new restrictive covenants running with the land, provided that: (1) the right to amend the covenants or impose new covenants is unambiguously set forth in the original declaration of covenants; (2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.

Based on these principles, the Court of Appeals affirmed summary judgment in favor of Greenwood Development with the exception of five Queen's Grant units for which the Court held Greenwood Development had failed to strictly comply with the method of notice it prescribed in the later covenant.

***Capco of Summerville, Inc. v. J.FL Gayle Construction Company, Inc.*, Op. No. 26118 (S.C. Feb. 27, 2006).**

On May 19, 1996, Pauline Conner was involved in an automobile accident with James Hogan in the parking lot of Dixie Plaza Shopping Center in Colleton County. Conner entered into a settlement agreement with Hogan for $5,000. Subsequently, in August 1998, Conner and her husband filed lawsuits against the owner (Capco of Summerville, Inc.) and general contractor who constructed Dixie Plaza (J.H. Gayle Construction Company, Inc.), alleging negligent design and construction of the parking lot. On June 13, 2003, Capco settled with the Connors for $500,000, whereby both Capco and Gayle were released from any liability. On September 22, 2003, Capco filed a contribution action against Gayle. Gayle moved for summary judgment, contending that Capco's claim was barred by the thirteen-year statute of repose set forth in S.C. Code Ann. § 15- 3-640(6) (subsequently amended to only eight years in 2005), as the action was commenced almost seventeen years after the completion of Dixie Plaza on November 1, 1986. Capco responded that the thirteen-year statute of repose had been implicitly repealed by the Legislature's adoption of the one-year limitation period set forth in S.C. Code. Ann. § 15-38-40(D) of the Uniform Contribution Among Tortfeasors Act. The trial court disagreed, holding that § 15-3-640(6) barred the contribution action.

The South Carolina Supreme Court affirmed, although the Court noted being deeply troubled by the result. The Court rejected Capco's contention that § 15-3-640(6) and § 15-38-40(D) are irreconcilably conflicting. Noting that repeal by implication is generally disfavored, the Court emphasized the difference between a statute of limitations and one of repose. While a statute of limitations is a procedural device operating as a defense to limit the remedy available from an existing cause of action, a statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. As § 15-3-640(6) is a statute of repose setting forth the outside time period in which an action must be brought, while § 15-38-40(D) is a

statute of limitations governing contribution actions, no irreconcilable conflict existed. The Court reiterated its misgivings over the "harsh" result which seems to run contrary to the purposes of the Contribution Act, but noted that it is not at liberty to rewrite the statutes, and any amendment must come from the Legislature.

***Earl v. HTHAssociates, Inc., et al.*, Op. No. 4086 (S.C Ct. App. Feb. 27, 2006).**

This case addressed the question of whether workers' compensation insurance existed for HTH Associates, Inc. under an NA policy which was believed to have been canceled by NA seven years earlier. In 1992, HTH purchased a one-year workers' compensation insurance policy from NA. On April 5, 1992, pursuant to regulatory requirements, NA electronically submitted the policy (number C35274522) to the National Council on Compensation Insurance ("NCCI"). NA then mailed a hard copy of the policy to NCCI, but mistakenly identified the policy as number W0CC35274522, the only difference being the prefix "WOC".

In 1993, HTH learned it was not required to provide workers' compensation coverage and decided not to renew the NA policy. However, HTH failed to submit a Form 38 Notice of Withdrawal, per S.C. Code Ann. Regs. 67-404 (1990). NA subsequently filed a notice of termination directly with NCCI, but canceled only policy number C35274522. Due to the mistaken identification of the policy in the hard copy submission, the W0CC35274522 policy was therefore still in effect according to the NCCI computer system.

In 2000, Curtis Earl, an employee of HTH, was in a work-related automobile accident while setting up new stores for Advance Auto Parts across the southeast. Gary Smith, the Director of Coverage and Compliance at the Workers' Compensation Commission, investigated and ultimately concluded HTH had coverage under the policy identified in the NCCI records as W0CC35274522. Thereafter, Earl filed a claim against HTH, Advance Auto Parts (as statutory employer), and the South Carolina Uninsured Employers' Fund. The single commissioner found NA failed to properly cancel policy WOCC35274522, and therefore, it was still in effect. The full commission affirmed, as did the circuit court.

The South Carolina Court of Appeals affirmed, rejecting NA's contention that it properly canceled HTH' s sole policy. Noting that workers' compensation statutes and regulations are to be construed liberally in favor of coverage, and that the decision of an administrative agency interpreting its own regulations is to be given great deference, the court found that NA failed to notify NCCI of the cancellation of the "second" policy (number WOCC3 5274522). If not for the clerical error by NA, the Commission would have filed noncompliance proceedings against HTH for failure to file a Form 38. Thus, since NA created the problem by identifying the same policy with two different numbers, the Court held that the most equitable result would be to charge the party responsible for the mistake, NA.

***Wilson et al. v. Style Crest Products, Inc., et al.*, Op. No. 26122 (S.C. March 6, 2006).**

Plaintiffs, on behalf of a class, alleged that various manufacturers were liable for the failure of a soil anchor tie down system to adequately secure mobile homes in high winds, in violation of applicable United States Department of Housing and Urban Development and the South Carolina Manufactured Housing Board codes. Plaintiffs sought to recover the cost of the anchor systems (approximately $1,000-1,200 each), the cost to upgrade the anchor system to one which is effective, or the cost of a permanent foundation (approximately $2,500-$7,000 each). In two separate orders, the circuit court granted Defendants' motion for summary judgment as to all causes of action on the ground that the Plaintiffs did not suffer any actual damages. Plaintiffs appealed only as to their causes of action for (1) breach of express warranty, (2) breach of implied warranties of workmanlike service and merchantability, and (3) fraudulent concealment.

Recognizing the plaintiffs' admission that they have not yet suffered any personal injuries or physical damage to their homes, the South Carolina Supreme Court addressed whether the plaintiffs must prove an actual injury to person or property to bring their warranty and fraudulent concealment claims. While conceding that law exists on both sides of the issue, the Court sided with what it believed was the majority rule on the so- called "no-injury approach to product litigation." Noting that the plaintiffs "have received what they bargained for - an anchor system which has been effective in high winds," the court affirmed summary judgment as to the warranty claims. Furthermore, without an injury or a defect, there could be no diminution in value to support the plaintiffs' fraudulent concealment claim. Thus, the Court affirmed summary judgment for the Defendants.

Justice Pleicones concurred in part and dissented in part, albeit for different reasoning. He dissented from the majority's decision with respect to Plaintiffs' claims for breach of the implied warranty of merchantability and fraudulent concealment. In Pleicones' view, proof of actual injury was not required.

***Farnsworth v. Davis Heating & Air Conditioning, Inc.*, No. 26120 (S.C. March 6, 2006).**

Farnsworth brought an action against Davis Heating & Air Conditioning, Inc. ("Davis") for breach

Continued on page 24

of contract and negligence. During discovery, Farnsworth's attorney sent a letter to Davis' attorney indicating that Farnsworth would settle for payment of $22,000. Davis' attorney accepted the offer by signing the letter. Soon thereafter, Farnsworth changed her mind, decided that she wanted to go to trial, and notified Davis that she was rescinding the agreement. Davis filed a motion to compel Farnsworth to comply with the agreement. The circuit court granted the motion, holding that Rule 43(k), SCRCP, governed the enforcement of agreement, and that the requirements of the rule had been satisfied.

The South Carolina Supreme Court reversed the circuit court's decision, and refused to enforce the written settlement agreement because it failed to comply with Rule 43(k). According to the Rule, no agreement between counsel shall be binding unless one of the following conditions is met: (1) the agreement is reduced to the form of a consent order signed by counsel and entered in the record; (2) the agreement is reduced to the form of a written stipulation signed by counsel and entered in the record; or (3) the agreement is made in open court and noted upon the record.

Since Farnsworth rescinded the agreement before Davis filed the motion to compel, there was no longer an agreement once Davis received notice of rescission. Thus, the circuit court erroneously ordered Farnsworth to comply with an agreement that did not exist. The Court also rejected Davis' argument on appeal that Rule 43(k), SCRCP, did not apply to a written settlement agreement that the parties admit was duly executed.

Federal

***Convey Compliance Sys., Inc. v. 1099 Pro, Inc.*, Op. No. 04-2335 (4th Cir. March 30, 2006).**

Convey Compliance Systems, Inc. and 1099 Pro, Inc. were parties to a settlement agreement relating to prior litigation between them. The prior litigation occurred in the State of Minnesota. The settlement documents executed by Convey and 1099 Pro to end that litigation contained mutual general releases of all claims between them, "known or unknown, arising out of any actions or events occurring in whole or part prior to or concurrent with the date" of the settlement. About three months prior to the settlement, however, an employee of Convey registered several domain names, including www.1099professionals.com. Those involved with the settlement negotiations were unaware of the registration of this domain name. Convey then began use of the domain name after execution of the settlement documents. 1099 Pro sued Convey in the World Intellectual Property Organization seeking an order compelling Convey to transfer the domain name and all rights to it to 1099 Pro. Convey defaulted in the WIPO action and was ordered to transfer the domain name to 1099 Pro. Convey then sued for breach of the settlement agreement.

Applying Minnesota law, the Fourth Circuit upheld a jury verdict in favor of Convey. Under Minnesota law, a release expressly covering unknown injuries may not be binding if such unknown injuries were not within the contemplation of the parties when the settlement was reached. In determining this intent, courts focus on five factors: (1) the language of the release; (2) the presence of legal counsel during settlement and execution; (3) the existence of fraud; (4) wrongful concealment of facts; and (5) duress. Reviewing these factors, the Court concluded that the intent of the parties was indeed to preclude any and all further proceedings between the parties based on any conduct that occurred prior to the settlement. This conclusion was supported by the fact that when Convey attempted to narrow the release language to commit resolution of any "unknown" claims to arbitration, 1099 Pro. In refusing to narrow the scope of the release, 1099 Pro sent a letter to Convey arguing in favor of inclusion of the broad language because it had a "very strong desire not to have future disputes." The jury verdict was upheld and attorneys fees were awarded to Convey based on the attorneys fee provision of the settlement documents in connection with any action necessitated by the other parties breach.

***Chawla v. Transamerica Occidental Life Ins. Co.*, Op. No. 05-1160 (4th Cir. March 7, 2006).**

Plaintiff, trustee for a trust holding a life insurance policy insuring the life of Harald Giesinger, appealed the district court's decision that Transamerica properly rescinded the life insurance policy as a result of misrepresentations made by Mr. Giesinger in his application for the relevant policy. Only months before applying for the relevant policy, Mr. Giesinger was hospitalized as a result of a meningioma, a type of brain tumor. His medical records in Austria, where he was hospitalized and where he spent several months a year, reflected that surgery was performed during his stay. Those records also indicated that Mr. Giesinger suffered from chronic alcohol abuse. When applying for the relevant insurance policy, however, Mr. Giesinger answered no to questions regarding whether he had been hospitalized in the past five years, whether he had any surgical operation in the past five years, and whether he received any treatment for alcoholism. Despite these negative answers, Transamerica did contain in its files, from previously issued life insurance policies on the Mr. Giesinger's life, that he did suffer from a meningioma and drank a bottle of wine daily. Both the district court and the Fourth Circuit, however, concluded that even having possession of that information did

not cure the most significant misrepresentation related to Mr. Giesinger's hospitalization and surgery. Had Mr. Giesinger honestly responded to those questions on the application, the medical records related to his hospitalization would have disclosed to the insurer a total of three hospitalizations, two surgeries and that Mr. Giesinger's alcohol use likely exceeded the bottle of wine a day he represented as his consumption. Based on those misrepresentations, Transamerica was entitled to rescind the policy.

***Patten v. Signator Ins. Agency, Inc., et al.*, Op. No. 05-1148 (4th Cir. March 13, 2006).**

Plaintiff Ralph Patten sought to vacate an arbitration decision, in which decision the arbitrator concluded that Patten's demand was subject to a one-year limitations period and thus was, having not been made until 14 months after the claim arose, time barred. Patten was employed as an agent for John Hancock Mutual Life Insurance Company. Upon entering that employment, he signed an agreement with Hancock and its affiliates, "Mutual Agreement to Arbitrate Claims." That agreement required claims arising between the parties to be resolved by mandatory arbitration. Signator Insurance Agency was an affiliate of Hancock. Thus, it was also subject to the mandatory arbitration agreement between Patten and Hancock. After the initial agreement was entered into, however, Signator and Patten entered into a second agreement in which they again agreed that all claims between them would be resolved by arbitration. This second agreement was silent as to timing or manner of any arbitration demand, and it expressly provided that it "supersedes all previous agreements, oral or written, between the parties hereto regarding the subject matter hereof."

On December 13, 2000, Patten was terminated, such termination to be effective January 2, 2001. Patten sent a letter to Signator on August 2, 2001, advising them he was wrongfully terminated and intended to file a lawsuit. Signator responded by denying Patten's allegations. The parties entered into unsuccessful settlement negotiations. On March 4, 2002, Patten sent a demand for arbitration. Signator and Hancock refused to arbitrate claiming the demand was untimely. Patten filed in district court to compel the arbitration. The district court entered an order compelling arbitration based on the original agreement, finding it unnecessary to address Patten's reliance on the later agreement with Signator. The district court further stated that all other questions about arbitration, including the timeliness of any demand, were to be decided by the arbitrator. The arbitrator decided that the demand was untimely, based on an implied one-year time limit deriving from the original agreement to arbitrate, and thus the claims were time barred. Patten returned to the district court seeking an order vacating that decision. The district court refused to vacate the order. The Fourth Circuit, however, disagreed with the lower court and determined that the second arbitration agreement between Patten and Signator controlled and it contained no time limitation. Indeed, it expressly superseded any prior arbitration agreements, including the original agreement that contained the time limit. Thus, the arbitrator's decision was in contravention of the unambiguous terms of the governing arbitration agreement and, even given the great deference provided to such awards upon review, must be vacated. Judge Luttig dissented from this decision.

ASBESTOS/SILICA
South Carolina
SC SB 1038: The Asbestos and Silica Victims Protection Act of 2006.

- An Act to amend title *44* of the 1976 code by adding chapter 135, to provide that, except for claims based on mesothelioma, no person may bring or maintain an asbestos or silica claim without first making a prima facie showing that a qualified physician has diagnosed the person with an asbestos- or silica-related disease based on the physician's analysis of a detailed occupational and exposure history of the person and an analysis of the person's medical history; and for related purposes.
- 04/06/2006 - Introduced to House; referred to Judiciary Committee.

Verdict Reports

Lori and Chad Hosmer v. Charles D. Dean

Court:	Dorchester County, Circuit Court
Case Number:	C/A No. 03-CP-18-1302
Type of Action:	Professional Negligence – Medical Malpractice
Injuries alleged:	Loss of 8 teeth
Tried before:	Jury
Judge:	The Honorable James C. Williams, Jr.
Verdict:	$0
Date of verdict:	October 21, 2005
Demand:	$500,000
Highest offer:	Parties were never able to have meaningful settlement discussions
Helpful experts:	Lynn Thompkins, DDS (Georgetown)
Defense Attorneys:	Robert H. Hood, Jr. James B. Hood

Plaintiff alleged that Dr. Dean deviated from the standard of care in his care and treatment. Specifically they argued that the use of an expansion device on 3 different occasions in an adult with a fused pallet was below the standard of care. Testimony was presented from the plaintiff's treating physicians and other experts that established that the use of an expansion device was not a deviation from the standard of care. Also presented was evidence that the plaintiff failed to follow the recommended course of treatment of her treating physicians after she left the care of the defendant and that it was this failure by the plaintiff that ultimately lead to the loss of the plaintiff's teeth.

Kimberly Jones, as Personal Representative of the Estate of Pamela A. Jones v. Trident Medical Center, LLC d/b/a Trident Medical Center

Court:	Charleston County, Court of Common Pleas
Case Number:	2004-CP-10-3163
Type of Action:	Medical Malpractice
Injuries alleged:	Second and third degree burns to face, head, neck and shoulders
Tried before:	Jury
Judge:	The Honorable R. Markley Dennis, Jr.
Verdict:	Defense verdict ($0)
Date of verdict:	May 3, 2006
Demand:	$500,000 and punitive damages
Highest offer:	Settlement discussions were unsuccessful
Helpful experts:	Seymour L. Halleck, M.D. of Chapel Hill, NC; Samuel Rosen, M.D. of Charleston, SC; Elizabeth Bivens, RN of Charleston, SC
Defense Attorneys:	Molly H. Craig Frederick F. Fisher Erika V. Harrison

Plaintiff alleged the nursing staff of the defendant hospital deviated from the standard of care in the care and treatment of the decedent which caused her to suffer severe burns to her face, head, neck and shoulders. Decedent was voluntarily admitted to hospital's behavioral health unit complaining of panic attack, presenting with a history of BPAD. Although admitting nurses complied with the applicable practices and policies, decedent ignited her hair and hospital gown while attempting to light a cigarette in her patient room. Subsequent death was unrelated to incident in question.

Pamela Swanson v. Brian G. Widenhouse, M.D. and Palmetto Plastic Surgery, PA

Court:	US District Court, South Carolina
Case Number:	2-03-3938-23
Type of Action:	Professional Negligence/ Medical Malpractice
Injuries Alleged:	Post-operative scarring following breast augmentation
Tried Before:	Jury
Judge:	The Honorable Patrick Michael Duffy
Verdict:	$0.00 (for the defense)
Date of Verdict:	February 8, 2006
Defense Attorneys:	Todd W. Smyth Neil D. Thompson

The plaintiff alleged the defendant plastic surgeon was negligent in failing to obtain the proper informed

consent and failing to properly perform breast augmentation. The negligence was alleged to have caused post-operative, hypertrophic scarring. The plaintiff also suffered from a capsular contracture that caused one of the implants to migrate from its original position. The defense established that the procedure was performed according to the standard of care and that the complications suffered by the plaintiff were well known to be a risk of the procedure of which the plaintiff was made aware. The court directed a verdict in favor of defendants on the claim of negligence in connection with obtaining the plaintiff's informed consent. A jury returned a verdict in favor of defendants on the remaining claim associated with the negligent performance of the surgery. The district court judge denied the plaintiff's post-trial motions for a new trial and for j.n.o.v. The plaintiff has appealed.

Katarina Laner v. Michael J. Shereff, M.D. and Orthopaedic Specialists of Charleston, P.A.

Court:	Charleston County, Common Pleas
Case Number:	04-CP-10-1201
Type of Action:	Profession Negligence/ Medical Malpractice
Injuries Alleged:	Infection in the left foot and physical deformity to the right foot
Tried Before:	Jury
Judge:	The Honorable Diedra Jefferson
Verdict:	$0.00 (for defendants)
Date of Verdict:	April 6, 2006
Helpful Experts:	Angus McBride, M.D. (Birmingham, AL) Robert Bowles, M.D. (Charleston, SC)
Defense Attorneys:	Molly H. Craig Chilton Grace Simmons

Plaintiff alleged that the defendants deviated from the standard of care in the care and treatment of the plaintiff, causing an infection in her left foot and a deformity to her right foot. The defendant's treated the plaintiff for hallux valgus for which surgery on both feet was medically necessary and performed. Plaintiff developed post operative infections and complications which were known potential complications of the surgical procedure. Plaintiff later developed a condition known as hallux varus which required subsequent surgeries.

DRI Update

by John S. Wilkerson, III

This spring has been filled with important DRI activities. In March, Aimee Hiers and I attended the annual meeting of State Representatives and Executive Directors in Chicago. This meeting not only provided many opportunities to share ideas with colleagues from around the country, but also showcased the many, many services, programs and initiatives that set DRI apart as "The Voice of the Defense Bar."

The promotion of judicial independence is an important priority among defense bar leaders nationwide and DRI is on the forefront of that initiative. Judicial independence will be a featured topic at this year's judicial symposium presented by the National Foundation for Judicial Excellence. More than 150 appellate court judges have signed up (several on a waiting list) from 43 states (including South Carolina) to attend. DRI has also established a Judicial Task Force, chaired by DRI board member, John Trimble. This group has been formed to research and identify issues that threaten to disrupt the independence of the judiciary and to develop recommendations of what states can do to address issues and problems occurring in their jurisdiction. This is primarily a state and local issue and the white paper to be published soon by this committee will arm local defense leaders with effective tools to respond to unwarranted attacks on judges, promote fair judicial merit selection, lobby for increased funding for judicial salaries, and other issues that threaten the independence of our judiciary. This is an initiative we should all get behind and support.

In April, defense bar leaders from South Carolina, North Carolina, Virginia, Maryland and the District of Columbia gathered in Greensboro for the DRI Mid-Atlantic Regional meeting. In addition to social and networking opportunities, Chip Delano, our Regional Director, orchestrated a very interesting and informative program. Richard Boyette, DRI Immediate Past President, was in attendance as well as several South Carolina leaders. Long range planning was prominent on the program, and our own Jay Courie along with Richard Bennett from North Carolina led that discussion. The current and past leadership of the SCDTAA is to be commended for setting South Carolina well ahead of the curve in meaningful long range planning initiatives Everyone was very interested in Jay's perspective on the successes we have enjoyed in South Carolina on numerous fronts. Moose Phillips also attended and reported on South Carolina activities this year, and again, the leadership of our organization has taken the lead on important member services and programs. The trial academy is a shining example of these accomplishments.

Next on the agenda is the DRI annual meeting, being held this year in San Francisco, October 11-15. Registration forms and hotel information are available on the DRI website (www.dri.org). Featured speakers at this year's meeting include Pat Buchanan, Donna Brazile and our own Alex Sanders. You also won't want to miss the Thursday night event planned at AT&T Park (so long as the Giants are not still alive in the playoffs). Attendees will have full access to the field, dugouts, and other areas of this fabulous ballpark--a special experience for all, particularly for you baseball park junkies. I hope to see you there!!

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

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