



THE DEFENSE LINE

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THE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

NO. 1

Legislative Report



By Carl Epps

Tort reform continues to be the hot item on the agenda for this year's session. The physicians' Tort Reform Bill has been introduced in both Chambers and is in the Committee. The medical community is doing a good job of presenting their problems to the public, as is evidenced by what you have seen on television and in your local newspapers. We have offered our endorsement with the exception of the provision limiting contingency fees.

The physicians' initially planned to introduce a broad based tort reform bill encompassing civil actions of any description. Prior to the start of the session, they narrowed the bill from one of general tort reform to a professional liability package. After further deliberation, they again narrowed the bill to its present status encompassing only "Health Care Providers" as defined in the bill. The Bill was introduced approximately three weeks ago and is expected to be reported out of Committee by middle to late March. The chances of the bill passing in some form appear favorable according to the reports we are receiving. We have a broad based tort reform bill of our own and are currently lining up support. The final draft of

the bill was presented to the Executive Committee at the February 21, 1986 meeting. Ed Poliakoff, Costal Pleicones and Thom Salane have been helpful to us in drafting the bill and lining up support. Gene Allen has also been intimately involved with the bill and has maintained good contact with the SCMA.

We expect several other pieces of significant legislation to be pushed in other areas of interest, such as workers' compensation retaliatory firing and Governmental Tort Claims. Public hearings are being held around the state by Senator Isadore E. Lourie's Senate committee, overseeing worker's compensation laws and the topics have typically included economic impact on injured workers and vocational and retaliatory firings. Earl Ellis serves on the Joint Legislative Worker's Compensation Study and Advisory Committee as our representative and will assist in keeping abreast of meaningful legislation introduced in that field. Some form of a Governmental Tort Claim's Act should pass this session. It appears that the cap on damages will either be \$100,000/\$300,000 or \$250,000/\$500,000.

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President's Letter

T. Eugene Allen, III

The 1986 Session of the South Carolina General Assembly has begun. Much attention has been focused on the legislation introduced through efforts of the South Carolina Medical Association. This "medical malpractice reform" bill seeks a number of changes which, in general, we as defense attorneys endorse - including limitations on punitive damages and allowing testimony regarding recovery from collateral sources. Unfortunately, the proposed legislation only applies to health care professionals. Accordingly, your Executive Committee has determined that our Association will not take any position on the legislation.

Your Executive Committee, however, has authorized the preparation of a tort reform bill by our Association. It is our intention to seek support for this legislation from other business and professional groups and to introduce this bill during this Session. It is our belief that the recent discussions regarding medical malpractice and the "insurance crisis" have highlighted the need for reform in areas of our civil justice system in which the pendulum has swung too far in favor of the plaintiffs. You will be receiving more information regarding our efforts as they progress.

In the last issue of the newsletter, each member received an updated copy of our expert witness file. Any member can obtain a copy of any transcript and/or resume in the file by contacting our Executive Director's office. The only charge to you is the copying expense. Although this file has grown dramatically during the past year, there are still many depositions and trial transcripts in your ended and active files which should be in our expert witness file. Please cooperate in this mutual effort by sending those items to our Executive Director's office.

Plans are progressing for both our summer joint meeting with the Claims Managers and our Annual meeting at Sea Island. Mark your calendar now for both meetings as they promise to be the best ever. Many of us in the defense bar see more of our colleagues on the plaintiffs' side of the bar than we see fellow defense lawyers. These two meetings are the best opportunities to renew friendships with your fellow defense attorneys so make your plans now to attend.

Ten Years Ago

As our Association began in 1976, JACKSON L. BARWICK, JR., retiring Secretary-Treasurer, reported bank balance of \$1,369.81. C. DEXTER POWERS, President, took over the helm from JIM ALFORD and we began our first experience with an Association Manager. Our 1975 Annual Report was published in memory of SAMUEL J. CORBIN, Esquire, who passed away in May of 1975.

The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 252-5646.

Recent Decision Case

Wrongful Discharge Employee Fails Urine Test

Satterfield v. Lockheed Missles and Space Co. Inc. 617 F. Supp 1359 (D.C.S.C. & 1985). Plaintiff was discharged from employment by Defendant after failing a urine test for marijuana use. Plaintiff seeks recovery and for causes of action: (1) wrongful termination; (2) breach of covenant of good faith and fair dealing; (3) intentional inflictions of emotional distress, and (4) invasion of privacy. Defendant moved for summary judgement, which was granted in a long opinion denying each of Plaintiff's claims.

First, Plaintiff's claim for damages due to wrongful termination, supported solely by a "hire notice" and the Employee Benefit manual fails because there was no written employment contract. The Court found the Plaintiff's employment to be terminable at the will of either party. The court states that an employment contract terminable at will may be terminated by either party, at any time, for any reason, or for no reason at all.

Second, the concept of at-will employment is anti-ethical to the concept of an implied covenant of good faith and fair dealing. By finding Plaintiff's employment to be terminable at will the court must deny Plaintiff's claim for damages based on any implied covenant of good faith and fair dealings.

Third, Plaintiff claims damages for intentional infliction of emotional distress, a course of action formally recognized in South Carolina in 1981. After reviewing the relevant portions of various depositions, the court concludes that Plaintiff fails to prove any of the requisite elements of this particular course of action.

Finally, Plaintiff alleges that Lockheed invaded his privacy. The court, due to the lack of specific pleading, presumes that plaintiff is claiming either the publicizing of private affairs or the wrongful intrusion of his private life. The court here finds, however, that Lockheed did not publicize the results of the test or that Satterfield was terminated. In conclusion the court grants defendant's motion for summary judgement.



ARSOR—Loss Payee Entitled To Payment

Standard Fire Insurance Company of Alabama v. Citizens and Southern National Bank. Greenville County Court of common pleas. Dec. June 14, 1985 by Dan F. Laney, Jr., Presiding Judge. (unpublished). This case interprets a loss payee clause on a fire insurance policy covering a mobile home. Plaintiff insured the mobile home owner against loss caused by fire. Defendant, bank is the successor to Carolina National Bank, a lienholder on the mobile home. Shortly after fire destroyed the mobile home, Plaintiff issued a check payable to the insured and the Defendant. Defendant deposited the check in satisfaction of its loan. The insured was then convicted of arson regarding the fire that destroyed the mobile home. Plaintiff argues that Defendant has unjustly enriched because, as lienholder and co-loss payee, defendant stands in insured place.

The Court finds for the defendant for two reasons. First, even though the policy specifically excludes damage caused by insured's intentional acts, its also specifically provides that the insured's lienholder's interest will not be impaired by insured's negligent acts. The court, construing the language most liberally in favor of the insured, determines that absent some specific exclusionary language impairing Defendant's interest as lienholder, Plaintiff properly paid benefits under the policy to Defendant. The court, states that plaintiff would have to pay even if it knew the fire was set by the insured.

Secondly, because Plaintiff failed its duty under South Carolina law to conduct adequate investigations before paying a claim when the insurer has knowledge of facts that would put a reasonably prudent man notice that an exclusion may be applicable. Plaintiff is charged with actual knowledge of insured's actions regarding the arson. Even if the policy contained specific exclusionary language impairing Defendant's interest, the payment would be proper due to this failure. (of course, plaintiff still has the right to restitution from its insured personally.)

Ethics Committee

You many not be aware that your Association has an Ethics Committee chaired by Elford Morgan. You Association wishes to know of any unusual ethical problems which you are experiencing particularly under our new Rules of Civil Procedure. We would like to share such problems and possibly your resolution with other members of the Association.

Likewise if you have encountered some unusual ethical problem which you wish an informal opinion or possibly the benefit of others who have experienced such a problem we invite your inquiry.

Recent Decision Case

Medical Malpractice Statute of Limitations

Smith v. Smith, Spartanburg County Court of Common Pleas, Judge E.C. Burnett, III. This medical malpractice action involves two lawsuits (one for wrongful death and the other for personal injuries) each with two causes of action—one in tort for negligence and the other in contract for breach of warranty. The facts are clear. Johnnie Smith sought treatment from Dr. T. Ravenel Smith (not related) because she was pregnant. The pregnancy had various complications which concerned both Mrs. Smith and her

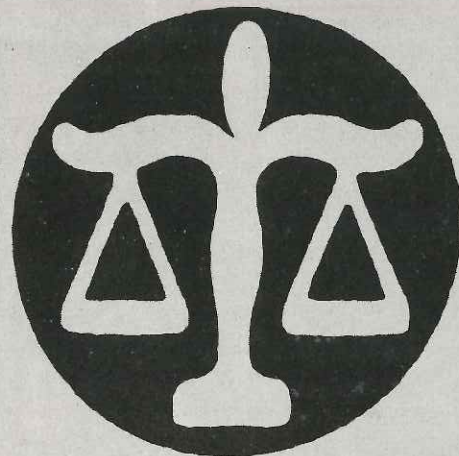
husband. Following these complications their child was delivered still-born on Sept. 12, 1979. The Plaintiffs immediately sought legal advice regarding the level of care rendered by Dr. Smith. Plaintiffs filed suit in March of 1985. Defendant moved for Summary Judgement based on the three year statute of limitations in S.C. Code Ann. §15-3-545 (1984 Supp.)

Initially the court found that all four causes of action shall fall within this statute. The legislature's choice of words - "Any action"-is broad enough to encompass both the breach of contract and tort claims. Plaintiffs make two arguments to avoid the bar of the statute of limitations. First, Plaintiffs argue that the statute is unconstitutional on equal protection grounds; and second, that, even if it is constitutional, Plaintiffs did not discover their causes of action until a point within three years of commencement of these suits.

The court, using a reasonably related test, states the issue as "whether the Legislative...acted reasonably in providing a shorter statute of limitations for revised health care provisions..." In answering this issue, the court determines that at the time of enactment a "medical malpractice crisis" was imminent and that the legislature responded in a fashion that could hardly be described as arbitrary or unreasonable. In addition, all members of the class are treated alike under similar conditions and circumstances.

Plaintiffs' second argument, that they did not "discover" the existence of their claims more than three years before they commenced the lawsuits, failed due to a lack of any grievance issue as to any material fact. Plaintiffs' own testimony reveals that their causes of action occurred more than three years prior to the commencement of these lawsuits.

Finally, notwithstanding that these actions are barred by the applicable statute of limitations, the court finds no implied warranty by a licensed health care provider to utilize ordinary skill and due care. In addition, due to the lack of evidence to the contrary the court finds that there was no express guaranty or warranty made by Dr. Smith in connection with his services. Summary Judgement is granted.



Memorial

John Roddey Holland

John Roddey Holland died suddenly from injuries sustained in an automobile accident on Wednesday, January 8, 1986. He was born in Rock Hill, South Carolina, on March 7, 1953. He grew up in Greenville and attended the public schools there. He was a 1976 graduate of the University of South Carolina with a B.A. Degree and finished magna cum laude. In 1977, he was the campaign manager for Harry Chapman's (of the Greenville Bar) Senate race. He was a 1980 graduate of the University of South Carolina Law School. During law school, he was a member of Moot Court Board and also the recipient of the J. Woodrow Lewis Award for the best Moot Court argument. He was the president of the Student Bar Association his senior year.

He practiced law with the firm of Whaley, McCutchen, Blanton and Rhodes. He was a member of the Richland County and American Bar Association; South Carolina Bar; South Carolina Defense Trial Attorneys Association; and Defense Research Institute. He was also a member of Five Points Rotary Club, the Spring Valley Country Club and a member of the Trinity Episcopal Cathedral.

EXPERT WITNESS INDEX

South Carolina Defense Trial Attorneys' Association
3008 Millwood Avenue, PO Box 11187
Columbia, SC 29211
(803) 252-5646

Name of Expert _____

Address _____

City _____ State _____ Zip _____

Phone _____

Area of Expertise/Specialty _____

Type of Case _____

Case Name _____

Did you consult _____ or confront _____ this expert?

If you consulted this expert, would you consult
him/her again? Yes _____ No _____

Do you have a file on this expert? Yes _____ No _____

Anything significant and/or unusual about expert and/or
testimony? _____

Name of Submitting Attorney _____

Telephone _____

Busy Year Culminates For Columbia Attorney

by Bill Kotlowski

Edward W. Mullins, Jr., a member of the Columbia, South Carolina law firm of Nelson, Mullins, Grier & Scarborough was elected as chairman of the board of the Defense Research & Trial Lawyer's Association (DRI) at the organization's annual board meeting held this past February. Mullins' ascendancy to the board's top-slot brought to closure a presidential term marked by substantial progress during DRI's Twenty-Fifth Anniversary year.

Highlights of Mullins' term of office include: DRI's aggressive pursuit of tort reform, through its participation in the development of the National Coalition on Litigation Cost Containment; the completion of the organization's shift, internally, from a manual to a fully computerized system for DRI's Expert Witness Index; an expanded program of defense practice seminars, which brought to fourteen the total number of seminars sponsored by DRI during fiscal year 1985; and, extensive liaison efforts designed to raise the level of visibility among a variety of allied professional and business associations.

Mullins visited with members of and spoke before a number of state defense trial lawyer associations in Alabama, Alaska, California, Florida, Hawaii, Illinois, Mississippi, North Carolina, New England, Tennessee, and in his home state.

Among the seminars scheduled are: Medical Malpractice, March 13-14 in San Diego; Drug and Medical Devices, April 3-4 in Washington, D.C.; Asbestos—Property Damage, April 24-25 in Philadelphia; a seminar for Insurance Supervisors, May 1-2 in Des Moines, Iowa; the Second Annual Insurance Symposium to be held May 15-16 in Chicago; and a Construction Law Seminar to be held June 5-6 in Toronto, Canada.

Improvements were also made to DRI's research services for members during 1985. Approximately 8,000 entries were made to DRI's Expert Witness Index, to include in many instances the names of trial counsel who have had experience with experts listed in the index.

DRI's "Traveling President" also visited periodically with the national headquarters office in Chicago, and was highly supportive of DRI's corporate counsel and insurance counsel constituencies defense trial lawyers belonging to DRI, an estimated 250 manufacturers and other service corporations and nearly 300 insurers are also members.

In addition to the fourteen defense practice seminars sponsored by DRI during Mullins' term, a similar number were planned for the 1986 term.

DRI also continued to develop its nationally recognized publications program during 1985.

For The Defense, the Institute's mon-

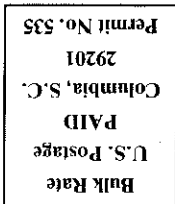
thly magazine, became more vibrant with the addition of a slick, four-color cover, and more in-depth features for its primarily defense lawyers readers. DRI also published: **Defending Chemical Exposure Cases**, a monogram dealing with the growing area of defense law involving hazardous waste disposal; **Defense Practice Notebook**, an annotation which carries defense tactics and strategy; **Plaintiffs Strategy**, which highlights tactics advanced by the plaintiffs trial bar in an effort to create awareness for defense trial lawyers; and other publications.

Members of the South Carolina Defense Trial Attorneys Association may obtain a free copy of DRI's 1985 Report of Annual Activities from DRI. The Report provides additional details about the organization's activities, publications, seminars, and services. Write **Defense Law News**, Defense Research & Trial Lawyers Association, Suite 5000, 750 North Lake Shore Drive, Chicago, Illinois, 60611.

Help!

Enclosed you will find a form to be filled out concerning the expert witnesses' files. SCDTAA Headquarters in Columbia will act as a clearing house to aid Association Defense Attorneys statewide in quickly locating needed expert witness information. The bi-Monthly **Defense Line** issues will carry a form to remind you to keep sending in the necessary updated information. Additional forms will be available upon request. Ideally a form should be filled out for each file your firm obtains, this can then be put on computer and cross referenced as to person or subject. A call to the Association could then give a quick answer as to what is available statewide on CV's and expert witnesses.

Please return the form(s) and support this important association project.



3008 MILLWOOD AVENUE, COLUMBIA, SC 29205

**SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION**


CALENDAR OF EVENTS

1986	Atlanta Claims Association	April 2-4	Atlanta Marriott
	Association of Insurance Attorneys	April 16-20	Vancouver, British Columbia
	International Association of Insurance Counsel (Annual)	June 29-July 5	The Greenbrier, White Sulphur Springs, West Virginia
	Defense Research Institute, Inc.	June 29-July 1	The Greenbrier, White Sulphur Springs, West Virginia
	Joint Defense Conference SCDTAA and Claims Managers	July 24-27	Grove Park Inn, Asheville, NC
	Federation of Insurance Counsel	July 30-August 3	Ritz Carlton, Laguna, CA.
	American Bar Association (Annual)	August 7-14	New York, New York
	American College of Trial Attorneys (Annual)	August 8	New York, New York
	SCDTAA Annual Meeting	October 30-November 2	The Cloister, Sea Island, GA.
1987	Federation of Insurance Counsel	February 25-March 1	Rancho Las Palmas, Palm Springs, CA.
	S.C. Bar Association	June 13-15	Asheville, NC
	Joint Defense Conference SCDTAA and Claims Managers	July 30-August 2 (Tentative)	Grove Park Inn, Asheville, NC
	Federation of Insurance Counsel	August 5-9	Broadmoor, Colorado Springs, Colorado