



THE DEFENSE LINE

AUGUST/SEPTEMBER

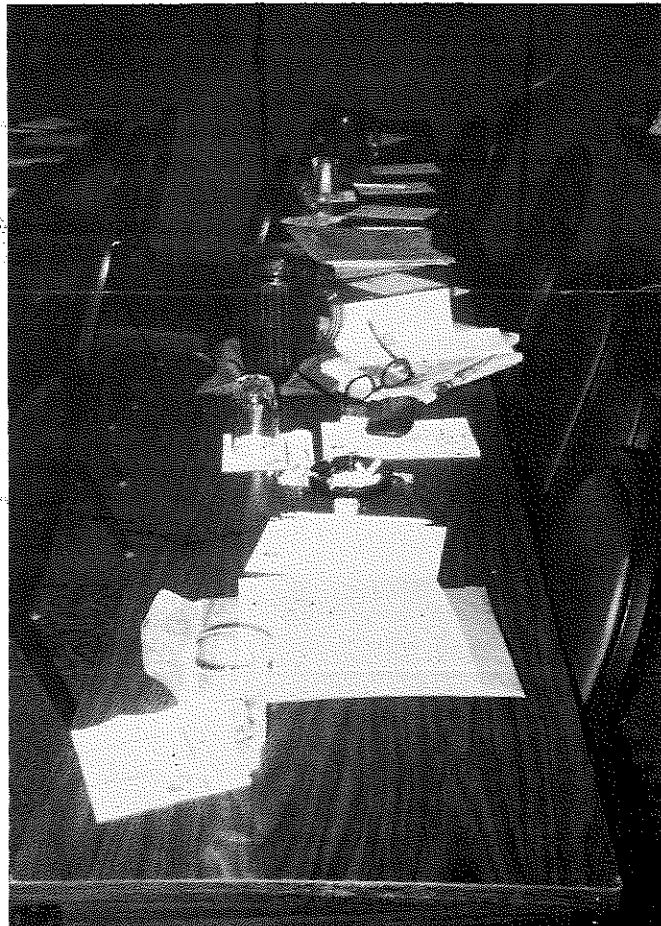
VOLUME 14

THE SOUTH CAROLINA DEFENSE TRIAL ATTORNEY'S ASSOCIATION

NO. 4

MISSED ASHEVILLE? MAKE THE CLOISTER!

If you weren't at the 1986 Joint Meeting July 24-26 at the Grove Park in Asheville, you missed an excellent convention. Glenn Bowers, Tim Bouch and their committee put together an outstanding program which focused on the insurance crisis, bad faith and tort reform. The social events were well planned and offered a change from years past. The Eddie Byrd Trio, who plays at the Summit Club in Columbia entertained the group at the Grove Park on Thursday evening for dinner and dancing. Friday the group enjoyed a special treat at the Biltmore Estate. After dining at the Deerpark Restaurant, a special candlelight tour of the Biltmore House highlighted the evening. Attendees were allowed to stroll through the house as invited guests, stopping at will to enjoy musical presentations in various rooms. The 'magical' evening ended with cordials and chocolates in the stables. The usual golf and tennis tournaments took place and everyone seemed to have fun even with a little problem with the weather. The weekend was very entertaining and educational.



Registration materials are out for the SCDTAA's 1986 Annual Meeting to be held October 30 - November 2, 1986 at The Cloister, Sea Island, Georgia. We urge you to complete and return these forms as soon as possible. The block of rooms reserved at The Cloister will be released September 30 for sale to the general public, so please make your hotel reservations before then. RETURN the hotel reservation DIRECTLY to The Cloister. You have several choices of accommodations, all of which are very nice. As The Cloister runs at near capacity the year round, it is advisable to make your reservation before the cut-off date, September 30. **Please note that The Cloister does not accept credit cards.** The Convention Registration, along with your registration fee, should be returned to Carol Davis at Association Headquarters. Please complete the forms and sign up for golf/tennis/spouse program. Your Annual Convention Committee has finalized the schedule of events, business and social, for this year's Meeting.

(See Page three)

**Join SCDTAA At The Cloister
October 30 - November 2**

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 Post Office Drawer 2426
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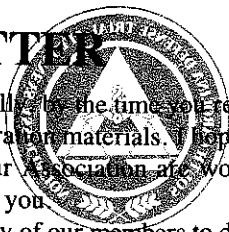
JACKSON L. BARWICK

ASSOCIATE EDITOR

NANCY H. COOPER

at this year's Meeting.
 (See Page 2)

PRESIDENT'S LETTER



The 1986 Annual Meeting is fast approaching. Hopefully by the time you receive this issue of the Defense Line, you will have your registration materials. I hope you will plan to attend the meeting. Many members of your Association are working hard to make it an enjoyable and educational time for you.

The specialty of workers compensation has caused many of our members to devote the large majority of their time to that area of practice. The Executive Committee is aware of the needs of these members and has decided, for the first time, to offer special "break-out" sessions during the program at this year's Annual Meeting. The Committee will be anxiously awaiting the response to these sessions. I encourage each of you who practices workers compensation to attend these sessions and give the Executive Committee your opinion so that we may continue trying to meet the needs of our members.

The Executive Committee is also considering a proposal to open the membership to the large number of labor lawyers in South Carolina. The success of the workers compensation sessions in this year's program may have some effect upon those plans. Your comments and suggestions regarding this proposal would be helpful and appreciated.

The next session of the General Assembly will be upon us before we know it. Our Association is a member of the South Carolina Civil Justice Coalition. The Coalition hopes to have a bill identical to the one introduced by Senators Doar and Coarson late in the last session prefiled this fall. You will be hearing more about the efforts of the Coalition which appears to be growing in members.

This column is an excellent chance for me to thank you, on behalf of the Association, Chief Justice Ness and the Court Administrator's office for their cooperation in scheduling "no court" for the week of our Annual Meeting. This will make it much easier for our members and guests to attend and enjoy the meeting.

See you at Sea Island!

Gene Allen

Notice of Proposed Change To By-Laws

Article III

QUALIFICATIONS FOR MEMBERSHIP

Those persons shall be qualified for membership who (1) Are members in good standing of the South Carolina State Bar; (2) Are actively engaged in the private practice of civil law, or employed by governmental bodies; and (3) Individually devote a substantial portion of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or (b) the representation of management in labor disputes.

Application for membership must be made upon a form provided by the Secretary and submitted to the Secretary, who shall then refer the application to the Membership Committee. A check for annual dues, in an amount fixed by the Executive Committee, shall accompany the application.

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.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION ANNUAL MEETING

October 30 - November 2, 1986
The Cloister • Sea Island, Georgia
 Thursday, October 30, 1986

ARRIVALS

- 3:00 P.M.
- 3:30 P.M.
- 5:00 P.M.
- 6:00 P.M.
- 6:30 P.M.
- 7:00 P.M.
- 8:00 P.M.
- 9:30 P.M.
- 8:00 A.M.-10:15 A.M.
- 8:45 A.M.-8:50 A.M.
- 8:50 A.M.-9:20 A.M.
- 9:20 A.M.-10:20 A.M.

Executive Committee Meeting.
 Registration desk opens - Plantation Lounge.
 Nominating Committee Meeting
 Registration desk closes.
 Cocktail Reception for first time attendees - Cumberland Room (First Time Attendees, Officers and Executive Committee)
 Cocktail Reception - Plantation Lounge.
 Dinner in Main Dining Room.
 Bingo in Cloister Clubrooms BY RESERVATION WITH CLOISTER.

Friday, October 31, 1986

Registration desk open - Plantation Lounge.
WELCOME - Ballroom
 T. Eugene Allen, Esquire, President SCDTAA
STATE OF THE JUDICIARY
 The Honorable J.B. Ness, Chief Justice, South Carolina Supreme Court
BREAKOUT SESSIONS
A. PRODUCT DISTRIBUTION: THE ANTITRUST, UNFAIR TRADE PRACTICES AND WRONGFUL TERMINATION ISSUES.
 James Lynn Werner, Esquire
 J. Rutledge Young, Jr. Esquire
 Harold W. Jacobs, Esquire, Moderator
 Panel Discussion By United States District Court Judges.

B. WORKER'S COMPENSATION
 1. Retaliatory Discharge and Its Affect Upon Workers' Compensation Practice.
 2. Medical Reports v. Depositions Under the Administration Procedures Act.
 3. The Second Injury Fund - Making and Processing Claims

COFFEE BREAK
BREAKOUT SESSIONS CONTINUED
The HONORABLE LEE M. THOMAS
 Administrator, Environmental Protection Agency
 Mr. Thomas will speak on the scope of liability under current environmental laws, including the Superfund. He will be introduced by The Honorable Alexander M. Sanders, Jr., Chief Judge of the South Carolina Court of Appeals.
 Spouses' Program (Coffee at 9:45)
 Golf and Tennis Tournaments
 Cocktails at Ocean Grove
 Seafood Buffet Dinner at Ocean Grove.

Saturday, November 1, 1986

BUSINESS MEETING - Ballroom
BREAKOUT SESSIONS
A. THE ELOQUENT BRIEF: HOW TO WRITE IT
 The Honorable Randall T. Bell, Judge, South Carolina Court of Appeals
B. APPELLATE PRACTICE AND WORKERS' COMPENSATION APPEALS
 1. For the Defense
 2. The Full Commission Speaks
 3. The First Court (Circuit Court)
 4. The Final Stop (Court of Appeals/Supreme Court)

COFFEE BREAK
USE OF MAGISTRATES IN FEDERAL CIVIL LITIGATION
 Robert R. Carpenter, Esquire, Moderator
 Panel Discussion By United States District Court Judges
THE HONORABLE HOWELL T. HEFLIN
 United States Senator (D. Ala.)

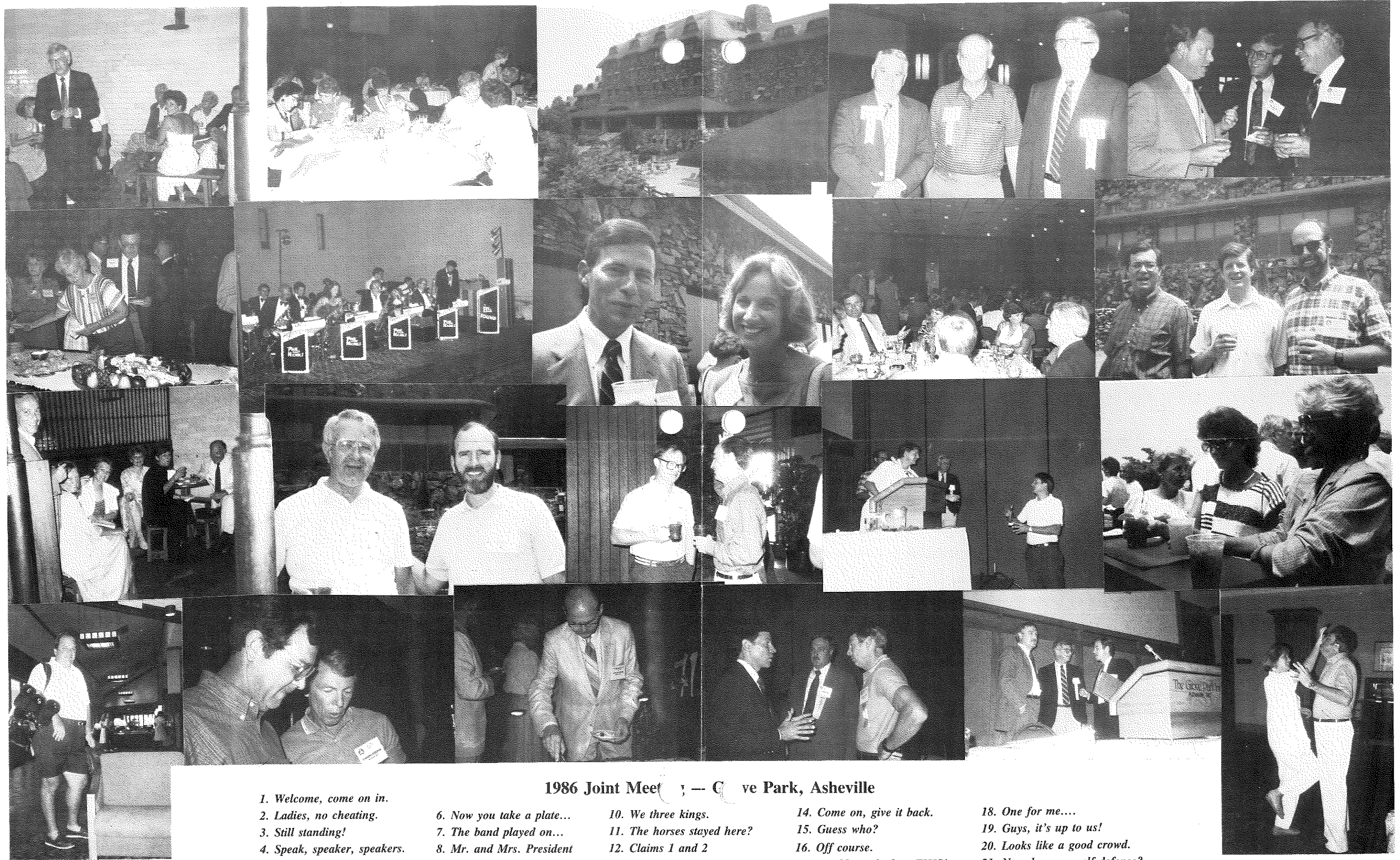
Senator Hefflin is a former Chief Justice of the Alabama Supreme Court and is presently a member of the Senate Committee on the Judiciary. He will speak on current congressional matters of interest involving the civil justice system. Senator Hefflin will be introduced by The Honorable J.B. Ness, Chief Justice of the South Carolina Supreme Court.

Cocktail Reception - Plantation Lounge.
 Dinner in Main Dining Room.
 Dance - "Band of Oz" (Open Bar)

Sunday, November 2, 1986

- Afternoon Free
- 6:30 P.M.
- 7:30 P.M.
- 9:00 P.M.-1:00 A.M.
- Farewells
- 1:00 P.M.

Check-out time.



1986 Joint Meeting -- Grove Park, Asheville

- 1. Welcome, come on in.
- 2. Ladies, no cheating.
- 3. Still standing!
- 4. Speak, speaker, speakers.
- 5. You think I'm bad,....

- 6. Now you take a plate...
- 7. The band played on...
- 8. Mr. and Mrs. President
- 9. Why me?

- 10. We three kings.
- 11. The horses stayed here?
- 12. Claims 1 and 2
- 13. Puzzles me why you haven't recovered from last year?

- 14. Come on, give it back.
- 15. Guess who?
- 16. Off course.
- 17. Would you look at THIS!

- 18. One for me....
- 19. Guys, it's up to us!
- 20. Looks like a good crowd.
- 21. New dance or self defense?

RECENT DECISIONS

FAYE STOREY AND CHARLES STOREY v. NOEL FULLER, D.M.D. AND IRA ADAMS, D.M.D., Court of Common Pleas for York County, Civil Action No. 85-CP-46-840.

In this dental malpractice case the Plaintiffs allege that the Defendants, an endodontist and a general dentist, failed to treat Mrs. Storey's periodontal problems. A second cause of action based on the Unfair Trade Practices Act was struck from the Complaint prior to the trial.

During trial, the Plaintiffs sought to present the reply testimony of two witnesses after the Defendants' case. The witnesses, Mrs. Storey's son and mother-in-law, were expected to corroborate Mrs. Storey's earlier testimony that she had seen the dentist more often than the doctors' records evidenced. The Defendants objected on the grounds the testimony should have been presented in the Plaintiff's case in chief, not on reply. After deliberation the Court decided to allow the Plaintiffs' proposed reply testimony; however, the Plaintiffs decided not to call the witnesses at all.

The case was submitted to the jury on actual and punitive damages, although the defense sought to prevent punitive damages going to the jury. The Court reasoned that if Mrs. Storey's testimony was taken as true, that is, periodontal disease was not even mentioned to her by the Defendants, the Defendants were guilty of conscious disregard of the acceptable standard of care, which would be deemed reckless.

The jury found for the defendants.

LYNN V. WHITNER V. JOE M. ROBINSON, M.D., W. FRANK STRAIT, M.D. AND ROCK HILL GYNECOLOGICAL AND OBSTETRICAL ASSOCIATES, P.A., Court of Common Pleas for York County, Civil Action No. 85-CP-46-1029.

The Plaintiff brought suit against the obstetrical doctors and their group alleging that the doctors misrepresented their skills and negligently performed a hysterectomy. A week after her uneventful hysterectomy, the Plaintiff began leaking urine through her vagina. Exploratory surgery never revealed a specific injury to the ureter, although an ureteral repair was performed which alleviated the problem.

The Plaintiff presented an internist as her expert. The Defendants objected on the ground that the expert did not have sufficient training or experience in the area of gynecology or surgery, as the only surgery he has participated in was during a rotating internship and while stationed in Vietnam. The Defendants cited *Bothelo v. Bycura*, ___ S.C. ___, 320 S.E.2d 59, (C.A. 1984) in which the South Carolina Court of Appeals confirmed an orthopaedic surgeon could not qualify as an expert in a medical malpractice case against a podiatrist. The Court, in the case at hand, discounted the principles of *Bycura* on the ground that the expert had medical training, albeit not in the specialties at issue. The expert was allowed to testify.

After the presentation of the Plaintiff's case, the Defendants moved for directed verdict on the ground that the Plaintiff had not presented sufficient testimony on the issue of the standard of care and the breach of that standard. The Court granted the Defendants' motion.

DEBBIE KELLAR, ADMINISTRATRIX OF THE ESTATE OF DONALD CRAIG, KELLAR, DECEASED, Appellate, Versus GENERAL MOTORS CORPORATION, Appellee.

Appeal from the United States District Court for the District of South Carolina at Charleston. Falcon B. Hawkins, District Judge. (C/A 84-1300-1).

Argued: May 6, 1986

Decided: July 16, 1986

Before WIDENER, SPROUSE and CHAPMAN, Circuit Judges.

F. Mikell Harper (Harper & Harper on brief) for Appellant; Wade H. Logan, III (David C. Norton; Holmes & Thomson; Patricia S. Harris; Judith A. Zakens, General Motors Corporation on brief) for Appellee.

PER CURIAM:

This is a products liability case arising from an engine fire which ignited when a 1982 Chevrolet Chevette was left idling; it resulted in the death of the plaintiff's decedent. The sole issue on appeal is whether the district court abused its discretion in admitting evidence of the decedent's blood alcohol level when contributory negligence was not at issue. Finding no such abuse, we affirm.

Donald Kellar spent the evening of December 31, 1983, drinking and dancing at the Exit 21 Club, at Ridgeland, South Carolina. Between 11:20 p.m. and 11:45 p.m. that evening, Kellar left the club in his 1982 Chevette and drove less than one mile to an abandoned Texaco station. There, he parked his car with the engine and heater running and went to sleep. Sometime later, a fire broke out under the hood of the Chevette. Kellar was found dead by the police and firefighters at 1:22 a.m. An autopsy performed on Kellar's body revealed that death was caused by carbon monoxide poisoning. A toxicological examination, performed as a part of the normal autopsy procedure, revealed a blood alcohol level of 194 mg/dl.

Kellar's widow brought this action against General Motors, Inc. in the South Carolina Court of Common Pleas alleging negligence, breach of warranty, and strict liability in tort. The defendant removed the case to the United States District Court for the District of South Carolina. Upon learning that the defendants intended to introduce evidence of Kellar's blood alcohol level, the plaintiff amended her complaint, abandoning her negligence claim. The plaintiff then filed a Motion in Limine to have the evidence of Kellar's blood alcohol level excluded. The plaintiff argued that since contributory negligence was no defense to claims for breach of warranty and strict liability in tort, Kellar's blood alcohol level was not relevant. The defendant opposed this motion contending that this evidence was relevant to assumption of risk, product misuse, and proximate cause. The district court denied the motion, and admitted a stipulation as to Kellar's blood alcohol level into evidence.

At trial, the defendant advanced the theory that "but for" Kellar's intoxication the noises of the engine overheating and catching fire would have caused him to wake up in time to save his life. In furtherance of this theory, the defendant offered expert testimony concerning the sounds that are given off by a Chevette engine as it overheats and catches fire, the length of time between the ignition of the fire and the moment at which the atmosphere in the passenger compartment becomes dangerous, and the effect that a blood alcohol level of .19 has upon the human nervous system. Finally, the defendant's toxicologist opined that but for Kellar's intoxication he would have been standing beside his car when the police arrived. The jury returned a verdict for the defendant, and the plaintiff has appealed.

The exclusion of evidence is within the discretion of the district court. *Reed v. Tiffan Motor Homes, Inc.* 697 F.2d 1192 (4th Cir. 1982). The district court cannot be reversed absent an abuse of that discretion. *DeBenedetto v. Goodyear Tire & Rubber Company*, 754 F.2d 512 (4th Cir. 1985). Rule 401 of the Federal Rules of Evidence provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The evidence of Kellar's intoxication was directly bearing on the issue of the proximate cause of his death, and it was on this issue that the case turned. The district court did not abuse its discretion in denying the plaintiff's motion in limine.

AFFIRMED.

RECENT DECISIONS

In a recent products liability case, **Figliorelli v. H. J. Wilson Co., Inc. and R. D. Werner Co., Inc.**, brought in circuit court in Charleston, Judge David F. McInnis granted summary judgment in favor of the defendant because the plaintiff failed to present any evidence tending to establish any defective condition of the product in question.

Plaintiff brought the lawsuit against defendant, a ladder manufacturer, claiming damages for injuries sustained when the ladder allegedly broke under his weight. At the first hearing, considering defendants' motion for summary judgment, Judge McInnis ordered the plaintiff to identify an expert or experts which he planned to use at trial to establish liability of the defendant within a week. At the subsequent hearing, the plaintiff failed to name such an expert.

In granting summary judgment in favor of defendants, the court found that there was no evidence of a defect in the ladder at the time it left the control of the defendant manufacturer and that evidence indicated that the ladder was damaged between the time of manufacture and the time of the accident. These findings were apparently based solely on the deposition of defendants' expert witness, Thomas E. Bayer, Senior Products Engineer of R. D. Werner Co. [the defendant] who stated there was no defect in design or manufacture of the ladder at the time it left the control of defendant, and that between the date of manufacture and the date of the accident there was intervening damage to the ladder which altered its performance capabilities.

Because defendants' showing negated two essential elements of plaintiff's burden of proof, plaintiff had the burden of coming forward with facts showing that there was a genuine issue for trial. Plaintiff filed no affidavits in response to the defendants' motion for summary judgment and failed to present any further evidence to establish a genuine issue for trial. The only showing plaintiff could make would, according to the court's order, consist of testimony of the plaintiff himself and an eyewitness regarding the accident. This was, however, insufficient as the mere proof of an accident does not amount to proof of negligence or defect. Because plaintiff's showing did not establish any genuine issue of material fact in that it failed to establish any defect in the ladder or any negligence on the defendant, summary judgment was granted in favor of the defendants.

The following letter was received by the President....

South Carolina Defense Lawyers Association
3008 Millwood Avenue
Columbia, SC 29205

Dear Sir:

The University of South Carolina School of Law is seeking a Dean to replace Harry M. Lightsey, Jr., who has resigned to serve as President of the College of Charleston. A committee of faculty, students, and members of the South Carolina bench and bar is in the process of soliciting recommendations and reviewing qualified candidates for the position.

We ask that you help us with our search by notifying your members and by making recommendations of persons you consider to be qualified candidates. Please send nominations and applications to Dr. Glenn Abernathy, Chairman, Dean Search Committee, Department of Government and International Studies, University of South Carolina, Columbia, SC 29208. The deadline for applications is December 1, 1986. The University is an equal opportunity affirmative action employer.

Thank you for your assistance.

Yours truly,



Glenn Abernathy
Chairman, Search Committee

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**SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION**



CALENDAR OF EVENTS

	SCDTAA Annual Meeting	October 30 -November 2	The Cloister, Sea Island, GA
	S.C. Bar Association (Mid-Year)	January 23-25	Omni Hotel, Charleston, SC
1987	Federation of Insurance Counsel	February 25- March 1	Rancho Las Palmas, Palm Springs, CA
	S.C. Bar Association (Annual)	June 5-7	Inter-Continental, Hilton Head Island, SC
	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