

# THE DEFENSE LINE

WINTER 1988

VOLUME 16

THE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

NO. 1



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## PRESIDENT'S LETTER

I first want to express my thanks to each member of the Association for giving me the opportunity to serve as its President. It is a privilege to be associated with the Defense Attorneys' and to occasionally serve as its spokesperson. All of the officers and members of the Executive Committee are cognizant of the trust and responsibility which accompany their positions, and look forward to serving you during the coming year.

Each year has seen our Association grow in numbers and in the services provided our membership. Our Executive Director, under the leadership of **CAROL DAVIS** and **NANCY COOPER**, have taken a tremendous load off of many of us and have given us continuity through the annual change of officers. We are gradually evolving from a purely social organization to one providing full social and service benefits to our membership. I have had the opportunity to attend two national conferences of defense bar groups, and we receive consistent recognition on a national level for our work. I would like to see our services to you continue to grow, and still manage to have a little fun along the way.

Two areas of particular emphasis will be the Defense Line and our programs and seminars. We have been blessed these many years to have **JACK BARWICK** as our Editor of the Defense Line, and **NANCY COOPER** has recently assumed direct responsibility for much of the work. They have thankless jobs but are always working to improve the publication. We have already started putting together programs for the Joint Claims Meeting in Asheville, the Annual Meeting at Kiawah Island, and a joint program with the CLE, all tailored to meet the needs of our membership. We also expect our legislative effort to be as great this year as last, not only on the issue of tort reform, but on a number of other issues, such as workers' compensation. Our recent contacts with the legislature have taught us that we need to maintain an active presence there.

It is not going to be easy to improve on the successes we have had over the years. This past year, under the leadership of **THERON COCHRAN**, was the best year ever for our Association, and I can only try to live up to the standards Theron and his predecessors set. The officers and committeemen are going into this year with a great deal of enthusiasm in hopes that next year's officers will say good things about us when they come on board. I ask that each member let me have any suggestion he has for improvements to our Association, as well as any criticisms you believe are warranted.

## TEN YEARS AGO

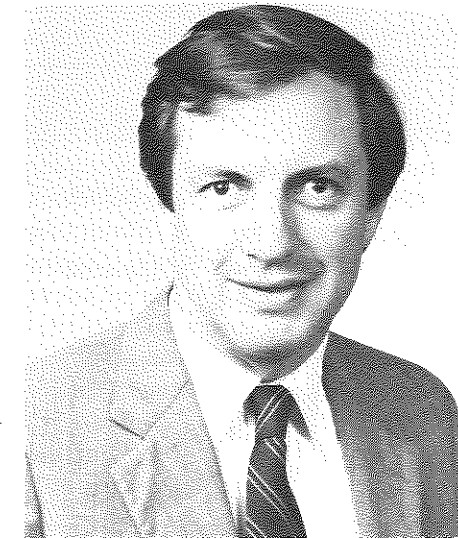
The Tenth Annual Meeting of the South Carolina Defense Attorneys was held at the Savannah Inn and Country Club, Savannah, Georgia, in October, 1977. We had an outstanding program planned by **JOHN J. McKAY, JR.** Who will ever forget the introduction given **HONORABLE ROBERT W. HEMPHILL** by our President, **JACKSON L. BARWICK, JR.**, and then the floating cocktail party on the paddle boat from the Inn to River Street and downtown Savannah. **MARK W. BUYCK, JR.** of Florence, was elected President; **BRUCE SHAW**, President-Elect and **F. BARRON GRIER, III**, Secretary-Treasurer. The Executive Committeemen were **ROBERT H. HOOD**, **H. SPENCER KING**, **THOMAS A. McKINNEY**, **WILLIAM C. GABLE** (now deceased), **JOHN B. McCUTCHEON** and **ERNEST J. NAUFUL**. At the end of the first decade, our association was "off and running"

*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.*

## ANNUAL MEETING

The Twentieth Annual Meeting of SCDTAA was held in November at the Inter-Continental Hotel at Hilton Head. The Honorable **J.B. NESS**, Chief Justice, South Carolina Supreme Court addressed the Association on the State of the Judiciary. The Honorable **JOHN L. NAPIER**, Judge United States Claims Court was a keynote speaker along with the Honorable **WALTER E. HOFFMAN**, Senior United States District Judge Eastern District of Virginia, the Honorable **ROBERT J. SHEHEEN**, speaker South Carolina House of Representatives and Professor **CHARLES ALAN WRIGHT**, Professor of Law, University of Texas.

Newly elected officers of the South Carolina Defense Trial Attorneys' Association are *President: CARL EPPS, President-Elect: FRANK GIBBES, Secretary: MARK WALL* and *Treasurer: GLENN BOWERS.*

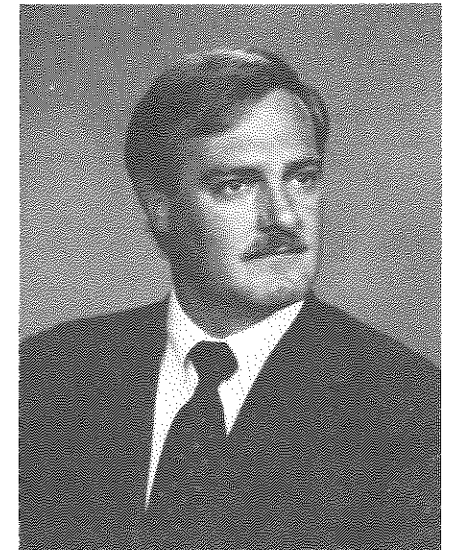


President-Elect, **FRANK HUGER GIBBES III** graduates from Davidson College in 1966. He served as 1 Lt. U.S. Army-Infantry (active duty) for three years before entering USC School of Law in 1968. While in Law School, Frank was Editor-in-Chief of the South Carolina Law Review. He received his law degree and was admitted to the South Carolina Bar in 1971. In 1975, Frank became a partner in the Law Firm of Rainey, Britton, Gibbes & Clarkson, P.A. in Greenville.



Secretary, **MARK WALL** is a partner in the Law Firm of Robinson, Craver, Wall & Hastie, P.A. in Charleston. Mark graduated from St. Anselm College in Manchester, New Hampshire before attending

USC School of Law. After receiving his law degree in 1974, Mark began practicing law with the firm of Bailey and Buckley. He became a partner in 1977. In 1984, Mark became associated with Robinson, Craver, Wall & Hastie.



Treasurer, **GLENN BOWERS** was born in Bremen, Germany. He was graduated from Clemson University in 1970 and USC School of Law in 1974. While in law school, Glenn was a member of the Order of Wig and Robe. In 1979, Glenn became a partner in the Law Firm of Moore & Van Allen, Nexsen Pruet.

Executive Committee members include **TIM BOUCH**, Charleston; **BILL SWEENEY**, Columbia; **BILL GRANT**, Greenville; **M.M. WEINBERG**, Sumter; and **BILL COATES**, Greenville with terms expiring in 1988. **TOM BOULWARE**, Barnwell; **KAY GAFFNEY CROWE**, Columbia; **ALBERT JAMES**, Darlington; **JACK McCUTCHEON, JR.**, Conway; and **CHARLES RIDLEY, JR.** Rock Hill with terms expiring in 1989. Elected for a three year term expiring in 1990 are **TOM WILLS**, Charleston; **HUGH McANGUS**, Columbia; **BILL LYNN**, Aiken; **MICHAEL WILKES**, Spartanburg; and **JOHN WILKERSON**, Florence.

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Florence, SC 662-3258

Mark H. Wall  
Charleston, SC 577-9440

## 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 **Defense Line** issues will carry a form to remind you to keep sending the necessary updated information. Additional forms will be available at the Annual Meeting or upon request. Ideally a form should be filled out for each file your firm obtains, this then can 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.

### 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 \_\_\_\_\_







# LEGISLATIVE REPORT

Carl B. Epps, III

The 1988 Legislative session begins January 12, 1988. This year's session promises to be active, with comprehensive changes in the workers' compensation laws, automobile insurance, and tort reform all being on the front burner.

Mark Wall is this year's Legislative Chairman. He will be assisted by a number of people within the Association, principally Bill Grant, Thom Salane and Ed Poliakoff.

The battle lines have been drawn for tort reform. The Coalition has directed much of its publicity towards the Trial Lawyers as many of you may have recently witnessed by a brochure authored by the Coalition and in radio advertisements making the same point. The Defense Attorneys objected to portions of the publications, and the Coalition toned them down at our request. We were not, however, able to eliminate all of the points we disagreed with, and as a consequence many within our organization have expressed displeasure with some of the statements being made about our counterparts in the plaintiff's bar. We have advised the Trial Lawyers of our dissent from some of the language employed, and hopefully we can play a role in keeping the debate on a high level.

We continue to support the Coalition and its efforts to enact tort reform. We are optimistic that the legislature will deal with the issue at an early date.

## DRI

In the January, 1988, *For the Defense News* Editor Bill Kotlowski published an Article about the upcoming legislative debate in South Carolina on tort reform and the recently published *Citizen's Guide to Tort Reform* by the South Carolina Civil Justice Coalition. This article gave a very favorable overview of the *Guide* and its goal of providing information to the public and the State legislature.

Mr. Kotlowski's article has several excellent quotes from Carl B. Epps, Edward W. Mullins, Jr., and Theron G. Cochran which outline the Association's overall position on tort reform.

*The Defense Line* recommends this article to its readers as another example of how your Association is again in the national spotlight.



Glenn Bowers, Esq., Columbia and Tim Bouch, Esq., Charleston study SCDTAA Proposal at recent Executive Board Meeting.

## THE HEAD OF THE FAMILY

Justice **JAMES K. HINES**, in *Curtis v. Ashworth*, 165 Ga. 782.

*Opinion:* While the husband is still declared by statute to be the head of the family, he, like the King of England, is largely a figurehead.

# RECENT DECISIONS

## S.C. CIVIL PROCEDURE — DEFAULT/ORDER ALLOWING LATE ANSWER

In *Day v. J.E. Burke Company, et al*, (Aiken Common Pleas; C.A. No. 87-CP-02-605) defendant Burke filed a motion for an order, pursuant to S.C.R.C.P. 6(b), permitting it to file a late answer. C. Bruce Littlejohn, Special Circuit Judge, considered five factors in addressing the issues raised by Burke's motion:

1. Whether or not defendant took prompt action to correct the default and the length of the delay;
2. Whether or not the default was the result of defendant's gross negligent or willful disregard of the process;
3. Whether or not defendant has a meritorious defense to plaintiff's claim;
4. Whether or not plaintiff will be prejudiced by granting defendant relief from the default; and
5. Whether a substantial amount of money was involved in the litigation.

In granting Burke's motion and permitting a late answer, Justice Littlejohn reasoned:

The Court takes notice that in promulgating the new Rules of Civil Procedure and in establishing the new standard for opening defaults, the Judicial Court and the ad hoc Committee to Study Circuit Court rules were guided by three policy considerations: to assure fairness to all litigants, to promote trial on the merits, and to apply the rules in a common sense manner. The "common sense" approach is evident under the facts of this case. The case was still at the pleading stage and discovery had not even begun. Burke acted in good faith and moved immediately to correct the default upon learning of it. Plaintiff will sustain no prejudice by granting Burke relief and Burke has alleged in its proposed answer that it has an absolute defense to plaintiff's claim. To deny Burke the relief which it seeks in its motion would be inequitable and would contravene the expressed mandate of the South Carolina Rules of Civil Procedure to liberalize relief from defaults.

Aiken C.P., submitted by Frank H. Gibbes, Esq., Greenville.

## FEDERAL DIVERSITY — UNINSURED MOTORIST — JOHN DOE *Fulcher v. Doe, McClain, and Roadway Express, Inc.*

After removal of the case by Roadway Express to Federal Court, the plaintiff tried to remand the case back to State Court on the grounds that the defendants had not

met their burden of proof in showing complete diversity, in that one John Doe, an unknown motorist involved in the accident, had not had his residence determined. The Court held that until the unknown motorist was identified, he/she is not a "real party in interest" for diversity purposes, but instead the uninsured motorist carrier is. Thus diversity was appropriately shown, and the motion to remand denied. Judge Hawkins, USDC, Charleston, CA # 2:87-0806-1, submitted by Comig B. Gibbs, Jr., Esq., Charleston.

## EMOTIONAL DISTRESS — PROSPECTIVE CAUSE OF ACTION

*Mandel v. Sickles*

A mother brought suit for negligent infliction of emotional distress upon witnessing her daughter's death in an auto accident. The accident, however, occurred almost nine months before the South Carolina Supreme Court decided *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465-66 (1985), which case adopted a cause of action for negligent infliction of emotional distress. The Court here, relying principally on *Bartlett v. Nationwide Mutual Ins. Co.*, \_\_\_\_\_ S.C. \_\_\_\_\_, 348 S.E.2d 530, 532 (1986), held that *Kinard*, since it created a new substantive right, should be applied only prospectively, and that thus the suit here was justly dismissed. USCA, Judge Russell, 4th Circuit 86-2190, submitted by David C. Norton, Esq., Charleston.

## SLANDER — PRIVILEGE — COUNTY COUNCIL

*Judy v. Reeves*

Judy brought a slander action against Reeves. Both men were councilmen at the time the allegedly defamatory statements were made. Reeves made a 12(b)(6) motion principally based on the affirmative defense of privilege, in order to have Judy's claim dismissed. The Court held that, the traditional view notwithstanding, the Rule 12(b)(6) motion was a proper vehicle for Reeves to point out the defense of privilege. Citing *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979), (which held that state legislators had an absolute privilege when making statements during official functions, when the statements were "connected with, or relevant or material to the matter under inquiry"), the Court extended the South Carolina rule to the state's lesser governing bodies, in this case, the county council. However, determining the relation of the statements to the official subject matter, held the Court, was a fact question for the jury, and the motion to dismiss was thus denied. Judge Traxler, Dorchester, CCP, Docket No. 87-CP-18-763, submitted by Thomas J. Wills, Esq., Charleston.



**SOUTH CAROLINA  
DEFENSE TRIAL ATTORNEYS' ASSOCIATION**

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ADDRESS CORRECTION REQUESTED

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**CALENDAR OF EVENTS**

**1988**

American College of Trial Lawyers (Spring)	March 6-9	Marriott's Desert Springs Resort Palm Desert, California
S.C. Bar-(Annual)	June 17-19	Omni Charleston, SC
Association of Insurance Attorneys	April 6-10	Sunburst Hotel Scottsdale, Arizona
Defense Research Institute (Mid Year)	July 4-6	The Greenbrier White Sulphur Springs, WV
Defense Counsel Trial Academy	July 23-30	College Inn Conference Center Boulder, Colorado
Federation of Insurance and Corporate Counsel	August 3-7	Southampton Princess Southampton, Bermuda
American Bar Association (Annual)	August 4-11	Toronto, Canada
SCDTAA Joint Meeting	August 11-14	Grove Park Inn Asheville, NC
SCDTAA Annual Meeting	October 27-30	Kiawah Island Resort