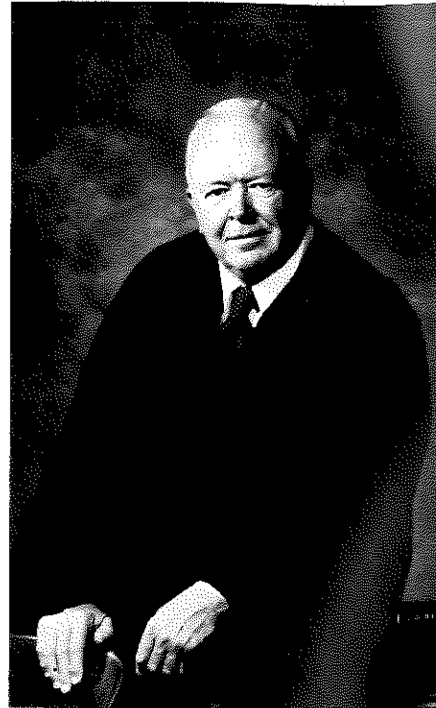
THE DEFENSE LINE

SUMMER 1988

VOLUME 16	THE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION	NO. 3

HEMPHILL AWARD
CRITERIA

1. **Eligibility.**
   (a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.
   (b) The current officers and members of the South Carolina Defense Trial Attorneys' Association Executive Committee at the time the award is made are not eligible.
2. **Criteria/Basis for Selection.**
   (a) The award should be based upon distinguished and meritorious service to the legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.
   (b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.
   (c) The candidate may be honored for recent conduct or for service in the past.
3. **Procedure.**
   (a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community and the reasons why the nominee is being put forward. Nominations should be directed to the President of the Association prior to the joint meeting each year.
   (b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association at its meeting immediately preceding the Annual Meeting of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."
   (c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee deems an award appropriate, but not more frequently than annually.
4. **Form of Award.**
   (a) The recipient shall receive an appropriately engraved plaque commemorating the award at the annual meeting.
   (b) The family of the late beloved Robert W. Hemphill, in the person of Harriet Hemphill Crowder of Mt. Pleasant, has consented to having the award named for the late United States District Judge, Robert W. Hemphill. When possible, the Association shall have a member of the Hemphill family present whenever this award is presented.



Robert W. Hemphill

By August 8, 1988
Clip and Send to: SCDTAA, 3008 Millwood Avenue, Columbia, SC 29205

I NOMINATE ______________________

OF THE FIRM OF ______________________

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CITY AND STATE ______________________

BECAUSE ______________________

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(ATTACH A SHEET OF PAPER IF NECESSARY)

____
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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.

TEN YEARS AGO

1978 was a busy year for the defense attorneys. At the April Executive Committee Meeting, **STEVE MORRISON** brought up the matter of our filing amicus curiae briefs in important cases and since that time, we have been most active in this area. President **MARK W. BUYCK, JR.** and Past-President **ED MULLINS** attended the North Carolina Defense Attorneys' Annual Meeting at Pine Hurst. Plans were underway for the Joint Meeting with the Claims Management Association in August at Grove Park (room rate was $34.00 single, $38.00 double). Defense attorneys in the Columbia area met and got an update on Legislative action and saw a film produced by the Insurance Crime Prevention Institute. **BRUCE SHAW** returned from the Eleventh National Conference of local defense associations in Des Moine, Iowa, where he accepted the Defense Research Institute Exceptional Performance Citation for our association. **GENE ALLEN**, Program Chairman for the Annual Meeting, reported on his plans for our meeting at Kiawah Island.

PRESIDENT'S LETTER

CARL B. EPPS, III

We were all saddened to learn of the death of Bill Grant's wife, Mildred M. "Millie" Grant, who passed away June 4, 1988. Bill has been an esteemed member of the Association for many years and has served us well through the Executive Committee and each other position entrusted to him. Our sympathies are with Bill and his family.

Frank Gibbes and I recently attended the National Conference of Defense Lawyers in Minneapolis, Minnesota sponsored by the Defense Research and Trial Lawyers' Association. Frank attended as your President-Elect, and I as the State DRI Chairman. Ed Mullins chaired the program, and it was reassuring to again be witness to the fact that our Association provides its members a quality of service exceeded by no other state. It was also nice to see our Association, through Ed, play such a key role in a group as esteemed as DRI.

The primary subject of discussion at the conference was the Defense Bar's public image and media relations. We, as defense lawyers in general, have historically shunned the public eye. We loathe publicity being attached to our cases, probably out of fear that someone might get the idea that the case has real meaning to it, while at the same time we are trying to convince a jury that it is nothing for them to be concerned about. We prefer to remain silent on most matters, whether they be legislative, executive, or judicial in origin. On the other hand, our friends and counterparts in ATLA keep a ready smile and will literally fight for the opportunity to tell the public how various events impact their clients. They also willingly contribute their energies and resources towards candidates, events, or causes which potentially affect their practices or, perhaps more importantly, their clients. To steal a phrase from Jim Morris, current President of DRI, we, as members of RATLA (the Real American Trial Lawyers' Association) represent our clients equally as effectively, but with a different perspective. We devote our resources and energies to our cases for the most part, and become involved in public issues only when we cannot avoid it.

Not that there is anything wrong with that. Everyone on both sides of the spectrum is doing all they can for their clients. The plaintiffs' bar has business and professional reasons for becoming publicly involved which we do not share. Publicity is more important to their practice than ours. Additionally, specific cases should not be discussed in the media prior to trial, and once they are over, they receive no attention unless the plaintiff gets a whopping verdict. We have never known that sort of publicity to be particularly helpful.

On broader issues, however, such as legislation, matters affecting the court system, and other public issues, activities by lawyers have been too one sided. Arguments offered by claimants on these issues are often ineffectively countered or not countered at all. On occasion we or our clients may have philosophical and practical differences with them and it is to those instances I refer. The truth is that the defense position is not coalesced sufficiently for any one person or group to respond, and oftentimes the ones who choose to respond are inadequately prepared. After all, only attorneys actively engaged in a civil practice really appreciate what can be good or bad for our system. And, because of that, the truth is that we, the defense lawyers, are frequently the best prepared to respond. We work within the system all day every day and we know what changes in the legislature and courts can mean. We owe an obligation to our clients to be vocal, to appear before legislative bodies and other rule making authorities, to engage in public debate when appropriate, and to support balanced political candidates. In other words, we have an obligation to get involved. No one can better protect the defense position than the defense bar. This was the message conveyed at the National Conference and it seemed to make a lot of sense. As time passes and our association continues to prosper, we should expect to witness corresponding growth in all matters of importance to the Defense Bar and to the clients we represent.

I look forward to seeing each of you in Asheville on August 11th and at Kiawah for the Annual Meeting on October 27th.

ATTENTION SPOUSES

Have you ever been called for jury duty only to find that none of the attorneys would accept you on their case due to your relationship to either a defense attorney or an insurance claim manager? Have you ever wanted to serve on a jury and see how the civil justice system works firsthand? NOW IS YOUR CHANCE! At the joint meeting of the South Carolina Defense Trial Attorneys' Association and South Carolina Claims Manager Association, one full day of the program will be dedicated to the presentation of a summary jury trial. This will most likely involve the facts of an actual case that is either pending or has pended on a federal court docket. The summary jury trial is a procedure adopted by some courts today in an effort to promote settlement of complex cases. The results are nonbinding on either party. The trial basically consists of the most interesting part of a trial to a juror, the closing argument of counsel. Usually no witnesses are presented but counsel presents the client's case in his or her best style of advocacy. Often exhibits are used and potential testimony is summarized for the jury in a very interesting manner.

We need people to volunteer to participate in this program as jurors. We plan to draw the jury for the trial of this case from volunteer spouses of defense attorneys and claim managers who attend the convention. After the trial, there will be a discussion period at which time the jurors will be given the opportunity to comment on what they liked and disliked about the procedure and what portions of the argument of counsel were most persuasive to them.

If you are interested in participating in this program, please contact John S. Wilkerson. We hope to have a large pool of jurors from which to draw and may be able to utilize all those who volunteer.

We look forward to seeing you in Asheville and are confident that you will enjoy both the program and social activities planned.

JOINT MEETING

The program for this year's meeting has been well planned and promises to be a good one. This year we will be having a summary jury trial and need volunteers from our spouses to be jurors.

We have made the social program a very casual one again this year. On Thursday evening we will be at the Grove Park for our dinner and reception. We will be dancing to the sounds of "Second Nature." On Friday evening we will be boarding buses for our yearly journey to Bill Stanley's for barbeque, beer and bluegrass. Don't forget your cowboy boots and hat.

Golf and tennis tournaments are again planned for this year, so don't forget to sign up for them. We also will have a special program for the ladies this year, one they won't want to miss!

The officers and committees of both associations have worked and planned hard to make this meeting a relaxing and enjoyable time for each of you and we hope you will be there.

TWENTY-FIRST ANNUAL JOINT MEETING
SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION
CLAIMS MANAGEMENT ASSOCIATION
OF SOUTH CAROLINA
AUGUST 11-14, 1988
GROVE PARK INN, ASHEVILLE, NORTH CAROLINA

John S. Wilkerson, III
David C. Norton
Co-Chairmen, Program Committee

PROGRAM

Thursday, August 11, 1988:

Time	Event
3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 6:30 p.m.	Registration
7:15 to 8:15 p.m.	Reception
8:15 to 11:00 p.m.	Steak Fry, open bar and entertainment

Friday, August 12, 1988

Time	Event
8:00 to 12 noon	Late Registration
8:15 to 8:40	Coffee
8:40 to 8:45	*Welcome:* Presidents of both organizations
8:45 to 10:30	Summary Jury Trial Presiding Judge: The Honorable Sol Blatt, Jr. Participating Attorneys: To be announced Jury: Drawn from volunteer spouses attending meeting Case: To be announced
(10:00 to 12:30)	Ladies Program and Luncheon "Put pizzazz in your wardrobe with color and accessories"
10:30 to 10:45 a.m.	Coffee Break
10:45 a.m. to 12 noon	Summary Jury Trial (continued)
12:15 to 1:15 p.m.	Bloody Mary and Screwdriver Break
12:30 p.m.	Golf Tournament
1:00 p.m.	Tennis Tournament
7:00 p.m.	Buses leave for Bill Stanley's
7:00 p.m. to 1:00 a.m.	Barbeque and Bluegrass

Saturday, August 13, 1988

Time	Event
8:30 to 8:45 a.m.	Business Meetings: Both organizations
8:45 to 9:45 a.m.	Jury returns and discussion Panel Members: Judge Blatt Participating Attorneys Jury Members Claim Representative
9:45 to 10:30 a.m.	Introduction to Alternative Dispute Resolution: Discussion of Arbitration, Mediation, Summary Jury Trials, etc. Speaker: R. Alvin Bensley, Jr. Assistant Vice President CIGNA Property and Casualty
10:30 to 10:40 a.m.	Break
10:40 to 10:45 a.m.	Claim Manager of Year/DRI Presentations
10:45 to 11:00 a.m.	The Honorable Thomas A. Marchant S.C. Workers' Compensation Commission
11:00 to 11:15 a.m.	The Honorable John G. Richards, Chief Insurance Commissioner
11:15 to 12 noon	Defense Tactics in Personal Injury Litigation Speaker: Gene Adams, Esquire The Ward Law Firm Spartanburg, South Carolina
12:15 to 1:15 p.m.	Farewell Bloody Mary and Screwdriver Break

21ST NATIONAL CONFERENCE OF DEFENSE BAR LEADERS MINNEAPOLIS, MINNESOTA APRIL 28-30, 1988

Frank H. Gibbes, III

The 21st National Conference of Defense Bar Leaders was held in Minneapolis, Minnesota on April 28-30, 1988. The conference was sponsored by the Defense Research Institute and the Minnesota Defense Lawyers Association. I attended the conference in my capacity as President-Elect of our association. Carl Epps attended in his capacity as state DRI Chairman.

1. Conference program. Ed Mullins was conference chairman. At the outset of the conference the conference chairman stated that the purpose of the conference was to get local defense organizations involved in a program designed to educate members of the media, law professors, and members of the public at large about the role of the defense attorney in our civil justice system. The conference chairman expressed concern that the plaintiff's bar continues to hold itself out to the public as the spokeman for all trial lawyers. The conference chairman noted that, on a nationwide basis, the fact that the plaintiff's bar has appropriated the name "trial lawyers" for themselves makes it difficult for defense organizations to gain recognition in the public sector.

During the first part of the program representatives of several defense associations spoke about their successes in conveying the defense attorneys' message to the media. Among the members of the panel that addressed this topic was Carl Epps.

Following this session representatives of various press organizations spoke to conference participants. The focal point of their comments was the need for defense attorneys to take the initiative in contacting representatives of the press to let the press know who we are and to establish a line of communication for conveying our message.

The balance of the substantive conference program dealt with association staffing and association efforts in support of tort reform. Our association appears to be in the forefront on both of these fronts in terms of overall progress.

2. Lawyers for Civil Justice. Lawyers for Civil Justice is an organization supported by DRI, FICC, AIDC, and other defense organizations. Lawyers for Civil Justice was formed to support tort reform on a nationwide basis. In the near future the coalition will approach state defense organizations and various law firms and will ask for a contribution of $250 in support of the work of the coalition. DRI encourages member associations and law firms to support the work of the coalition.

WHEN DOES UIM COVERAGE APPLY?

Bert G. Utsey, III
David B. Summer, Jr.
SINKLER & BOYD
Charleston, South Carolina

As a result of recent legislative amendments, an apparent ambiguity now exists in South Carolina's statutory provisions concerning when underinsured motorist (UIM) coverage applies. While the ambiguity can be logically resolved, claimants will undoubtedly argue for a liberal interpretation of the conflicting provisions, and carriers should be wary of bad faith liability which can arise when negotiating settlements with UIM claimants.

South Carolina Code Ann. Section 38-77-30(14) (Law. Co-op. Supp. 1987) defines an "underinsured motor vehicle" as follows:

> "Underinsured motor vehicle" means a motor vehicle as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in Section 56-9-820[15/30/5] and the amount of the insurance or bond:
>
> (a) is less than the limit of underinsured motorist coverage under the insured's policy; or
>
> (b) has been reduced by payments to persons, other than an insured, injured in the accident to an amount less than the limit for underinsured motorist coverage under the insured's policy.

However, the definition under subsection (a) cannot be applied without reference to other relevant portions of the UIM insurance law. Specifically, South Carolina Code Ann. Section 38-77-160 (Law. Co-op. Supp. 1987) provides:

> [Automobile insurance] carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at fault insured or underinsured motorist.

Obviously, an ambiguity arises when one compares these two code sections. The mandatory offer provision uses broad language to describe UIM coverage as applying any time that damages are sustained in excess of the liability limits carried by an at fault driver. The definitions section, on the other hand, would appear to deny UIM coverage in many situations where the at fault driver's liability limits are equal to or greater than the UIM limits of a given claimant.

While the mandatory offer provisions predate the statutory definition of underinsured motor vehicle, the mandatory offer provisions were amended in the same act which gave rise to the underinsured motor vehicle definition. In that amendment, the reference to the purpose of UIM coverage was unchanged. Therefore, South Carolina now has concurrent yet conflicting legislative statements as to when UIM coverage is to apply.

Let us assume that following an automobile accident an at fault driver with liability limits of 15/30/5 is sued by a victim ("Plaintiff") who has underinsured motorist policy limits of 15/30/5 and liability limits of 100/300/50. Following a trial on the merits, Plaintiff receives a jury verdict for $19,000.00 The at fault driver's liability carrier tenders the $15,000.00 proceeds of its liability policy, and our Plaintiff is left with a $4,000.00 deficiency.

Applying subsection (a) of the definition above to the facts at hand, one would assume that Plaintiff's UIM coverage would not apply since the at fault driver's liability coverage is equal to and not "less than the limit for underinsured motorist coverage under the insured's policy." Unfortunately, determining when UIM coverage applies may not be so clear.

As a principle of statutory construction, apparently conflicting statutory provisions are to be reconciled, if logically possible. *Adams v. Clarendon County School District #2,* 270 S.C. 266, 241 S.E.2d 897 (1978). While these two statutory provisions create an apparent conflict, the Plaintiff will offer a second interpretation of the sections which appears to harmonize them. One may reason that the legislature used the language "limit for underinsured motorist coverage under the insured's policy" to mean that UIM coverage applies when an at fault driver's liability coverage is less than the total "limit" for underinsured motorist coverage that was available to an insured: i.e., the limits of his liability coverage.

Under the mandatory offer section of the Code, the insurance carrier is to offer UIM coverage "up to the limits of the insured's liability coverage." Therefore, the UIM coverage *available* under an automobile insurance policy is equivalent to the liability coverage purchased thereon, and this is the interpretation that the Plaintiff would embrace in order to collect the deficiency of hs judgment from his UIM carrier.

(Continued on page 8)

UIM

(Continued from page 7)

Even though this reading of the statute may seem somewhat tenuous, it does reconcile the apparent conflict between the mandatory offer provision, which provides that UIM coverage applies when damages are greater than the liability limits of the at fault motorist, and the statutory definition of an "Underinsured motor vehicle." Further, this reading of the statute would more fairly comport with the obvious legislative intent of providing maximum coverage to the insured, more so than an interpretation which would render the $15,000 UIM coverage provided to Plaintiff unrecoverable under any circumstances except those in which the at fault driver's liability coverage has been partially or wholly depleted by payments to other claimants who are not insured under Plaintiff's UIM policy.

It is interesting to note that case law prior to the amendments discussed above interpreted the definition of underinsured motor vehicle with reference to the mandatory offer provision and concluded that underinsured coverage applied when the liability coverage of the at fault driver is insufficient to cover a claimant's damages. *See Garris v. Cincinnati Ins. Co.,* 280 S.C. 149, 311 S.E.2d 723 (1984); *Gambrell v. Travelers Ins. Co.,* 280 S.C. 69, 310 S.E. 2d 814 (1983). While a UIM carrier would certainly argue that these cases were effectively overruled by the legislative amendments, the holdings in these cases indicate a judicial willingness to interpret the application of underinsured motorist coverage pursuant to the terms of what is now Section 38-77-160. Therefore, one would expect Plaintiff's attorney to argue that the rationale of *Garris* and *Gambrell* still apply.

On the other hand, a much more logical argument exists in favor of our original assumption that the Plaintiff in our factual scenario would not be entitled to UIM proceeds. As noted above, this result hinges on intepreting the language "less than the limit for underinsured motorist coverage under the insured's policy" as meaning "less than the underinsured motorist policy limits." The fact that this definitional section was enacted after the *Garris* and *Gambrell* decisions creates a presumption that the legislature attempted to change these judicially mandated interpretations of "underinsured motor vehicle" by amending UIM insurance law accordingly. This argument is strengthened by the fact that it focuses on the definitional language of "underinsured motor vehicle" under the act.

Finally, the strongest support for the position that no UIM coverage applies in the case at hand comes in the form of a recent legislative enactment dealing with underinsured motorist coverage. On May 4, 1988, Section 38-73-1105 was signed by the Governor and reads as follows:

> The definition of "underinsured motor vehicle" contained in Item (14) of Section 38-77-30 may not be used by an insurer unless the insurer reduces its rate for underinsured motorist coverage by an amount determined appropriate by the Commissioner and refunds any such premium that the Commissioner determines is necessary to correspond with the new definition. An insurer may not use the definition in its settlement negotiations unless the insurer has filed and the Commissioner has approved an enorsement to its contract. If an insurer uses the new definition in its negotiations with a person before having the contract endorsed it is an unfair claims practice and in addition is bad faith entitling the injured person to reasonable attorney fees, punitive damages, and all actual damages.

Clearly, the General Assembly intended for the definition of an "underinsured motor vehicle" to limit the availability of coverage to only those situations where the at fault driver's liability coverage is less than the UIM policy limits. Section 38-73-1105 was passed to insure that carriers were not unjustly enriched in using this new definition by receiving premiums for coverage which subsequently would not apply.

A recognized principle of statutory interpretation permits courts to interpret an ambiguous statute in light of subsequent legislative acts which apply a particular construction to the ambiguous language. Following the construction of the subsequent legislation, a court can then presume the legislature's construction to be correct. *Sadler v. Lyle,* 254 S.C. 535, 176 S.E.2d 290 (1970); *Abell v. Bell,* 229 S.C. 1, 91 S.E.2d 548 (1956). The rule has limits, however, and may not be applied to defeat the clear meaning of the language used in an allegedly ambiguous statute. *Boat-Rite v. McElmurray,* 247 S.C. 199, 146 S.E.2d 716 (1966).

In the present situation, there is a persuasive argument that the statutes have no clear meaning and that the legislature itself has interpreted the language used in the definitional section to mean that an underinsured motorist is a tort feasor whose liability insurance coverage is less than an insured's UIM coverage. Of course, Section 38-73-1105 would apply and a carrier would have to comply with those statutory requirements before it could avail itself of the more conservative intepretation of the definition of an "underinsured motor vehicle." Failure to adhere to the requirements of Section 38-73-1105 could render the carrier liable under a statutory bad faith cause of action.

The inconsistencies in the statutory language discussed above create an uncertainty in the law which every automobile insurance carrier must face. Unfortunately, the resolution of this uncertainty may have to come in the form of yet another legislative amendment or a judicial interpretation of the apparent ambiguity as it is now codified.

A JUDGE'S PRIVILEGE

ARTHUR G. POWELL, in I Can Go Home Again, page 136.

Judge Guerry it was who announced a great legal maxim, which has often been cited and quoted, and the soundness of which has never been questioned by the bar of this State. The sheriff had sent word to him while he was in a poker game that it was time to open the Court. "You tell the sheriff," he said to the baliff who brought the message, "that in this State a judge of the superior court has but damned few privileges, but one of them is to do just as he damn pleases." *Opinions and stories of and from the Georgia courts and bar, collected and arranged by Berto Rogers.*

LIGHTER SIDE

HOW TO TAKE A DEPOSITION OR WHAT WAS THAT ANSWER AGAIN?

The Problem: everyone tells you How to Take a Deposition, but no one warns you What May Happen during the deposition.

"Q. What trouble have you had with the law?
A. I have been arrested twice, but I never had no trouble.
Q. What were the arrests for?
A. One for shooting craps and the other for shooting a guy.
Q. Did you kill somebody?
A. He died afterwards, but I didn't kill him on the spot."

***

"Q. What were you charge with?
A. I think I was charged with melancholy mischief.
Q. Malicious mischief.
A. Malicious mischief."

***

"Q. What were you charged with?
A. Drinking while intoxicated."

***

"Q. How come your car laid down 167 feet of skid marks?
A. Well, that is how far I slid."

***

"Q. And when did you first realize that there was an accident about to occur?
A. Well, when he hit me I knew there was an accident.
Q. Do you know who hit who?
A. I'd say we probably collided about the same time."

***

"Q. Do you know of any witnesses to the accident?
A. Well, none excepting the ones that saw it."

***

"Q. Now, you have done quite a lot of drinking in your life, haven't you?
A. Yes, sir.
Q. In fact, you have been drinking this morning, haven't you?
A. Yes, sir, I have had a little.
Q. What have you had to drink this morning?
A. Beer, two.
Q. You mean to tell me, as red-faced as you are, and as glassy-eyed as you are, that you have had only two bottles of beer?
A. No, sir, I didn't say nothing about bottles. Cases, man, cases."

***

Q. What part of your lower back is it that hurts you?
A. It is about an inch below the belt line. It just aching, feel like it is numb and dead, just like a knife sticking me."

"Q. What happened then?
A. I woke up unconscious in the hospital."

"Q. Are you represented by counsel?
A. No, I only got a lawyer."

"Q. Have you had any prior accidents?
A. No, and I didn't have any before then, either."

The definition of an expert: "A man who uses big words because he is afraid that if people knew what he was talking about they would know he didn't know what he was talking about."

"Q. Are you laboring under any disability or physical infirmity?
A. No, I'm not doing anything now"

. . .

"Q. Doctor, run that by me again.
A. *To put it more simply,* the description of the external precipitation stress, the predisposing factors and the adjective description of the estimated resultant incapacity recorded in this examination are for fully psychiatric study and treatment purposes."

A WOLF IN SHEEP'S CLOTHING

THE PLAINTIFF ATTORNEYS' STRUCTURED SETTLEMENT CONSULTANT

Thomas G. Allen

Thomas G. Allen is Vice President of Structured Financial Associates, Inc., a national structured settlement firm home based in Baltimore, MD. The author thanks Charles W. Harlan, Executive Vice President of SFA, for his assistance with this article. Mr. Allen is located in Columbia, SC.

In 1979, after the issuance of Revenue Ruling 79-220, structured settlements started to become popular with tort claimants because of the ability to receive periodic payments which could be excluded from gross income for Federal income tax purposes. The defendant carriers were equally enthused because cases now had the potential for settling for lower dollar amounts than if negotiated on a pure lump sum basis.

In the early 1980's, many plaintiff attorneys felt that defendant carriers were gaining an undue advantage over their clients by portraying the actual value of structured settlements to be far greater than their cost.

Unlike the defense, who had ready access to settlement consultants to advise on structured settlement offers and negotiations, there were few structured settlement advisors to the plaintiff bar. Those who did represent plaintiffs did not usually have direct access to the settlement annuity information to determine the real cost of settlement to the defense. This was due to the settlement annuity carriers restricting their rate information to their licensed brokers who were "defense only" consultants.

In the last several years there has been a growing trend toward plaintiff attorneys seeking structured settlement advice on a variety of consultants who can accurately evaluate the cost of the defense's offer. A number of certified actuaries and economists, who have the expertise to reduce to present value the cost of periodic payments, are now regularly used by the plaintiff bar. These individuals usually charge an hourly fee for their services and can be of genuine assistance on properly advising plaintiff's counsel on the merits of the defense's offer.

Quite recently, another phenomena has taken place which appears to have created much controversy in the structured settlement industry: the plaintiff broker. This broker may be one whose primary orientation is to represent the plaintiff bar. This individual usually represents only a few settlement annuity underwriters, since the majority of the major carriers prohibit their settlement brokers from making their annuity rates directly available to plaintiffs. This position has been taken by these carriers in order to avoid the potential problem of constructive receipt as well as to discourage plaintiffs from concentrating purely on the cost of settlement as opposed to the satisfaction of their present and future damages through an alternative to a lump sum offer.

This consultant/broker is usually not working on a fee basis for his client, but hopes to be compensated by receiving a commission for the placement of the settlement annuity. This arrangement usually creates the following problems:

1. Plaintiff may negotiate a lump sum settlement, then request a structured settlement after the fact. This drives up the cost of settlement for the defense, thus discourages them from using structures in the future.
2. Creates potential for constructive receipt to the plaintiff thereby jeopardizing tax exempt status of periodic payments.
3. Turns over to the plaintiff's attorney an area of negotiation that is normally controlled by the defense.
4. Presents an ethical problem for the defense on how to fairly compensate its structured settlement broker/consultant who is usually retained on the basis of brokering the annuities used to fund the structured settlement.
5. Places the claims handler and defense counsel in the position of feeling direct or indirect pressure to use plaintiff's broker to settle the case.
6. Creates problems for the major settlement annuity carriers in terms of maintaining good will with its licensed brokers.

While it is essential for the plaintiff's bar to be able to properly evaluate any settlement offer, it would seem preferable for all parties to a structured settlement offer to recognize in advance the legitimate role to be performed by defense and plaintiff oriented structured settlement consultants.

ADVERSE POSSESSION — TRACT OR BOUNDARY

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How much land does it take to make a tract? That is the question you may be asking yourself in an adverse possession action.

Aside from the somewhat hybrid theory of "color of title," (better addressed by one with a thorough understanding), adverse possession appears to be a relatively simple legal theory, the requisite elements of which have been long established. The South Carolina Supreme Court early set forth that in order to state a valid claim for adverse possession, the possession must be actual, open, notorious, hostile, continuous and exclusive for the entire statutory period.[1] Each of the elements has been examined and defined, and each instance is, of course, determined by the facts of the particular case. This article will examine the element of hostility, and how its application has been significantly transformed in light of the recent decision of *Widgfall v. Fobbs, et al.*[2]

The Supreme Court has repeatedly held that the mere possession of land, in and of itself, is not a sufficient basis for adverse possession;[3] possession must be without subserviency to, or recognition of, the title of the true owner, and must be hostile as to the owner and to the whole world.[4] While the Court examines the personal relationship of the parties,[5] it has generally held that the possession must be with the intention to dispossess the true owner.[6] Therefore, a mutual mistake between parties as to ownership of property eliminates the indispensible element of hostility in the assertion of ownership,[7] and serves to defeat a claim to title based upon adverse possession.

The intent to dispossess remained a necessary and integral part of the element of hostility throughout a number of Supreme Court decisions. In *Babb v. Harrison*,[8] the Court held that one intending to claim only that which she believed she purchased had no claim of adverse possession until learning of an encroachment upon another's land. Prior to learning of the encroachment, Plaintiff's only claim was one of lawful ownership, and her use of the adjacent property was certainly not hostile as she was not conscious of using her neighbor's land.[9] Subsequently, the Supreme Court again applied the standard that possession of property with intent to claim only to the true line is not hostile and will not ripen into title.[10]

The requirement of intent was recently repeated in *Brown v. Clemens.*[11] In *Brown,* the Defendant acquired title to a certain tract of land through a chain of voluntary conveyances and tax deeds. The Plaintiff inherited an adjacent tract and subsequently initiated an action to declare the boundaries of the tracts, seeking an order requiring Defendant to remove certain encroachments constructed by Defendant's predecessor in title. The Court found the encroachments were erected under a mistaken belief as to the boundary, therefore, there was no hostile possession and the Defendant's claim of adverse possession consequently failed.[12]

While the requirement of intent has been consistently applied to matters involving boundary disputes, such application has not been exclusive. In *Lusk v. Callaham*,[13] Respondents' predecessor in interest farmed the land in question, cut timber and hunted on the property, claiming ownership of the 20.61 acre parcel. Respondents conceded, however, that Appellant was the holder of record title. The Court of Appeals, relying on established precedent, held that Respondents' possession under a mistaken belief that the property was theirs, without intent to claim against the true owner, did not constitute hostile possession.[14]

In the recent case of *Wigfall,*[15] the Supreme Court, disregarding *Lusk* and the precedent upon which it was based, significantly altered the historical requirement of intent. There, Respondents established legal title to two tracts of land, to which appellants claimed title through purchase or inheritance and by virtue of adverse possession. The lower court, applying the established test of intent, concluded because of Appellants' mistaken belief of ownership, they lacked intention to dispossess the true owner, therefore, their possesion was not hostile, and their claim for adverse possession must fail. The Supreme Court, however, reversed the lower Court, finding that the rule requiring intention to dispossess inapplicable since the case did not involve a boundary dispute between adjoining landowners. The Court further altered the long established rule by affirmatively declining to extend it to cases involving adverse possession of a tract of land.[16]

Wigfall is obviously a significant departure from South Carolina's long standing axiom that one can not adversely possess that which he believes he owns. The drastic distinction now drawn between cases involving boundary disputes, and those dealing with independent tracts of land, provides a preview of the success one may anticipate in raising adverse possession as an affirmative defense. Further, it must be considered whether the *Wigfall* decision is our Supreme Court's first step toward the overall adoption of the majority rule that entry and possession for the required time that is actual, open, notorious, continuous and exclusive, even though under a mistaken claim of title, is sufficient to support a claim of adverse possession. The majority

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TORT REFORM ACT OF 1988

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The Tort Reform Act of 1988 was signed into law by Governor Carroll A. Campbell, Jr., on April 5, 1988.

The act specifically provides that it "applies to those causes of action arising or accruing on or after . . ." April 5, 1988. The act addresses five (5) general areas: Statutes of Limitation, including those concerning minors and licensed health care providers; new trials; standard or proof for punitive damages; contribution among joint tortfeasors; and sanctions and penalties for frivolous proceedings. Each will be addressed below.

I. Statutes of Limitation

A) Section 15-3-530 has been amended to reduce the general statute of limitations from six (6) to three (3) years. This section covers suits for breach of contract; penalties and forfeitures; damage to real property; damage to personal property; personal and bodily injury; wrongful death; fraud; actions on insurance policies; and action against directors or stockholders of monied corporations or banking associations to recover a penalty imposed by law for *ultra vires* acts.

The time to commence an action for personal or bodily injuries is controlled by the "discovery" rule.[1] That rule holds that the time begins to run when the facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist, and not when the injured party has sought the advise of counsel or developed a full-blown theory of recovery.[2]

B) Actions against licensed health care providers[3] must be commenced within three (3) years from the "discovery" of the act or omission, not to exceed six (6) years from the occurrence,[4] excepted as to foreign objects, negligent placement of any appliance or apparatus, or suits by minors against health care providers.

Actions for the placement and leaving of foreign objects in a person or the negligent placement of any appliance or apparatus "in or upon" a person must be commenced within two (2) years of discovery; provided, however, that in no event shall the time limitation be less than 3 years, even if the object is immediately discovered.[5]

In actions against licensed health care providers by or on behalf of a person who was a minor at the time of the act or omission, the statute of limitations does not begin to run until one (1) year after the minor reaches majority or seven (7) years from the occurrence, whichever occurs first. There is a savings clause for fraud or collusion between the parent or guardian *and* the health care provider or his insurer.[6] This section does not affect any other disability addressed in Section 15-3-40.

The new general statute of limitations does not affect any other specific statutory limitation found in Chapter 3 of Title 15, with the exception of the "architects" statute (Section 15-3-640) which provides an outside limitation within which the "normal statutes of limitations continue to run." Therefore, the architects statute should be construed as: three (3) years from date of discovery, not to exceed thirteen (13) years from date of "substantial completion." (See Exceptions in Section 15-3-670.)

II. New Trials

The use of the procedure of a New Trial NISI Additur (new trial on damages only) is prohibited unless the Court should have granted a directed verdict to the Plaintiff. In all other cases the new trial must be on both liability and damages. Thus the trial judge's suggestion of a "settlement figure"[8] has become just that, a suggestion.

III. Punitive Damages[9]

This section provides that in any "civil action where punitive damages are claimed, the Plaintiff has the burden of proving *such damages* by clear and convincing evidence." [emphasis added]

The legislature could not have meant the literal use of the phrase "such damages," as punitive damages are not damages suffered by the Plaintiff, nor are they of a type which require the Plaintiff to offer any proof. As no mathematical formula exists for the calculation of punitive damages, the amount and the awarding of punitive damages is peculiarly within the judgment and discretion of the jury.[10]

The only logical interpretation consistent with the case law is that the legislature intended that the Plaintiff must prove the nature and character of the tort by clear and convincing evidence.

The test for determining whether or not punitive damages may be recovered is whether or not the reckless conduct (not the damage) was committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the Plaintiff's right.[11] The Plaintiff must now prove this conscious disregard of the rights of others by clear and convincing evidence.

IV. Contribution[12]

A) When two or more persons become jointly or severally liable, in tort, for the same injury (to person or property) or for the same wrongful death, there is a right of contribution among them, even though judgment has not been recovered against all or any of them. This right extends against tortfeasors who are not parties to the action.

B) As this is a new statute, our Courts have not yet addressed the isue of when this right arises or accrues. Our sister states have determined that this right to

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contribution does not arise until a judgment is entered or a compromise, settlement and/or payment is made.[13]

Our sister states have also determined that the right of contribution is a substantative right and not merely procedural.[14] It would, therefore, seem appropriate that the right of contribution should apply to any action presently pending in State or Federal Court or settled since April 5, 1988.

C) The act is silent as to whether or not the right of contribution can be enforced by use of our Third-Party Practice (Rule 14) or Joinder Practice (Rules 19 & 20). If it is construed as a substantive right, the logical conclusion would be to allow the Third Party action against the joint tortfeasor, especially in light of the liberal use of joinder and emphasis on judicial economy.

The intent of the act, however, seems to imply the desire of the legislation to require enforcement by separate action. The act speaks of enforcement by separate action and provides for a one (1) year statute of limitations to commence an action for contribution. Yet, the act uses the permissive language of "may be enforced by separate action" or "may be enforced" at the end of the trial by motion.

Until the Supreme Court rules on these issues, the decision whether or not to attempt to add a joint tortfeasor should be considered a purely tactical decision based upon the "in fighting" which could occur and its possible effect on the overall issue of liability.

One very practical reason to join all joint tortfeasors is that the act specifically provides that no tortfeasor is compelled to make contribution beyond his pro rata share of the entire liability.[15] However, the right to contribution does not arise until after you have paid more than your pro rata share.[16] Thus, when judgment is rendered, it is divided by the number of defendants against whom judgment is entered,[17] and no Defendant is compelled to pay more than the resulting amount, regardless of the financial ability of the other defendants. You are, however, compelled to pay, and must pay to prevent execution and levy, the pro rata share of tortfeasors who were not parties to the suit. Also, you can not bring an action for contribution until you have paid.

D) The act provides that there exists no right of contribution in favor of any tortfeasors who have been found liable for an intentional tort.[18] No does the act apply to breach of trust or of other fiduciary obligations.[19]

Further, the act does not apply to or impair any rights of contractual indemnity or indemnity actions allowed pursuant to the holding in *Stuck v. Pioneer Logging Machinery, Inc.,* 301 S.E.2d 552, 279 S.C. 22 (1983).

E) If a joint tortfeasor enters into a settlement, in good faith, by way of partial release, covenant not to sue or the like, it does not discharge any other tortfeasor from liability (but is a set-off). The settling party may not bring a claim for contribution against any other tortfeasors, but it does discharge the settling party from liability to the Plaintiff and from any contribution to any other tortfeasor.[21]

If a joint tortfeasor enters into a full and complete settlement of all claims, all joint tortfeasors are discharged from any liability to the Plaintiff. This does not discharge the non-settling parties from liability for contribution to the settling party. The action for contribution must be commenced within one (1) year of payment. (There is a slight time differential if case is settled prior to or during suit.)[22]

A liability insurer, who pays on behalf of its insured funds sufficient to fully discharge its responsibility to its insured, is subrogated to its insured's right of con-

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tribution to the extent that it has been paid amounts in excess of its insured's pro rata share of the common liability.

F) The rendering of a judgment against one (1) tortfeasor does not discharge other joint tortfeasors from liability to the Plaintiff, unless and until the judgment is paid. The satisfaction of judgment by one (1) tortfeasor ends all claims by the Plaintiff but does not discharge any right of contribution.[24]

G) The Statute of Limitations for commencing an act against a joint tortfeasor is one (1) year after the judgment becomes final, regardless of the date of payment. (Payment must be made before commencing the action.)

Attached, as an exhibit to the article, is a outline of actions and results assuming certain scenarios.

V. Sanctions For Frivolous Civil Proceedings[26]

Any person or entity who procures, initiates, continues or *defends* [emphasis added] any civil proceeding is subject to assessment for all or a portion of the adverse party's attorneys fees and Court costs if: 1) the primary purpose is other than securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; *and* 2) if the proceeding has been "terminated" in favor of the adverse party.[27]

The elements of the claim are:

1) the other party procured, initiated, continued or defended the civil proceeding against him;
2) the proceedings were "terminated" in his favor;
3) the primary purpose of the other party was improper, (as above defined);
4) the aggrieved party has incurred attorney's fees and court costs; and
5) the amount of the fees.[28]

The statute does not define "terminated." *Black's Law Dictionary,* Fifth Edition, 1979, defines "terminate" as: "to put an end to; to make to cease; to end." The implication being any ending of the suit, where one party prevailed; including voluntary non-suit or dismissal. This interpretation is, however, contrary to a reasonable interpretation of the enforcement procedures set-forth in the statute, which provide that entitlement of the aggrieved person to attorney's fees and costs "must be determined by *the* trial judge at the conclusion of *a trial upon motion* of the aggrieved party stating the manner in which . . ." this statute has been violated. "The Court *shall* base its decision upon a review of the proceedings and affidavits submitted. . ."[29]

The plain language requires a trial, at the conclusion of which a motion must be made. Under our Rules, it is impossible to commence a proceeding by motion, therefore, the "trial" must be the trial of the underlying claim. Further, the right to submit affidavits indicates there is to be no "trial" to prove the elements of the claim for the frivolous proceeding.

The matter is further confused by Section 15-36-30 which provides that when the essential elements of the chapter, "as set forth in Section 15-36-10" (actually 15-36-40), have been established "a per-

son is entitled to recover his attorney's fees and court costs, reasonably incurred in litigating the proceedings." What proceedings! The statute is designed to grant attorney's fees and costs in the underlying proceeding. This section would be void and have no meaning if it refers to the underlying proceeding. It must therefore, refer to the "litigating" of the attorney's fees and costs proceeding. What "litigating"! The oral motion at the end of the trial, with the judge reviewing the proceedings?

The unsubstantiated, unannotated opinion of the writer is that you can not commence a separate action for attorney's fees and costs; that there must be a trial of the underlying action, upon which you have prevailed; that a motion must be made at the conclusion of the trial; and if successful in your motion, you are entitled to receive additional attorney's fees and costs for the preparation of any affidavits and the submissions of proof of incurred attorney's fees and costs.

All the above being stated, Section 15-36-20 provides that the other party "must" be considered to have acted to secure a proper purpose if he "reasonably believes" in the existence of the facts upon which his claim is based; *and*

1) reasonably believes that under those facts his claim "may" be valid under existing or developing law; or
2) relies upon the advise of counsel, sought in good faith with full disclosure of the facts and information known to him; or
3) believes, as an attorney of record, in good faith that his actions were not intended "merely" to harass or injure the other party.

WHEREFORE this writer (I don't qualify as an author) pleads *Caveat Emptor* and prays that all parties will secure and review a copy of the act.

CONTRIBUTION: ACTION AND REACTION

I. Final judgment against only one (1) of several joint tortfeasors.
   - A) pay judgment in full;
   - B) liability of all joint tortfeasors discharged;
   - C) commence action for contribution, after payment in full, but within one (1) year of final judgment;
   - D) if judgment is not satisfied, Plaintiff may commence action against other tortfeasors.

II. Final judgment against all tortfeasors
   - A) after determination of the issues of liablity and damages, make motion for contribution, with notice to all parties;
   - B) no right to re-litigate;
   - C) Court to determine contribution pro rata without regard to degrees of fault but may, if equity requires, find that the collection liability of some as a group shall constitute a single share;
   - D) pay only your pro rata share, which discharges your liability to Plaintiff.

III. Final Judgment against two (2) or more but not all joint tortfeasors.
   - A) after determination of the is-

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(Continued from page 14)

sues of liability and damages, make motion for contribution, with notice to all parties;
   - B) no right to re-litigate;
   - C) Court to determine contribution pro rata without regard to degrees of fault but may, if equity requires, find that the collection liability of some as a group shall constitute a single share;
   - D) pay only your pro rata share, which discharges your liability to Plaintiff;
   - E) commence action for contribution within one (1) year of final judgment against all non-party joint tortfeasors;
   - F) if successful, divide new number of judgment joint tortfeasors by judgment amount, collect from new judgment tortfeasors all amounts paid in excess of new pro rata share of common liability;
   - G) if judgment not satisfied, Plaintiff may commence action against other tortfeasors.

IV. Settlement of all claims by less than all tortfeasors.
   - A) discharges all tortfeasors from liability to plaintiff;
   - B) commence action within one (1) year of payment against all non contributing tortfeasors;
   - C) if successful, divide the number of all tortfeasors by settlement amount, collect all sums paid in excess of pro rata share of settlement.

V. Settlement under partial release or covenant not to sue.
   - A) pay your money;
   - B) go home as you are discharged from all liability for the injuries as against the world. But you can not complain if you paid too much;
   - C) suit continues against remaining tortfeasors with right of set-off for sums received.

FOOTNOTES

1. Section 15-3-535
2. *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981)
3. Licensed health care provided is defined as physicians and surgeons; directors, officers and trustees of hospitals; nurses; oral surgeons; dentists, pharmacists; hospitals, nursing homes; or any similar category of licensed health care provides while acting within the scope of the their profession.
4. Section 15-3-545(A)
5. Section 15-3-545(B)
6. Section 15-3-545(D)
7. Section 15-33-125
8. *Graham v. Whitaker,* 321 S.E.2d 40, 45 (S.C. 1984)
9. Section 15-33-135
10. *Durham v. Clements,* 367 S.E.2d 174, 175 (S.C. App. 1988) no evidence of financial condition in record, punitive damages allowed to stand.
11. *Cash v. Kim,* 342 S.E.2d 61, 64 (S.C. App. 1986)
12. Section 15-38-20 et. seq.
13. *Evans v. Lukas,* 230 S.E.2d 136, 140 Ga. App. 182 (1976) *Shiplet v. Ellen,* 369 S.E.2d 250, 228 Va. 115 (1984) *Sydenstricker v. Unipunch Products, Inc.,* 228 S.E.2d 511, 169 W. Va. 440 (1982) *Bumgarner v. Tomblin,* 306 S.E.2d 178, 63 N.C. App. 636 (1983)
14. *Great West Casualty Co. v. Flatcher,* 287 S.E.2d 429, 56 N.C. App. 247 (1982) *Hyde v. Klar,* 308 S.E.2d 190, 168 Ga. App. 64 (1983)
15. Section 15-38-20 (B)
16. Id.
17. Section 15-38-30(a) and *Great West Cas. Co.,* supra.
18. Section 15-38-20 (C)
19. Section 15-38-20 (G)
20. Section 15-38-20 (F)
21. Section 15-39-50
22. Section 15-38-40 (D)
23. Section 15-38-20 (E)
24. Section 15-38-40 (E)
25. Section 15-38-40 (C)
26. Section 15-36-10 et. seq.
27. Section 15-36-10
28. Section 15-36-40
29. Section 15-36-30

SPECIALIZATION:

Legal Assistants in Workers' Compensation Defense

C. Victoria Barnes

Victoria Barnes is a workers' compensation legal assistant in the Greenville office of Haynsworth, Marion, McKay & Guerard.

The South Carolina workers' compensation arena has undergone enormous change during the last 20 years. The South Carolina Industrial Commission closed slightly more than 69,000 cases in 1967 with total awards barely reaching $12 million. In its Annual Report for fiscal year 1987, the South Carolina Workers' Compensation Commission reported 115,128 cases closed with awards in excess of $203.9 million.

The challenges of successfully defending workers' compensation claims have risen commensurately. Extended coverages and benefits, together with sophisticated and expensive medical procedures, have contributed to the complexity of defending these claims. In an attempt to control handling costs, carriers often delay the referral of files to their attorneys. Lawyers in high demand are then left with little time to adequately prepare cases for hearing and schedules which require constant juggling of conflicting priorities.

Enter the legal assistant. Confronted with increased case volume and complexity, an increasing number of defense firms employ legal assistants in workers' compensation. While some are graduates of paralegal training programs, others are trained by attorneys who tailor instruction.

Many aspects of case management can be efficiently handled by a well-trained assistant. File organization, summarization (both pre-trial and at the time of hearing), research for Second Injury qualification, and much of trial preparation can be delegated to a competent assistant without compromising the quality of case handling. In fact, legal assistants with nursing or health-related backgrounds may enhance the quality of representation on cases involving tedious medical problems.

While many attorneys offer carrier representatives the opportunity to complete recommended hearing assignments themselves, the legal assistant may be used when the client lacks the staff or resources to accomplish tasks in the allotted time. Additionally, use of the legal assistant gives the attorney more direct supervision over the case handling. The power to subpoena enables the assistant to obtain information previously unavailable to the client. Often, subpoenas produce information invaluable to the defense of the claim which may entirely change the course of handling.

Legal assistants can bring a myriad of ancillary benefits to the workers' compensation practice. While interviewing witnesses prior to a hearing, the legal assistant can answer questions, alleviate fear, and reassure witnesses of the lawyer's sensitivity to their positions. It is not unusual for the assistant to hear, "Oh, I'm so glad you're not the company's lawyer, may I ask you something?" Research projects, administrative responsibility and countless other functions can often be effectively delegated. Finally, the legal assistant may work to build or improve a positive working relationship with other professional associations in the community.

The Activity Summary and Statistical Abstract of the Commission's Annual Report for 1987 offers encouraging news for a workers' compensation legal assistant or one considering the field:

> More than 7,358 employers purchased insurance or became self-insured during FY 1987 than in the previous year. South Carolina's increasing workforce and steady employment figures also bear witness to the increased coverage .... As South Carolina's economy and workforce continue to grow, it can be expected that greater demands will be placed upon the workers' compensation system.

Many of these demands will fall upon the experienced defense firms in this state which have developed, or are now building, reputations for excellence in the handling of workers' compensation. As South Carolina firms expand their workers' compensation sections, new opportunities for legal assistants will surely follow.

Admittedly, some attorneys will struggle with the growing trend to employ legal assistants. Concerned with the nuances of client relations and conditioned by years of "doing it themselves," like conscientious fathers, they resist all ideas of "letting go." Recently I heard a wonderful story about a Columbia paralegal who has to repeatedly remind the attorney with whome she works that "they didn't train me to pack boxes in school." Unfortunately, all good attorneys aren't good managers. It would be difficult to find an attorney who would spend $25,000 on equipment only to leave it crated in his office. It would probably be much easier to find an attorney with members of his support staff who have never been "uncrated."

The attorney who employs and "uncrates" his legal assistant, properly trains the assistant, and provides for him a challenging and creative work environment, can reap invaluable rewards — not only for himself, but for his clients as well.

RECENT DECISIONS

MERCHANT HELD NOT LIABLE FOR FAILURE TO COMPLY WITH BAD CHECK STATUTE

John B. McLeod
Haynesworth, Marion, McKay & Guerard

In a lawsuit arising out of a customer's arrest for passing 16 bad checks in a single day, United States District Judge Joe Anderson ruled that the failure of the merchant to comply with S.C. Code §34-11-70 did not give rise to a cause of action for malicious prosecution and false imprisonment.

In this case, the merchant went before a magistrate to obtain 16 arrest warrants before the 15 day notice period specified by the bad check statute had expired. In her deposition, the plaintiff testified that she drew the checks with full knowledge that she did not have sufficient funds in her account to cover these checks. The plaintiff further stated that her husband had attempted to pay off the checks prior to her arrest.

In granting the merchant's motion for summary judgment, Judge Anderson noted that a cause of action for false imprisonment could not be maintained when an arrest was made pursuant to lawful authority. Judge Anderson further noted that the bad check statute "does not create a cause of action in favor of a maker of a fraudulent check, but protects merchants who follow its procedure." Moreover, the Court noted that payment of a bad check within the grace period does not prevent a prosecution for issuing a fraudulent check, therefore, the arest was proper even if the plaintiff's husband was prevented from making restitution.

Summary judgment was granted on the malicious prosecution claim based upon the plaintiff's admission that she was guilty of the crimes charged. Judge Anderson held that the plaintiff's guilt of the crimes charged prevented her from making out all of the elements of malicious prosecution. The Court also pointed out that the bad check statute was of no assistance to the plaintiff in making out a claim for malicious prosecution.

This decision is worthy of note because it rejected the plaintiff's contention that the failure of a merchant to follow the procedure specified in the bad check statute would give rise to civil liability. As noted by Judge Anderson, this statute provides a "safe harbor" for merchants in that the giving of the required notice creates a presumption of fraudulent intent in criminal prosecution and a presumption of probable cause in a civil lawsuit. It clearly was not designed to punish merchants for not following its procedures. *(Submitted by John B. McLeod, Haynsworth, Marion, McKay & Guerrard)*
James V. Fast Fare, Inc., C.A. No: 7:87-3222-17 (May 25, 1988).

MOTION GRANTED BASED ON STATUTE OF LIMITATIONS

David Traylor
Nelson, Mullins, Riley & Scarborough

In an Order filed May 15, 1988, in *Quattlebaum v. Carey Canada, Inc.,* The Honorable Joe Anderson granted Defendant Carey Canada's Motion for Summary Judgment based on the Statute of Limitations.

This wrongful death action was instituted by Mrs. Ruby Quattlebaum on March 17, 1986, pursuant to SC Code Section 15-51-10 (wrongful death statute). The plaintiff's husband, Robert Quattlebaum, died on July 8, 1984. In her Complaint, Mrs. Quattlebaum alleged that Carey Canada was liable for her husband's contraction of asbestosis and subsequent death. Mr. Quattlebaum had been informed in 1971 that he was suffering from asbestosis. On July 7, 1976, Mr. Quattlebaum had filed a Complaint against numerous manufacturers of asbestos-containing products, alleging that his asbestos-related disease was attributable to the actions of these defendants. Carey Canada was not a party to the original action. On October 5, 1979, Mr. Quattlebaum settled with the defendants in the original suit.

The issue before the Court was "whether a plaintiff suing under the wrongful death statute may pursue an action based on the same wrong sued upon earlier by the decedent, if the personal injury statute of limitations has expired, but the specific wrongful death limitations has not elapsed."

There is no South Carolina authority directly on this point. Thus, Judge Anderson reviewed case law from other jurisdictions. In particular, he noted that the English interpretation of Lord Campbell's Act supports the position taken by Carey Canada. The established law in English is that, where an action could not have

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RECENT DECISIONS

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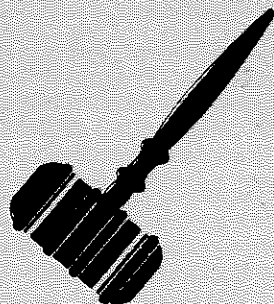
been brought by the decedent, the wrongful death cannot be maintained for the same action by his representative. Further, he noted that other jurisdictions with similar wrongful death statutes derived from Lord Campbell's Act have also adopted the English rule. In those jurisdictions, the running of the statute of limitations against the injured person's right of action bars the statutory right of the personal representative to sue for wrongful death.

Finally, he indicated that, although the case law in South Carolina has not directly addressed the issue at hand, the South Carolina Supreme Court has not been hesitant to prohibit wrongful death actions in which the decedent had in some way barred himself from pursuing the underlying cause of action. The South Carolina Supreme Court has ruled that anything that would have defeated the decedent's recovery had he survived the accident, "such as contributory negligence, a valid release, or similar acts on his part," would defeat the right of recovery on behalf of his family in case of his death. Thus, he noted that it "follows logically that the decedent's failure to file a timely claim against Carey Canada is an act, or omission, on his part which should defeat the right of recovery of his personal representative."

Thus, he concluded that the South Carolina Supreme Court would no doubt find that the wrongful death statute contains language establishing a condition precedent to the right to bring a wrongful death claim. Therefore, a new statutory right is created by Section 15-51-10 in the personal representative of the decedent which can only be maintained if the decedent, had he lived, could have maintained such an action. (submitted by David Traylor, Nelson, Mullins, Riley & Scarborough)



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ADVERSE POSSESSION

(Continued from page 11)

rule recognizes that a requirement of conscious hostility rewards intentional wrongdoers and disfavors honest, mistaken entrants. Cautious counsel will be well served by careful consideration of the impact of *Wigfall*.

FOOTNOTES

1. *Mullis v. Winchester,* 237 S.C. 487, 118 S.E.2d 61 (1961); S.C. Code of Laws Section 15-67-210 (1976).
2. *Wigfall v. Fobbs,* et al., _______ S.C. _______, 367 S.E.2d 156 (1988).
3. *Croft v. Sanders,* 283 S.C. 507, 323 S.E.2d 791 (S.C. App. 1984)
4. *Gregg v. Moore,* 226 S.C. 366, 85 S.E.2d 279 (1954)
5. *Mullis v. Winchester,* supra.
6. *Ouzts v. McKnight,* 114 S.C. 303, 103 S.E. 561 (1920)
7. *Klapman v. Hook,* 206 S.C. 51, 32 S.E.2d 882 (1945)
8. *Babb v. Harrison,* 220 S.C. 20, 66 S.E.2d 457 (1951)
9. *Id.,* at 458.
10. *Lynch v. Lynch,* 236 S.C. 12, 115 S.E.2d 301 (1960)
11. *Brown v. Clemens,* 287 S.C. 328, 338 S.E.2d 338 (1985)
12. See also *Walker, et al. v. Harris,* 291 S.C. 454, 354 S.E.2d 56, (S.C. App. 1987)
13. *Lusk V. Callaham,* 287 S.C. 459, 339 S.E.2d 156 (S.C. App. 1986)
14. *Id.,* at 158
15. *Wigfall v. Fobbs,* et al., supra.
16. *Id.,* at 157

Kiawah Island, SC
October 27-30, 1988

The planning for the program at the annual meeting at Kiawah Island is progressing well, and we anticipate an outstanding lineup of speakers. One of our featured speakers will be Mark A. Dombroff, Esquire, a partner in the Washington, D.C., office of Hughes, Hubbard & Reed. Mr. Dombroff is an experienced legal instructor, lecturer, and prolific author, writing numerous articles for the nation's leading law journals and books including *Dombroff on Demonstrative Evidence, Dombroff on Unfair Tactics,* and *Dombroff on Direct and Cross-Examination* (Wiley Law Publications), *Trial Objections* (Ford Publishing), *Key Trial Control Tactics* (Executive Reports), and *Dynamic Closing Arguments* (Prentice Hall). You may be amazed at Dombroff's skill in prestidigitation. It isn't that what all of our clients expect of us?

We are also delighted that Chief Judge Alex Sanders of the South Carolina Court of Appeals has agreed to address the group along with the President-Elect of the Defendant Research Institute, Duffield Smith. We hope to have good participation on the program by both the state and federal judiciary.

We are still putting together the program agenda and hope to have some additional announcements in the near future to round out the program.

SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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CALENDAR OF EVENTS

1988

Event	Date	Location
Defense Counsel Trial Academy	July 23-30	College Inn Conference Center, Boulder, Colorado
Federation of Insurance and Corporate Counsel	August 2-6	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
SCDTAA CLE Seminar	November 11	Columbia, SC

1989

Event	Date	Location
International Association of Defense Counsel Surety Trial Practice Program	January 27-28	The Plaza New York, New York
American Bar Association (Mid-Year)	February 1-8	Denver, Colorado
International Association of Defense Counsel (Mid-Year)	February	Location to be announced
Defense Research Institute (Annual)	February	Location to be announced
Federation of Insurance and Corporate Counsel	February 22-26	Camelback Scottsdale, Arizona
Association of Insurance Attorneys	April 18-22	Olympic Hotel Seattle, Washington
International Association of Defense Counsel (Annual)	July 2-8	Copley Place Boston Massachusetts
Defense Research Institute (Mid-Year)	July 3-5	Copley Place Boston Massachusetts
Defense Counsel Trial Academy	July 21-29	College Inn Conference Center, Boulder, Colorado
Federation of Insurance and Corporate Counsel	July 26-30	The Homestead Hot Springs, Virginia
SCDTAA Joint Meeting	July 27-30	Grove Park Inn Asheville, NC
American Bar Association (Annual)	August 3-10	Honolulu, Hawaii
SCDTAA Annual Meeting	November 2-5	The Cloister Sea Island, GA