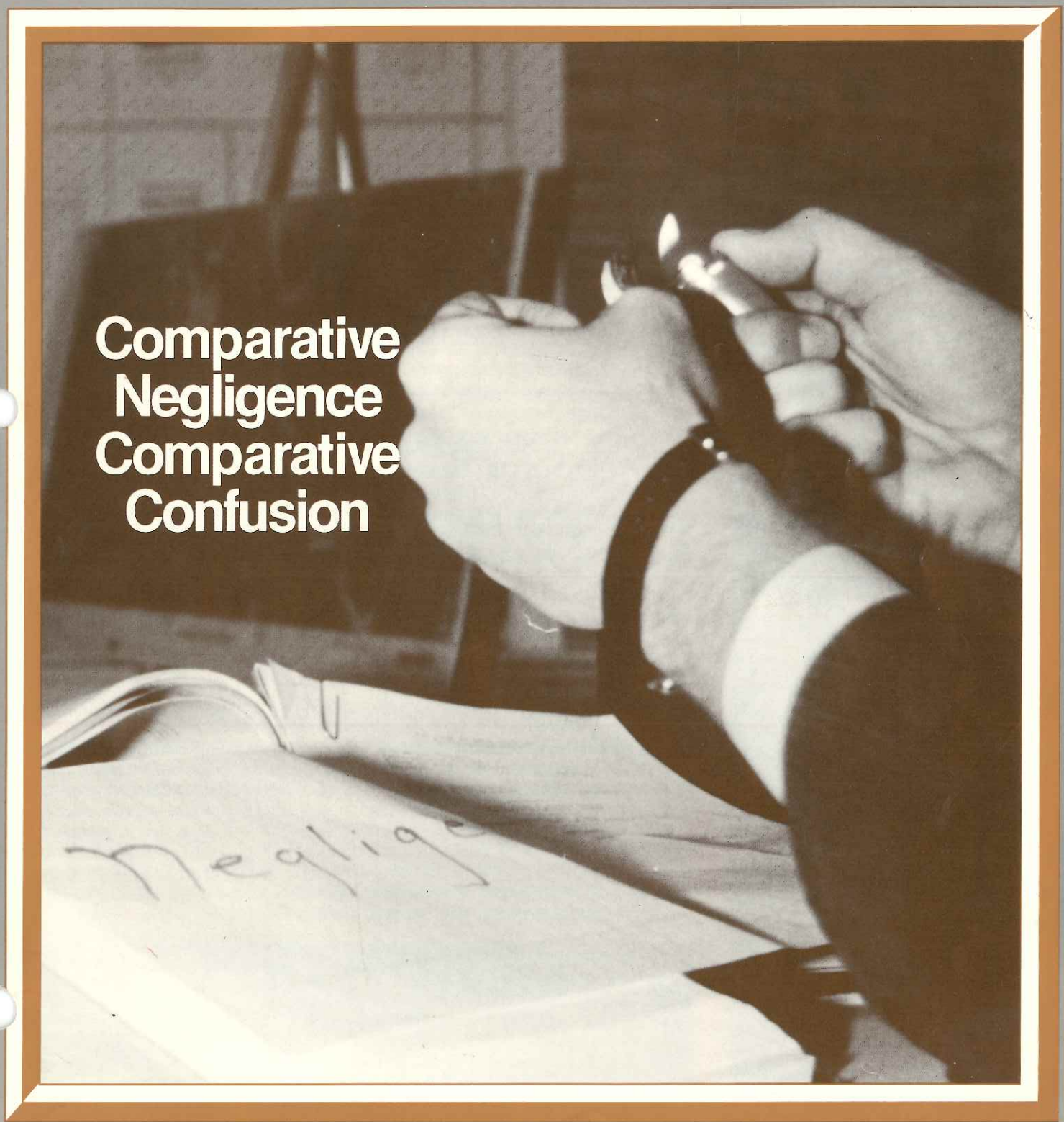
The Defense Line

S.C. Defense Trial Attorneys' Association

Spring 1991
Volume 19 Number 1



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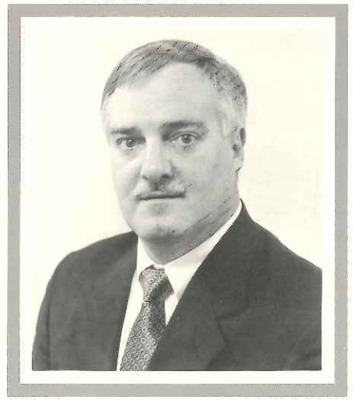

Glenn Bowers

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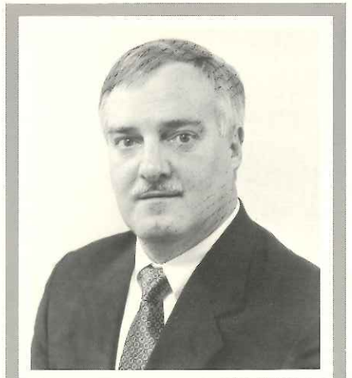

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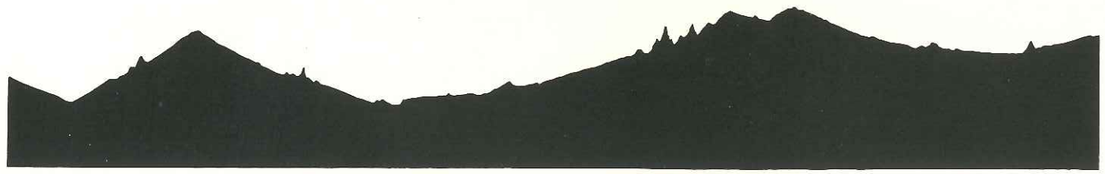
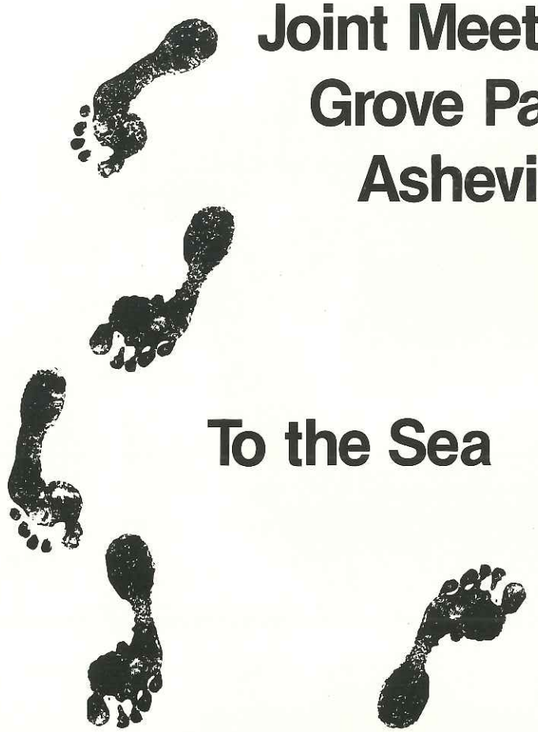
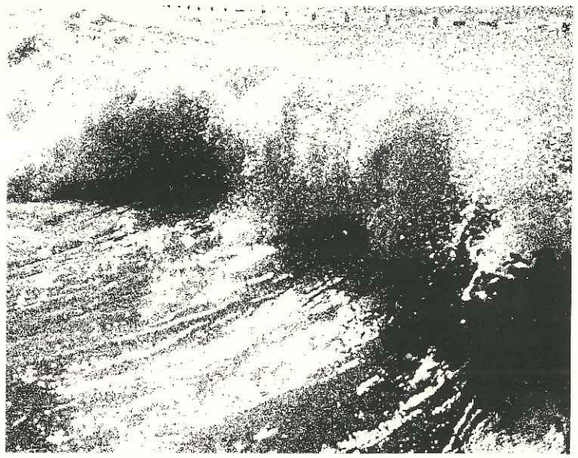
Follow SCDTAA from the Mountains



July 18 - 20, 1991
Joint Meeting
Grove Park Inn
Asheville, NC



To the Sea



November 7-10, 1991
Annual Meeting
The Cloister
Sea Island, GA

Judicial Legislation: Comparative Negligence — Comparative Confusion — Comes To South Carolina

On January 7, 1991, the South Carolina Supreme Court decided the case of *Nelson v. Concrete Supply Company*[1], and in so doing, gave the writers of this article the proverbial "good news and bad news." The good news was that the judgment entered on the jury defense verdict below was affirmed and there would be no new trial. This was especially good news in that *Nelson* was a wrongful death case involving the death of a young mother who was the primary wage-earner for a family of two children, one of whom was an infant when she was killed.

The bad news was that in affirming the judgment below, the Supreme Court overruled the long standing doctrine of contributory negligence and sent these and other defense attorneys scurrying to their law review articles and horn books in an attempt to understand what the Supreme Court meant by the following language:

> **For all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence. If there is more than one defendant, the plaintiff's negligence shall be compared to the combined negligence of all defendants. *See Elder v. Orluck*, 511 Pa. 402, 515 A.2d 517 (1986).**

This article will give a brief history behind the doctrines of contributory and comparative negligence in South Carolina and then highlight the obvious and not so obvious questions the Supreme Court did not answer in the *Nelson* case. In the immortal words of Dan Rather, we will try to tell you "what we know, and what we don't know..."

FACTS OF *NELSON* CASE

Debbie Nelson was killed when she drove her stationwagon directly into the back of an eighteen wheel cement hauler, driven by John Clinkscales. Clinkscales was attempting to merge onto I-20 in 7:30 a.m. rush hour traffic. There was no evidence of Clinkscales' negligence, but every witness to the accident testified that Mrs. Nelson never looked at what was in plain view in front of her, but was instead concentrating on picking a spot on I-20 in which to merge.

Given these facts, even a less than astute defense lawyer would ask: "So, where's the comparative negligence issue in this case? *Only* Mrs. Nelson was negligent." This is precisely the argument made at summary judgment and both directed verdict stages. However, it was not until the case was on appeal, in a footnote to the Supreme Court's decision, that the absence of any negligence on the part of the defendants was judicially recognized.

Why, then, was the question of abrogating the doctrine of contributory negligence even before the Court in *Nelson*? We may never know the answer to why the Court almost literally jumped at the chance to overrule the longstanding doctrine, but what we do know now is that the Court has once again demonstrated its impatience with the General Assembly[2] and taken it upon itself to craft a major change in a doctrine which had been followed since 1851 in this State.[3]

BRIEF HISTORY

A detailed history of the doctrine of contributory negligence is set out by Chief Judge Alex Sanders in the case, *Langley v. Boyter*, 289 s.c. 162, 325 S.E.2d 550 (App. 1984). Briefly, the doctrine was first recognized in South Carolina in *Freer v. Cameron*, 38 S.C.L. (4 Rich.) 228 (1851). As noted by Judge Sanders in *Langley*, "South Carolina first acknowledged the doctrine of contributory negligence in a case where it was held inapplicable and in which the issue of whether it should be adopted as common law of this State was not raised."[4]

Nevertheless, until *Langley*, the doctrine was never challenged in a reported South Carolina case. Thus, almost by default, it became the law of South Carolina. The South Carolina Court of Appeals in *Langley* abolished contributory negligence and adopted the modified, "not greater than," form of comparative negligence. Shortly thereafter the South Carolina Supreme Court quashed the Court of Appeals' opinion on procedural grounds, stating that in doing so it was not reaching the merits of comparative negligence. It held "that the issue of contributory negligence versus comparative negligence" must await the permission of this Court before a change in this basic, well established law is brought about, unless the legislature acts on the matter before hand." *Langley v. Boyter*, 286 S.C. 85, 332 S.E.2d 100 (1985).

The South Carolina Legislature did act. It enacted certain tort reform legislation in 1988. It considered and did not pass other tort reform proposals. Bills were introduced in the Legislature providing for a comparative negligence statute. They were rejected.[5] The doctrine of contributory negligence was left intact.

On January 7, 1991, however, the South Carolina Supreme Court, apparently impatient with the delay, dealt the death knell to the doctrine.

WHAT WE KNOW: A. TYPES OF COMPARATIVE NEGLIGENCE

There are four (4) general versions of comparative negligence that have been adopted by other states.[6] There is the "slight-gross" form, under which the plaintiff can recover if his negligence is slight as compared to the gross negligence of the defendants. There is the "pure" form under which the plaintiff recovers regardless of the degree to which he is at fault, but under which his damages are diminished by that degree of fault. Then there are two types of modified comparative negligence: "not greater than," and "not as great as." Under the "not greater than" modified form, plaintiff recovers reduced damages if his negligence is not greater than the defendant's. In other words, if the plaintiff's negligence is 50% or less, he recovers damages reduced by his percentage of negligence. Under the modified form, "not as great as," the plaintiff recovers reduced damages as long as his negligence is not as great as the defendant's i.e., 49% or less. Under both modified versions, if the plaintiff's negligence is greater than the cutoff percentage, 50% or 49%, he may not recover.

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JUDICIAL LEGISLATION

Continued from page 5

B. THE SOUTH CAROLINA RULE

The South Carolina Supreme Court adopted the modified "not greater than" comparative negligence form, which coincidentally is the modified form of comparative negligence suggested by the South Carolina Court of Appeals in *Langley v. Boyter.* Under this form if the plaintiff is only 50% negligent, then he can recover. If, however, the plaintiff is 51% negligent, recovery is barred. Some believe that the 51%-49% rule is preferable.[7] In fact, even the South Carolina Trial Attorneys' Association has in the past advocated adoption of the "not as great as," or 51%-49%, form of comparative negligence.[8] Judge Sanders discussed problems inherent in the "not-as-great-as" version in *Langley.* He objected to the "not-as-great-as" version because, in his opinion, it allowed a defendant who is equally at fault to escape all responsibility. In his opinion, the "not-greater-than" version of the doctrine was preferable. He discussed that it provided the correct balance. It required that parties equally at fault in causing an accident share equally in the damages and costs.

There are also problems, however, with the "not greater than" version. An example of one such problem with the 50%-50% rule is illustrated by the following: assume two parties collide in an automobile accident, both of whom were drinking, speeding and driving down the middle of the road, unfortunately toward each other, both are injured and driver A has injuries of $50,000.00 and driver B has injuries of $25,000.00. A and B are determined to be equally at fault. Under the "not greather than" version, A collects $25,000.00 from B (his damages reduced by his percentage of fault), but B collects only $12,500.00 against A (his damages less his percentage of fault). Both are equally at fault, but B must pay 100% more than A.

WHAT WE DO NOT KNOW: AFTERSHOCK

There are a great many areas of tort law that are potentially affected by the change from contributory negligence to comparative negligence and a great many questions left unanswered. Some of these areas of the law affected are:[9]

A. The last clear chance doctrine;
B. Assumption of risk;
C. Foreseeable misuse of a product;
D. Grossly negligent or reckless conduct;
E. Willful misconduct;
F. Violation of a statute as negligence *per se;*
G. Various types of workplace injuries;
H. Strict liability/no fault;
I. The degree of causation, as opposed to fault;
J. Interaction with the Uniform Commercial Code;
K. Application of the rule to multiple defendants with varying degrees of causation/fault;
L. Apportionment/joint and several liability;
M. Contribution among joint tortfeasors; and
N. Set off/contribution.

It is beyond the scope of this article to discuss the impact of the judicial enactment of comparative negligence on these areas of law. However, by way of example of the impact of the change in the law, we have included herein a brief discussion of the doctrines of last clear chance and assumption of the risk. There are also a number of treatises and decisions in other states that provide such instruction.[10]

(1) Last Clear Chance

Is the doctrine of last clear chance still the law in South Carolina?[11] Should it be?[12] Most commentators agree that the doctrine of last clear chance is probably no longer viable under a comparative negligence scheme, since the jury will be weighing each party's conduct against the other's. The purpose of last clear chance was to ameliorate the often harsh results of contributory negligence. As these results theoretically will be reduced or eliminated under comparative negligence, last clear chance would seem superfluous.

(2) Assumption of the Risk

The defense of assumption of the risk, which was born during the Industrial Revolution to protect entrepreneurial employers in rapidly expanding industries,[13] essentially recognizes that a plaintiff who willingly accepts a potentially dangerous situation cannot later shift responsibility to a defendant for the outcome of the plaintiff's exposure to that situation. With the adoption of comparative negligence, the question arises whether and to what extent assumption of the risk remains a valid defense in South Carolina. Some states appear to have merged assumption of the risk with comparative negligence, under the theory that the defense frustrates the purpose of comparative negligence, to apportion damages on the basis of fault. The criticism of assumption of the risk arises from the following apparent inconsistency: a plaintiff who knowingly accepts a danger caused by the defendant's conduct can be barred completely under the defense, while a plaintiff who negligently encounters the danger may recover in proportion to his degree of fault. A close examination of the policies behind the two doctrines, however, reveals that there is no inconsistency: comparative negligence measures a plaintiff's conduct objectively against that of the "reasonable person" while assumption of the risk is based not on relative fault, but on the plaintiff's knowing and voluntary exposure to a defendant's dangerous conduct. To merge the defense with comparative negligence would be to mix issues of consent with comparative fault.[14]

THE FUTURE

Attorneys and judges might expect that the Legislature will now turn to the issue and attempt a comprehensive law. Until that time or until the Court has the opportunity to define the parameters of the new law, there will be much confusion, for all cases arising after July 1, 1991.

by Susan Batten Lipscomb and
Susi P. McWilliams, both of
whom are partners with
Nexsen Pruet Jacobs & Pollard

ENDNOTES

1. S.C. Op. No. 23303 (Jan. 7, 1991).
2. The Supreme Court judicially abrogated the doctrine of charitable immunity in *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association*, 277 S.C. 1, 282 S.E.2d 230 (1981); abolished the doctrine of parental immunity in *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980); abolished the "locality rule" in medical malpractice cases in *King v. Williams*, 276 S.C. 478, 279 S.E.2d 618 (1981); and abolished sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).
3. Ironically, just as the issue was not truly before the Court in *Nelson*, so also in *Freer v. Cameron*, 38 S.C.L. (4 Rich.) 228 (1851), where South Carolina courts first recognized the doctrine of contributory negligence, the issue was not squarely raised by the facts of that case.
4. *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (App. 1984).
5. *See e.g.*, H.B. 2709, 1979 S.C. General Assembly; H.B. 2112, 1982 General Assembly; H.B. 2971, 1983 General Assembly; H.B. 2306, 1985 General Assembly; H.B. 2610, 1987 General Assembly.
6. Georgia has a unique version of comparative negligence codified at *Ga. Code Ann.* § 105-603 (Supp. 1982)
7. W. Prosser, J. Wade and V. Schwartz, *Tort Cases and Materials* (6th Ed. 1976).
8. Amicus Brief, South Carolina Defense Trial Attorney's Association, *Langley v. Boyter.*

Continued on back cover

New House Ethics Rules

Below is a summary of the new House Rules concerning ethics and campaign practices which have recently been adopted. This summary was prepared by Stephen P. Bates, Counsel to the Speaker, and was graciously provided to us by Mr. Bates for our publication in *The Defense Line.*

If this summary raises additional questions, please refer to the full text of the House Rules for guidance which can be obtained through the House of Representatives here in Columbia.

RULE 11
LOBBYISTS AND LOBBYING

11.1 Definitions of terms used in the rules, including definitions of "lobbying," "lobbyist," and "gift."

Several persons are excepted from the definition of "lobbyist," including persons expressing personal opinions; persons who receive no compensation to lobby and expend less than $1,000 a year for the benefit of House members and staff; persons who limit activities to appearances before committees; elected or appointed public officials appearing in their official capacities; persons who perform professional drafting services or render opinions to clients as to construction or effect of proposed legislation; members of the press; persons representing churches; and, persons running for offices elected by the General Assembly.

"Gifts" are defined as any item, entertainment, food, beverage, travel, and lodging given or paid voluntarily to a House member or his/her immediate family member without full and adequate consideration. Not included, however, are mementos of occasions, gifts from non-lobbyists valued at less than $25, and food and beverages provided by a non-lobbyist.

11.2 Registration requirements for lobbyists.

11.3 Annual reporting requirements for lobbyists.

11.4 Annual reporting requirements of state agencies on lobbying activities.

11.5 Powers of the House Ethics Committee, including subpoena power, authority to require reports from persons, deposition power, rule making authority, power to request Attorney General to initiate proceedings for violations of state law outside of the jurisdiction of House Rules, and power to impose fines.

11.6 Duties of the House Ethics Committee, including creating reporting forms, issuing ID cards to lobbyists, preparing manual recommending bookkeeping and reporting methods, keeping and making available records for public inspection, receipt of complaints and initiation of investigations, preparation of studies and reports upon request from House members, and making recommendations for legislation.

11.7 Lobbyists may not be paid on a contingency basis.

11.8 Lobbyist who violates rule or falsifies records is guilty of contempt. Also, lobbyist who violates state law regulating lobbyists barred from lobbying for 3 years.

11.9 Willful filing of a complaint to Ethics Committee may result in disciplinary action if complaint lacks just cause or is filed with malice.

11.10 No lobbyist may invite any House member to, nor may any member attend, a function paid for by a lobbyist unless one of the following groups is invited: the entire membership of the House, a standing committee, a standing subcommittee, a caucus, or an entire county House delegation.

RULE 12
ACCEPTANCE OF COMPENSATION

12.1 Definition of "compensation" same as in Rule 11.1.

12.2 (A) No House member or staff member may receive or solicit, directly or indirectly, anything of value as a gift, gratuity, or favor if there is reason to believe the donor would not give the gift but for the House member or staff member's position or if there is reason to believe the officer or director of the donor is seeking to obtain business relationships with the House member or staff member's agency or if the donor conducts operations regulated by the recipient's agency, if the gift is related to the recipient's office or position.

(B) Anyone in violation of 12.2 (A) is subject to punishment under the House Rules.

(C) Except for campaign contributions, no member or staff member may receive anything of value from a lobbyist except food and beverages consumed at a function to which the entire membership of the house, a standing committee, a standing subcommittee, caucus, or county House delegation is invited, a memento of the occasion, or other award in the form of a plaque, etc. having value only to the recipient.

(D) Any House member receiving more than $1000 in a year from any person which employs, directly or indirectly, a lobbyist shall report that compensation to the House Ethics Committee.

12.3 Members of the House, candidates for the House, and those working on their behalf must not accept contributions of more than $50 in cash from anyone and contributions of more than $250 from any lobbyist or employer of a lobbyist for any given campaign.

12.4 Candidates for the House or those working on their behalf must keep a record of all campaign contributions and expenditures, regardless of amount, and file those records with the House Ethics Committee on a quarterly basis and 30 days after the election.

12.5 Quarterly filing requirements of Rule 12.4 are considered continuing after election if candidate continues to collect funds to pay off expenses.

12.6 No member of the House may accept campaign contributions on State House complex.

12.7 Candidates for and members of the House shall not use campaign funds for personal use.

12.8 No member of the House acting in his/her official capacity shall receive cash honorariums for speaking engagements, other than for actual expenses incurred.

RULE 13
CONTEMPT PROCEEDINGS

13.1 Upon a report to the Speaker of conduct contemptuous or otherwise violative of House Rules, the Speaker shall refer the matter to the House Ethics Committee for a hearing. The Ethics Committee must either dismiss the matter or make a report to the House. Upon receiving a report, the House shall meet as a committee of the whole and consider the matter and render appropriate action. If a finding of contempt is made, the guilty party is subject to a fine of $500 to $1000.

DO's & DON'T's UNDER NEW HOUSE ETHICS RULES

Gifts from Lobbyists

To House Members: Prohibited, except for food or beverages served at a function to which the entire membership of the House, a committee, subcommittee, caucus, or county delegation is invited, mementos of such occasions, or awards such as plaques having value only to the recipient.

To Staff Members: Same as for House Members.

Gifts from Nonlobbyists

To House Members: Prohibited if reasonable to believe donor would not give except for recipient's official position. Gifts of food or beverage, mementos of an occasion, or gifts of less than $25 not prohibited, however. Honorariums for more than actual expenses are prohibited.

Continued on page 8

HOUSE ETHICS RULES

Continued from page 7

To Staff Members: Prohibited if reasonable to believe donor would not give except for recipient's official position. Gifts of food or beverage, mementos of an occasion, or gifts of less than $25 not prohibited, however.

Social Functions Paid For By Lobbyists

House Members: May not attend unless entire membership of the House, one of its standing committees, subcommittees, caucuses, or county delegations is invited, unless the member pays his own way.

Staff Members: May not attend unless entire membership of the House, one of its standing committees, subcommittees, caucuses, or county delegations is invited. That means individual staffers or committee staff, etc. cannot be taken out to lunch by a lobbyist. Staff members can attend lobbyist-paid-for functions only if their boss has been invited under the above guidelines.

Social Functions Paid For By Nonlobbyists

House Members: May attend. Includes dinners given by local plant managers, PTA, other civic and business groups, for example.

Staff Members: May attend.

Campaign Contributions From Lobbyists

House Members & Candidates for the House: $250 limit per lobbyist, per campaign and no cash contributions larger than $50. All contributions, regardless of amount, must be reported.

Campaign Contributions From Non-lobbyists

House Members & Candidates for the House: No monetary caps imposed except for a $250 limit per each contributor who employs a lobbyist, per campaign. No cash contributions larger than $50 allowed and all contributions, regardless of amount, must be reported.

Prefiled Workers' Compensation Bills

By Samuel F. Painter

Ten bills related to workers' compensation were prefiled when the South Carolina General Assembly convened on January 7, 1991. These bills, which are identified below by bill number and sponsor, can be summarized as follows:

S.94 [Sponsor: Land] 50% STOP PAYMENT PENALTIES — This bill would increase the penalty for stopping payments of temporary total disability compensation in violation of the pertinent commission regulations from 25% of the amount wrongfully withheld to 50% of the amount wrongfully withheld.

S.95 [Land] REPETITIVE TRAUMA — This bill would amend the definition of injury to include repetitive trauma.

S.96 [Land] PRIOR TREATMENT *BY* (RATHER THAN *IN*) INSTITUTION SUFFICIENT TO PROVE PRE-EXISTING PSYCHONEUROTIC DISABILITY TO SIF — The Second Injury Fund statute lists 33 conditions which are presumed to be permanent and an hindrance to employment (and which therefore may be the basis for a claim against the Second Injury Fund for reimbursement of a portion of compensation and medical benefits). One is psychoneurotic disability. The current statute reads that the psychoneurotic disability must follow treatment *in* a recognized medical or mental institution. Under the proposed amendment, the prior treatment need only to have been provided *by* a recognized medical or mental institution.

S.97 [Land] 25% LATE PAYMENT PENALTIES — This bill would increase the penalty for late payments of compensation from 10% of the late installment to 25% of the late installment. It further provides that a weekly or bi-weekly installment may be subject to such a penalty if that installment is as much as three days late.

S.127 [McConnell] STATE FUND RECORDS SUBJECT TO F.O.I. ACT — This bill would make records of the State Workers' Compensation Fund subject to disclosure under the Freedom of Information Act.

S.133 [Land] AVERAGE WEEKLY WAGES — This bill would change the method of determining an employee's average weekly wage from using the average of the previous 52 weeks to taking the average of the highest and lowest preceding quarters and dividing that average by 13. Where this is impractical due to the shortness of time during which the employee has been in the employment, regard is to be had to the average weekly amount earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

S.134 [Land] RESIDENT ADJUSTERS REQUIRED — This bill would require every insurance carrier insuring employers in this state under the Workers' Compensation Act to maintain a resident adjuster for the purpose of investigation and settlement of claims.

S.231 [Pope] COUNTY PRISONERS — This bill would delete the provision in the present statute (§42-1-500) which limits workers' compensation coverage to county prisoners serving sentences of 90 days or more so as to provide that workers' compensation coverage applies to county prisoners regardless of the length of sentence.

S.363 [Rose] REMOVAL OF 500 WEEK LIMITATION; HEMIPLEGICS — This bill would remove the 500 week limitation now imposed under §42-9-10 on most total disability awards and would provide for payment of total and permanent disability "without limitation, regardless of any other provision of law" for the "actual period of the total and permanent disability." The bill also adds "hemiplegics" to the present list of conditions ("paraplegic, quadriplegic, or who has suffered physical brain damage") which qualify for lifetime benefits. This bill was drafted so as to apply retroactively with regard to any injury for which compensation was being paid on October 1, 1990.

H.3022 [Gentry] COUNTY PRISONERS — This bill appears to be identical to S.231.

SUMMARY JUDGMENT GRANTED TO DEFENDANTS IN 42 U.S.C.A. § 1983 ACTION DUE TO ABSOLUTE AND QUALIFIED IMMUNITY AND FAILURE BY PLAINTIFF TO ESTABLISH STATE ACTION REQUIREMENT IN HIS § 1983 CAUSE OF ACTION.

In *Miller v. Town of Mount Pleasant*, Civil Action No. 89-1458-18 (October 29, 1990), the Honorable David C. Norton, held in a summary judgment that Plaintiff failed to state a federal cause of action under 42 U.S.C.A. § 1983. Miller, the Plaintiff brought this action against the Town of Mt. Pleasant, the Mayor of Mt. Pleasant and the individual members of the Mt. Pleasant Town Council in their official capacities. The causes of action alleged were: (1) violation of Civil Rights under 42 U.S.C.A. § 1983; (2) intentional infliction of emotional distress; (3) negligence; (4) invasion of privacy; and (5) malicious prosecution. Summary judgment was granted as to the first cause of action under § 1983. Therefore, the dismissal of the Plaintiff's only federal cause of action (§ 1983) left remaining causes of action which were exclusively governed by state law. It would have required the South Carolina Tort Claims Act to be interpreted and applied. Due to the recent enactment of the SCTCA there is not a wealth of authority available on its applicability. Therefore, the Court decided that the parties would be better served by allowing the state law matters to be adjudicated in the state court. Thus, the state law claims were dismissed without prejudice to the right of the Plaintiff to seek redress in the appropriate form.

In this § 1983 action Miller alleged that Town employees acting under the direction of the above-named Defendants arrested and tried him on two different occasions for the same offense. Miller asserted that the Defendants' actions deprived him of his 5th Amendment right to be free from being twice subjected to jeopardy of life or limb for the same offense, more commonly referred to as double jeopardy. U.S. Const., Amend. V.

The underlying prosecutions in this case concerned various signs Miller used for a car dealership he owned and operated in Mt. Pleasant. He used three free standing signs. One which was a large sign with a "Cadillac" logo which identified the dealership. This sign had been erected prior to the passage of an ordinance which classified certain signs as "non-conforming." The second sign was a free standing "Peugeot" sign. The Peugeot was erected pursuant to a variance which allowed its construction, provided an adjacent building was constructed within one year so as to remove the sign's status as a free-standing sign. The building was never constructed. The third sign was a "Used Car" sign. In addition to these three signs, there was also a commercial billboard constructed on Miller's property. Miller allowed an advertising agency to maintain this sign and the agency rented space on the sign to various businesses.

On November 2, 1988, Miller was served with the Summons and Complaint for a violation of Mt. Pleasant Municipal Code § 155.72(h.1), "Nonconforming [S]tructures and Uses." The Summons defined the nature of the offense as "Cessation of [N]onconforming [S]igns; 155.72." Section 155.72(h) provides:

> [a]ll nonconforming uses of land shall be discontinued, and all nonconforming buildings or other structures shall be torn down, altered, or otherwise made to conform with the provisions of this ordinance within the following period of time after said ordinance is enacted into law.
>
> (1) Nonconforming signs shall be brought into compliance by removal, relocation, or alteration within three years from the effective date of this restriction

On January 17, 1990, Miller was tried before a Mt. Pleasant Municipal Judge. The Municipal Judge found that Miller fell within a grandfather provision which allowed all signs erected prior to the ordinance's passage to remain in existence. Therefore, he found Miller not guilty. Mt. Pleasant initially appealed, but dropped the appeal on advice of counsel. On March 14, 1989, Miller was again served with a Summons for violation of § 155.72(h.1). This charge was termed "continuing violation of § 155.72(h.1), of [N]onconforming [S]igns Structures and [U]ses." Under § 155.142, which is the "Penalty" ordinance, an offender is subject to separate prosecution for each day a sign infraction continues.

At his second trial, Miller moved to have the Municipal Judge dismiss the charge because it violated his constitutional right not to be placed in double jeopardy. Apparently, the Municipal Judge deferred ruling on this motion until the end of the trial. When Miller was found not guilty, this motion was not ruled upon, either because of the Municipal Judge found it unnecessary or because Miller's attorney did not pursue the motion further. The record was unclear regarding this. At the second trial, the Municipal Judge again found that Miller's signs fell under a grandfather provision and that Miller was therefore not guilty. Mt. Pleasant appealed. This appeal was heard by Circuit Judge Ralph King Anderson, who dismissed it with prejudice. Miller then brought the action alleging the five above-mentioned causes of action.

Judge Norton, in determining summary judgment for the Mayor and members of the Town Council noted that the threshold issue for determination was whether those named were entitled to immunity. Immunity is the threshold issue in a § 1983 case which involves persons holding legislative positions who are named as defendants. Justice Norton noted that it is well settled that a county legislature, such as mayor or town council member, is entitled to absolute personal immunity provided that he can establish that he was functioning in a legislative capacity when the conduct at issue occurred. *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983). Although the mayor and council members in this case may have acted in a legislative capacity in enacting and amending the various town ordinances under which Miller was prosecuted, Miller asserted that these legislators lost their absolute immunity when they agreed to prosecute Miller. It is important to note that at oral argument, counsel for Miller conceded that at least three council members should be dismissed. There was no evidence in the record to even suggest that the mayor and council members participated in the prosecution of Miller. Rather, it appeared that the mayor and council members merely received updates on the progress of the prosecution during the normal course of council meetings. There was also no evidence that the mayor and council members stepped outside their legislative province and into the area of enforcement. Therefore, Justice Norton found that the mayor and council members were entitled to absolute immunity.

Judge Norton went even further and stated that even accepting Miller's contention that the mayor and council members acted outside the province of their legislative realm and entered into the area of prosecution such that they were not entitled to absolute immunity, they may nonetheless have been protected by the shield of qualified immunity.

The Court noted that the test for qualified immunity is whether an official's conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court, after reviewing the record, found that it was devoid of any fact that would establish that this test had been met in the instant case.

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Accordingly, the Court found the mayor and council members were entitled to summary judgment on the basis that they were entitled to absolute as well as qualified immunity under the facts of the case. As to the Town of Mt. Pleasant, Justice Norton stated that in a § 1983 action, a plaintiff must prove two essential elements: (1) that the conduct of which he complains was committed by a person acting under cover of state law (the state action requirement); and (2) that the conduct deprived him of a constitutional right (privilege or immunity) secured by the Constitution of the United States. *Gomez v. Toledo*, 446 U.S. 635 (1980).

Miller asserted that he was deprived of his 5th Amendment right not to be prosecuted twice for the same offense. In this case, it was not necessary for the Court to determine the issue of whether Miller was placed in double jeopardy, because, he failed to establish that the named defendants were subject to suit under the facts of this case and failed to establish that state action was present in the case.

Miller's theory was that the prosecutor was acting under the policy or direction of Mt. Pleasant when she prosecuted Miller. A municipality can be found liable under § 1983 only where the municipality itself causes the violation at issue. Generally, respondeat superior or vicarious liability will not attach under § 1983. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). It is only when "the execution of the government's policy or custom...inflicts the injury...that the government as an entity is responsible under § 1983"; *Id.* at 694. Therefore, in order for Miller to have prevailed in the case, it was not enough to show that a municipal employee acted wrongly. Rather, he had to show that the tortuous actions occurred as a result of a municipal policy or custom.

While municipal policy is usually obvious in municipal ordinances, regulations and the like, it may also be found in formal or informal ad hoc policy choices or decisions of municipal officials authorized to implement municipal policy. *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987). In addition to "policy," "custom or usage" may also provide a basis for liability under § 1983. The existence of a custom or usage may be found in "persistent and widespread...practices of [municipal] officials [which] [a]lthough not authorized by written law, [are] so permanent and well settled as to [have] the force of law. *Spell* at 1386 [citation omitted]. Justice Norton noted that the following factors are critical in a § 1983 case based on policy or custom: (1) identifying the specific policy or custom; (2) fairly attributing the policy at fault for its creation to the municipality; and (3) finding the necessary "affirmative link" between identified policy or custom or specific violation. *Spell* at 1389.

The policy or custom alleged by Miller in this case was Mt. Pleasant's failure to adequately train or supervise the prosecuting attorney on the concept of double jeopardy. Judge Norton noted that there are circumstances where a failure to train can amount to a policy or custom. However, "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *City of Canton, Ohio v. Harris*, 109 S. Ct. 1197, 1205 (1989). Further, for liability to attach, the identified training deficiency must be closely related to the ultimate injury. *Id.* at 1206.

Justice Norton found in this case that Miller had failed to produce any evidence whatsoever of a custom, had failed to attribute the creation of that custom to Mt. Pleasant, and had failed to establish a link between the alleged custom and the specific violations in the instant case. Accordingly, Miller had not established the state action requirement of his § 1983 cause of action. Therefore, summary judgment was granted as to this cause of action.

Submitted by Thomas J. Will
Burnwell, Whaley, Patterson & Helms
Charleston, SC

SUMMARY JUDGMENT: LACK OF FILING AS PRESCRIBED BY THE TORT CLAIMS ACT PREVENTS RECOVERY WITHIN THE PRESCRIBED STATUTE OF LIMITATION.

In *Curry v. Newberry County Memorial Hospital*, Civil Action No. 90-CP-36-19 (November 13, 1990), the Honorable Thomas L. Houghston, Jr., held in a summary judgment that the claimant did not file an appropriate claim under *S.C. Code Ann.* §15-78-80, and was therefore barred by the Statute of Limitations prescribed by *S.C. Code Ann.* §15-78-110 (Supp. 1989). Thus, summary judgment was granted for the Defendant, Newberry County Memorial Hospital ("NCMH") on the grounds that the action against it was barred by the two year Statute of Limitations found in the South Carolina Tort Claims Act *S.C. Code Ann.* §15-78-110. NCMH is a governmental health care facility as defined in *S.C. Code Ann.* §15-78-30 (j) and, therefore, a political subdivision of the State under *S.C. Code Ann.* §15-78-30 (h). Therefore, the case was governed by and subject to the provisions of the South Carolina Tort Claims Act, *S.C. Code Ann.* §15-78-10, *et. seq.*

The undisputed evidence showed that the Plaintiff, Brenda Curry, was injured in an automobile accident on July 25, 1986. Emergency medical services personnel placed her in a "Reeves Sleeve" at the scene to immobilize her spine, and transported her to the NCMH. The Defendant, T. Daniel Caddell, M.D., examined her in the emergency room and, with assistance from the hospital personnel, treated her. She was then transferred to the care of the trauma team at Richland Memorial Hospital for additional treatment.

The Plaintiff claimed that the Defendant negligently failed to remove the "Reeves Sleeve" and her clothing, which was soaked with gasoline, and clean the gasoline from her skin prior to her transfer to Richland Memorial Hospital, which omissions caused the skin on her buttocks, back and legs, to be chemically burned. Her deposition stated that on the day of the accident she felt a burning sensation from the gasoline on her back, and was told that her back surgery had to be delayed because of the burns. She also testified that she viewed the burns that day. She, therefore, clearly discovered or reasonably should have discovered her loss on July 25, 1986, and the statute undeniably commenced to run on that day. The Plaintiff commenced this case against NCMH on June 2, 1989, which was more than two years but less than three years after she knew or should have known of her loss.

The Statute of Limitations applicable to this and other Tort Claims Act cases is found at *S.C. Code Ann.* §15-78-110, and reads as follows:

> Except as provided for in §15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred *unless the action is commenced within three years of the date the loss was or should have been discovered.* (Emphasis supplied)

The claims provision of the Act is found at *S.C. Code Ann.* §15-78-80, which section prescribes the contents of claims filed under the act and also provides a method by which such claims should be filed. It reads in pertinent part as follows:

> (a) A verified claim for damages under this chapter, setting forth the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved is known, and the amount of the loss sustained may be filed:

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> (1) In cases against the State, with the State Budget and Control Board, or with the agency employing an employee whose alleged act or omission gave rise to the claim;
> (2) Where the claim is against a political subdivision, with the political subdivision employing an employee whose alleged act or omission gave rise to the claim;...
> (c) Filing may be accomplished by receipt of certified mailing of the claims or by compliance with the provisions related to the service of process.
> (d) The verified claim may be received by the Budget and Control Board or the appropriate agency or political subdivision. If filed, the claim must be received within one year after the loss was or should have been discovered.

The Plaintiff notified the NCMH of her claim for damages by letter to the hospital dated March 11, 1987. This letter was forwarded by the hospital to its liability insurance carrier, the Insurance Reserve Fund, a division of the State Budget and Control Board. Plaintiff subsequently forwarded medical records concerning the Plaintiff's treatment following her automobile accident to the Insurance Reserve Fund. In addition, Plaintiff's attorney discussed the case with the claims representative for the Insurance Fund. None of the letters or other written communications sent by Plaintiff to the hospital or to the Insurance Reserve Fund were verified, nor were they sent by certified mail, nor served in compliance with the provisions of law relating to service of process.

The Plaintiff argued that she had substantially complied with the requirements of §15-78-80 through her letters to the hospital and to the Insurance Reserve Fund and her attorney's oral conversations with the claims representative. Therefore, she argued, that the Statute of Limitations was extended from the two year period to the three year period prescribed by the Statute.

The Court disagreed with the Plaintiff and granted summary judgment for the Defendant, NCMH. The Court noted that the hospital is only liable for torts within the limitations of the Tort Claims Act and in accordance with the principals established therein. *S.C. Code Ann.* §15-78-20 (a). None of the limitations imposed by that Act is the Statute of Limitations in §15-78-110. Under that provision, a Plaintiff must commence an action within two years after the loss was or should have been discovered, and as the Court noted was July 25, 1988 in this case, unless she had first "filed a claim pursuant to this chapter" in which case she would have three years in which to file her action.

The Court further noted that although the Plaintiff provided information to the NCMH and the Insurance Reserve Fund concerning her claim, she did not file a claim as prescribed by the Act. Nothing she provided to the NCMH or to the Insurance Reserve Fund was verified, nor was it sent by certified mail or served in compliance with the provisions of law relating to service of process. Further, she did not provide all the information required in §15-78-80, omitting such things as the amount of medical bills, the size and location of the burns and any permanent scarring, the amount of any lost wages, and the extent and kind of any additional medical treatment necessitated by the alleged defect. Finally, no verified amount of loss claimed by the Plaintiff was ever provided.

The Court concluded, that because the Plaintiff did not follow the verified claim procedures of §15-78-80 and did not fully provide the information required, she did not file claim pursuant to the Act. Therefore, she could not avail herself of the optional three-year Statute of Limitations. The two-year Statute of Limitations outlined in §15-78-110 was applicable to the case, and since the Plaintiff commenced the action more than two years after the date she knew or should have known of her loss, her action was barred.

Submitted by Laura C. Hart
Turner, Padget, Graham & Lane
Columbia, SC

DRI Seminars

February 13-15, 1991 —
Defending Product Liability Claims in the 1990's —
Westin Canal Place, New Orleans, LA

February 21-22, 1991 —
Damages —
Desert Inn, Las Vegas, NV

February 28 - March 2, 1991 —
Environmental, Hazardous Waste and Toxic Torts —
Hotel del Coronado, San Diego, CA

March 26-27, 1991 —
Insurance Claims Supervision —
Westin Hotel, Seattle, WA

April 18-19, 1991 —
Drug and Medical Device Litigation —
Fairmont Hotel, Chicago, IL

May 2-3, 1991 —
Excess and Reinsurance —
Stouffer Harborplace Hotel, Baltimore, MD

A Tribute To William G. "Bill" Lynn, Jr.

William G. "Bill" Lynn, Jr., 47, died October 26, 1990 at his home in Aiken, South Carolina following surgery in July, 1990. At the time of his death, Bill was completing a term on the Executive Committee of the South Carolina Defense Trial Attorneys' Association.

A native of Dillon, Bill received his undergraduate degree from Wofford College and graduated from the University of South Carolina School of Law in 1968. Upon graduation, Bill joined the Henderson & Salley law firm in Aiken and spent his entire twenty-two year legal career with the firm, primarily handling insurance defense cases. In addition to his service to the South Carolina Defense Trial Attorneys' Association, Bill was a past president of the Aiken County Bar Association and served as Aiken County Attorney in the mid-1970's. He was also a member of the SERTOMA Club in Aiken and St. John's United Methodist Church.

Bill was a popular and highly esteemed member of the legal profession. Senior partner Julian B. Salley, Jr. described Bill as being "diligent in his work. He will be sorely missed by the firm." Friends remember his fondness for golf and his ability to render sound advice. His law school classmate, Ernest J. Nauful, Jr., had this to say about him: "His excitement for life and for things which were important was contagious. For twenty-five years, I had the pleasure and distinction of knowing him. He never lost that enthusiasm. He was fun to be with and will be remembered as a true southern gentleman but most of all as a friend." He made friends easily as was evident by the overflow crowd at his funeral service on October 28, 1990 in Aiken.

Bill is survived by his wife, Beth; two sons, Gordon and Stephen; his parents of Dillon; and his two brothers. Memorial contributions may be made to the Kappa Sigma Fraternity Scholarship Fund at Wofford College or the St. John's United Methodist Church in Aiken.

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JUDICIAL LEGISLATION

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9. In addition to the impact of the new doctrine on old law, there are the practical problems of how now to evaluate a case, make a closing argument, and charge the jury on the state of the law (including whether a jury should be advised of the effects of its apportionment on the plaintiff's recovery).
10. Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk, 8 Miss. College L. Rev. 159 (1988);* Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C.L. Rev. 296 (1980) (provides a discussion of setoff and contribution, among others); Wade, *Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act,* 29 Mercer L. Rev. 373 (1978); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 Mercer L. Rev. 403 (1978).
11. *See*, Phillips, *Comparative Fault*, 32 S.C.L. Rev. 295 at 297 (1980).
12. It has been suggested that the last clear chance doctrine was useful in mitigating the harsh result of the contributory negligence rule, James, *Last Clear Chance: A Transitional Doctrine,* 47 Yale L.J. 704 (1938), but also that the doctrine is widely recognized as unsound outside that context. *Phillips*, 32 S.C.L. Rev. at 297.
13. Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk*, 8 Miss. College L. Rev. 159 (1988), citing *Rutter v. Northeastern Beaver County School Dist.*, 437 A.2d 1198, 1206 (1981).
14. See Spell, *supra*, at p. 169.

Jackson L. Barwick, Jr. Hemphill Award Recipient

Columbia attorney Jackson L. Barwick, Jr. was named recipient of the third annual Hemphill Award, sponsored at the S.C. Defense Trial Attorneys' Association's Annual Meeting in October. Given in honor of the late U.S. District Judge Robert W. Hemphill, the award was presented for distinguished and meritorious service to the legal profession and the public.

Jackson L. Barwick, Jr.

Jackson L. Barwick, Jr. was born in Atlanta, GA, September 28, 1924. He attended public schools in Atlanta, graduating from Tech High School, US Army Air Corps 1943-1945, B29 Bombardier. He graduated from the University of Georgia, AB Degree, majored in Political Science, 1948. He attended the University of Georgia Law School, member of the Georgia Law Review, LLB Degree from the University of Southern California in 1949. He was employed as an insurance adjuster with the Insurance Company of North America, Los Angeles, California 1949-1950 and, United States Fidelity and Guaranty Company, Adjuster, Assistant Superintendent, Claims Examiner, Claims Superintendent 1950 to 1969. He was admitted to Georgia Bar in 1951, South Carolina Bar 1969, U.S. District and Circuit Courts and The U.S. Supreme Court. Member American Bar Association, South Carolina Bar Association, Richland County Bar Association and Georgia Bar Association. Past President of Columbia Claims Association, South Carolina Claims Association and Claims Management Association of South Carolina. Past President South Carolina Defense Trial Attorneys' Association. He is an Elder in the Lake Murray Presbyterian Church, Chapin, SC. Married Nan Rutledge of Childress, TX. He has five children, nine grandchildren. He is senior partner of Belser, Baker, Barwick, Ravenel & Bender, Columbia, South Carolina.