SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

2006 Annual Meeting

PRESIDENT'S MESSAGE

Interview with Elbert Dorn
SCDTAA President

Reprinted from *Lawyers Weekly*

Our president, Elbert Dorn, kicked off the new year with an interview by Lawyers Weekly [Vol. 6, No. 13]. While Elbert and reporter, Greg Froom, discussed several interesting issues confronting defense lawyers, the article provided an opportunity to address the important issue of expert standards in the state court system. This portion of the article is being reprinted here with the permission of Lawyers Weekly:

Attorney Elbert S. Dorn, the incoming president of the South Carolina Defense Trial Attorneys' Association, said a key concern for the defense bar is expert qualification in state court. He plans to take up that issue during his term.

"I think the problem with our state evidentiary rule on experts is that the reliability aspect of expert testimony is not as pointed as it is under the federal rule," Dorn told Lawyers Weekly during an interview at his Columbia office.

Dorn said he would like to see state courts adopt the standards for expert witness qualification that were set out in the 1993 U.S. Supreme Court decision of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579.

South Carolina's federal courts already use the standards, but their implementation in state court is not allowed under current authority. That creates consistency problems, Dorn said.

"Some people say that our state rule for expert testimony is similar, but in my view it is not as rigorous as Daubert and has not been applied as rigorously. We want to strive to get Daubert standards adopted in South Carolina either by the court or by the Legislature," Dorn said. According to Dorn, the Daubert standard imposes stricter scrutiny of a potential expert's reliability, scientific methodology and peer-review materials.

"I've had courts here admit testimony under our state test where the same testimony has been excluded by either a federal or even a state court under Daubert," he said.

Plaintiff's attorneys should also welcome the implementation of the standards, according to Dorn.

"This is not a one-sided thing. The plaintiff's bar should expect the defense expert would have to meet those kinds of standards, too," he said.

Dorn said it is important to ensure a level playing field for defendants and plaintiffs particularly as he has seen jury awards increase.

"I do think there is a trend toward larger verdicts in South Carolina, and I don't know how to explain that. I've seen a difference in just the past two or three years," he said.

"Our complexion is changing. All of us need to recognize that and make sure that we are in touch with juries, with judges and in touch with our opposing counsel -- because we don't want the system to get away from us," Dorn said.

New SCDTAA Officers

l to r:

G. Mark Phillips, Immediate Past President;

John T. Lay, Jr. Treasurer;

Donna S. Givens, President-Elect;

Elbert S. Dorn, President;

T. David Rheney, Secretary

Letter From The Editors

by Gray T. Culbreath & Wendy J. Keefer

"A good lawyer knows the law. A great lawyer knows the judge." Unkown.

This maxim, and often heard lawyer joke, may be comical to many, but every good lawyer knows the importance of forging relationships with members of the judiciary. And, there is no better place to do that than at SCDTAA's Annual Meeting. This year's meeting was no exception, boasting the attendance and participation of numerous state and federal judges.

Over the years each of us has appeared before members of the bench and the more we appear before a particular judge the more we come to appreciate the judge's style, demeanor and expectations. The same can probably be said from the opposite perspective – the judges learn what to expect from us as lawyers. This information is important and aids in the steady flow of the courts' work. But at the end of the day, it remains just that, our work. What getaways like this past meeting at Amelia Island offer is a chance for all of us, judges and lawyers, to get to know each other as people. This informal opportunity to socialize with one another provides the perfect background for discussions of everything from the law to favorite movies or hobbies. If for no other reason, and there are many other reasons, attendance at these meetings is not only professionally beneficial but personally rewarding.

Another activity that has been both professionally and personally rewarding is putting together this publication. Gray and I took on this task with determination to make the DefenseLine relevant to our members. We may not have succeeded yet, but we are well on our way. And, progress could not have been made without the help of so many of you. From our authors to those attorneys who volunteered to help us gather content for each issue, we were lucky.

This year has been a good one for the Association. Under the fine leadership of outgoing President Mark Phillips, the Association had two very successful meetings – the Joint Meeting in Asheville and the Annual Meeting at Amelia Island Plantation – had another sold out trial academy, filed an amicus brief in Hardee v. Conway Dialysis Center – summarized in this issue's case notes section, and had an energized Young Lawyers Division led by Jennifer Barr. Next year looks to be equally productive with Elbert Dorn at the helm, especially with the help of next year's board members.

Speaking of our Executive Committee, Gray and I congratulate the newest editions to the Executive Committee, Jennifer Barr, past-President of the Young Lawyers, William B. (Kip) Darwin, Jr., Anthony W. Livoti, and Bruce Shaw, who will fill the Past President seat on the board. Congratulations also go to re-elected members Sterling Davies, Glenn Elliott, Eric Englebardt, Ron Wray, and Gray and to our Corporate Counsel Chairperson, Duncan McIntosh. Last, but certainly not least, congratulations to newly elected Young Lawyers' President, Drew Butler.

Gray T. Culbreath

Wendy J. Keefer

Gray and I have enjoyed this year immensely. Even more, we have enjoyed the various comments and suggestions we received from you throughout the year. Your input was both helpful and proof that members were actually reading.

In this, the last issue of the year, we hope you appreciate and enjoy the diverse contributions to this publication. From the wisdom of a well-respected and experienced trial lawyer to the insights of a newer member of the bar, this issue, as we hope past issues have, tries to provide information that is pertinent to you and your practice. We also try to highlight things of interest to the Association as an organization. It is for this reason that sections summarizing key verdicts and court opinions, as well as judicial profiles, were added. But there is still much room for improvement. Please continue to provide your thoughts as the DefenseLine continues to grow into what we hope to be the first read and most favored publication of South Carolina defense attorneys.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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THE DefenseLINE

ATTENTION MEMBERS

The SCDTAA is relying more and more on email to communicate with the membership. Prime examples are the email information sharing system and announcements about SCDTAA events.

A number of emails are being returned as "undeliverable" or "blocked". If you have changed your email address or if you aren't sure the SCDTAA has the correct address please notify the SCDTAA office today.

If your firm is "blocking emails" or if you do not want to receive email communications, please contact the SCDTAA office at (803) 252-5646 or (800) 445-8629.

The SCDTAA Docket

MEMBER NEWS

Reid Sherard Reappointed To USC Board of Visitors

Reid Sherard, an associate in the Greenville office of Nelson Mullins Riley & Scarborough LLP, was reappointed to a two-year term on the University of South Carolina Board of Visitors. Mr. Sherard represents the 13th Judicial Circuit and has served on the Board of Visitors since 2005.

Neil Jones Gets Patent Victory In the Federal Circuit

Neil Jones of Nelson Mullins Riley & Scarborough served as lead counsel for Bann Quimica and C.H. Patrick Co. of South Carolina in a case in which his clients allegedly infringed upon an indigo dyeing patent owned by DyStar Textilfarben GmbH & Co. Deutschland KG of Germany. Though a jury awarded $90,000 in damages to the patent owner and the district court imposed an injunction upon the alleged infringers' activities, the Federal Circuit ultimately invalidated the German company's patent. The win is a big one in which smaller Brazilian and South Carolina companies succeeded against a large multinational company.

Haynsworth Sinkler Boyd Welcomes Six New Attorneys

Recent University of South Carolina law graduates, Callie A. Campbell and Bachman S. Smith, IV, joined the Charleston office of Haynsworth Sinkler Boyd as associates on the firm's Charleston Litigation team, focusing on insurance defense matters. Callie received her B.A., magna cum laude, in English from Washington & Lee University, where she was a member of Phi Beta Kappa. She earned her J.D. in 2006. During law school, Callie was a member of the Moot Court Bar, *Order of the Barristers*, and a Student Notes Editor on the Southeastern Environmental Law Journal. Bachman received his B.A. in fine arts from the University of South Carolina in 1993 and a M.A. in English from The Citadel in 1999. Prior to going to law school, Bachman was a high school teacher for 8 years. He earned his J.D. in 2006.

Three 2006 law school graduates joined the Greenville office of Haynsworth Sinkler Boyd. Christopher T. Brumback, a 2006 graduate of Washington & Lee University School of Law, received his B.A., *magna cum laude*, in communication studies from Vanderbilt University in 2003. He joins the firm as an associate concentrating on banking and financial services litigation. Carter N. Dupree, a 2006 graduate of Washington & Lee University School of Law, earned his B.A. in 2003 from Washington & Lee University. Prior to joining the firm, Carter was a summer intern for Senior U.S. District Judge Sol Blatt, Jr. in Charleston. He joins the firm as an associate working on real estate matters and corporate transactions. Joshua D. Spencer, a 2006 graduate of the University of South Carolina School of Law, earned his B.A., *magna cum laude*, in history from the University of South Carolina – Spartanburg, where he was a member of Phi Kappa Phi and Gamma Beta Phi. While in law school, Spencer received the CALI award in Interviewing, Counseling and Negotiation and was a member of the South Carolina Law Review in which his student note, *Hearing Those Who Pay the Bills: A Comparison of the Federal and South Carolina Taxpayer Standing Models in Light of Sloan v. Sanford, 56 S.C. L. Rev. 675 (2005)*, was published. He joins the firm as an associate on the Greenville Litigation team, focusing on insurance defense, commercial and construction litigation.

Wendy J. Keefer has joined the firm's Charleston office as Of Counsel and will be working on the Charleston Litigation team. She is concentrating her practice on issues involving employment law, as well as intellectual property, business & commercial litigation and other complex litigation matters. She is a 1997 graduate of Campbell University's Norman Adrian Wiggins School of Law, where she served as Editor-in-Chief of the Campbell Law Review and was a member of several moot court teams, winning the award for the Southeast Region's Best Oral Advocate in the 1996 ABA Moot Court Competition. Following law school, she clerked for the Honorable J.L. Edmondson, United States Circuit Judge for the Eleventh Circuit and was senior counsel and chief of staff to the Assistant Attorney General for the Office of Legal Policy at the U.S. Department of Justice. Her work also includes work on issues regarding compliance with Title III of the USA PATRIOT Act, as well as other USA PATRIOT Act issues. She recently co-authored an article for The Georgetown Law Journal, Annual Review of Criminal Procedure entitled FISA and the PATRIOT Act: A Look Back and a Look Forward, 35 Geo. L.J. Ann. Rev. Crim. Proc. (2006).

McAngus Goudelock & Courie, LLC Welcomes Langdon Cheves and J. Bennett Crites, III

McAngus Goudelock & Courie, LLC is pleased to announce that Langdon Cheves has joined the firm's Greenville office. Langdon's practice focuses on all matters of general litigation including products liability, premises liability, and insurance litigation.

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Member News

He graduated from Emory University with a Bachelor of Arts degree in English and a minor in Philosophy. Langdon received his Juris Doctorate degree from the University of South Carolina School of Law where he was a member of the Environmental Law Journal. He is a former law clerk to The Honorable Henry F. Floyd, District Court Judge for South Carolina. Langdon has extensive trial experience throughout South Carolina. He is a member of the South Carolina and Greenville County Bar Associations, the South Carolina Defense Trial Attorneys' Association, and the Defense Research Institute.

Bennett Crites has joined the firm's Charleston office. Bennett's practice focuses on general liability defense including automobile negligence, premises liability, products liability, and commercial trucking law.

He graduated from The Citadel with a Bachelor of Science degree in Business and Administration. Bennett received his Juris Doctorate from the University of South Carolina School of Law. He is a former law clerk to The Honorable R. Markley Dennis, Jr., Judge of the Ninth Judicial Circuit of South Carolina. Bennett is a member of the American Bar Association, the South Carolina Bar Association, the Charleston County Bar Association, and the South Carolina Defense Trial Attorneys' Association.

Joel W. Collins, Jr. Receives Award

Joel W. Collins, Jr. of Collins & Lacy, PC, has received the Champion for Children Award from the South Carolina Department of Juvenile Justice. The award recognizes Collins' contributions to the Friends of Juvenile Justice to provide programs, advocacy and funding for prevention, rehabilitation and reintegration programs for South Carolina's troubled youth.

WINNERS ANNOUNCED!

It is with great pleasure that SEA, Ltd. announces the winners of SEA, Ltd.'s drawing for the $50 Gift Cards for Macaroni Grill. The winners are Mr. Shawn Allen of Nelson, Mullins, Riley & Scarborough, Myrtle Beach, and Mr. Charles O. "Bo" Williams of McAngus, Goudelock & Courie, Columbia. The winners' names were drawn from business cards collected at the 2006 Annual Convention of SCDTAA, held recently at Amelia Island Plantation. SEA, Ltd. congratulates the winners.

SEA, Ltd. also would like to express its appreciation for allowing SEA the opportunity to get acquainted with your organization and its members. May it be the start of a long and mutually advantageous relationship.

Annual Meeting Recap Amelia Island, Florida

by Molly H. Craig

How do blue skies, 70 degree weather, and a gathering of good friends at an oceanfront resort sound? If you attended the SCDTAA Annual Meeting at Amelia Island in November, you know firsthand because you participated in this outstanding weekend event. If you missed the SCDTAA meeting at Amelia Island this year, plan now to attend next year's Annual Meeting at Pinehurst.

We began the weekend on Thursday night with the President's Welcome Reception at the Amelia Island Inn on a beachfront patio where we were treated to great food and a warm breeze. On the social front, the golf tournament was a huge success. The golf courses at Amelia Island were in great shape and the good weather contributed to the overall experience. Judge Cooper, Patrick Fant, Mike Wilkes, and Teddy Stockwell, were the winning foursome in the golf tournament. Many attendees elected to go fishing and it was reported that dozens of red fish and sea trout were caught by the fishermen. Other social activities included tours of Fernandino Beach, horseback riding, wine tasting, and simply sitting on the beach. On Friday night, we all enjoyed an outdoor oyster roast and lowcountry dinner, along with bluegrass music. The weekend ended in typical fashion with dinner and dancing on Saturday night.

On both Friday and Saturday mornings, our panel of speakers conducted the CLE portion of our program. We are grateful to several of our past Presidents for sharing their experiences and war stories, as well as countless nuggets of advice. Bobby Hood served as moderator of the past Presidents panel discussion on how 30(b)(6) depositions can make or break your case. We sincerely thank Bobby, along with Barron Grier, Dewey Oxner, Mark Wall, and Mike Wilkes, for their participation in this panel.

Walter Pratt, Dean of the University of South Carolina School of Law, and Patrick Long, President of Defense Research Institute, were our honored guests at the Annual Meeting. Dean Pratt enlightened the crowd to some of the exciting current and future developments in the works in Columbia. Despite all that is occurring at the DRI, Patrick Long did a fantastic job updating our membership on the current activities this national organization is undertaking.

We also owe a great deal of thanks to numerous judges who graciously dedicated their time and efforts to participate in panel discussions during the seminar. The Honorable Costa Pleicones led our discussion on professionalism. He, along with Senator James Ritchie, Jr., Jeffrey Thordahl, Elbert Dorn and Eric Englebardt offered insight to many issues associated with the judicial merit selection process. The Honorable Weston Houck, the Honorable Michael Duffy, and the Honorable Henry Floyd led a lively discussion to update the attendees on the new rules for electronic discovery in federal court. This panel discussion was both entertaining and helpful in offering tips on these new federal rules.

Other honored speakers and guests included David Dukes, Immediate Past President of DRI. David provided an excellent presentation about the merits of creating curiosity in your opening statement. We were also grateful to chief litigation counsels from several companies for their thoughts regarding the management of product liability and mass tort litigation. The CLE portion of our meeting concluded with Ken Walsh's discussion on the fascinating topic of presidential retreats.

The Annual Meeting was an enjoyable, productive and beneficial experience for everyone involved. We look forward to the 2007 Annual Meeting which will be held in Pinehurst, NC next fall.

2007

Spring

TRIAL ACADEMY

June

Greenville, SC

Summer

JOINT MEETING

July 26 - 28

The Grove Park Inn

Asheville, NC

Fall

ANNUAL MEETING

November 1-4

Pinehurst Resort •

Pinehurst, NC

FEATURE ARTICLE

SCDTAA Members Help Rebuild New Orleans

by John Grantland

When J. R. Murphy (Murphy & Grantland, PA) came back from New Orleans after a mission trip in late May, 2006, he was a man with a new vision. He was not sure how the other attorneys at Murphy & Grantland would react to a suggestion of a firm trip to help rebuild New Orleans, but suggested it anyway. The response was overwhelmingly positive and from July 5 –10, 2006, nine of the firm's twelve attorneys spent two full days in New Orleans helping to demolish three homes and repaint another.

John Grantland said "the trip was the ultimate team building exercise," and "rather than a ropes course, we came together over hard work that benefited others." Beginning with a van ride down to New Orleans, extending to staying together on cots in a church fellowship hall, and spending the days ripping out sheetrock and shoveling debris, the firm's attorneys drew together like never before.

The trip also revealed to the attorneys the devastation of the entire area. Bill Connor noted that he had been to third world countries before, but was shocked by the lack of hope and life in New Orleans. Charles Blackburn's active construction litigation practice almost caused him to drop out of the trip at the last minute due to his busy schedule. Instead, he resolved to carve out time for the trip. His pre-law experience working as a subcontractor enable him to serve as the team's foreman, and he came back with a deep commitment to more actively helping others.

The trip served as a positive experience for every member of the group, but also contributed to a cohesiveness in the firm that could not be matched by any firm retreat. Plans are being made now for a return trip with other people in their community. If you have any questions about Murphy & Grantland's experience, or would like to have information about getting involved in the on-going New Orleans rebuilding efforts, you can contact J. R. Murphy at 803.454.1231.

Inside the Judge's Chambers: The Honorable Joseph F. Anderson, Jr.

by Shelby K. Leonardi*

On October 11, 2006, Judge Joseph F. Anderson, Jr., the chief judge of the United States District Court for the District of South Carolina, celebrated twenty years on the federal bench. He has had a distinguished career in which he has become know as an exceptional jurist and a brilliant intellectual. He is also very witty and is known around the courthouse as a practical joker. He played a joke on the jury clerk who frequently spoke about the crazy excuses she received from people trying to get out of jury duty. Judge Anderson sent her a letter pretending to be the relative of a prospective juror and included a plastic bag of cement dust alleged in the letter to be the ashes of the deceased juror. Outside of the courthouse, Judge Anderson dressed up as a Clemson football coach, snuck in line with the team, and ran down the hill into Death Valley. He is an avid Clemson fan, which was only fueled by his son, Fletcher, playing as a kicker for the Clemson football team.

When Judge Anderson was appointed by President Ronald Reagan twenty years ago, he was just 36 years old. He was the youngest person ever appointed to a federal judgeship in South Carolina and the second youngest in the nation. Since that time, Judge Anderson has heard and seen a lot in his courtroom. He has seen the practice of law evolve, and he has observed changes in the lawyers who appear in front of him. Based on those experiences, he agreed to share what he viewed as the major changes to the court, some of his career highlights, and some practical advice for lawyers practicing in federal court.

Changes in the Court System

Judge Anderson identified several major changes in the federal courts in the past twenty years. First, and most regrettable according to Judge Anderson, is the shrinking federal bar. Fewer lawyers are practicing in federal court presumably because they are afraid of the additional rules and responsibilities involved in a federal practice. Judge Anderson would like to see a wider array of lawyers practicing in front of him – from big cities to small towns and from both large and small firms.

Hand in hand with the shrinking federal bar is Judge Anderson's observation that the lawyers appearing in front of him today are much more specialized than they were twenty years ago. While increased specialization is helpful in the context of complicated cases, it has an overall negative effect because bar members do not know each other as well as they used to, which ultimately leads to less civility among lawyers.

The third change identified by Judge Anderson is the dramatic shift in the percentage of his time spent on criminal cases. In 1986, approximately 15% of his time was spent handling criminal matters. Today, he spends an equal amount of time on civil and criminal cases.

Electronic filing and courthouse security have also revolutionized day-to-day court life. Electronic filing has streamlined files in the courthouse and allows court staff and lawyers alike easy access to pleadings. "I never sign my name anymore," Judge Anderson quips. For obvious reasons, courthouse security has taken a central role in courthouse considerations. Judge Anderson dealt with the ins and outs of courthouse security in his role as chief judge, which required him to oversee construction of the new federal courthouse in Columbia.

Career Memories and Highlights

In looking back on the last twenty years, Judge Anderson identifies two aspects of his job that make it especially enjoyable. First, when he talks to jurors after a trial he is always pleased to hear about the healthy appreciation for the judicial system that the jurors developed through jury service. Many of them come in with a negative notion of the judicial system, but through the course of seeing the lawyers and Court in action, ultimately conclude that we have a pretty good system of justice. Second, Judge Anderson enjoys seeing his law clerks develop during their tenure with him and also enjoys following their careers as they move out of the courthouse and into practice.

Judge Anderson has a deep respect for the judicial system and passes that respect along to his law clerks. On their first day at the courthouse, Judge

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JUDGE PROFILE CONT.

Anderson never fails to tell his new clerks that while some cases may garner media attention or involve especially interesting legal issues or substantial damages, each case the Court deals with is the most important case to the litigants involved in that case. Consequently, each case deserves the same thought and attention because every litigant is entitled to his or her day in court.

That being said, Judge Anderson recalls two cases that he found particularly interesting: a trial involving 27 consolidated cases stemming from the 1994 crash of a US Airways flight in Charlotte; and a 2005 trial of an alleged securities fraud case. Both cases involved good lawyers, high stakes, and complicated legal issues stemming from a precise area of the law. The airplane crash case involved a trip to the airport so jurors could sit in an airplane cockpit and interesting witnesses including an astronaut who had walked on the moon. The securities case was particularly challenging because many areas of the applicable law were unsettled and required significant analysis by the Court.

Practical Advice for Lawyers

Given his extensive history of presiding over hearings and cases, Judge Anderson has helpful insight on the "do's and dont's" for lawyers practicing in federal court. He offers the following four pieces of advice to lawyers appearing in front of him.

Judge Anderson's first two tips – be prepared and don't dodge the tough questions – go hand in hand and are relatively self explanatory. Be sure to do your research and be ready to respond fully to all issues in the case. By dodging the tough questions, you lose credibility with the court. On the other hand, admitting that an issue is close or will require special attention is likely to buy some credibility with the Court.

Judge Anderson's third tip – don't over try the case – is contrary to our general inclination as defense lawyers, but Judge Anderson warns that juries react negatively to lawyers who offer the same evidence in three or four different ways. Judge Anderson states that in talking to juries following trials – a practice which he consistently follows – the jurors' primary complaint is that there was too much repetition throughout the trial. It is always wise to get all of your evidence into the record, but it is usually overkill to ask on re-direct that which was already asked on direct examination.

Judge Anderson's fourth tip is not to engage in discovery abuse. He cautions that if you consider a discovery request to be overly broad, do not object to the entirety of the request. Rather, respond to as much of the request as you deem to be reasonable and object to the rest. Not only is this required by the federal rules, it also goes a long way in buying credibility with the judge who will ultimately rule on the discovery dispute.

Judge Anderson's twenty years on the bench are worthy of celebration. He is an example to lawyers and other judges alike and we can only hope that he will continue to serve the nation, state, and citizens of South Carolina for at least another twenty years.

** Shelby K. Leonardi is an associate with Nelson Mullins Riley & Scarborough in their Columbia, South Carolina office and practices in the areas of product liability, toxic tort, and construction litigation. She and her husband are also former law clerks to Judge Anderson.*

FEATURE ARTICLE

Professional Licensing Statutes: Usurping Judicial Functions?

by Van Horger*

Recently, professional organizations have begun pushing state legislation preventing members of the profession from giving expert testimony if they are not certified or licensed by the appropriate licensing board of the state in which the testimony will occur. This trend is causing concern among lawyers who use experts in these given professions. While the legislation is often favored by in-state members of the profession, it has also drawn sharp criticism from both plaintiff and defense attorneys. In South Carolina, the Supreme Court has recently stepped in to limit legislation enacted by the General Assembly.

Traditionally, medical professionals are most commonly affected by such legislation. Legislation regarding expert medical testimony has been suggested or enacted in a large number of states. Plaintiffs' attorneys have traditionally been the most critical of medical testimony requirements, on the grounds that it is difficult to find in-state doctors willing to testify against their own. The trend, however, has expanded in a way that is getting the defense bar's attention as well. In at least a few states, statutes have been enacted that define "work as an engineer" as giving court testimony, and thus require out of state engineer expert witnesses to obtain licenses from any state where testimony is given.

The issue in South Carolina came to a head soon after the General Assembly enacted some new legislation regarding what constitutes "the practice of medicine." On June 9, 2006, Act No. 385 of 2006 legislation took effect. The Act amended the Physicians Practice Act's definition of the "practice of medicine" to include "testifying as a physician in an administrative, civil, or criminal proceeding in this State by expressing an expert medical opinion." Section 40-47-20(36)(h), Act No. 385, 2006 S.C. Acts __. The Act then provides in section 40-47-35:

> (A) The board may issue a license to a physician licensed in good standing in another state, who has been engaged to testify as an expert medical witness in an administrative, civil, or criminal proceeding in this State. The license only shall authorize practice in this State as an expert medical witness in a particular proceeding in this State. This license must be valid for the duration of the particular proceeding for which it is issued. This license must authorize only practice in this State that is related directly to the particular proceeding for which it is issued. A separate license must be obtained for each proceeding in which the applicant is engaged to testify as an expert medical witness in this State. The applicant shall submit the following items:
>
> (1) a completed application and payment of applicable fees; and
>
> (2) satisfactory documentation of the applicant's engagement as an expert witness in a particular proceeding in this State.
>
> (B) The board may waive any part or all of a fee for this license for a physician to testify as an expert witness on behalf of a state, county, or municipal agency or office.

Section 40-47-35, Act No. 385, 2006 S.C. Acts __. Therefore, the South Carolina Board of Medical Examiners was given the primary right to determine whether a physician would be granted a limited license, and in effect, the power to prohibit an out of state physician from testifying.

However, on August 24, 2006, the Supreme Court of South Carolina took action. The Court issued an Order temporarily delaying judicial enforcement of Act 385 of 2006 insofar as the Act requires a physician to obtain a license to practice medicine in South Carolina before offering expert medical testimony in a South Carolina administrative or court proceeding. The Court found that "the effect of the revised statutes has the potential to substantially impair the orderly administration of justice." Supreme Court Order Regarding Act No. 385 of 2006, ¶ 4 (Aug. 24 2006). The Court then cited several hypothetical scenarios where applying the Act would create an injustice. *Id.* The Court ended the Order with the following paragraph:

> While we remain respectful of the General Assembly's voice in matters of practice and procedure in South

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> Carolina's courts, this Court cannot allow the orderly administration of justice to be substantially impaired. We are confident, however, that when the General Assembly provides further clarity on this matter, the changes that result will reflect careful consideration and deliberation; will consider and account for the scope of the court's existing rules and the need for efficient and orderly court administration; and will be subjected to close scrutiny in the Judiciary Committees of both the South Carolina Senate and the House of Representatives.

Id. at ¶ 7 .

Just a few days after the Order was issued, the Supreme Court of South Carolina issued an opinion on an almost identical legal question. In *J.T. Baggerly v. CSX Transportation, Inc.*, No. 26208, 635 S.E.2d 97, 2006 WL 2474203 (S.C. Aug. 28, 2006), plaintiff retained Robin Harrison, a professional engineer from California, to testify as an accident reconstruction expert. Defendants moved to exclude Harrison's testimony pursuant to S.C. Code § 40-22-20(22) (Supp. 2005). Section 40-22-20, which governs the licensing of professional engineers in South Carolina, defines the "practice of engineering" as including expert technical testimony. S.C. Code § 40-22-20(22) (Supp. 2005). The trial court granted defendants' motion to exclude.

On direct appeal, the South Carolina Supreme Court reversed the trial court and held "that an out-of-state professional engineer may give expert testimony, if qualified under Rule 702, despite not being licensed in South Carolina. *J.T. Baggerly* at 104. The Court reasoned that "to accept the trial court's interpretation would clearly contravene Rule 702, SCRE", which allows experts qualified "by knowledge, skill, experience, training, or education" to testify when it will assist the trier of fact.

While the Supreme Court of South Carolina did not directly address the separation of powers issue, in finding that the legislature could not have reasonably intended a literal interpretation of the statute, the Court stated the following:

> [I]f we held that exclusion of an out of state professional engineering expert is proper under the statute, the result would be to limit the truth-seeking duty of the courts of this State….[E]xperts are intended to assist juries. We refuse to endorse an interpretation of the professional engineer licensing statute which has the potential of either preventing out-of-state experts from testifying in South Carolina courts or imposing the unreasonable burden of getting licensed in this State simply to be permitted to provide forensic testimony.

J.T. Baggerly at 104. Therefore, the Court reversed the trial court's decision to exclude the plaintiff's expert witness in accident reconstruction engineering from testifying at trial.

South Carolina is not alone. For instance, the Illinois Supreme Court also recently held "that licensure with the State of Illinois pursuant to the Engineering Act is not a mandatory prerequisite to rendering an expert opinion." *Thompson v. Gordon*, 851 N.E.2d 1231, 1240 (Ill. 2006). However, the Court indicated in dicta that such testimony may constitute a criminal act, as directed by the relevant statute. *Id.* The Court of Appeals of Michigan addressed this issue more than 35 years ago. In *White Co. v. LeClair*, 181 N.W.2d 790, 791 (Mich. Ct. App. 1970), the Court held that trial testimony of an unlicensed architect does not constitute the practice of architecture in violation of the state licensing statute. The court reasoned that the purpose of the licensing statute was intended to safeguard the public, life, health, and property, and not to protect the court against misleading or unqualified testimony. *Id.*

Thus, until a more definitive action is taken by the General Assembly, South Carolina lawyers are not bound by these restrictions on their experts. However, given the Supreme Court's stern stance as displayed in its Order and the *J.T. Baggerly* decision, this remains an issue to watch.

* *Van Horger, an associate of Nelson Mullins Riley & Scarborough LLP, practices in Columbia in the areas of product liability, business litigation, and toxic torts.*

FEATURE ARTICLE

How to Win at Mediation

by M. Dawes Cooke, Jr.

We call ourselves trial attorneys. Yet, we are well aware that most of our cases are resolved not by trial, but by settlement. More and more they are settled by mediation. We should occasionally compare notes about what works and does not work in mediation, much as we do about trial tactics.

Why Does Mediation Work?

The key to a successful mediation is for the mediator to help each party feel that it is okay to settle the case. By the time a case comes to mediation, the parties have usually been fully immersed in the adversarial process of litigation. Their lawyers have too, and their energy understandably has been directed to building their case rather than to negotiating settlement. Their goal has been to win the case. To compromise now is to admit defeat. The mediator must help the parties shift their focus from winning the case to meeting some important need in their lives. Mediation is not really a cooperative process as we are often told. Each side still wants to win the mediation. It is the mediator's job to allow both sides to win by helping them redefine their goals and understand how settlement furthers those goals.

Rarely is a negotiation symmetrical. In most personal injury, property damage, and business tort cases there is an individual or small business on one side and a corporation or an insurance company on the other side. Their needs are different, their levels of sophistication are different, and their tolerance for risk is different.

The plaintiff needs to overcome a loss: rebuild a home, replace lost earnings, care for a disabled family member, or pay medical bills. The defense needs to manage risk, minimize litigation expense, and cut its losses. An experienced mediator might address this asymmetry very directly, such as by telling the plaintiff that the defendants have been in mediations many times and this is their business. He might tell him that one of the hardest things to accept will be that the defense can offer only money – and they will never offer enough -- to compensate him for a very personal loss. The plaintiff might be asked to acknowledge that, no matter how much money he might receive in settlement or at trial, he would readily pay that amount and more to turn back time and erase the injury that brought them to litigation. The mediator might explain that the term "compensatory damages" is a misnomer, because money cannot truly compensate for personal loss. The plaintiff must not evaluate a settlement offer according to whether it adequately compensates for the loss, because it never can. Instead, he should look at the ways in which the settlement would improve his or his family's lives.

This discussion accomplishes two things: it prepares the plaintiff to consider an offer that is less than what he thinks is fair, and it allows him to begin to see settlement as a way to improve his or his family's future. Later, after significant offers have been made, the mediator might ask the plaintiff to envision life with this money and life without it. The plaintiff must be forced to contemplate the possibility of losing the case at trial. Appealing once again to his sense of responsibility to his family, the mediator might tell him that he has a sum of money within his grasp that will satisfy important needs, and ask whether he thinks it would be prudent to gamble this money by going to trial. Sometimes it is helpful to have the plaintiff describe what he would do with the money, so he clearly envisions it. When he inevitably expresses frustration over having compromised much more than the defendant, it might be necessary to explain frankly to him that he does not have equal bargaining power with the defendant, because if he loses the case he will not get another chance, whereas if the corporate defendant or insurance company loses it will just move on to the next case. In other words, the defendant has superior tolerance for risk. Needless to say, this message is received better coming from the mediator than from the defendants themselves.

Finally, the plaintiff might need to understand that most corporate defendants evaluate cases and decide in advance of mediation what they will pay, and it is rare that anything comes out in mediation that causes them to make a radical revision of their evaluation. The best way to get the defendants to pay more than they want is to send a signal that settlement is possible. This is done by making a final demand that is within striking distance of the defendants' top offer. This then puts pressure on the defendants, such that they must now seriously consider the cost and the risk of going to trial versus paying a

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bit more than they had intended to settle the case.

It is important for the plaintiff to feel that, through the mediation process, he has persuaded the defendants to pay more than they were prepared to pay coming into the mediation. Only at this point do both sides see that settling the case is the best way to meet their essential needs. The defendants might have to pay more than they wanted to pay, but they are surprised to find that the case can settle near the case's real value. The plaintiff now sees the negotiation process as a means of improving his life or the lives of his family rather than as a mandate to defeat the defendants; nevertheless, he has achieved a victory by maneuvering the defendants into paying more than they had planned to pay to settle the case. It is important for the defendants to leave the mediation feeling that they could not have settled the case for less and for the plaintiff to feel that he did not leave any money on the table.

How Much Can You Lie?

It has been said that "[c]onsensual deception is the essence of caucused mediation."[1] The mediator himself practices deception, as his main function is to control the flow of information between the parties and in so doing to manipulate their perceptions of the case. The parties expect and want this. The thornier question is, how much are the lawyers themselves supposed to lie? The Rules of Professional Conduct and the American Bar Association provide some guidance. South Carolina Rule of Professional Conduct 4.1 provides, in part:

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

Official Comment 3 explains that a party's intentions as to an acceptable settlement of a claim are ordinarily not taken as a statement of material fact. Earlier this year, the American Bar Association's Standing Committee on Ethics and Professional Responsibility elaborated further, interpreting the identical Model Rule 4.1:

> We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact", are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Formal Opinion 06-439 (April 12, 2006). Experienced mediators observe that they would be out of business if lawyers did not misrepresent their clients' intentions regarding settlement. Mediation jjfkflvaccommodates this accepted form of deception, but it has no way of dealing with unethical factual misrepresentation. The market eventually deals with such conduct by rendering known liars ineffective in negotiating on behalf of their clients.

To Win, You Have To Play

A popular means of concealing one's intentions as to an acceptable settlement is not to show up for mediation. It has become commonplace for participants in mediation to announce that the decisionmakers will be participating by telephone, or that the person attending the mediation has been extended "full" authority, which later turns out to be only limited authority. This tactic is actually counterproductive. Recall that the mediator's job is to allow the parties to feel that it is okay to settle the case. The plaintiff must feel that he has maneuvered the defendant into paying more than it intended to pay. This cannot occur when the decisionmaker on the other side is an unseen, unheard authority sitting at a desk in a distant city. It is maddeningly plain to the plaintiff that this person has heard nothing and was unaffected by the mediation process.

The consensual deception that is the essence of mediation cannot occur in such a situation, and the defendants are less likely to achieve an acceptable settlement than if they had fully participated in the mediation and allowed the process to work. The best negotiators are those who work with the mediation process, not those who resist it.

Footnotes

1 John W. Cooper, "Defining the Ethical Limits of Acceptable Deception in Mediation", Journal of the Dupage County Bar Association, Illinois, reprinted at www.mediate.com/articles/cooley1.cfm (2000).

Case Notes

State

Correction/Addition to Prior Case Summary:

In the previous volume of this publication, we included a summary of *Ardis v. Sessions*, Op. No. 4136 (S.C. Ct. App. July 10, 2006). In that summary, the jury instruction quoted was set forth as quoted by the majority opinion. As was noted in the case summary, Judge Beatty dissented. Judge Beatty's dissent rested on the principle that a jury charge must be considered in its entirety and that the charge given to the jury in this case included many instructions which, as a whole, were reasonably free from error and provided substantially correct statements of the law. The dissenting opinion provided the entire text of the relevant jury instruction, including, by way of example, the underlined portion below, which did not appear in the majority opinion's quote of the instruction:

> I further charge you that a mistake in diagnosis of itself will not support a verdict in a malpractice suit. I charge you that a physician is not ordinarily liable for making an incorrect diagnosis where it is made in good faith and there is reasonable doubt as to the nature of the physical conditions involved or as to what should be done in accordance with recognized authority in good current practice or where it is made in good faith on observation of the patient and based upon physical evidences and symptoms which would warrant such diagnosis by a reasonably prudent and informed physician.

We provide this information to ensure readers understand the positions and opinions of the majority and the dissent in this case.

Hardee v. Bio-Medical Applications of S.C., Inc. d/b/a Conway Dialysis Center, Op. No. 26217 (S.C. Oct. 23, 2006).

In this case Plaintiffs were injured in a car accident with Danny Tompkins. Tompkins was a patient of Defendant Conway Dialysis Center and sometime prior to the accident had undergone dialysis treatment. Patient drove himself home from the procedure and during that drive lost control of his vehicle. Plaintiffs alleged the loss of control was due to insulin shock or low blood sugar and that the dialysis center was responsible having allowed Tompkins to drive himself home after the procedure and allegedly without having warned him of the dangers of driving.

The trial court granted summary judgment to the dialysis center, concluding that this State generally recognized no duty to third parties owed by medical care providers. The limited exceptions to this general rule were inapplicable to this case. Plaintiffs appealed.

The Supreme Court, though not finding there was an actual duty in this case, reversed the trial court. Reversal was required, the Court opined, because it "believe[d] South Carolina tort law ought to recognize such a duty." Thus, Plaintiffs should be permitted to produce evidence on that issue in order for a determination whether such a duty existed under the facts and circumstances here. The Court explained the duty as follows:

> Thus, a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering treatment. Therefore, if Respondent knew that Patient could experience ill effects following dialysis treatment, Respondent owed Appellants a duty to warn Patient of the risks of driving.

It appears from the Court's opinion that the case will now be remanded to the trial court for a determination of whether the dialysis center knew its treatment of Tompkins might impair his driving ability and, if so, whether it warned Tompkins of the possible impairment.

The South Carolina Defense Trial Attorneys' Association submitted an amicus curiae brief in support of the dialysis center in this matter and also submitted a memorandum in support of Respondent dialysis center's Petition for Rehearing on the grounds that the Court generally does not apply newly created duties retroactively. The Court, however, denied the Petition for Rehearing in this matter.

O'Leary-Payne v. R.R. Hilton Head, II, Inc. and Charter Oak Group, Ltd., Op. No. 4173 (S.C. Ct. App. Oct. 30, 2006).

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Plaintiff, O'Leary-Payne, was employed by a retail store located in a shopping center owned by defendant R.R. Hilton Head, II. R.R. Hilton Head II hired the other defendant, Charter Oak Group, to manage the property. As part of her employment duties, Plaintiff was required to take all trash from the store to a trash compactor and dumpster provided by the shopping center. One night while performing these duties, in an admittedly dimly lit area and with trash stacked up to her waist on a cart, Plaintiff tripped over a metal pipe causing injury to her. Plaintiff had never before noticed the metal pipe and did not see it until after her fall.

Testimony and photographs evidenced a metal pipe or rod that protruded about 5 1/2 inches from the sidewalk where Plaintiff fell. No warnings existed in connection with the rod's existence or protrusion. Plaintiff sued the property owner and management company. After suit was instituted, those defendants filed a separate action against various third parties claimed to be responsible for the metal rod. During the trial of this case, however, Plaintiff sought to exclude any evidence of liable third parties. The court excluded that evidence subject to the Plaintiff's opening the door. Defendants appealed this decision, along with other issues some of which were not preserved for appeal.

The Plaintiff did open the door, at least slightly. During the trial, namely Plaintiffs presentation of a video deposition which presumably included attorneys for the potentially liable third parties, discussions between the trial judge and the attorneys led to Plaintiff's ultimately agreeing "to let [the jury know there were other attorneys involved and who they represented." Plaintiff's counsel stated in response to the court's further questioning that "[i]f he wants to blame the other people in the case … he can blame them." No evidence was introduced, however, by either Plaintiff or Defendant about the third parties or their possible liability. Thus, at closing the trial court refused to permit Defendants' counsel to argue the liability of third parties. As the trial court stated when ruling that without evidence of the blame of others it could not be argued, "the stipulation was that you could blame, but you didn't blame." The Court of Appeals upheld the trial court's decision to prohibit any third party blame as part of Defendants' closing.

The Court of Appeals explained its decision as follows:

> Neither [Defendants] nor [Plaintiff] presented any evidence of third party liability. [Defendants] argue[that Plaintiff's] statement that it could blame third parties rose to the level of a stipulation thereby entitling it to argue third party liability to the jury. While this is admittedly a close issue, we defer to the trial court's judgment regarding the scope of the alleged stipulation.
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> . . . .
>
> Absent testimony on this issue or the trial court's communication of the stipulation to the jury [which the Defendants refused], the matter of third party liability was not in evidence. Therefore, the trial court correction refused to allow [Defendants] to blame third parties during closing argument.

Thompson v. South Carolina Steel Erectors, et al., Op. No. 4109 (S.C. Ct. App. July 5, 2006).

Thompson was injured while working for S.C. Steel Erectors. His injuries left him paraplegic. At the time of Thompson's injury, he was married with two young children and was living in a house owned by Thompson's uncle, paying rent that was below market value. After his injuries, Thompson's employer's workers' compensation insurer paid $35,000 to modify the rental home such that it would accommodate Thompson's needs.

Thompson filed a claim with the S.C. Workers' Compensation Commission for total general disability with lifetime benefits and sought a partial lump sum payment to be used to construct a new, permanent home for his family. The single commissioner awarded Thompson weekly lifetime benefits, as well as a lump sum payment of $150,300 for construction of a new home, an additional $83,700 to upfit the new home to accommodate Thompson's paraplegia, and ordered the compensation insurer to provide therapeutic exercise equipment for Thompson. The single commissioner expressly stated that these lump sums were to come from the "back end" of Thompson's future benefits and not to be deducted from Thompson's monetary weekly benefits. The Commission upheld the weekly benefits and the partial lump sum for the home but reversed the lump sum awarded to upfit the new home concluding that sum was duplicative of the funds already paid to modify the rental home and, thus, the second award for home modification was an abuse of discretion.

Thompson appealed and the circuit court affirmed the Commission's decision. Thompson and his employer both appealed to the Court of Appeals.

The Court of Appeals concluded that Thompson was entitled to the award provided by the single commissioner, including the costs of upfitting the new home despite the prior payment to modify Thompson's rental home. The court explained that "[t]he modifications are necessitated solely by Thompson's admittedly compensable injury. The bottom line is that Thompson cannot live in the proposed home without the modifications to accommodate his paraplegia." The court further addressed the claimed duplication of benefits pointing to the fact that even had the Thompsons remained in the rental home additional modifications would be

necessary to enable use of the therapeutic exercise equipment to be provided to Thompson.

Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Compensation Trust Fund, Op. No. 26216 (S.C. Oct. 23, 2006).

Answering a certified questions from the United States District Court, the South Carolina Supreme Court concluded that the South Carolina Workers' Compensation Commission did not have jurisdiction over fee disputes relating to fees charged by an out-of-state medical provider for medical services performed out of state regardless of whether the medical services were sought as a result of an injury that occurred in South Carolina. Thus, unlike medical services provided in South Carolina to treat a work related injury that occurred in South Carolina the Commission was not the exclusive forum for resolving any fee dispute between the medical provider and the workers' compensation insurer.

South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey, Op. No. 4176 (S.C. Ct. App. Nov. 6, 2006).

David R. Dawsey, Sr., the father of David R. Dawsey, Jr., was insured by a Farm Bureau homeowner's policy. That policy expressly excluded coverage for injuries "resulting from intentional acts or directions of you or any insured." That exclusion went on to provide that "[t]he expected or unexpected results or [sic] these acts or directions are not covered." On the date of the accident, the son drove to his father's house for a visit. The visit became hostile and the father fired a pistol three times at the son's truck's tires. One of the bullets ricocheted and injured the son. The son sued his father, but the father defaulted. To determine any coverage for this incident, Farm Bureau filed this declaratory judgment action.

The master in equity determined that the policy exclusion at issue excluded coverage for the son's injury. The Court of Appeals affirmed that decision. In reaching that decision, the court noted that unlike policies interpreted in other cases which merely contained an intentional act exclusion, this policy also excluded any unintentional consequences resulting from intentional acts. The son argued that a distinction existed between unexpected consequences and unintentional consequences. The court disagreed, finding those terms essentially synonymous such that coverage was clearly excluded under these circumstances.

Wright v. Dickey, Op. No. 4126 (S.C. Ct. App. June 19, 2006).

In this appeal from the circuit court's upholding resolution of an attorneys' fee dispute by the Resolution of Fee Disputes Board of the South Carolina Bar, the court of appeals explained that when a client submits a fee dispute to the Board there is no appeal from that decision. Unlike the Administrative Procedures Act's provision for appeal from final agency action, the Board's decision is not an executive agency action but, rather is the action of an administrative arm of the Supreme Court of South Carolina from which no appeal is provided unless set forth in the relevant court rule, Rule 416. That rule provides only for limited appeal to the circuit court and nothing more.

Federal

Glaser, et al. v. Enzo Biochem, Inc., et al., No. 05-1920 (decided Sept. 21, 2006).

Plaintiffs purchased shares of Enzo Biochem (Enzo) stock. In this case, they alleged that their stock purchases were made based on misrepresentations regarding the success of various of Enzo's drug therapies. The district court dismissed Plaintiffs' common law fraud claim related to these stock purchases, but on appeal to the Fourth Circuit, the court concluded that certain of the alleged statements made during stockholder meetings and in press releases by Enzo and its representatives could form the basis of a common law fraud claim. The case was then remanded for further proceedings. Prior to any decision by the district court on remand, the Supreme Court decided *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

In *Dura*, the Supreme Court explained that in cases such as these plaintiffs must allege an actual decrease in stock price that corresponds with the public's learning of the truth of the misrepresentation. Plaintiffs in this case made no such allegations. Plaintiffs merely alleged that they paid a higher price for the stock than they would have paid had they known the truth about the drug therapies.

As the Supreme Court explained, "as a matter of pure logic, a the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that at that instant possesses equivalent value." *Dura*, 544 U.S. at 342. "It is only after the fraudulent conduct is disclosed to the investing public, followed by a drop in the value of the stock, that the hypothetical investor has suffered a 'loss' that is actionable after the Supreme Court's decision in *Dura*." Op. at 7.

Plaintiffs' own assertions establish their failure to satisfy the loss causation rule of *Dura*. Plaintiffs' alleged disclosure of the truth of the misrepresentation but such disclosure, pursuant to Plaintiffs' own allegations, occurred after Plaintiffs had already sold

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their Enzo stock and declared bankruptcy. Thus, the revelation of the misrepresentation could not have been the cause of their loss. The Fourth Circuit also affirmed the district court's denial of Plaintiffs' motion to amend their complaint for the fifth time.

Cowan Sys., Inc. v. Harleysville Mut. Ins. Co., No. 05-2253 (decided Aug. 8, 2006).

Cowan Systems, Inc. (Cowans), the insured, filed a declaratory judgment action after its insurer refused to provide it a defense to a third party complaint. That complain alleged that Cowans was contractually obligated to indemnify the third party plaintiff in the main action. A Cowans employee was injured when he fell on the premises of a Linens 'N Things store to which he was making a delivery. Cowans had an agreement with Linens 'N Things in which Cowans agreed to indemnify Linen 'N Things for tort liability. When Cowans' employee sued Linens 'N Things, alleging negligent failure to remove ice and mud from its premises, Linens 'N Things filed a third party complaint against Cowans seeking indemnification pursuant to the agreement. Cowans insurer refused to provide a defense to the claim. Cowans paid to defend itself and was granted summary judgment.

The insurer claimed that coverage was not provided based on three coverage exclusions: (1) workers' compensation exclusion, (2) employer's liability exclusion, and (3) auto exclusion. The Fourth Circuit disagreed. The court affirmed the district court's award of attorneys' fees and costs associated with the underlying tort claim and with the declaratory judgment action.

Applying Maryland law and relying on the broad duty of insurer's to defend their insures in the face of even potential coverage, the Fourth Circuit refused to conclude that no potential coverage existed. None of the three exclusions applied in this case. The injured Cowans employee was making a premises liability claim, not a worker's compensation claim in the action against Linens 'N Things. In addition, that the employee was near the truck he had driven to the premises did not make the truck any part of the cause of his injury; thus, the auto liability exclusion was inapplicable. Finally, the employer's liability exclusion might have applied but for the express exception to that exclusion for insured contracts, which the court concluded included the contract between Cowans and Linens 'N Things.

Locklear v. Bergman & Beving AB, et al., No. 04-2506 (decided Aug. 7, 2006).

Plaintiff was injured on December 20, 1999. On December 17, 2002, prior to expiration of the three-year statute of limitations, he filed a complaint against Hassleholms. At the time the complaint was filed, Plaintiff's counsel believed Hassleholms was the manufacturer of the machine that caused Plaintiff's injury. Plaintiff failed to serve "Hassleholms" within the required 120-days, but the district court sua sponte extended the time for service. Prior to that extension, Plaintiff moved for additional time – another nine months – to effectuate service. In support of this request, Plaintiff claimed it was only recently discovered that Hassleholms was not the actual machine manufacturer but rather the town in which the manufacturer was located. Plaintiff intended to amend his complaint to name the actual manufacturer and serve that entity. Plaintiff's first contact with the manufacturers was on February 20, 2004 and they were not served until April 2004. The district court granted the manufacturers' motion to dismiss because the court concluded the amendment did not relate back to the original complaint. Thus, the claims were time barred. Plaintiff appealed. The Fourth Circuit affirmed the dismissal.

Plaintiff claimed that Federal Rule of Civil Procedure 15(c)(3), which provides for relation back when a party name is changed, required the amended complaint to relate back to the original filing date, which was prior to the end of the limitations period. For relation back under this Rule, however, the party to be named in the amended pleading must have known or should have known that but for a mistake concerning its identity the action would have originally been brought against it. This knowledge must be obtained within the statute of limitations period.

Inherent in Rule 15(c)(3)'s requirements is a distinction between mistake due to a lack of knowledge and mistake due to a misnomer. The Fourth Circuit adopted the Seventh Circuit's explanation of this distinction: "Rule 15(c)(2) [which later became (c)(3)] permits an amendment to relate back where that party is chargeable with knowledge of the mistake, but it does not permit relation back where, as here, there is a lack of knowledge of the proper party." Op. at 6 (quoting Western Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1201 (4th Cir. 1989) (quoting Wood v. Woracheck, 618 F.2d 1225, 1230 (7th Cir. 1980)). Plaintiff acknowledges he did not know the identity of the proper party until six months after the claim was otherwise time barred. To permit relation back under these facts would eliminate the distinction between lack of knowledge and a mistake due to misnomer and would extend the rule beyond its intended scope, "which is to prevent a defendant from defeating an action on the basis of a formality that is neither a surprise or prejudicial to the misnamed party." Op. at 7.

VERDICT REPORTS

AND THE DEFENSE WINS:
SCDTAA Members Strut Their Stuff

With the addition of Verdict Reports in *The DefenseLine*, the courtroom successes of members of the Association are more obvious than ever. Below are just some of the highlights. To all of you, keep up the good work and don't forget to report your successes to *The Defense Line*.

SCDTAA President Wins in Madison County, Illinois

Mark Phillips wowed lawyers across the country when he obtained a defense verdict in one of the nation's most pro-plaintiff jurisdictions, Madison County, Illinois. Identified as one of six "Judicial Hellholes" in 2005 by the American Tort Reform Association, Madison County is Hampton County times ten. In this asbestos products liability case, however, Mark Phillips and the rest of the defense team were able to get through to the jury.

Common Sense Returns to Medical Malpractice

Though the verdicts reported depend entirely upon submissions from our members, the submissions from this year made it clear that jurors can understand the difference between a bad outcome and legal wrongdoing. In no other arena was this more obvious than in the number of defense verdicts reported in medical malpractice cases. Perhaps the successes of our member attorneys will help doctors focus on patient care rather than potential liability.

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