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2005 Joint Meeting Recap

July 28 - 30 • Asheville, NC

by John T. Lay, Jr.

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This year's 38th Annual Joint Meeting was held again in Asheville, North Carolina and was a tremendous success. While the weather was not always kind, the program was informative and focused on the recently passed tort reform. For the second straight year, the meeting had record attendance with over 120 lawyers and a substantial number of claims managers.

The Honorable Thomas W. Cooper, Jr. from Manning, South Carolina led the primary discussions on tort reform. Becky Lafitte also put together an amazingly experienced group of litigators to explain some of the potential practical applications of this important legislation. We were also honored to have Richard Boyette, the current president of the Defense Research Institute, in attendance. The program was extremely entertaining and we thank all the speakers who participated.

In addition, thanks again to Bill Besley and his entire committee for their efforts in coordinating the silent auction. Thanks to their efforts and the generosity of our membership, we were able to surpass previous years donations. We are pleased to present to the South Carolina Bar Foundation's Children's Fund a donation of \$6,740.00. The golf tournament was held at Reems Creek Golf Club and was wonderful fun for all involved, despite the rainy conditions. The tournament this year was won by a team led by our President, Jay Courie, with an incredible score of 18 under. We are still studying the scorecard to determine if any improprieties exist.

The organization would like to give its thanks to Bill Besley, David Traylor, Glenn Elliott and Anthony Livoti for their efforts in putting together this important meeting.



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President's Letter

by James R. Courie



“Did you hear the one about the lawyer who...”

If I asked you to continue the sentence, I'm sure your thoughts turn to the most recent lawyer joke shared by a good-natured friend. Everyone loves a good lawyer joke, and most lawyers, who don't take themselves too seriously, just laugh along.

Hurricane Katrina was no laughing matter. It was the most destructive storm in U. S. History. Law firms, lawyers, and other legal professionals were some of the first to step forward and offer aid to those in need. So when I ask, “Did you hear the one about the lawyer who...,” my thoughts in these recent days turn to the concern and generosity being shown by law firms, lawyers, and other legal professionals in South Carolina and throughout the country. Everyday, I hear about more and more efforts being undertaken by South Carolina firms, lawyers, and legal professionals. I wish I could include them all, but here is a sample:

- Almost every major defense firm in South Carolina has made a financial commitment to the Katrina relief efforts through firm gifts and matching contributions. Nexsen, Pruet, Adams and Kleemeier has made a commitment of \$100,000.00 and issued a “Carolinas Challenge” in North and South Carolina to make a substantial contribution.
- Every law firm I contacted was involved in an effort to contribute food, water, and supplies both to those in the gulf coast as well as displaced persons that have been brought to South Carolina.
- Paralegal associations and young lawyer groups throughout the state have undertaken fund-raising efforts to assist the Salvation Army, American Red Cross, and other relief organizations.
- The South Carolina Bar continues to assist evacuees with legal questions and provide housing, office space and supplies for displaced lawyers.
- The South Carolina Bar Young Lawyers' Division has organized a book drive to benefit Gulf Coast children whose school libraries were destroyed by Hurricane Katrina.

- A Columbia law firm has organized collection sites for school supplies for the new South Carolina students that have been displaced as a result of Hurricane Katrina.
- National organizations such as DRI, FDCC, IADC, and others have been active in assisting lawyers in contacting family members, courts, clients and opposing counsel, as well as providing emergency shelter, emergency housing, office space, and supplies to displaced lawyers.
- Nelson Mullins attorney Anthony Hayes (who you may remember from our Wills for Heroes Program) has set up a non-profit organization called “United for Disaster Relief.” With money raised through private contributions from Nelson Mullins employees, lawyers helped feed over 100 medical and volunteer staff, set up recreational areas for children and adults, established shelters for pets and provided supplies for the command and control center.

These are just a few of the many examples of lawyers coming to the aid of others. I am also pleased to say that our organization has made a significant financial contribution to relief efforts for those seeking shelter in South Carolina. So the next time someone asks if you heard the one about the lawyer who ..., enjoy the humor, then ask them if they heard the one about the South Carolina defense lawyer who spent a week volunteering in shelters on the Gulf Coast.

I hope everyone plans to attend the DRI Annual Meeting October 19-23 in Chicago. This meeting marks an exciting time for South Carolina defense attorneys since one of our own, David Dukes, will take over as President. To honor David, our Association will co-host a cocktail reception with Nelson Mullins prior to the President's Gala Saturday evening. As always, DRI provides great educational and networking opportunities. I hope you will join me in Chicago to support David and show the rest of the country the strength and pride of South Carolina defense attorneys.

I hope you will also plan to attend the SCDTAA Annual Meeting to be held at Pinehurst November 3-6. We continue the tradition of inviting our state and federal judges, and expect a large turnout this year. Please join us in Pinehurst as we enjoy an outstanding educational program as well as fellowship time with your fellow defense attorneys and judges.

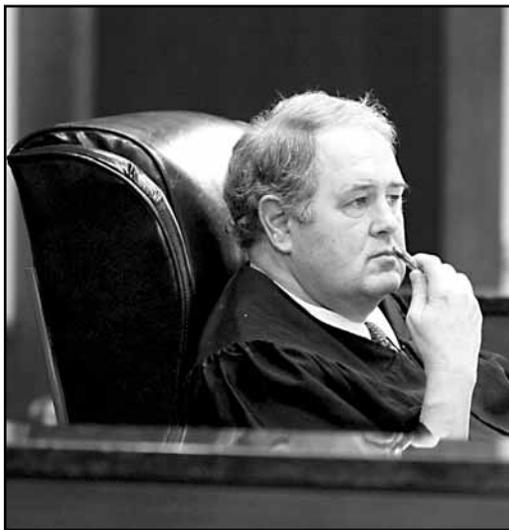
In Memoriam of the Honorable Marc H. Westbrook

Can another ever fill the shoes of a man who, because of his ability to remain an ordinary man, served us as an extraordinary jurist? To speak of our resident judge using accolades and adjectives seems inadequate, but how else to tell of Judge Westbrook's many wonderful qualities?

When a lawyer found out that his case was to be heard by Judge Westbrook, he knew that he would get a fair ride. Judge Westbrook was a judge who kept things level and even. He didn't just endure the company of the lawyers

who went before him on a daily basis, but he truly liked and cared about them, individually and professionally. Never forgetting the plight of the everyday litigator, scurrying from one court to the next, he endured with remarkably good humor countless allegedly meritorious reasons for continuances, some so last minute that a less tolerant judge would have refused them. Regardless of his private moments of skepticism, and even to the repeat offender, he remained a gentleman-temperate, moderate and fair. Only from time to time did he give his best effort at a stern lecture following the occasional bar meeting riddled with lawyers' obviously lame excuses for not being ready. Because he was human, I am sure that Judge Westbrook at times had his criticisms of these excuse makers, and maybe there were those whom he didn't particularly care for- but you would never know it. Ever mindful of the dictates of his position, Judge Westbrook kept those thoughts for himself and his court family. I saw him raise his voice only once, and then, it was to a lawyer who he perceived had "sandbagged" me with some late document production during the middle of trial. It offended his notion of fundamental fairness, a cornerstone of the way he operated his court.

At his funeral, Chief Justice Toal described Judge Westbrook's approach to people as "uncomplicated and open." Nothing could be closer to an accurate description. I am sure that at times the black robe weighed heavily on his shoulders, but he never tried to shift that weight to someone else. He didn't take



out his frustrations on lawyers or litigants, and surely there were times when he was sorely tempted. Lawyers, after all, can sometimes be quite trifling.

Judge Westbrook was a hard worker, not discouraged by problems that others would find as easy excuses to "break down court." He worked tirelessly and ceaselessly to get us our new courthouse. He endured the asbestos debacle, and during asbestos abatement, held roster meetings in what we could best approximate to be the former produce section of an old

grocery store. Toward the end of the use of the old courthouse, I was in trial with the judge when the air conditioning broke. I knew the Judge was hot natured, and wearing a robe, so I just knew we would recess. Instead, we opened the windows and made our arguments over the sound of the trucks rumbling down Main Street. When my law partner, Bill Woods, tried the very first case in the new courthouse, the chairs had not been delivered for the jury deliberation room, but Judge Westbrook was not to be deterred. The show went on, seats appeared from somewhere, and a verdict was secured. He didn't give up and he didn't get grumpy about it. He didn't look to cast blame, but laughed and worked through it.

There is much more to being judicial than wearing a black robe, and there is much more to life than work. Judge Westbrook got that. My best memory of him is not in the courtroom, but rather is of him at our SCDTAA Annual Meeting. I can still picture him, chasing his granddaughter Abigail all over the meeting hall, playing those endless child's games of repetition, never tiring, but stopping only long enough to show her off to those of us passing by, who found ourselves as much enchanted by his sheer adoration of the child as the child herself.

To say that he will be missed seems somehow totally insufficient. His absence is a void incapable of measurement or expression. We are all better for having known him, and would do well to follow his grand example in every aspect of our lives.

by Donna Seegars Givens

2005 Annual Meeting

November 3 - 6 • Pinehurst, NC

by John T. Lay, Jr.



The 2005 South Carolina Defense Trial Attorneys Association's Annual Meeting will be held at Pinehurst, North Carolina November 3rd thru November 6th. Obviously the golf will be unbelievable, and our annual tournament will be held at Pinehurst Course No. 5. However, believe it or not, Pinehurst offers much more than golf. The primary hotel, the Carolina, is a four-star hotel and offers many amazing restaurants and a brand new full service spa. The village of Pinehurst offers many unique and specialized shopping opportunities in a charming environment. Pinehurst is a wonderful resort that will be relaxing and entertaining for golfers and non-golfers alike.

The program for the meeting this year is also spectacular. This year we are honored to have the President of the Defense Research Institute, David Dukes of Nelson Mullins Riley and Scarborough and

the President of the Association of Trial Lawyers of America, Ken Suggs of Janet Jenner & Suggs. This is the first time that lawyers from the same state have held two high profile national positions at the same time. Another highlight of the meeting will be a presentation by Viet Dinh on the US Supreme Court Nomination process. Mr. Dinh is a former assistant attorney general for the United States and former White House counsel charged with the judicial nomination process. He is the author of the Patriot Act and a frequent speaker on CNN, Fox News and other news programs.

In addition, best-selling author Ron Rash, author of two critically acclaimed novels, *One Foot in Eden* and *Saints at the River*, will also be speaking to us. Ron has also been the recipient of many literary awards including the O' Henry Prize, the Weatherford Award for Fiction, the 2003 Appalachian Writers' Association Book of the Year Award and the Southern Book Critics Circle Award.

Finally, Chief Justice Toal will also be in attendance to offer her annual State of the Judiciary address. The program could not be better and promises to be very entertaining. Between the wonderful and diverse amenities of Pinehurst and the wonderful program, it is a meeting that should not be missed.

Tentative Agenda

Thursday, November 3, 2005

3:00 p.m. to 5:00 p.m.
Executive Committee Meeting
4:00 p.m. to 6:00 p.m.
Registration Desk Open
5:00 p.m. to 6:00 p.m.
Nominating Committee Meeting
7:00 p.m. to 8:00 p.m.
President's Welcome Reception
Dinner on your own

Friday, November 4, 2005

8:00 a.m. to 12:00 noon
Registration Desk Open
8:00 a.m. to 9:00 a.m.
Coffee Service

8:15 a.m. to 8:30 a.m.
Welcome
James R. Courie, President SCDTAA
Opening Remarks and Announcements
8:30 a.m. to 9:00 a.m.
Taking the Show on the Road
G. Mark Phillips, Esquire
8:30 a.m. to 9:30 a.m.
Young Lawyers Division Breakout
9:00 a.m. to 9:45 a.m.
The United States Supreme Court
Nominating Process
Viet D. Dinh, Georgetown University Law Center
9:45 a.m. to 10:15 a.m.
Ethical Issues Brought About by
Graniteville Train Accident
F. Earl Ellis, Jr., Esquire,
Immediate Past President of the South Carolina Bar

10:15 a.m. to 10:30 a.m.

Break

10:30 a.m. to 11:30 a.m.

Judges Panel – Perspectives from the Bench
The Honorable James E. Brogdon, Jr.
The Honorable R. Bryan Harwell

10:30 a.m. to 11:30 a.m.

Workers' Compensation Breakout

11:30 a.m. to 12:00 noon

Effective Appellate Advocacy

William B. Watkins, Esquire

12:30 p.m.

Golf Tournament

Played on Pinehurst Course No. 5

1:00 p.m.

Cameron Village Antique Trip

Cameron Village, a national historical register district started in 1875, it is spread throughout three blocks of antique shops, old homes and beautiful churches.

2:00 p.m.

Quail Hunting at Pine Lake Plantation

2:00 p.m.

Chef Demonstration and Wine Tasting

Pinehurst's experienced Chef and Wine Steward will entertain and educate guests about some of Pinehurst's best culinary secrets and will provide guests with a wonderful show of food and wines.

7:00 p.m. to 9:30 p.m.

"Taste of North Carolina" Dinner

Join us for a casual evening featuring some of North Carolina's best cuisine, live music, and some "nite lite putting"

Saturday, November 5, 2005

8:00 a.m. to 12:00 p.m.

Registration Desk Open

8:00 a.m. to 9:00 a.m.

Coffee Service

8:00 a.m. to 8:30 a.m.

SCDTAA Business Meeting

8:30 a.m. to 9:00 a.m.

State of the Judiciary Address

Chief Justice Jean H. Toal,
South Carolina Supreme Court

9:00 a.m. to 9:45 a.m.

National Legal Trends

David E. Dukes, Esquire
President, Defense Research Institute

Kenneth M. Suggs, Esquire
President, Association of Trial Lawyers of America

9:45 a.m. to 10:30 a.m.

Avoiding Legal Malpractice

Charles J. Baker III, Esquire
Samuel W. Outten, Esquire

10:30 a.m. to 10:45 a.m.

Break

10:45 a.m. to 11:30 a.m.

Panel Discussion – Now that There's Tort Reform, Where we do go from here?

Panel featuring Federal Court Judges, State Court Judges and lawyers

11:30 a.m. to 12:00 noon

Musings of a Southern Writer

Ron Rash

2:00 p.m.

Chef Demonstration and Wine Tasting

Pinehurst's experienced Chef and Wine Steward will entertain and educate guests about some of Pinehurst's best culinary secrets and will provide guests with a wonderful show of food and wines.

Afternoon on your own

7:00 p.m. to 8:00 p.m.

Cocktail Reception

8:00 p.m. to 12:00 a.m.

Dinner and Dancing with music by
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Recent Order

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF YORK
C.A. NO. 2004-CP-46-2305

Gregory S. Burkhamer and Kimberly A. Burkhamer, individually and as Guardian ad litem for Quintin Burkhamer, Minor, Plaintiffs,

vs.

Dryvit Systems, Inc.; Viking Enterprises, Inc. of Fort Mill; and Standard Insulating Company, Inc., Defendants.

ORDER

This matter comes before the Court on Dryvit Systems Inc.'s Motion to Compel filed on March 11, 2005. This Court recognizes that the United States Department of Health and Human Services has issued regulations pursuant to the Health Insurance

Portability and Accountability Act of 1996 ("HIPAA"), governing the privacy of individually identifiable health information obtained, created or maintained by certain entities, including healthcare providers. Under 45 C.F.R. §164.512(e), protected health information may be disclosed by healthcare providers and other such entities in the course of a judicial or administrative proceeding in response to the Order of a Court or administrative tribunal.

This Court finds that in the above-captioned civil action the medical condition of Quintin Burkhamer, minor child of Gregory and Kimberly Burkhamer, and a plaintiff in this action is at issue. Specifically, Plaintiffs' Complaint alleges Quintin has suffered "serious physical health problems ... physical pain, ... mental anguish, [and] emotional distress." Plaintiffs also allege they have incurred costs for medical, hospital and physician services for Quintin Burkhamer. Accordingly, the Court hereby orders all entities who are or have been involved in the care and treatment of Quintin Burkhamer to provide to Dryvit Systems, Inc., Viking Enterprises, Inc. of Fort Mill, and Standard Insulating Company, Inc./ United Subcontractors, Inc., current Defendants in this action, and/or their agents, upon Defendants' request, the following:

Copies of any and all medical records, including but not limited to, physicians' notes, nurses' notes, any other handwritten notes, photographs, phone message notes, psychiatric reports, consultation reports, history and physicals, discharge summaries, lab reports, x-rays, bills, correspondence with patient insurance companies, other treating physicians, and rehabilitation practitioners, patient questionnaires, E.R. reports, operative notes, pharmacological management, and any other documents relating to the care, treatment, and medical conditions of the Plaintiff.

IT IS FURTHER ORDERED the parties shall use the medical records received pursuant to this Order for the purposes of this litigation only and will not disclose said records to persons or parties not associated with this litigation. Nothing in this Order shall be construed to prevent the Defendants from providing copies of said records to any experts or medical consultants retained in this litigation to assist in their defense.

IT IS SO ORDERED.

This 16th day of August, 2005.

Judge John C. Hayes III, Sixteenth Judicial Circuit

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Workers' Compensation System Faces Intense Scrutiny

By Michael G. LeFever and Jeffrey N. Thordahl of MG&C Consulting

Will Workers' Compensation Reform become the Tort Reform issue of the 2006 session of the South Carolina General Assembly? All signs point to an all out push to make significant changes to the workers' compensation laws as business, industry and study committees assemble to debate the issues and make recommendations.

Fueling the sense of urgency is a voluntary market rate increase of 32.9% filed in July by the National Council on Compensation Insurance. This followed a 32.8% rate increase in the assigned risk plan approved in February. The Department of Insurance denied the voluntary market rate increase on September 2 for being too high and likely to lead to excessively high rates. The NCCI may appeal the department's decision to the SC Administrative Law Court or submit a new request.

Reacting to the rate increases and the growing uneasiness in the business community over the general operations of the Workers' Compensation Commission, Governor Mark Sanford created the Governor's Workers' Compensation Reform Task Force by executive order on July 26, 2005. The task force is composed of business and insurance industry representatives, physicians, and attorneys. Among the issues identified for study by the executive order are the dramatic rise in premiums, the current awards process, the current decision and appeals process, and the current oversight of the workers' compensation system; however, the task force is not limited to these issues.

In an early session identifying other issues for consideration, the task force added concerns such as the effect of *Brown v. Bi-Lo* and *Tiller v. National Health Care Center*, the definition of accident and repetitive trauma, fee schedules for outpatient care and prescription drugs, the often unexplainable disparity between a physician's impairment rating and a commissioner's disability rating, the 50% rule for the back, intoxication standards, and many others. The full task force will now meet bi-weekly to consider recommendations from four subcommittees that are focusing on the following problem areas: Legal Issues, Medical Issues, Commission Issues, and Insurance Issues. A final report to the Governor is due no later than January 1, 2006.

Contrary to the task force's announced deliberative process is the fact that at its second meeting, the

members of the task force voted almost unanimously to abolish the Second Injury Fund. This action came just one day after a coalition of business groups held a news conference at the Statehouse Rotunda to denounce the nearly 100% assessment increase by the Second Injury Fund and demand workers' compensation reform. The coalition was led by the South Carolina Chamber of Commerce which recently added Jay Courie to its influential Workers' Compensation Committee.

After failing to act on several far-reaching workers' compensation reform bills introduced during last year's legislative session, the House Labor,



Commerce and Industry Committee seems poised to take a hard look at provisions which can bring about reform by restoring balance to the system. In particular, Rep. Converse Chellis, chairman of the Business and Commerce subcommittee, is committed to providing fair and impartial hearings in an effort to preserve the best of the seventy year old system while correcting notable deficiencies.

Look for workers' compensation reform to grab its fair share of headlines when the General Assembly returns in January. This issue will rank right near the top with property tax relief, K-12 education, Medicaid, and transportation funding.

Recent Opinion

Brewer vs. Myrtle Beach Pavillion

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Dawn Brewer, Appellant,

v.

Myrtle Beach Farms Company, Inc. d/b/a Myrtle Beach Pavilion and S&S Power, Inc. f/k/a Arrow Dynamics, Inc., Defendants,

Of Whom Myrtle Beach Farms Company, Inc. d/b/a Myrtle Beach Pavilion is the

Appeal From Horry County

John L. Breeden, Jr., Circuit Court Judge

Unpublished Opinion No. 2005-UP-508

Heard June 17, 2005 – Filed August 30, 2005

AFFIRMED

Sean K. Trundy, of North Charleston, and Thomas Hayden Hesse, of Summerville, for Appellant.

Douglas M. Zayicek, of Myrtle Beach, for Respondent.

PER CURIAM:

Dawn Brewer appeals the trial court's order granting summary judgment to Myrtle Beach Farms Company, Inc., doing business as the Myrtle Beach Pavilion, on her claims for negligence and inadequate warnings of the dangers associated with riding its roller coaster, the "Mad Mouse." We affirm.

FACTS

On July 31, 2000, Brewer was spending the day at Myrtle Beach Pavilion, an amusement park, while vacationing with her family when she decided to ride the Mad Mouse. The Mad Mouse is a ten-car roller coaster designed to speed around a track with hair-pin turns at approximately 30 miles per hour. Several clearly visible signs near the entrance of the roller coaster warn that the Mad Mouse "BY ITS VERY NATURE CREATES FORCES & SPEEDS THAT

MAY NOT BE ACCEPTABLE TO SOME RIDERS WITH Pre-existing medical CONDITIONS" and those with neck or back problems "MUST NOT BOARD THE MAD MOUSE." Although Brewer had pre-existing back problems stemming from a car accident and "didn't want to get on it," she did not read or heed the warnings and boarded the roller coaster.

Despite a sign that warned riders to "SIT UP STRAIGHT WITH BACK & SHOULDERS AGAINST THE SEAT BACK WITH HEADS ERECT TO AVOID INJURY," Brewer was riding the Mad Mouse with her head leaning out of the side of the car and her eyes closed. The Mad Mouse went around a curve on the track and came to an abrupt stop that thrust Brewer against the lap bar restraint. Brewer waited on the stopped Mad Mouse for several minutes while Pavilion maintenance personnel inspected it. Then the Mad Mouse started up again and completed its trip around the track. After Brewer exited the ride, she spoke to maintenance personnel who informed her the Mad Mouse was completely controlled by a computer system, and the computer's safety mechanism had likely shut down the ride because one car was traveling at a higher rate of speed than another.

Brewer waited until the following day to see a doctor in the Myrtle Beach area who told her she had bruised ribs and gave her pain medication. When Brewer returned home from vacation, she saw her chiropractor who diagnosed her with compressive spinal fractures.

On June 23, 2003, Brewer brought suit against the Pavilion and the roller coaster's designer S&S Power, Inc., formerly known as Arrow Dynamic, Inc., whom she later voluntarily dismissed, for injuries she sustained while riding the Mad Mouse. The Pavilion moved for summary judgment. At the hearing, William Avery, a safety expert, testified the ride's computer's safety feature engaged because of a possible mechanical, electrical, or operational malfunction but that he could not determine which possibility caused the Mad Mouse to stop. The trial court granted summary judgment to the Pavilion. This appeal followed.

LAW/ANALYSIS

1. Negligence

Brewer argues the trial court erred in granting summary judgment in favor of the Pavilion. Brewer contends her expert presented specific facts showing

there is a genuine issue for trial. We disagree.

Summary judgment is inappropriate when facts are presented on which reasonable minds could differ. *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 428, 505 S.E.2d 354, 357 (Ct. App. 1998). It is not enough that one create an inference which is not reasonable or an issue of fact that is not genuine. *Id.* at 429, 505 S.E.2d 357-58. “The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact. . . .” *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

To establish a *prima facie* case for negligence, a plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff, 2) a breach of that duty by negligent act or omission, and 3) damage proximately caused by the breach. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). South Carolina does not recognize the doctrine of *res ipsa loquitur*, but negligence may be proved by circumstantial or direct evidence. *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). “Where circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation.” *Id.*

Expert testimony on the question of the causal connection between a plaintiff’s injuries and the acts of the defendant must satisfy the “most probably” rule. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). It is not sufficient for the expert to testify that the injury might or could have resulted from the alleged cause, but the testimony must indicate the opinion represents his professional judgment as to the most likely one among the possible causes. *Id.*

Brewer contends she presented sufficient circumstantial evidence through her expert Avery’s testimony, to survive a summary judgment motion. Avery testified the Mad Mouse came to a sudden stop because of an operational, mechanical, or electrical malfunction, but stated that it “is not possible at this time to reverse engineer and conclude whether the breakdown was mechanical, electrical, or operational.” Avery alleged, “the Pavilion’s failure to properly document the event prevents us from knowing exactly how [the Pavilion] acted negligently prior to the malfunction.” Avery maintained the Pavilion “deviated from the standard of care” by failing to document the event that caused the Mad Mouse’s safety feature to engage.

Avery’s testimony does not create a genuine issue of material fact. It is Brewer’s burden to show the Pavilion was negligent in the ride’s computer shutting down, and nowhere does Avery allege the Pavilion’s actions most probably injured Brewer.

Avery opined the ride’s computer likely shut down because two of the cars were too close together due to an operational, mechanical, or electrical malfunction. However, Avery never discusses why the cars may have been too close together, what maintenance or inspections would have corrected this situation, or that proper maintenance and inspections were not done by the Pavilion. Avery presented no testimony or evidence that he spoke to Pavilion personnel regarding the incident or consulted any engineering experts. Moreover, nothing the Pavilion did or failed to do after the accident is proof of negligence before the incident.

The Pavilion presented evidence, through the testimony of its maintenance supervisor, that Pavilion staff inspected the Mad Mouse the morning of the incident and found no problems. Additionally, the Pavilion showed the ride shut down for safety as designed by the manufacturer. The Pavilion also presented detailed safety inspection records showing the inspections complied with the manufacturer’s specifications and industry standards. Additionally, no evidence was presented to show Pavilion personnel could have caused an operational malfunction in light of the Pavilion’s evidence the Mad Mouse was completely operated by a computer, designed by the ride’s manufacturer. Therefore, the trial court did not err in granting summary judgment to the Pavilion because Brewer presented no evidence showing the Pavilion caused any problem to the Mad Mouse or knew, or should have known, of any problem with the ride.

2. Warnings

Brewer argues the trial court erred in finding as a matter of law that the Pavilion’s warnings were adequate and that any further warnings would have been futile. We disagree.

Neither party disputes the question of whether a roller coaster needs a warning to be safe, so the only question at issue is whether the warnings the Pavilion provided for the Mad Mouse were adequate as a matter of law.

Generally, the question of the adequacy of the warning is one of fact for the jury as long as evidence has been presented that the warning was inadequate. *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 428, 505 S.E.2d 354, 357 (Ct. App. 1998). A product bearing a warning that the product is safe for use if the user follows the warning is neither defective nor unreasonably dangerous; therefore, the seller is not liable for any injuries. *Id.* Further, a seller is not required to warn of dangers or potential dangers that are generally known and recognized. *Dema v. Shore Enters.*, 312 S.C. 528, 530 435 S.E.2d 875, 876 (Ct. App. 1993). It follows, then, that a product cannot be deemed either defective or unreasonably dangerous if a danger associated with the product is one that the product’s users generally recognize.

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Anderson v. Green Bull, Inc., 322 S.C. 268, 271, 471 S.E.2d 708, 710 (Ct. App. 1996).

Brewer presented no evidence the Pavilion's warnings were inadequate. Several signs, clearly visible to anyone boarding the roller coaster warned that the Mad Mouse: "BY ITS VERY NATURE CREATES FORCES & SPEEDS THAT MAY NOT BE ACCEPTABLE TO SOME RIDERS WITH Pre-existing medical CONDITIONS" and those with neck or back problems "MUST NOT BOARD THE MAD MOUSE." Another sign warned riders to "SIT UP STRAIGHT WITH BACK & SHOULDERS AGAINST THE SEAT BACK WITH HEADS ERECT TO AVOID INJURY." Brewer testified that she watched the Mad Mouse for several minutes then decided to ride even though she "didn't want to get on it" and had a pre-existing back injury. When asked at deposition whether she read or heeded the warnings, Brewer responded, "no sir, I did not. I didn't need to read the warning signs anyway." Brewer also testified that she rode the Mad Mouse with her head leaned over the side of the car, directly contrary to the warnings.

Additionally, Brewer's expert's testimony that additional warnings were needed does not create a

genuine issue of material fact that the warnings were inadequate. Avery never states what additional warnings are required, and the signs comport with the required warnings from the ride's manufacturer. The fact that the ride shut down and caused cars on the track to brake does not mean that the force created was dissimilar to the other jolts and forces normally associated with the Mad Mouse. Brewer's expert provided no evidence whatsoever that the force created by the event was different from any other force or stress created by the inherent nature of a roller coaster. Moreover, Brewer clearly stated that further warnings would not have made a difference and would have been futile under the circumstances. Because Brewer presented no genuine evidence the warnings were inadequate, we find no error in the trial court's finding the warnings were adequate as a matter of law. For the reasons stated above, the order of the trial court is

AFFIRMED.

HEARN, C.J., BEATTY, and SHORT, J.J., concur.

ATTENTION SCDTAA 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.

DRI Report

by John S. Wilkerson, III, DRI State Representative

The following article, published in *The Defense*, a publication of the Minnesota Defense Lawyers Association (reprinted here by permission of the author) captures the essence of the many reasons all defense attorneys should seriously consider attending the DRI annual meeting next month in Chicago:

* * *

SWEET HOME CHICAGO

By Michael S. Ryan

**MURNANE BRANDT, PA
MDLA DRI State Representative**

Chicago is home to many things. To name a few, Wrigley Field, the Shedd Aquarium, the Sears Tower, Soldier Stadium, the Magnificent Mile, the Field Museum, and some of the finest jazz and blues clubs in the country. This year Chicago will also be home to the DRI 2005 Annual Meeting: "The Voice for Civil Justice." The Annual Meeting will be held at the Sheraton Chicago Hotel & Towers on October 19-23, 2005. Make plans to attend — there are lots of good reasons.

The 2005 Annual Meeting will be kicked off by the Shannon Rivers Irish Bagpipe Band, a fixture in the Chicagoland area. The Shannon Rivers Irish Bagpipe Band has participated in every St. Patrick's Day Parade in Chicago since 1956. You won't want to miss the Opening Ceremony and Welcome at 9:00 Thursday morning.

Following the Opening Ceremony and Welcome, the attendees will be entertained as well as educated by Fred Dalton Thompson. Mr. Thompson is a former U.S. Senator and served as Minority Counsel to the Senate Watergate Committee. Since then, Mr. Thompson has become an accomplished film and television actor. On the big screen, his feature films include "In the Line of Fire," "Die Hard II," and "Hunt for Red October." More recently, he has appeared in "Law & Order" and "Law and Order: Trial by Jury." Senator Thompson is an expert in issues involving homeland security, economic opportunity and fiscal responsibility and will address the attendees on these issues.

Consistent with the theme of this year's annual meeting, "The Voice for Civil Justice," a debate on the preservation of the jury system will be featured. Can the jury trial remain at the center of our law practices and the civil justice system? Stephen G. Morrison, a past DRI President, will lead the debate/discussion between Donna D. Melby, current President of the American Board of Trial Advocates (ABOTA), Walter K. Olson, a critic of the jury trial system, Bruce R. Pfaff, a prominent Chicago plaintiff's trial lawyer, and Chief Judge Myron H. Thompson from the U.S. District Court for the Middle District of Alabama.

Blockbuster speakers and CLE sessions are too numerous to list. Included among these, however, is a session with a jury research expert and a number of defense trial lawyers regarding jury decision-making dynamics and the effects on jurors of recent news accounts of corporate wrongdoing. Another session will address how to get new clients and keep them happy. This session will feature perspectives from both the corporate and insurance side, as well as helpful tips from several outside counsel. In addition, David H. Maister, widely acknowledged as one of the world's leading authorities on the management of professional service firms, will teach you how to make another human being give you what you want. Mr. Maister is the author of "True Professionalism" and "The Trusted Advisor." In 2002 he was listed as one of the "top 40 business thinkers in the world."

In addition, the ever-entertaining Professor James W. McElhaney will present on the combined evidence topics of expert witnesses, hearsay, bad acts and character evidence. Dealing with the admissibility of expert testimony, the first portion of Professor McElhaney's presentation is entitled "Daubert, Kumho Tire and Common Sense." Of all of the speakers I have seen over the years, Professor McElhaney is among the best at imparting knowledge through interesting and entertaining anecdotes and stories. He will be a must-see in Chicago.

Beyond the more studious aspects of the annual meeting, there will also be many opportunities to catch-up with old friends and clients, meet new friends and clients, and enjoy the many sights and sounds of Chicago. The Welcome Reception will feature a return to the 1893 Chicago World's Fair—DRI has reserved the House of Blues Chicago

DRI Report

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for the Diversity Reception on Thursday evening, where good food, drink, music and hospitality will be served up DRI style. A Halloween Parade will take place near the hotel on Saturday. The exhibit, "Pompeii: Stories from an Eruption," opens on Friday at the Field Museum. You can participate in any or all of these activities, or at your option, check out some of Chicago's world-class restaurants, jazz and blues clubs, or take in a show at one of Chicago's more than 100 live theaters.

Sandwiched in among these activities, will be the Award Luncheon on Thursday afternoon. Susan Estrich, the first female President of the Harvard Law Review, and a former U.S. Supreme Court judicial clerk, will be the guest speaker. Ms. Estrich is now a FOX news commentator and law professor at the University of Southern California. She is known to be a witty and intelligent columnist who no doubt will be worth the price of admission.

For younger lawyers, the Young Lawyers Committee has organized a Sports Extravaganza Reception for Friday night. In addition, the Women's Networking Luncheon will take place on Friday afternoon. This complimentary luncheon provides an interactive forum for women trial lawyers from around the country to share the secrets of their successes with each other. Leading women of DRI will also be in attendance at the luncheon. And, of course, let's not forget the

President's Gala and Installation Ceremony which winds up the program on Saturday evening. After cocktails, dinner and the installation program, the party will continue with the music of the Wailer Family Band.

The 2005 Annual Meeting will take place at the Sheraton Chicago Hotel & Towers located at 301 E. North Water Street. For convenient reference, the phone number at the Sheraton is (312) 464-4000. The hotel is located on the Chicago River and is within walking distance to Navy Pier, the Magnificent Mile, the Art Institute, the Loop Business District, as well as many shopping and dining options.

Register now. You may do so by mail or online at www.dri.org. Chicago and the DRI 2005 Annual Meeting is a veritable smorgasbord of options and opportunities.

* * *

Even beyond the many reasons cited by Michael in his excellent article, South Carolina Defense Lawyers have an added incentive to be present for the installation of our own David Dukes as DRI President. To recognize and honor David for this achievement, the SCDTAA will co-host a reception with Nelson Mullins immediately prior to the installation ceremony on Saturday October 22nd. This is an event you won't want to miss. See you there!!!!

Young Lawyers' Division Update

by Jennifer S. Barr

The Young Lawyers' Division of the Association met on July 28, 2005 at the Joint Meeting at the Grove Park Inn in Asheville, North Carolina. Members discussed several exciting upcoming events of the Young Lawyers' Division.

In the fall, the Young Lawyers' Division will host a meeting and Ethics CLE in Charleston, South Carolina at the offices of Nelson Mullins Riley & Scarborough, located at 151 Meeting Street, Suite 600. Members will be offered an opportunity to gather with other young lawyers for a social event as well as participate in an Ethics CLE with experienced members of the South Carolina Bar. Additional information regarding this event will follow.

The committee chairs for the Annual Meeting have begun preparation for a Young Lawyers' Division Break-Out session in which members will be given an opportunity to listen to and question senior members of the South Carolina Bar regarding their knowledge and experiences. This Break-Out session is an exciting opportunity young lawyers will not want to miss! Mark your calendars and make plans to attend the Annual Meeting at Pinehurst, North Carolina November 3-6, 2005!

Additional updates will be sent via Electronic Mail. To sign up for Young Lawyers' Division updates or for questions, contact Jennifer Barr, Young Lawyers' Division President, at jbarr@wcsr.com.

Greenville Judicial Reception

by Matthew H. Henrikson

The SCDTAA hosted its last judicial cocktail reception of the year amidst cooler weather and changing leaves in Greenville on the first day of Fall. Over 125 defense lawyers from Greenville, Spartanburg and Columbia entertained upstate area judges at the beautiful Poinsett Club where the theme was Pinehurst 2005. This followed very successful receptions in Charleston in the Spring at the home of Mark and Karen Phillips on the Battery and in June in Columbia at the palatial

offices of Nelson Mullins Riley & Scarborough during the Trial Academy. Very special thanks to Mark and Karen, Nelson Mullins, and Immediate Past President of the SCDTAA, Sam Outten. We are especially grateful for the hard work of SCDTAA's Executive Director, Aimee Hiers, and her staff for coordinating these wonderful opportunities to socialize with members of the South Carolina Judiciary and friends from the bar.

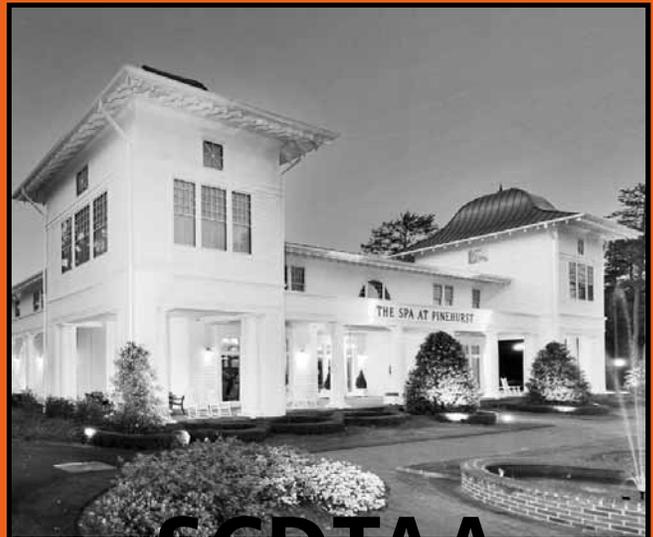




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OCTOBER 19 - 23
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SCDTAA Annual Meeting November 3 - 6, 2005



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