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Spring

TRIAL ACADEMY
April 21 - 23, 2004
Charleston, SC

Summer

JOINT MEETING
July 22 - 24, 2004
Grove Park Inn Asheville, NC



Fall

ANNUAL MEETING
November 11-14, 2004
Château Élan Braselton, GA

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President's Letter

by Samuel W. Outten



As discussed in the President's letter which appeared in the Spring '04 Edition of the DefenseLine, the need to provide young lawyers with first-hand trial experience is greater than ever. I am pleased to report to you that this year's Trial Academy was an unqualified success. The comments I heard from students, faculty and judges were overwhelmingly positive, and we accomplished our goal of improving the trial skills of fine young lawyers from across

the state. Thanks to all of those who worked very hard to make this year's Trial Academy a productive experience. I would especially like to thank Richard Boyette, President Elect of DRI and Tyler Howes, Deputy Executive Director of DRI, who came a day early to be witnesses for the Trial Academy on Friday and to John Kouris, Executive Director of DRI, who make a special trip to South Carolina from Chicago to be a witness at the Trial Academy.

The SCDTAA is also trying to adapt to the many

changes which have occurred in the practice of law. One major initiative undertaken recently is the addition of a Corporate Counsel section to our association. Chaired by Duncan McIntosh, we expect the members of this section to give us the unique perspective of in-house counsel in all areas of the defense practice. One goal is to enhance the partnership between civil defense practitioners and in-house counsel. No doubt in-house counsel will also be willing to provide us with ways in which we can more effectively represent the needs of our corporate clients.

As we head into the summer, the Joint Meeting of the SCDTAA and the CMASC is just around the corner. John T. Lay and Glenn Elliott have worked hard to plan an interesting and informative program for us. In addition to the educational aspects of the meeting, there will also be golf, tennis, rafting, social events, etc. The end of July is a good time to get away from the heat in South Carolina and retreat to the mountains. Please mark your calendar and plan to attend the Joint Meeting on July 22 - 24 at the beautiful Grove Park Inn in Asheville.

Please mark your calendars now for the SCDTAA Annual Meeting which will be held November 11 - 14 at the Chateau Elan in Braselton, Georgia. Two years ago, under the leadership of Mills Gallivan, the SCDTAA held its annual meeting there, and it was one of the best we have ever had. We expect no less from this meeting. David Rheney, Matt Henrikson and Donna Givens will have several dynamic speakers and a variety of topics of interest, both to the defense bar and the many judges which we hope will be in attendance.

I look forward to seeing you at the Grove Park Inn.

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2004 Trial Academy Recap

April 21 - 23 • Charleston, SC

by Molly H. Craig

Through the hard work of enthusiastic students, gracious judges, skilled speakers and breakout leaders, the SCDTAA enjoyed exceptional success in its Fourteenth Annual Trial Academy. Young lawyers from around the state came to Charleston for a three-day intensive Trial Academy to improve upon and refine their trial skills. The first two days of the Trial Academy consisted of training sessions for the students where they were enlightened by our panel of speakers on such topics as Motion in Limine, Opening Statements, Direct and Cross Examination of Lay Witnesses, Direct and Cross Examination of Expert Witnesses, Evidence, Preserving the Record for Appeal, Closing Arguments and Post-Trial Motions. All of our speakers were well-seasoned and experienced trial lawyers with many war stories and nuggets of advice to share. In this respect, we are most grateful to the following individuals who volunteered their time to provide their knowledge and insight to our Trial Academy students: John Hamilton Smith, Gedney M. Howe, III, Mark H. Wall, Samuel R. Clawson, The Honorable Walter T. Cox, The Honorable William Howard, Robert H. Hood, Warren E. Moise, and John S. Wilkerson, III.

Following each speaker's presentation, the students engaged in breakout sessions designed to cement the lessons of our speakers and to help them better prepare for their upcoming mock trials. Another cast of lawyers of significant experience from around the state supervised the breakout sessions. The breakout leaders worked with groups of four students in helping provide them with instruction and practical tips which the students could incorporate into the presentation of their cases.

After two days of intense instruction in both the mechanics and strategic points of trying and defending a wrongful death case, the students tried their cases before Circuit Court Judges at the Charleston County Historic Courthouse. We are indebted to Julie Armstrong and her staff for allowing the Trial Academy to consume the courthouse for our six (6) mock trials. We also owe a great deal of thanks to the following judges who graciously dedicated an entire day to preside over the mock trials: The Honorable R. Markley Dennis, Jr., The Honorable Diane Schafer Goodstein, The Honorable Jackson V. Gregory, The Honorable Thomas L. Hughston, Jr., The Honorable A. Victor Rawl, and The Honorable Roger M. Young. The judges heard motions in limine, opening statements, the presentation of evidence, ruled on evidentiary issues, closing arguments and, in some

cases, post-trial motions. Throughout the mock trial process, the judges offered the students instruction as well as constructive ideas and advice. The witnesses were played by lawyers from across the state who joined us in Charleston solely to help with the Trial Academy. Likewise, each mock trial was presented to a panel of jurors composed of lay people who dedicated their time and attention to our trials. Many thanks to all of these people who volunteered their time to assist with the Trial Academy. We have received glowing remarks from the students about their experiences during the mock trials as well as their overall experience with the Trial Academy. Below are a few testimonials from the Trial Academy students.

At the Trial Academy "I was provided the opportunity to learn a great deal more about effectively trying a case. Moreover, I appreciate the opportunity to meet and get to know many of my peers from other defense firms around the state. Finally, I was glad to have the opportunity to meet the numerous judges and many senior members of the defense trial bar who gathered during Thursday night's dinner." Christian Stegmaier

"The 2004 Trial Academy was terrific. The speakers were well prepared, enthusiastic and obviously knowledgeable and experienced. The actual mock trial was the highlight of the program as it was a wonderful opportunity and confidence builder. The caliber of the speakers and staff was so impressive and the all-around experience was an invaluable one. I will highly recommend it to my peers. Besides all of that, it was such a good time and I loved meeting other young lawyers from around the state." Martha Rhodes

"The program speakers were very informative, including nationally recognized experts, and the program was very well organized." Wesley Few

All was not work, however, as the Young Lawyers Division of the SCDTAA hosted a cocktail reception at the Francis Marion Hotel on Wednesday, April 21, 2004 and Mr. and Mrs. Robert H. Hood hosted cocktails and dinner for the students, judges, speakers, breakout leaders and all members of the SCDTAA at their home on Thursday, April 22, 2004. A good time was had by all. The Trial Academy was an enjoyable, productive and beneficial experience for everyone involved. We look forward to the 2005 Trial Academy which will be held in Columbia next Spring.

2004 Joint Meeting

July 22 - 24 • Asheville, NC

by E. Glenn Elliott

Our Annual Joint Meeting with the Claims Managers Association of South Carolina will be held July 22 through 24 at The Grove Park Inn Resort and Spa in beautiful Asheville, North Carolina. John T. Lay, Glenn Elliott, and Aimee Hiers have put together a program which promises to provide presentations and breakout sessions on numerous topics so there should be something of interest for everyone. The program will qualify attendees to receive approximately 7.0 CLE credits.

The meeting will begin on Thursday, July 22nd with a Young Lawyers' division meeting at 2:00 p.m. This year's tennis tournament will begin at 3:00 p.m. that afternoon. The Joint Meeting registration desk will be open from 4:00 p.m. until 7:00 p.m. and room check-in begins at 4:00 p.m. Thursday's welcome cocktail reception will be held from 6:30 p.m. until 8:00 p.m.

The programs for both Friday and Saturday will present a number of speakers on various topics which should provide useful information and tips for use in everyday practice. On Friday we will receive a legislative update, Judge John Few will speak to us on how to be an effective and ethical advocate, and then we hear from John Wilkerson on how to protect the claims file from discovery by opposing counsel. White water rafting and the golf tournament will both be held Friday afternoon. Please make sure you include these activities on your registration form so that appropriate plans can be made. Scott Garrett has coordinated the golf tournament which will be played at Reems Creek Golf Club. Friday night dinner is again on your own, but we will also have a cocktail reception and silent auction from 6:30 p.m. to 8:30 p.m. We have also coordinated with Grove Park to have a children's program (with dinner included) lasting from 6:30 p.m. until 10:00 p.m., so members traveling with children can have a break and enjoy themselves for the evening. Saturday's program will begin with the SCDTAA Business Meeting followed by a panel discussion on mediation

ethics, UIM/UM bad faith, and a presentation on the effective use of an engineering expert. As the issue of the awarding and handling of punitive damages at trial is still a hot issue, Judge Henry Floyd has agreed to attend and to preside over a "State Farm v. Campbell" motion hearing. Gene Covington and Elbert Dorn will present the opposing sides of those arguments and everyone will have an opportunity to ask questions and participate at the conclusion of the hearing. We will also have another panel discussion involving a number of experienced trial counsel discussing "The Little Things that Win Big Cases." We will also have five breakout sessions on Saturday on the areas of worker's compensation, employment

law, construction law, insurance coverage issues, and the trial on a personal injury case. The claims managers will also have their own breakout session.

Please remember that you must make your hotel reservations with Grove Park no later than July 11, 2004 in order to ensure that you have a room and that you receive our group

rates. Meeting registration forms must be returned to Aimee Hiers no later than July 16th.

Dinner each night is on your own. Chops at Sunset Terrace, The Blue Ridge Dining Room, and Horizons, all located within The Grove Park Inn, present excellent dining options. Downtown Asheville also has many excellent restaurants. Dining and reservation information will be included in your information packet.

The Spa at Grove Park offers a number of options for those folks who need a little pampering. Massages, facials, manicures and much more are available. The Spa is very popular so to avoid being disappointed make your appointments now.

As always, our meeting at Grove Park will be an opportunity to spend time with claim managers and clients, possibly find new clients, and enjoy the camaraderie of our association. Downtown Asheville and the Belle Chere Festival will also present opportunities for shopping and fun. Please make every effort to attend.



Tentative Agenda

Thursday, July 22

2:00 to 3:00 p.m.

Young Lawyers Division Meeting

3:00 p.m.

Tennis Tournament

3:00 to 5:00 p.m.

SCDTAA Executive Committee Meeting

4:00 to 7:00 p.m.

Registration Desk Open

6:30 to 8:00 p.m.

Welcome Cocktail Reception

DINNER ON YOUR OWN

Friday, July 23

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

Registration Desk Open Exhibit Hall Open

8:15 to 8:45 a.m.

Coffee Service

8:15 to 8:30 a.m.

Welcome

Samuel W. Outten - SCDTAA President
Danny E. Parris - CMASC President

8:30 to 9:00 a.m.

Legislative Update

James R. Courie, Esquire

9:00 to 9:45 a.m.

Observation from the Bench: How to be an Effective and Ethical Advocate

The Honorable John C. Few

9:45 to 10:15 a.m.

Protecting the Claims File

John S. Wilkerson, Esquire

10:15 to 10:30 a.m.

Coffee Break

10:30 to 11:00 a.m.

Effective Use of the Engineering Expert

Jeffery H. Warren, The Warren Group

10:30 to 11:00 a.m.

Workers' Compensation Breakout Psychological Permanency Cases (Wage Loss v. Whole Person)

Scott B. Garrett, Esquire

11:00 to 11:30 a.m.

Workers' Compensation Breakout Second Injury Fund Status / Action to be Taken

R. Daniel Addison, Esquire

11:30 to 12:00 noon

Workers' Compensation Breakout Proposed Legislative Changes to Brown v. Bi-Lo / Status of Workers' Compensation in South Carolina, including the SCWCC

F. Earl Ellis, Jr., Esquire

11:00 to 12:00 noon

Panel Discussion – The Little Things that Win Big Cases – Tips from the Trial Masters

Frank H. Gibbes III, Esquire
Michael B. T. Wilkes, Esquire
Stephen G. Morrison, Esquire
Thomas C. Salane, Esquire
Samuel W. Outten, Esquire - Moderator

12 noon to 1:00 p.m.

Beverage Break

12:15 to 5:30 p.m.

White Water Rafting Trip

12:30 p.m.

Golf Tournament –

Scott B. Garrett, Golf Chair
**Reems Creek Golf Club

6:30 to 10:00 p.m.

Children's Program at Grove Park (Dinner Included)

6:30 to 8:30 p.m.

Cocktail Reception/Silent Auction

DINNER ON YOUR OWN

Saturday, July 24

8:00 to 12:00 noon

Registration Desk Open Exhibit Hall Open

8:00 to 8:30 a.m.

Coffee Service

8:00 to 8:30 a.m.

SCDTAA Business Meeting & Announcements

8:30 to 9:00 a.m.

Avoiding the Mine Fields in the High Profile Case

Carl B. Eppes III, Esquire

9:00 to 9:30 a.m.

Ethical Dilemmas in Mediation

Kevin M. Barth, Esquire
Andrew M. Walsh, Public Services Counsel
for the South Carolina Bar
Danny E. Parris, AIC
E. Glenn Elliott, Esquire - Moderator

9:30 to 10:15 a.m.

State Farm v. Campbell Motion Hearing

The Honorable Henry F. Floyd
Eugene C. Covington, Jr., Esquire
Elbert S. Dorn, Esquire

10:15 to 10:30 a.m.

Coffee Break

10:30 to 11:00 a.m.

UIM/UM Bad Faith

John S. Wilkerson, Esquire

10:45 to 11:30 a.m.

Employment Law Breakout

Stephen C. Mitchell, Esquire

11:00 to 11:15 a.m.

The Implications of Crawford v. Henderson

E. Glenn Elliott, Esquire

11:15 to 12:00 noon

Construction Law Breakout Perspectives on the Defense of an EIFS Case

Martha Rhodes, Esquire
Mark A. Crawford, Esquire
Ryan A. Earhart, Esquire

11:15 to 12:00 noon

Young Lawyers Breakout Trying the Soft Tissue Personal Injury Case

A. Johnston Cox, Esquire

11:15 to 12:00 noon

CMASC Business Meeting

11:15 to 12:00 noon

Cutting Edge Coverage Issues

Thomas C. Salane, Esquire

11:30 to 12:00 noon

Workers' Compensation Breakout Question and Answer Session with the Commissioners

12:00 noon to 1:00 p.m.

Adjournment/Beverage Break

by Duncan S. McIntosh

“God bless those people who sue my clients”. I heard this years ago from the Honorable Thomas Kemmerlin, Jr., Master-in-Equity for Beaufort County. Judge Kemmerlin modestly refuses to take credit for this quote, and says he heard it years ago. I do not know who said it, but it illustrates that the interests of defendants in civil litigation may differ from the interests of their lawyers.

While the interests of a defendant and his attorney may differ, their goals are the same: they want to win. But the definition of "winning" is not necessarily the same for each of them. A defendant almost always believes he has done nothing wrong, and he would like to snap his fingers and make the dispute disappear. All good lawyers certainly have their clients' best interests at heart, but the prospect of expensive, complex litigation, followed by a defense verdict at trial, is not unappealing to them. In house counsel and their clients worry about being defen-

dants in expensive, complex, time-consuming litigation. Outside counsel worry about not having clients who are defendants in expensive, complex, time-consuming litigation.

The attorneys in our law department recognize the objectives of Blue Cross and Blue Shield of South Carolina may differ from those of our outside counsel. However, we believe we manage this divergence appropriately, and have excellent working relationships with the firms and attorneys we retain. This article addresses what we expect from outside counsel, and how we believe outside counsel can meet those expectations.

At Blue Cross, we retain, work with, and manage outside counsel to ensure: 1) our files are worked appropriately; 2) we receive top quality legal services, and; 3) we pay a fair price for those services.

There are scores of consultants and hundreds of articles and publications touting various techniques for managing outside counsel effectively. We have investigated fixed fee agreements, but found them of limited benefit in litigation. We do not believe in having third parties audit bills, and we do not try to obtain litigation budgets and enforce them. In our view, clients need to do only one thing to ensure they receive high quality legal work, at a fair price. This "technique" does not involve litigation budgets, third-party audits of bills, fixed fees, TQM, or any other litigation management tools. The most effective litigation management tool is simple, and free: Hire the right lawyer (not the right law firm).

We hire lawyers, not law firms. Effective trial preparation and litigation cannot be accomplished by committee. If we select the right lawyer, our files will be worked appropriately, with little day-to-day oversight by in house counsel. One lawyer has to run the ship, and the client should select him or her. We do not rely on law firms to assign our work appropriately. We have little interest in training lawyers or ensuring a junior partner or associate meets his billing goals. While we recognize that young lawyers need to gain experience, in most cases it is not appropriate for them to obtain this experience on our work. In this regard, we are very sensitive to multiple lawyers, paralegals, or law clerks working on a file.

We hire bright, experienced trial lawyers with an appropriate workload. A lawyer with too few cases may be inclined to overwork a file. A lawyer with too many cases may tend to ignore a file or delegate it to

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less experienced counsel. There are very few cases which are so complex that more than one attorney needs to represent our interests at depositions, motion hearings, and meetings with counsel. Often outside counsel forget that some tasks are have a finite value, regardless of the length of time it takes to accomplish them.

We hire trial lawyers. Many lawyers do not enjoy trying cases, and prefer to conduct discovery and engage in a "motions practice". While discovery disputes and summary judgment motions with their attendant memos and briefs may be somewhat helpful, often they cannot withstand a cost benefit analysis.

We firmly believe in paying a fair price to our outside counsel, and this philosophy cuts both ways. We do not want to pay \$5,000 for a \$10,000 work product, nor do we want to pay \$20,000 for a \$10,000 product. We strive to compensate counsel based on the value of their work, and value is not based solely on positive results. No good client expects good results all the time. We expect our lawyers to conduct a thorough analysis of the facts and applicable law, and give us their best judgment on the appropriate course of action. A legal opinion that "You never know what a jury will do" does not bring in much repeat business.

While we do not use litigation budgets, we do provide billing guidelines to outside counsel with whom we have an on-going relationship. These billing guidelines are as followings:

BILLING GUIDELINES

BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA

1. Please set forth the hourly rates for attorneys, paralegals, law clerks, and all other staff.
2. Absent extenuating circumstances and prior approval, all matters will be handled by one lawyer.
3. Blue Cross expects to be billed for the actual time expended for a task, in time increments of .1 of an hour. We will not pay minimum charges for a task, such as .2 for a telephone call, .3 for drafting a letter, or a minimum charge for form documents, such as standard interrogatories. We will pay only for the actual time expended.
4. Bills should not contain block billing entries. Each task should be itemized, with a time assigned to it.
5. In the event of an appearance on behalf of more than one client, such as attending a roster meeting, Blue Cross will pay only for its pro rata portion of the time incurred.
6. Copies - Blue Cross will pay 10 cents per copy or your actual cost, whichever is lower. For large copying jobs, please consider using outside vendors.
7. Research - Please obtain the prior approval of in-house counsel before conducting substantial research of three or more hours. Blue Cross will not

pay for research by law clerks without prior approval. When research is conducted, Blue Cross expects to receive a memo reflecting the results of this research. We also expect outside counsel to utilize existing memos, databases, and other research, at no additional charge to the company.

8. Blue Cross will pay your actual long distance charges, and actual charges for sending facsimiles. We will not pay a flat rate or per page rate for a fax.

9. Blue Cross should not be billed for inter-office conferences or inter-office memos between firm personnel. We do not expect to be billed for memos to the file unless they involve a substantive matter, in which case we should receive a copy of the file memorandum.

10. Please send bills to Blue Cross on a quarterly basis, unless fees and expenses exceed \$1,000.

11. Only professional services should be billed. The following are examples of activities which, in most situations, are clerical in nature, and for which we do not expect to be billed:

- a. Scheduling meetings and appointments;
- b. Internal docket control;
- c. Conflict checks;
- d. Pick-up and delivery of internal documents, records, and files;
- e. Creation and organization of files and subfiles;
- f. Processing vendor bills;
- g. Inventory, indexing and collation of documents and file materials;
- h. Travel arrangements;
- i. Copying, binding, filing, and refiling;
- j. Pulling and copying documents.

12. Travel, Meals, and Lodging. We do not pay for first class airline tickets. The maximum we will pay for meals is \$75.00 per day. Lodging charges in excess of \$150.00 per night require advance approval.

These billing guidelines are not intended to be exhaustive. We are relying on you and your firm to bill us fairly and appropriately. If you have a question about whether a particular task should be billed or not, please discuss the issue the attorney who is managing the matter.

Again, on the whole we have excellent relationships with our outside counsel. However, the following are some of our collective pet peeves in the law department at Blue Cross, which arise occasionally in dealing with outside counsel.

Unresponsiveness. It is frustrating not to receive return telephone calls or responses to emails when we are paying you to talk to us. While we understand lawyers may be in trial or otherwise unavailable, we do expect the courtesy of a return call from a secretary or administrative assistant.

Defense Attorneys and Legislators Enjoy Wild Bird Supper

By James R. Courie

On April 14, 2004, a group of South Carolina Defense Trial Attorneys including the Executive Committee and past presidents hosted members of both the House and Senate Judiciary Committees of the South Carolina General Assembly. This is the second year in a row the Defense Attorneys have entertained members of the Judiciary Committees. This year's event, at the Indigo Club in lower Richland County, featured a skeet shooting demonstration and individual lessons from a professional instructor. Afterward, members of the General Assembly were given an opportunity to demonstrate their skills. House Judiciary Committee Chairman Jim Harrison of Columbia and Rep. Seth Whipper of North Charleston, in particular, put on quite an exhibition.

Lawmakers and SCDTAA members enjoyed the menu of quail, poussin, and pheasant, with all the trimmings, including grits, collard slaw, and home-



l to r around table: Tommy Lavender, Gray Culbreath, Sam Outten, Sen. Jake Knotts (R-Lexington), Rep. Todd Rutherford (D-Richland), Rep. Seth Whipper (D-Charleston), Rep. Jim Harrison (R-Richland), and Curtis Ott.

made banana pudding. The Defense Attorneys' Legislative Committee made every effort to make this a unique gathering rather than another typical legislative dinner. Feedback from the members of the General Assembly that attended the function

was very positive. The event certainly provided a great opportunity to interact with members of the legislature on a social level, as well as providing our members an chance to discuss and promote the issues that are important to our organization.

Special thanks go to Duncan McIntosh of Blue Cross/Blue Shield and Steve Bates and Kim Schneider of McAngus, Goudelock & Courie for coordinating the event.



Rep. Seth Whipper (D-Charleston), the instructor, and Rep. Jim Harrison (R-Richland).



Board Member and Judicial Committee Chair, Duncan McIntosh

Direct contact with internal business clients without approval is usually a bad idea. Absent clear direction from house counsel, be careful about contacting internal clients directly.

Before travelling several hours for a roster meeting, always check with the judge or a law clerk to be sure your attendance is mandatory.

Meetings with internal clients must be handled appropriately. Unfocused, stream-of-consciousness dialogue in meetings with clients is seldom, if ever, appropriate or helpful. Your jokes may be funny, but they are seldom worth \$200 an hour. It is often difficult to arrange a 30 minute meeting with internal clients. When a lawyer is late or unprepared for a meeting with internal business clients, you put in house counsel in a very unpleasant position. Our clients are looking directly to us for legal advice, and

they expect us to retain the appropriate lawyer to handle a matter. If retained counsel is late or unprepared, our clients blame us, not you.

There is obviously nothing magic about the observations and comments set forth above. While we believe that the interests of outside counsel are inherently different from those of internal clients, we do not believe they are irreconcilable. However, you are much more likely to keep your clients happy if you recognize that your goals are different from theirs. To quote Judge Kemmerlin again, he recalls a greeting from defense counsel to lawyers for the plaintiff: "Thank you for chasing the rabbit into my hat".

In your role as defense counsel, it is a good idea to remember that while you are delighted by the presence of the rabbit in your hat, the rabbit is certainly less so.

...
continued from page 7

Order Granting Motion for Sanctions and Protective Order

Redbone Alley vs. Florence Restaurant Supply

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO. OO-CP-21-902

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

REDBONE ALLEY OF COLUMBIA, INC./ D/B/A
REDBONE ALLEY RESTAURANT AND BAR
Plaintiff,
vs.
FLORENCE RESTAURANT SUPPLY, INC.,
DONALD BALL, ORBITAL ENGINEERING, INC.,
AND LEONARD GREENE,
Defendants.

This matter was initially before the Court pursuant to the Notice of Motion and Motion for Sanctions filed by the Plaintiff herein on July 19, 2001. In that Motion, Plaintiff requests an Order pursuant to S.C.R.C.P., Rule 37, and Circuit Court Alternative Dispute Resolution Rules 5 and 11 sanctioning the Defendants Donald Ball, Florence Restaurant Supply, Inc., and their insurer, Harleysville Insurance Company for allegedly failing to comply with the mandatory mediation process in a number of respects. This Motion also requests an award of attorney's fees, costs and disbursements and other related relief. This Motion, with supporting Affidavits and documentation, was properly served upon all parties and the matter is properly before the Court.

A hearing was scheduled in this matter for February 22, 2002. Present at the hearing in this matter were Kevin M. Barth, Esquire, of the Florence County Bar, on behalf of Plaintiff, Ronald Diegal, Esquire, of Richland County Bar, on behalf of the Defendants, Donald Ball and Florence Restaurant Supply, Inc., Charles S. Bernstein, Esquire, of the Charleston County Bar, on behalf of Donald Ball individually, W. Edward Lawson, Esquire, of the Horry County Bar, on behalf of Harleysville Insurance Company, and Lawrence B. Orr, Esquire, of the Florence County Bar, on behalf of Orbital Engineering, Inc., and Leonard Greene.

By way of procedural history, upon the filing of the Notice of Motion and Motion for Sanctions by the Plaintiff, Plaintiff, served certain Deposition Notices upon employees of Harleysville Insurance Company. As a result of the service of those Subpoenas and Deposition Notices, Attorneys for Donald Ball and Florence Restaurant Supply, Inc., filed a Motion for Protective Order. A hearing was held on the Motion for Protective Order on September 13, 2001. After carefully considering the issues raised, an Order was filed October 12, 2001 by this Court, which denied the Motion for Protective Order and allowed the Plaintiff to take the requested depositions. These depositions were, in fact, taken in Nashville, Tennessee by the Plaintiff on December 3, 2001. The original depositions were presented to the Court for consideration in conjunction with the Motion for Sanctions.

Each attorney argued the respective positions to the Court. The Court has carefully considered the entire file in this matter, as well as the argument of counsel and finds and concludes as follows:

Circuit Court Alternative Dispute Resolution Rules, Rule 5(a) provides as follows:

The following persons shall physically attend a mediated settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative purposes of the Circuit;... (4)for any insured party against whom a claim is made a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim." (Emphasis added)

Circuit Court Alternative Dispute Resolution Rules, Rule 11 (b), provides as follows:

If a person fails to attend the mediated settlement conference without good cause, the Court may impose upon the party or his principal any lawful sanctions, including, but not limited to, the payment of attorney's fees, mediator's fees, and expenses incurred by persons attending the conference, contempt,

Order...

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and any other sanction authorized by Rule 37(b), S.C.R.C.P...

The sanctions available to the Court for failing to comply with these rules, include the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; (E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply show that he is unable to produce such person for examination.

This action was commenced by the Plaintiff as a result of alleged negligence in the design and construction of the Redbone Alley Restaurant in Columbia, South Carolina. The action was filed in Florence County, South Carolina, which county is subject to the Mandatory Alternate Dispute Resolution Rules and Regulations. This action is subject to mandatory mediation.

Richard Hinson was appointed mediator in this matter by Stipulation of Neutral Selection, and the original mediation conference was set for June 21, 2001. At that initial mediation conference, all of the aforementioned attorneys, with the exception of William E. Lawson (who was not involved in the litigation at the time) appeared on behalf of the respective parties. Jamie Bruner, adjuster for Harleystville insurance Company, appeared on behalf of Florence Restaurant Supply, Inc. and Donald Ball. Ed Erp, adjuster for CNA insurance Company, appeared for the remaining Defendants. The individual Defendants were also present.

The Court has carefully reviewed the deposition of Jamie Bruner, the adjuster for Harleystville Insurance Company, who attended the first mediation on behalf of Florence Restaurant Supply, Inc., and Donald Ball. It is clear from the deposition that Ms.

Bruner, at the time she appeared for the mediation, knew virtually nothing about the facts of this case or the law applicable thereto. She had only reviewed the file for a limited period of time a day or two prior to the mediation, and had extremely limited knowledge regarding it. Ms. Bruner was clearly not in a position to negotiate a settlement in good faith and her appearance at the mediation conference was virtually useless to the process.

I find that the first mediation session lasted an excessive number of hours, during which time Ms. Bruner was being educated on the facts involved in this case and the law applicable thereto by the Plaintiff and its counsel. It is further clear that a crucial issue in this litigation is a legal theory known as joint and several liability. Although Ms. Bruner, prior to the mediation conference had heard of it, she had never been involved in joint and several liability applicable to negligence actions in the State of South Carolina, and had no working knowledge as to how that legal theory would apply to the case. Ms. Bruner was clearly sent by Harleystville Insurance Company to "physically appear" at the mediation conference, even though she had no working knowledge of the case and was not in a position to negotiate any type of settlement on behalf of their insureds.

The June 21, 2001 mediation was adjourned and scheduled to reconvene on July 18, 2001 at the request of MB. Bruner. Ms. Bruner asked for additional time to review the file with her superiors, in order to be in a position to meaningfully enter into negotiations with Plaintiff's counsel at the subsequent mediation conference, which was scheduled at her request. Upon the reconvening of the mediation on that date, Ms. Bruner did not attend. Instead, Harleystville sent John Stoehr as their representative.

Mr. Stoehr works from his home in the Charlotte area on behalf of Harleystville Insurance Company and has been an adjuster for them a number of years. While employed at Harleystville, Mr. Stoehr has never handled a negligence claim, has never been involved in a case where negligence theories were involved (except as they relate to the payment of workers compensation liens from third party liability actions), and basically handled nothing for Harleystville insurance Company other than Workers' Compensation claims in the States of North Carolina and South Carolina.

The sum and substance of Mr. Stoehr's knowledge of the case was obtained in telephone conversations with his supervisors at the Nashville, Tennessee office late in the afternoon prior to the second mediation session. Mr. Stoehr had no file on the matter, had reviewed no documents or pleadings, and had never reviewed depositions, discovery, responses or expert opinions. In fact, Mr. Stoehr clearly had no knowledge whatsoever of the case and was simply sent by Harleystville to "physically attend" the mediation conference. Mr. Stoehr was clearly not in a position to enter into negotiations in this matter. In fact,

he had virtually no knowledge whatsoever of the facts, issues involved or legal theories, Of note is the fact that Mr. Stoehr was not even aware of the extent of Plaintiff's alleged damages as a result of the Defendants' action. He had only learned of the mediation conference and his required attendance on the afternoon prior to the mediation conference.

Circuit Court Alternative Dispute Resolution Rules, Rule 5(d), provides that "communications during the mediated settlement conference shall be confidential" and that "the parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding, any oral or written communications having occurred in a mediation proceeding...". Counsel for Defendants, Ball and FRS, refers the Court to Rule 11 (b) , which Defendants contend only allows sanctions if "a person fails to attend the mediated settlement conference without good cause." It is their contention that so long as someone appears physically at the mediation conference, even though that person may have limited or no authority, and no working knowledge of the file, that the ADR rules have been complied with.

Counsel for Plaintiff contends that Plaintiff is entitled to request sanctions if the insurance carrier fails to act in good faith and/or fails to have the physical appearance of an insurance adjuster "who has full authority to settle the claim." Plaintiff's contention is that the mediation process will be completely thwarted and avoided by Defendants and their carriers if the rules simply require the physical attendance of someone at the mediation conference, even though that person might have no knowledge of the file, and no ability to discuss and negotiate a settlement.

The issue for the Court to decide is whether or not the insurance carrier, Harleysville, has complied with these rules, when it sent two adjusters to the mediation conferences who clearly had limited authority, and no ability to discuss or negotiate the settlement of this claim. Ms. Bruner, in fact, after attending the mediation conference for a significant number of hours, knew so little about the case, that she never even made an offer of any type to the Plaintiff. Mr. Stoehr did not either.

The Court agrees with the Plaintiff and finds that in order to comply with the implied duty of good faith and the Rule cited above, the carrier is required to send an adjuster to the mediation conference with sufficient knowledge of the file to be in a position to "negotiate the claim in good faith". To allow an adjuster to simply appear and draw breath would destroy the ADR process and render the rules ineffective and useless. The Court clearly finds that the insurer, Harleysville Insurance Company, failed to comply with these mandatory rules. As a result, their insureds, Florence Restaurant Supply, Inc., and

Donald Ball, should be sanctioned pursuant to the Rules.

Plaintiff contends that the violations of the Defendants are so severe that this Court should strike the Answer of Florence Restaurant Supply, Inc., and Donald Ball, and render Judgment in favor of the Plaintiff. The Court finds that such a remedy is too severe, in that the insurance company is the culprit and not the insureds. To punish the insureds in such a drastic fashion for the failures of its insurance carrier would be unfair and inappropriate in this case. As a result, Plaintiffs request for such a sanction is hereby denied.

On the other hand, the Plaintiff has incurred significant expenses as a result of the failed mediation conferences, to which it is entitled to reimbursement. Plaintiff submitted to the Court an Affidavit in support of an attorney's fees and costs award with attachments, as well as a Supplemental Affidavit in support of same. The Court has carefully considered the request and finds that the Defendants should be responsible to pay a portion of the attorney's fees incurred by Kevin M. Barth on behalf of the plaintiff and certain costs. The Court will address and outline this award below. The Court, however, declines to require the Defendants to be responsible for the expenses incurred in traveling to and from Nashville, Tennessee for these depositions of the adjusters, and the time associated with that travel.

The Court has carefully considered the factors in regard to an award of attorney's fees, including "1) the nature, extent and difficulty of the legal services rendered; 2) the time and labor necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the fee customarily charged in the locality for similar services, and; 6) the beneficial result obtained". *Baron Data Systems, Inc. v. Loter*, 297 S.C. 3S2, 377 S.E. 2d 296 (1989). The Court has carefully considered the fees charged by counsel for Plaintiff and finds them to be reasonable, particularly in light of the difficulty and complexity of the issues and the beneficial results obtained. However, after deducting from that bill certain expanses associated with the travel to and from Nashville, the Court find that a reasonable attorney's fee to counsel for Plaintiff is the sum of \$6,427.50. In addition, counsel for Plaintiff has submitted certain expenses for which Plaintiff is requesting reimbursement. The Court approves the reimbursement to Plaintiff's counsel for the following expenses: Plaintiff's portion of mediator fee--\$1,122.50; service of process fee - \$210.00, and; Court reporting fees - \$1,032.10 for a total of \$2,354.60.

In summary. Defendants shall pay to Kevin M. Barth, attorney for Plaintiff, Post Office Box 107, Florence, South Carolina 29503, within ten days of the date of this Order, the sum of \$8,792.10.

Any and all other sanctions requested by the

SCDTAA Hosts Reception for Upstate Members of the State and Federal Judiciary

By Duncan S. McIntosh



On Thursday, May 20, 2004, the South Carolina Defense Trial Attorneys' Association hosted a reception for members of the state and federal judiciary. The reception was held at the Poinsett Plaza Building in downtown Greenville.

The reception was very well attended, by both members of the defense bar and the judiciary. The following judges attended: J. Derham Cole, Henry F. Floyd, Henry M. Herlong, Jr., D. Garrison Hill, John W. Kittridge, Bruce W. Miller, Larry R. Patterson, Samuel H. Stilwell, William B. Traxler, Jr., William W. Wilkins. Over 100 lawyers and judges attended, and

the food, beverages, and venue were all outstanding. South Carolina Defense Trial Attorneys President Sam Outten of Womble Carlyle Sandridge & Rice, and William Brown of Nelson Mullins Riley & Scarborough did an admirable job of coordinating and organizing the reception, although William's secretary Susan Zeigler almost certainly deserves more credit than William.

We are planning similar functions in Columbia and Charleston, and would welcome the opportunity to hold events in other locations, depending on the interest of our members.

Plaintiff are hereby denied, including the right to depose certain other officers and directors of Harleysville Insurance Company. The Court would note that subsequent to the Nashville depositions, counsel for Plaintiff noticed other depositions of Harleysville officials. As a result of those notices, Defendants again moved for a protective Order asking the Court to not allow those depositions to go forward. The Motion for Protective Order in regard to those further depositions is hereby granted.

ACCORDINGLY, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Defendants, Florence Restaurant Supply, Inc., be sanctioned for failing to comply with the

Circuit Court Alternative Dispute Resolution Rules, said sanction to be as outlined above.

2 That the Motion for protective Order filed by W. Edward Lawson dated January 7, 2002 be granted.

3. That any further sanctions requested by the Plaintiff herein in regard to the aforementioned failure be denied.

AND IT IS SO ORDERED.

James E. Brogdon, Dr.
Circuit Court Judge

Florence, South Carolina
May 16, 2002

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The DRI Report

by William S. Davies, Jr.
South Carolina State Representative

The South Carolina Defense Trial Attorneys' Association hosted the DRI Mid Atlantic Regional Leadership Meeting in Charleston on April 23 and April 24, 2004. The Mid Atlantic Region of DRI is made up of the District of Columbia and the states of South Carolina, North Carolina, Virginia, and Maryland. The meeting was scheduled to immediately follow the SCDTAA Trial Academy and this assured good representation from our organization.

As with any properly organized meeting of lawyers, this one started with a delightful cocktail welcome reception at the home of Mark and Karen Phillips. Karen and Moose provided the perfect informal yet elegant locale on The Battery to begin our meeting in proper form. This cocktail reception, as is traditional, was sponsored by your SCDTAA as the host organization. Following the reception, almost 50 lawyers and their guests enjoyed dinner at Ansons Restaurant.

The professional portion of the meeting began at 8:30 A.M. Saturday morning at the offices of Nelson Mullins Riley & Scarborough. Jay Courie, President Elect of our organization, and Gardner M. Duvall of Whiteford, Taylor & Preston of Maryland discussed tort reform and legislative efforts in these states. A group discussion ensued as to the desirability and extent of participation by state defense organizations in the legislative process generally.

Federal District Judge Mike Duffy honored us with his presence and joined Curtis Ott of our organization in discussing the landmark case of *State Farm v. Campbell*. As requested by Judge Duffy, Curtis outlined the facts of the case and some of the important holdings. Judge Duffy then made comments as to his interpretation of some of the significant issues. When learned trial counsel from South Carolina and other states tried to tie him down on how he would rule on specific points, the judge aptly, and as usual, turned such questions aside with his delightful Irish humor.

There followed an extensive discussion of the benefits of membership in the Defense Research Institute (DRI) by Richard T. Boyette, the President-Elect of DRI. Richard is from our sister state, North Carolina, where he practices with the firm of Cranfill, Sumner & Hartzog. In his normal understated manner, he encouraged all of us, as well as all of you, to attend the Annual Meeting of DRI to be held in New Orleans October 6 through October 10,

2004. The Annual Meeting will provide opportunities to interact with our compatriots across the country and to "network" with possible sources of future referrals. The social activities at any DRI function are exemplary and the camaraderie is outstanding. The professional presentations are superior to every other organization in the country. Those who had attended prior DRI Annual Meetings joined Richard in encouraging anyone who has not done so to sign up for the meeting in October.

The concluding portion of the meeting featured a presentation by a representative of each state organization outlining significant events and projects undertaken by their organizations during the past year. The roundtable discussion following each of these presentations allowed all of us to have an opportunity to consider possible new endeavors for our organization. Sam Outten, your President, reported on the activities of the SCDTAA in the past year, and those involved were appropriately impressed by both his manner of presentation and the content of his comments. Some of those attending the meeting had either observed or participated in the Trial Academy the previous day. Your organization received high praise for that endeavor.

On April 1 and April 2, 2004, DRI held its annual State Representatives and Executive Directors meeting in Chicago. Your State Executive Director, Aimee Hiers, attended and fully participated, particularly in the "relaxation hours". Aimee and other representatives from South Carolina, including Bill Coates, the representative of the Mid Atlantic Region on the DRI Board, took the opportunity to discuss with John Kouris, Executive Director of DRI, and Tyler Howes, Deputy Executive Director, the upcoming SCDTAA Trial Academy. Both John and Tyler were enthusiastic about the project and agreed to come to Charleston so that they could participate in the mock trials on Friday morning as witnesses. Aimee Hiers reported that Tyler Howes did an excellent job in his testimony as a witness playing various roles. On the other hand, John Kouris only played one role. In fact, because of certain conflicts, he was only able to testify in one trial. The witness he impersonated was an expert retained by the plaintiff in the case who was an experienced high school and college football official, as the scenario in the Trial Academy involves an injury during a football game. The student lawyers involved in the case had not met John before he testified. Expecting the normal hurriedly prepared novice, their questions were

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**...The DRI
Report**

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presented with expectations of very short answers that possibly would exhibit little knowledge of the profession. They were quite surprised with the depth and length of John's replies. It was only after the trial that they were informed that John is one of the most experienced officials in NCAA Division 1 football, and regularly officiates at Big 10 games every fall. In fact, the conflict which required John to leave soon after his testimony was that he was going to officiate at the Notre Dame Spring football game the following day. John may have been the most "expert" witness we have ever hosted at the Trial Academy.

I would like to take this opportunity to join Richard Boyette, the President-elect of DRI, as well as David Dukes, the second Vice President of DRI, in inviting each of you to attend the DRI Annual Meeting in New Orleans October 6 through 10, 2004. If you are not a member of DRI, today is the best day to join. If you are already a member, sign onto the web site and obtain the details, as well as the registration form, for the Annual Meeting. DRI truly is "The Voice of the Defense Bar" in our country. All of us should be members.



The Voice of the Defense Bar

2004

DRI MEETING

October 6-10

New Orleans Marriott

New Orleans, LA

South Carolina Defense Trial Attorneys' Association
1 Windsor Cove, Suite 305
Columbia, SC 29223

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