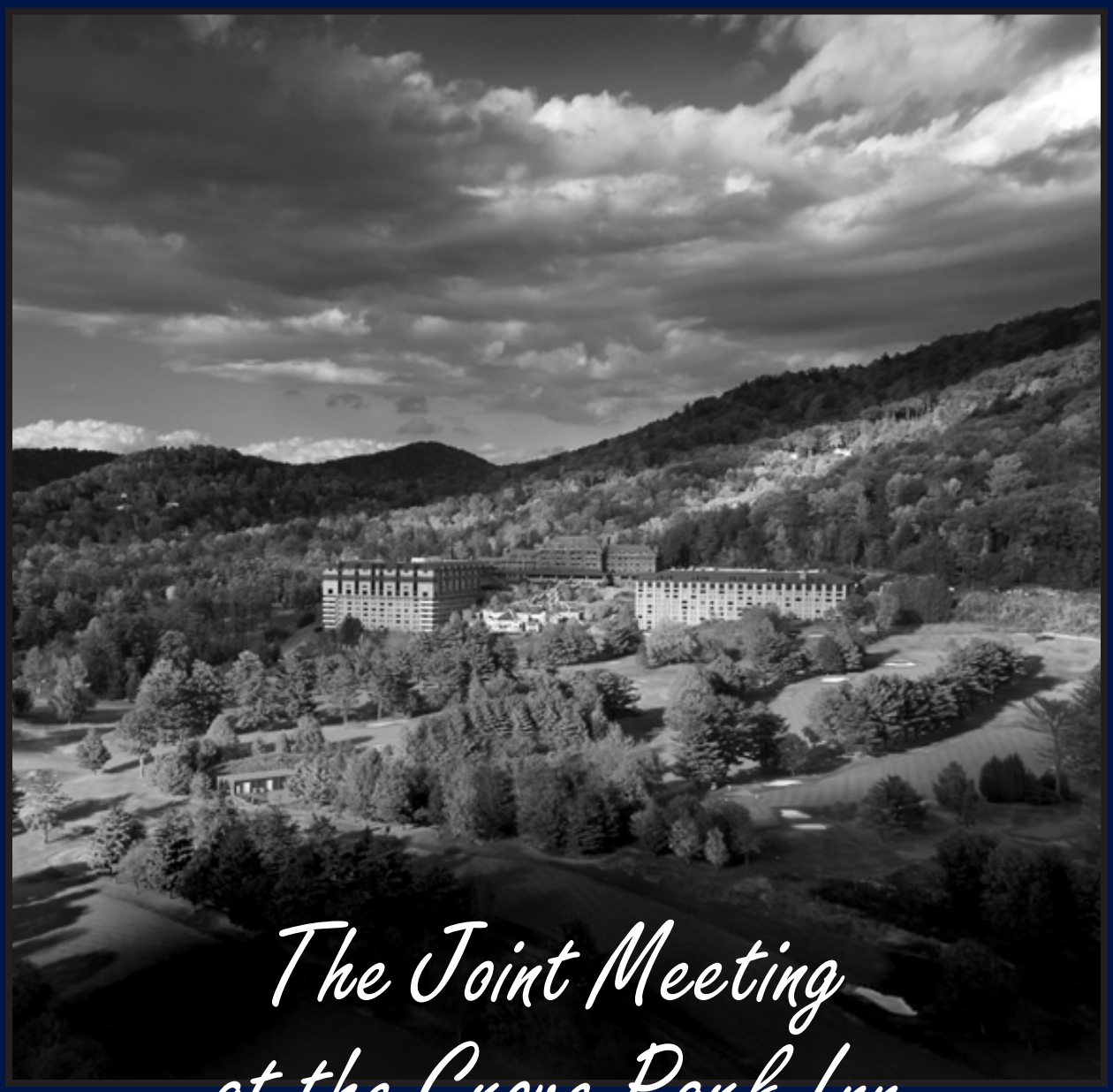
SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



The Joint Meeting at the Grove Park Inn July 24 - 26

http://www.scdtaa.com

President's Message

by Donna S. Givens

As the season has cycled from Winter to Spring, and now to Summer, your association has been busily working to advance the common goals and interests of the SCDTAA. In addition to what we have accomplished thus far, we have many great events on the horizon. Before I turn to those future "happenings," I would be remiss if I failed to thank our Legislative committee chairs, Eric Englebardt and David Anderson, who, with the assistance of MG&C Consultants, put together another great reception at the Oyster Bar. This legislative reception was well attended by our Executive Committee and our invited guests from the House and Senate Judiciary Committees. This has evolved into an annual event and is growing in attendance. We see increased enthusiasm every year for this function.

We have also just completed our Eighteenth Trial Academy, which took place in Greenville on June 18, 19, and 20, 2008. Academy chairs Matt Henrikson, Bill Besley, Sterling Davies, and Alan Lazenby put together a fantastic program. This year the Trial Academy was again sponsored by Ogletree, Deakins, Nash, Smoak, & Stewart. Their sponsorship assisted in allowing the Trial Academy to be of the highest caliber. Additionally, we would like to thank the Academy professors who are among the best and brightest of the Defense Bar and our fellow lawyers. This year's Academy could not have been possible without the assistance of the staff of the Greenville County Courthouse and the following members of our judiciary who gave up their time to preside over the mock trials: The Honorable Gary Clary; The Honorable Derham Cole; The Honorable Roger Couch; The Honorable Mark Hayes; The Honorable William Keesley and The Honorable Alexander Macaulay. We would also like to extend a special thank you to Fred and Judy Suggs who hosted a wonderful reception at their home to coincide with our Trial Academy.

In July we have our Joint Meeting. This year, our focus will be on trial tactics for both workers' compensation and litigation attorneys. Invited guests as well as our all important partners at the Claims Managers Association and Chairs Molly Craig, Anthony Livoti and Mitch Griffith have put together a great program already. This year we are shaking things up a bit on the social scene to make our Friday night event extra special. Plan to bring the kids because, for the first time, they will have their own special kids program tailored to begin and end at times consistent with our plans. Additionally, we are very pleased to announce that we will have the Golf Tournament at the Grove Park Inn course. Please sign up for golf and our golf chair, John Hudson, will put together the pairings. The opportunity to play there on the premises is one you shouldn't miss!

We will have other social gatherings throughout the year, culminating in the Annual Meeting at the Ritz-Carlton on Amelia Island. Our program there, headed by Chair Curtis Ott, and his vice chairs Wendy Keefer, Hugh Buyck and Ron Wray, promises speakers and topics that are timely and interesting. As an early sampling of what we will have to offer, I am both delighted and honored that the Honorable Matthew J. Perry will speak with us on his historical involvement in the Civil Rights Movement. Please plan early to come to this meeting. All of the rooms at the Ritz are ocean view, and the property is unsurpassed. We will, of course, provide more detail as these events draw nearer.

In closing, I thank you all for your continued support, involvement, and enthusiasm. It continues to remain my privilege and honor to serve in this position. Please know that you should always feel free to contact me via phone or email to discuss any issues of concern which you might have.

Letter From The Editors

by Wendy J. Keefer and Erin D. Dean

Getting to Know SCDTAA

As editors of *Defense Line*, we get to work not only with other members of our Executive Committee but also with a wide range of our membership. Contributions to this publication quite often come from the two best sources – our young lawyers, who are just getting started in this profession, and our most experienced colleagues, from whom we all still have so much to learn. In this position, it becomes clear how eager so many of you are to become involved in this organization. Though submitting articles for this publication is a great and continually encouraged endeavor, other committees and activities of the organization also provide great opportunities to become involved and to get to know other defense attorneys across the state. Below are just a few examples of ways in which our members can get involved throughout the year, whether this year or (perhaps due to timing and schedules) in years to come.

Trial Academy.

SCDTAA operates one of the most applauded trial academies for new lawyers. The envy of other legal organizations, SCDTAA holds an annual trial academy that is typically an early sell out, with firms eager to enroll their young litigators. In addition to providing basic guidance and information, the trial academy brings young lawyers together with their more experienced peers for an invaluable sharing of knowledge. Moreover, these young lawyers then have the opportunity to appear during the mock trials before our state's finest trial judges. Once you participate in this program as a young lawyer, however, you may still continue to be involved. Each year our organization must assemble a group of lawyers, law clerks, and judges to make the academy a success. We urge any of you interested in continuing to make this a successful offering of the SCDTAA to serve as speakers, break out group leaders or witnesses.

Joint Meeting Silent Auction.

SCDTAA prides itself on serving not only the defense bar but in its charitable efforts. For those who have attended in the past, the Joint Meeting in Asheville provides not only a great and informative time but also a chance to win a fabulous prize while donating to charity. The silent auction may often go overlooked by some but anyone who has taken a peak at what is available knows that this auction has much to offer. Please consider not only bidding on any items that catch your eye but also in donating an item to be auctioned at this wonderful event.

Membership.

Perhaps the most important means of participation is simply by joining SCDTAA. With budgets tight and a variety of organizations and continuing legal education programs vying for our firm dollars, membership in SCDTAA cannot be undervalued. Through nearly every event of the organization, members gain access to a wealth of knowledge and fellowship. In what is all too often the rush of law practice, we may overlook the need to form friendships with our peers. Our best teachers throughout our professional lives will be each other. By becoming a member of SCDTAA and by encouraging others in your firm to become members you are recognizing the importance of associating with each other. Where better to find that attorney to affiliate in a matter not within your area of expertise? What better network within which to share stories and tips in connection with a particular adversary or expert witness? And what better affiliation to have when you need an amicus brief in support of an issue important to the entire defense bar? Membership, indeed, has its privileges.

Wendy J. Keefer

Erin D. Dean

Let this brief letter not be viewed as exhaustive. The ways in which you can participate and assist this organization are no doubt innumerable. But if any of these activities appeal to you, please do not hesitate to volunteer your time. It will be invaluable to us all as defense attorneys.

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THE DefenseLINE

A special "Thank You" to our 2008 Joint Meeting Sponsors

GOLD LEVEL
A. William Roberts, Jr. & Associates

SILVER LEVEL
South Carolina Bar Foundation

BRONZE LEVEL
South Carolina Lawyers Weekly

The SCDTAA Docket

In Memory of James W. Alford SCDTAA President (197475)

James W. Alford, past President of SCDTAA (1974-75) and a founding partner of Barnes Alford, died February 24, 2008 at the age of 78. Memorial services were held at Shandon Presbyterian Church. Alford was born in 1930 in Walterboro, South Carolina. He received his J.D. from the University of South Carolina School of Law, where he served on the South Carolina Law Review. Alford was well known for his courtroom presence and his sense of humor. He was recognized in the 1993, 1994, and 1995 editions of The Best Lawyers in America. Retired from the practice of law in 2000, Alford had been active in numerous organizations, including the Federation of Defense and Corporate Counsel, the Defense Research Institute, the South Carolina Defense Trial Attorneys' Association, the American Board of Trial Attorneys and the Richland County Bar Association.

Fourth Circuit Upholds Summary Judgment

The Fourth Circuit upheld the grant of summary judgment in favor of an individual third party defendant represented by William A. Coates of Greenville's Roe Cassidy Coates & Price, P.A. Plaintiffs sued their insurance provider and employer for failure to pay medical claims. These ERISA claims were settled as between Plaintiffs and the employer but proceeded against the third party defendant. Ruling that the third party plaintiff employer lacked standing to bring any claims based on the failure to pay ERISA benefits, the Fourth Circuit affirmed the district court's grant of summary judgment. As the employer was not a participant, beneficiary or fiduciary under ERISA and was not entitled to "derivative standing" (like that of primary health care provider assignees) the claims could not be brought by that employer against the third party defendant.

Summary Judgment Granted in Favor of BMW

Don Sellers, Jay Matthews and Chris Major of Haynsworth Sinkler Boyd, PA, obtained summary judgment in favor of BMW Manufacturing Co., LLC in the United States District Court. The lawsuit sought more than $100 million in damages based on an alleged conspiracy to tortiously interfere with agreements. The claims resulted from alleged contacts with government officials to pressure Plaintiff to give up certain development rights to provide for an adequate incentive package for BMW. The court concluded that even assuming such contacts occurred, the Noerr-Pennington Doctrine protects the government and BMW would be justified in its action based on its legitimate purpose in the negotiation of a State incentive package and the finished product of the proposed graduate engineering school to be built on Plaintiff's property.

Defense Verdict in False Imprisonment Case

On March 21, 2008, Molly H. Craig and Diedra Wilson Hightower of Hood Law Firm, obtained a defense jury verdict in the Charleston County Court of Common Pleas The plaintiffs sought damages for claims of false imprisonment, assault, invasion of privacy and loss of consortium in connection with the involuntary commitment of Plaintiff Delores Wood to a psychiatric hospital for one night.

The case arose as a result of Plaintiffs' report to Mrs. Wood's treating psychiatrist that Mrs. Wood discontinued her psychotropic medications, had not slept for days and was experiencing suicidal ideation. The Woods agreed that Mrs. Wood should be admitted to a mental health facility for in patient treatment. Calls were made to Palmetto Lowcountry Behavioral Health to notify them to expect Mrs. Wood's arrival and of her suicidal ideation. The Woods arrived at the facility and were interviewed by a mental health counselor. When presented with them, Mrs. Wood refused to sign "Consent For Treatment Forms." After that refusal, Mrs. Wood's treating psychiatrist was contacted and she was involuntarily committed. She was released the following day. Plaintiffs asserted numerous claims, including a violation of South Carolina Code §§ 44-17-410 governing involuntary commitment.

Plaintiffs focused their claims and tried the case on the basis of alleged false imprisonment, rather than on medical negligence. The Court permitted the jury to determine whether the statute regarding involuntary commitment had been violated. The jury found that it had not and rendered a verdict for the Defendant.

Collins & Lacy Founder Elected President of the Foundation of the American Board of Trial Advocates

Collins & Lacy, PC founder, Joel W. Collins, Jr., was elected President of the Foundation of the American Board of Trial Advocates (ABOTA), the national organization devoted to preserving the civil jury trial.

Collins has an active complex civil litigation and white collar criminal defense practice. His commitment to the preservation of our civil justice system for future generations has led to an active role in the ABOTA Foundation throughout his career. Most recently, Collins served as Secretary of the Board of

Continued on next page

Trustees of the ABOTA Foundation. He has also served as the President and the National Board Representative of the South Carolina Chapter of ABOTA.

Collins & Lacy Founder Elected to the South Carolina Workers' Compensation Educational Association Board

Collins & Lacy, PC founder, Stanford E. Lacy has been elected to serve on the Board of Directors for the SC Workers' Compensation Educational Association. Lacy has been very involved with the Association, serving as President from 1997-1999. His law practice includes over 30 years of experience before the Workers' Compensation Commission, practicing workers' compensation exclusively for over 20 years, including appeals to all appellate courts. He argued many landmark cases including Breeden v. TCW and Pee v. AVM.

Ellis Lawhorne Recognized As South Carolina Bar Pro Bono Firm of the Year

Ellis, Lawhorne & Sims, P.A. was awarded this year's South Carolina Bar Pro Bono Firm of the Year award. The firm was selected for its commitment of legal services, financial support, and firm-wide volunteerism on behalf of Home Works, a non-denominational organization that seeks to improve the quality of life of South Carolinians in need.

This is the second time in its 28-year history that Ellis Lawhorne has been recognized by the South Carolina Bar as the Pro Bono Firm of the Year.

Commenting on Ellis Lawhorne's selection for the award, South Carolina Bar President Lanneau Wm. Lambert, Jr., said, "The work that Ellis Lawhorne has dedicated to the Home Works organization demonstrates a true commitment to pro bono service. The entire firm has made a significant impact not only on the organization's operations, but also on the lives of the elderly and disadvantaged whose homes they have repaired. It is my hope that Ellis Lawhorne's leadership will serve as an example and encourage others to volunteer in their communities."

ABOTA Elevates Nelson Mullins Partner G. Mark Phillips to Advocate

The American Board of Trial Advocates (ABOTA) elevated Nelson Mullins Riley & Scarborough Partner, G. Mark Phillips, to the rank of "Advocate." This level is achieved only after an attorney has experience equivalent to 50 jury trials. Phillips' litigation practice focuses on the defense of product liability matters. He has tried a significant number of produce and general liability cases in venues across the United States during his more than 20 years of practice.

Nexsen Pruet Partner Molly Hughes Named to Wofford College Alumni Executive Council

Mary L. "Molly" Hughes, a Partner in the Charleston office of Nexsen Pruet, was named to the Alumni Executive Council for the Wofford College National Alumni Association. This Council is made up of 22 distinguished graduates of the college. Hughes practices in the employment & labor and business litigation practice groups at the firm and is a Certified Specialist in Employment and Labor Law. Hughes was named to Best Lawyers in America 2008 and selected for Leadership South Carolina. She is actively involved in the Charleston area community and serves on the Board of Directors of the Tri-County Human Resources Management Association.

Nexsen Pruet Partner Thomas S. Tisdale Elected to Positions with the Southern Education Foundation and The South Carolina Historical Society

Thomas S. Tisdale, a Partner in Nexsen Pruet's Charleston office, was elected to the Board of Trustees of the Southern Education Foundation and elected President of the South Carolina Historical Society.

The Southern Education Foundation is an organization focusing on fairness and excellence in education in the State of South Carolina. The South Carolina Historical Society is one of the pre-eminent historical societies in America.

Tisdale is an experienced attorney who practices in the litigation and appellate groups at the firm. He is the former president of the South Carolina Bar and served as the organization's secretary, treasurer and circuit vice president.

Nexsen Pruet Partner Brad Waring Named President of Historic Charleston Foundation

Bradish J. (Brad) Waring, a Partner in the Charleston office of Nexsen Pruet, has been named President of the Historic Charleston Foundation. The Historical Charleston Foundation works to preserve and to protect Charleston's historical, architectural and cultural heritage. Waring practices in the firm's business and consumer litigation groups and was listed in Best Lawyers in America for business litigation. He is a former president of the South Carolina Bar and was named to the Commission on The Profession by Chief Justice Toal.

Collins & Lacy Opens Greenville Office

The law firm of Collins & Lacy, P.C. is pleased to announce that it has opened a new office in Greenville, South Carolina. Collins & Lacy currently has offices in Columbia and is among the fastest growing firms in South Carolina. The firm's expansion into the Greenville area signifies its commitment to the strategic growth of the firm to more effectively serve its clients throughout the entire state of South Carolina.

Collins & Lacy Announces New Shareholders

Collins & Lacy is pleased to announce that Christian Stegmaier has been named a voting shareholder of the firm. Stegmaier's practice focuses on retail and hospitality defense, appellate advocacy,

premises liability and complex litigation. He also has extensive experience in white collar criminal defense and state health care regulatory issues.

Collins & Lacy, PC is also pleased to announce that Andrew N. Cole has been named a shareholder of the firm. Cole's practice focus includes construction law, defense litigation, personal injury, complex litigation and premises liability. He is also experienced in appellate advocacy, having served as a staff attorney for the South Carolina Court of Appeals.

Collins & Lacy Welcomes New Attorneys

Collins & Lacy, PC is pleased to announce that Jack D. Griffeth has joined the firm as Of Counsel. He practices in the areas of Employment and Mediation. Griffeth serves as General Counsel to Wofford College, Furman University and Spartanburg Methodist College and has developed a defense practice representing employers in employment related litigation. "Collins & Lacy is honored to have Jack Griffeth Of Counsel to the firm," said Stan Lacy, founding partner of the firm. "His extensive experience as a defense trial attorney and outstanding reputation in mediation will allow him to make significant contributions to our client's interests in these areas."

Collins & Lacy, PC is also pleased to announce that Ross B. Plyler has joined the firm as an associate. He will practice in the areas of insurance coverage, business and employment law, as well as college and university law. His prior experience includes handling complex commercial real estate transactions as well as state and federal court litigation. "We are pleased to have Ross as a new member of our firm" offered Stan Lacy. "His litigation skills in the areas of insurance, business, employment, and educational institution law will further enhance our growing Greenville office."

Ellis Lawhorne Welcomes New Associate

Ellis, Lawhorne & Sims, PA is pleased to announce that Jenna W. Garraux has joined the firm as an associate. She will work with the Workers' Compensation Practice Group and will focus her practice on defending the interests of employers, including self-insured companies and insurance carriers. Garraux is a 2007 graduate of the University of South Carolina School of Law.

Nexsen Pruet Names 3 New Partners In Columbia Office

Nexsen Pruet is pleased to announce that J. David Black, Amy Harmon Geddes, and J. Frederick (Rick) Reames, III have been named Members (partners) in the firm's Columbia office.

Black practices in the areas of complex civil litigation, commercial litigation, software litigation, intellectual property and procurement. He also has broad experience in electric-utility law.

Geddes practices in the areas of tort litigation, commercial litigation, and business litigation, with an emphasis on products liability and bad faith insurance claims.

Reames practices in the areas of taxation, trust and estate planning and administration and general business law.

Congratulations to the Following SCDTAA Members named to the 2008 (inaugural) list of South Carolina Super Lawyers:

J. Boone Aiken, III
Stuart M. Andrews, Jr.
Charles J. Baker, III
Cherie Wilson Blackburn
John K. Blincow
W. Howard Boyd, Jr
William C. Boyd
C. Mitchell Brown
Edward D. Buckley, Jr.
Mark W. Buyck, Jr.
Robert C. Byrd
George Barry Cauthen
N. Heyward Clarkson, III
William C. Cleveland, IIIFrancis B. Knowlton
Brent O.E. Clinkscale
William A. Coates
Donald A. Cockrill
Thomas H. Coker, Jr.
Joel W. Collins, Jr.
M. Dawes Cooke, Jr.
Gray T. Culbreath
John E. Cuttino
Stephen E. Darling
David T. Duff
David E. Dukes
L. Franklin Elmore
Carl B. Epps, III
Carol B. Ervin
Steven Farrar
Richard A. Farrier
H. Mills Gallivan
L. Gray Geddie
C. Allen Gibson
Manton M. Grier
Jack D. Griffeth
Henry E. Grimball
William U. Gunn
Kevin A. Hall
Kathy Dudley Helms
Thomas C. Hildebrand, Jr.
Erroll Anne Y. Hodges
Wallace G. Holland
Robert H. Hood
William C. Hubbard
S. Keith Hutto
Marvin D. Infinger
Amy Y. Jenkins
Ellis M. Johnston, II
J. Rene Josey
Robert O. King
Rebecca Laffitte
John T. Lay, Jr.
Wallace K. Lightsey
Wade H. Logan, III
H. Sam Mabry, III
Francis M. Mack
Max G. Mahaffee
W. Francis Marion, Jr.
Charles Stuart Mauney
W. Hugh McAngus
David B. McCormack
Moffatt Grier McDonald
Robert A. McKenzie
Rita McKinney
Stephen F. McKinney
Stephen G. Morrison
Edward W. Mullins, Jr.
Leigh M. Nason
Curtis L. Ott
Samuel W. Outten
G. Dewey Oxner, Jr.
R. Allison Phinney
A. Marvin Quattlebaum, Jr.
D. Cravens Ravenel
Phillip E. Reeves
Carroll "Pete" Roe, Jr.
Thomas C. Salane
Gordon D. Schreck
Eric C. Schweitzer
R. Bruce Shaw
Franklin G. Shuler, Jr.
Benjamin Rush Smith, III
Joel H. Smith
John Hamilton Smith, Sr.
Henry B. Smythe, Jr.
Thornwell (Biff) F. Sowell
Charles T. Speth, II
Kent T. Stair
Robert E. Stepp
J. Hamilton Stewart, III
Randell C. Stoney, Jr.
James A. Stuckey
Fred W. Suggs, Jr.
H. Simmons Tate, Jr.
Robert J. Thomas
Monteith P. Todd
David G. Traylor, Jr.
Ronald J. Tryon
Susan Taylor Wall
Shawn D. Wallace
J. Calhoun Watson
James L. Werner
Daniel B. White
John S. Wilkerson, III
Wm. Reynolds Williams
Thomas J. Wills, IV
M. Baker Wyche
J. Rutledge Young, Jr.

2008 SCDTAA & CMASC Joint Meeting
Tentative Agenda

Thursday, July 24, 2008

3:00 pm -5:00 pm
SCDTAA Executive Committee Meeting

4:00 pm - 5:00 pm
CMASC Business Meeting

5:00 pm – 6:00 pm
Young Lawyers Division Meeting

4:00 pm – 7:00 pm
Registration Desk Open

6:00 pm – 11:00 pm
Children's Program for SCDTAA & CMASC Members

6:30 pm – 8:30 pm
Welcome Reception and Silent Auction

Friday, July 25, 2008

"From Here to Eternity": The Life of a Lawsuit

8:00 am – 12:00 noon
Registration Desk Open

Exhibit Hall Open

8:15 am – 8:30 am
Welcome and Announcements

Donna S. Givens, Esq. -SCDTAA President
Deborah Travis-CMASC President

8:30 am – 9:15 am
What is the New Business Court and Why Would You Want Your Case in the Business Court

Honorable J. Michelle Childs
Honorable Edward W. Miller
Honorable Roger M. Young
Moderator: Gray T. Culbreath, Esq.

9:15 am – 10:00 am
The Transition of Claims Investigation to Litigation

J. David Kibler of CMASC
John A. Massalon, Esq.

10:00 am – 10:15 am
Break

10:15 am – 10:45 am
Opening Statements:
The Plaintiff and Defendant's Perspective

John S. Nichols, Esq.
Karl S. Brehmer, Esq.
Moderator: Ronald K. Wray II, Esq.

10:45 am – 11:15 am
Vetting and Hiring Expert Witnesses

John T. Lay, Esq.

10:45 am – 11:15 am
Workers' Compensation Breakout Session:
Lifetime Medical Treatment Issues

Walter H. Barefoot, Esq.

11:15 am – 12:00 noon
Workers' Compensation Breakout Session:
The History and Status of Shoulder Claims

South Carolina Workers' Compensation Commissioners
Mark A. Allison, Esq.
Landon L. Hughey, Esq.

11:15 am – 12:00 noon
Breakout Session: Theories on Reserving Your Claim and Protecting Your Reserves During Discovery

J. David Kibler of CMASC

11:15 am - 12:00 noon
Trial Director Breakout Session: Use of Technology to Present Demonstrative Evidence

James B. Hood, Esq.
Robert H. Hood, Jr., Esq.

12:00 noon – 1:00 pm
Beverage Break

12:15 pm – 5:30 pm
White Water Rafting Trip

12:15 pm – 4:30 pm
Microbrewery VIP Tour

12:30 pm
Golf Tournament at the Grove Park

12:30 pm – 5:30 pm
Flat Boat Fishing Outing

6:00 pm – 11:00 pm
Children's Program for SCDTAA and CMASC Members

6:30 pm – 10:30 pm
Bluegrass, Bluejeans and Barbeque on the Blue Ridge

Saturday, July 26, 2008

8:00 am – 12:00 noon
Registration Desk Open

Exhibit Hall Open

8:00 am – 8:30 am
SCDTAA Business Meeting

8:30 am – 9:30 am
Ethics

Honorable John C. Few

9:30 am – 10:00 am
Explaining and Exposing Expert Testimony: Tips and Strategies for Handling Expert Witness Testimony at Trial

Ronald B. Diegel, Esq.

9:30 am – 10:00 am
Workers' Compensation Breakout Session: Adjuster Ethics

South Carolina Workers' Compensation Commissioners
Michael W. Burkett, Esq.

10:00 am – 10:15 am
Break

10:15 am – 10:45 am
Winning Closing Arguments: A View from The Plaintiff and a View from The Defense

Carl L. Solomon, Esq.
A. Marvin Quattlebaum, Esq.
Moderator: Samuel W. Outten, Esq.

10:45 am – 11:15 am
Honorable Diane S. Goodstein

11:15 am – 12:00 noon
Workers' Compensation Breakout Session: Brain Damage Claims

Peter H. Dworjanyn, Esq.

12:15 pm – 1:30 pm
Adjournment/Beverage Break

JUDGE PROFILE

Judicial Profile of Roger M. Young

by Katherine E. Graham*

My introduction to Judge Roger M. Young began, not in the courtroom, but in a class with Vincent LaGuardia Gambini. As a 3L at the University of South Carolina Law School, 300 of my classmates and I were attending Bridge the Gap, where Judge Young was presenting the Circuit Court portion of the program. I had already accepted his gracious offer of serving as his law clerk and was anxious to hear my new boss speak. As Judge Young began, the most unexpected images were flashed on the big screen - clips from My Cousin Vinny. As he continued, I noticed the newspapers closing and the heads peeking out from behind the laptops. With the help of Joe Pesci's halfwit but lovable character, Judge Young effectively explained what a lawyer should do in Circuit Court, but more importantly what a lawyer should NOT do in Circuit Court. Laughter filled the auditorium. This was the first of many instances that showed me Judge Young's uncanny nature and wit.

In addition to his knack for captivating an audience, Judge Young represents a rare combination of humility, immunity to pressure, and fidelity to truth that has earned him the respect and admiration of the legal community. Further, his honest and forthright attitude in relation to day to day activities and his genuine concern for people has earned him the reputation of one of the most approachable Circuit Court Judges in the state. After a year of not only being my boss, but more importantly my mentor, teacher, and friend, I can only say that he is indeed a most remarkable person.

Despite the time constraints of serving as the Chief Administrative Judge of the Ninth Circuit, Judge Young made time for me a few weeks ago so I could ask him a few questions. Of course, he answered with the same wit and humor that fostered my first impression of him at Bridge the Gap.

QUESTIONS

Chief Justice Toal assigned you to oversee the Business Court Pilot Program in the Ninth Judicial Circuit. How is that process moving, and do you have any advice for lawyers on how to navigate through the new Court?

There is a great deal of interest, but a corresponding amount of confusion as to what it is and what qualifies for it. It has enormous potential, but it is still too early to generalize results. I suggest a lawyer call and talk to one of the three judges assigned as Business Court judges and see if the case qualifies. We're glad to assist.

In your experience, what is the most common error that lawyers are committing in front of a jury?

Not knowing when you've made your point and to sit down. Jurors get more than we give them credit for, and they don't want to hear repetitive questions and testimony.

What is your advice to new lawyers joining the practice of law?

Don't be afraid to admit your ignorance and seek a mentor or more experienced lawyer's help. Most experienced lawyers got help when they were young and are actually flattered when their advice is sought.

What is the greatest danger facing the practice of law in South Carolina?

Too many lawyers don't know each other and would rather file a motion or response to one without talking to the other side. Return your phone calls and be nice. It's what separates us from the rest of the country and is known as having southern manners.

What is your greatest source of pride as it relates to the practice of law in South Carolina?

Despite their faults, lawyers are usually wonderful story-tellers and are fun to be around, as are my fellow judges. Bar meetings, barbeques, and oyster roasts are great fellowship opportunities. I encourage the combination of the three as much as possible, and encourage attendance at every opportunity.

You are known as the "techie" judge by other State Circuit Court Judges, and as a result, you tend to be the "guinea pig" of new technology advancements for the Court. Do you think it is a fitting nickname?

Computers are fun for me. I love tinkering with them, often to the exclusion of actual productive work. The Boss Lady (Chief Justice Toal) is the best Chief Justice in the country and recognizes that computerization of the Courts is essential if we are to keep pace with the limited financial resources provided by the Legislature. I'm happy because I get to play with the new "toys," which is how some people feel when they get to play golf. Plus I get to make fun of Perry Buckner when he can't figure out how to work his ipod.

** Katherine Graham is an Associate at Tupper, Grimsley & Dean, P.A., a Beaufort based defense litigation firm with a state-wide practice. Ms. Graham's practice focuses in the areas of insurance defense law, construction law and family law. She can be reached at (843) 524-1116 or katherinegraham@tgdpa.com.*

FEATURE ARTICLE

Temporal Association and Differential Diagnoses as Expert Causation Evidence

by Daniel R. D'Alberto*

As many lawyers are aware, the South Carolina Supreme Court is currently in the process of considering an evidentiary rule change that would, in effect, adopt the federal *Daubert* standards for the admission of expert testimony. Given the current debate, in South Carolina and elsewhere, regarding the proper standards for the admission of expert testimony, it seemed the appropriate opportunity to analyze the propriety, under *Daubert*, of an expert's reliance on temporal associations to opine on issues of causation.

Despite the fact that most legal dictionaries recognize the phrase "*post hoc ergo propter hoc*," or "after this, therefore because of this," as a valid legal maxim, evidence of temporal association between an alleged cause and effect is insufficient, by itself, to support a reliable expert opinion on causation. In fact, all federal circuits have ruled that a "temporal relationship, by itself, does not establish causation." Frank C. Woodside III, M.D., J.D., *Drug Product Liability* § 5.08 (2005). Still, "a strong temporal relationship between plaintiff's symptoms and exposure to a drug or medical device can assist a physician in offering an explanation." *Id.* Thus, federal courts will sometimes allow a strong temporal relationship, coupled with a differential diagnosis, to establish causation in pharmaceutical and toxic tort liability cases.

While some are more restrictive than others, nearly every federal jurisdiction appears to support the notion that while a temporal connection alone will not satisfy *Daubert*, a temporal relationship in conjunction with a differential diagnosis may be enough to prove causation. Exactly when an expert relies too heavily on a temporal relationship, however, is difficult to pinpoint.

The Third Circuit offers a framework on how to draw a line. *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 158 (3d Cir. 1999). "The temporal relationship will often be (only) one factor, and how much weight it provides for the overall determination of whether an expert has 'good grounds' for his or her conclusion will differ depending on the strength of that relationship." *Id.* at 154. The court offered two extremes to highlight when temporal relationships, coupled with a differential diagnosis, were appropriate. On one end, assume chemicals spilled in a river far away from plaintiff, who began to experience illness on the same day. *Id.* Even if plaintiff recovered around the time the spill was cleaned up, a proper differential diagnosis and temporal analysis would not be enough to show the spill caused plaintiff's illness. *Id.* On the other hand, "'if a person were doused with chemical X and immediately thereafter developed symptom Y, the need for published literature showing a correlation between the two may be lessened.' " *Id.* (citing *Cavallo v. Starr Enter.*, 892 F. Supp. 756, 774 (E.D. Va. 1995), *aff'd in relevant part*, 100 F.3d 1150, 1159 (4th Cir. 1996), *cert. denied*, 118 S. Ct. 684 (1998)).

Heller is a landmark case for temporal causation in the Third Circuit. *Heller*, 167 F.3d at 146. In *Heller*, plaintiff homeowner sued defendant for respiratory illness caused by defendant's carpets. *Id.* The Third Circuit ruled that the district court improperly required homeowner's expert to rely on published studies linking the illness to the carpet and to rule out all alternative possible causes of the illness. *Id.* at 149. The court still excluded the testimony because it was based on a "flawed temporal relationship" between the illness and the carpet's installation. *Id.* Specifically, the court noted that the symptoms occurred weeks after the carpet was installed and remained weeks after the carpet was removed. *Id.* at 157.

Thus, the general rule in the Third Circuit is when a temporal relationship is strong, and it forms even a part of a differential diagnosis, the plaintiff should be able to show causation. See, e.g., *Winnicki v. Bennigan's*, No. 01-3357 (JAG), 2006 U.S. Dist. LEXIS 5568, at *49 (3rd Cir. Feb. 9, 2006); Heller, 167 F.3d at 154.

In *Winnicki*, plaintiff became quite sick shortly after eating a salad. *Winnicki*, 2006 U.S. Dist. LEXIS 5568, at *47. Her doctor testified that he considered the salad a potential cause because he believed her illness was caused by something she ate within a 12-hour period. *Id.* The doctor never actually examined the salad, but he did eliminate other possible causes (i.e., medication, allergies) and also considered what could have been wrong with the salad. *Id.* at *48. In ruling that the doctor's testimony was admissible, the court noted that "[h]ere, the temporal relationship is strong and forms a part of . . . [a] . . . differential diagnosis. . . . Thus, his opinion does not rest solely or primarily upon timing." *Id.* at *49.

In contrast, case law in the Eleventh Circuit seems to support the notion that the courts there are gener-

Continued on next page

ally very hesitant to rely on temporal evidence in a causation analysis. In *McClain*, the Eleventh Circuit ruled that plaintiffs' expert had not offered reliable testimony because, in part, he relied too much on temporal sequence. *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005). In this case, several plaintiffs sued defendant after they had taken a diet drug and soon-after developed various problems. *Id.* at 1233. The court offered the following analysis of temporal relationships:

> [S]imply because a person takes drugs and then suffers an injury does not show causation. Drawing such a conclusion from temporal relationships leads to the blunder of the post hoc ergo propter hoc fallacy . . . . It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship. As the Court of Appeals for the District of Columbia explained in a similar context: 'in essence, the requirement of adequate documentation in scientific literature ensures that decision makers will not be misled by the post hoc ergo propter hoc fallacy -- the fallacy of assuming that because a biological injury occurred after a spill, it must have been caused by the spill.' *Ohio v. U.S. Dept. of the Interior*, 279 U.S. App. D.C. 109, 880 F.2d 432, 473 (D.C. Cir. 1989).

Id. at 1243

Other Eleventh Circuit decisions have frowned on temporal relationships and the case reports and differential diagnosis they often inform. *See, e.g., Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1295 (11th Cir. 2005) ("in the context of summary judgment . . . differential diagnosis evidence by itself does not suffice for proof of causation."); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300 (11th Cir. 1999) (holding that the courts would look unfavorably upon case reports, temporal proximity, and animal studies).

Case law in the district courts of the Eleventh Circuit also seems pointed in favor of a requirement that evidence stronger than a temporal relationship exist. *See, e.g., Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 692 (N.D. Ga. 2006) (ruling that a lack of epidemiological studies creates a "high bar" for plaintiff's to jump in proving liability, as such heavy reliance on temporal proximity will withstand scrutiny under *Daubert*); *Benkwith v. Matrixx Initiatives, Inc.*, 467 F. Supp. 2d 1316, 1331 (D. Ala. 2006).

Various district courts in other circuits provide conflicting guidance on this issue. One district court in the Sixth Circuit ruled that temporal causation was not strong enough to support causation when a plaintiff suffered eighteen injuries, including burning sensations, shortly after a chemical spill. *Gass v. Marriott Hotel Servs.*, 1:05-CV-856, 2007 U.S. Dist. LEXIS 33580, at *21 (D. Mich. 2007). Another district court listed reliance on temporal proximity as one of several red flags that tend to cut against admissibility. *Downs v. Perstorp Components, Inc.*, 126 F. Supp. 2d 1090 (D. Tenn. 1999). Other courts view the impact of a temporal relationship more favorably.

The Appeals Court of Massachusetts, also using *Daubert* as a guide, found that case studies and a differential diagnosis, coupled with temporal proximity, were enough to establish causation. *In re Hicks's Case*, 62 Mass. App. Ct. 755, 761 (Mass. App. Ct. 2005). (citing *Baker*, 156 F.3d at 253). In that case, the court even noted there had been no scientific or epidemiological studies that showed a statistically significant relationship between the drug and the purported injury. *Id.*

No clear rule can be gleaned from the above cases. While *Baker* says that differential diagnosis is acceptable to show causation, *Polaino* points in another direction. *Polaino*, though, is a decision from an inferior court. Further, it was evaluating what it considered to be a very poor and insufficient differential diagnosis. It could be argued the case turned more on that aspect than the overall nature of differential diagnosis. Some common elements can be found, however, in most courts' treatment of the significance of temporal proximity to issues of expert evidence and causation.

All federal circuits agree that temporal concurrence alone is not enough to establish causation under *Daubert*. Further, while some circuit courts are more direct than others, they all seem to support the notion that a well-reasoned differential diagnosis, of which a temporal relationship is a significant part, *can* be enough to show reliable expert testimony.

Where the circuits diverge is when the courts actually handle expert testimony that relies heavily on temporal associations. Given similar facts, some have seemingly allowed plaintiffs to meet the causation hurdle while others find the expert testimony unreliable.

All of the circuits apply a facts-based analysis. So it is impossible to say that the more "liberal" courts would not have come up with the same conclusion as the "conservative" courts if they had faced the exact same facts. Still, it does seem that while the federal courts espouse the same general rule, how that rule will be applied may depend much on where one files his or her case.

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Case Notes

State

Ex Parte: Smith v. Auto Owners Ins. Co., Op. No. 4363 (S.C. Ct. App. March 31, 2008).

The Court of Appeals affirmed the circuit court's order finding that an individual did not qualify as an "insured" under his parents' automobile insurance policy, where the parents owned two homes, one in which the parents resided the majority of the time, and a second home where the son resided and the father stayed at on occasion.

The parents in this case owned two homes, one in Laurens County and another in Spartanburg County. After years of living in the Spartanburg home, the couple moved to the Laurens home and established themselves in Laurens County. However, the father maintained personal belongings and clothing at the Spartanburg home and occasionally stayed there. Their son lived in the Spartanburg County home. In May of 2004, the son died in an automobile accident. He did not have automobile insurance at the time of his death. The parents maintained automobile insurance through Auto-Owners Insurance Company.

Shortly after the son's death, the personal representative of the son's estate brought an action against Auto-Owners arguing that the son was an "insured" party under his parents' policy. Section 38-77-30(7) of the South Carolina Code defines "insured" to include both the insured person or person named in a policy and "while resident of the same household, the spouse of any named insured and relatives of either."

The circuit reached the conclusion that the son and his parents resided in two separate households, and thus the son was not an "insured" party under his parents' policy. The court undertook a two prong analysis in reaching this decision. The court first determined where each of the family members resided. Because the father maintained personal items at the Spartanburg home, where the son lived, and stayed there on occasion, the record supported the assertion that the father resided in both homes. Thus, the court was required to proceed to the second prong of the analysis. In the second prong, the court applied the Buddin standard of "one other than a temporary or transient visitor" to determine whether the father was a resident of the Spartanburg home. The court applied the 3-factor Waite test and found that though the father occasionally lived under the same roof as the son and maintained a close relationship with him, the father did not intend to make the Spartanburg home his residence for any substantial duration. Thus, he was nothing more than a temporary visitor or transient for matters of convenience.

The Foothills Brewing Concern, Inc., et al. v. City of Greenville, Op. No. 26467 (S.C. March 31, 2008)

In this direct appeal from a declaratory judgment order, the Supreme Court reversed the circuit court's ruling that a municipal ordinance banning smoking in bars and restaurants is preempted by State law and violates the State Constitution.

In 1987, Greenville became the first municipality in South Carolina to pass an ordinance regulating smoking in public places. The ordinance exempted bars and restaurants from the ban. In 1990, the Legislature enacted the Clean Indoor Air Act of 1990. The Act provides that it is unlawful to possess lighted smoking material in various public indoor areas. In 2006, the City sought to be more comprehensive in its regulation of smoking in public places. Therefore, it enacted an ordinance prohibiting smoking in all enclosed public places, including bars and restaurants. Shortly thereafter, several owners of bars and restaurants filed a declaratory judgment action contending the Ordinance was invalid. Initially, the trial court denied the bar owners' requests for a temporary restraining order. However, several months later, the trial court issued an order declaring the ordinance was both unconstitutional and preempted by State law and permanently enjoined the City from enforcing the Ordinance.

In reversing the trial court's decision, the Supreme Court used a two-step process to determine the validity of the local ordinance. First, the Court had to determine whether the City had the power to enact the ordinance, and if the City did have the power, the Court had to determine whether the Ordinance is consistent with the Constitution and the general law of the State. The Court concluded that the City had the power to enact the ordinance, because Act 445 and the Clean Indoor Air Act did not preempt the City from legislating in the area of indoor smoking. The Court reasoned that there is simply no expressly stated intent in the statute that the State chose to exclusively regulate the subject of indoor smoking. As to the second step of the process, the Court held that the Ordinance is consistent with the Constitution and the general law of the State.

Continued on next page

The Court agreed with the City's claim that the Ordinance is "a proper exercise of municipal power because it seeks to protect citizens from second-hand smoke." (citing S.C. Code § 5-7-30, which states that a municipality may enact an ordinance which promotes general welfare and promotes health).

James v. Kelly Trucking Co., et al., Op. No. 26447 (S.C. March 10, 2008).

In this proceeding, the Supreme Court accepted two certified questions from the United States District Court. The first question asked whether a plaintiff in South Carolina is precluded, as a general matter, from maintaining a cause of action for negligent hiring, training, supervision, or entrustment after an employer stipulates that it is vicariously liable for its employee negligence. And if the first question is answered in the affirmative, the second question asks whether there is an exception to this general rule when the negligent hiring claim involves a properly pled and available claim.

The Supreme Court answered "no" to the first question and therefore did not reach the second. In this action, the James commenced an action to recover for injuries sustained in an auto accident caused by the driver of a tractor-trailer. The James sued both the driver and his employer. The James sought to hold the employer liable for the driver's negligence through the doctrine of respondeat superior. In addition, the James asserted a separate cause of action against the employer for negligent hiring. The employer admitted liability for the driver's negligence based on respondeat superior. The James then sought recovery under the underinsured motorists provision of their insurance policy. The insurer moved for partial summary judgment, arguing that the James were precluded from proceeding with their negligent hiring claim because the employer had admitted liability for the driver's negligence.

The insurer argued that public policy justified the preclusion of a negligent hiring claim against an employer when the employer admits vicarious liability. The insurer argued that an independent cause of action against the employer will require evidence of an employee's past negligence be admitted, and this would be too prejudicial to the employer. The Court disagreed, stating that the largely policy-based arguments in support of the insurer's position do not justify a rule precluding a plaintiff from pursuing a negligent hiring claim once respondeat superior liability has been admitted.

Spence v. Kenneth B. Wingate, Sweeny Wingate & Barrow, P.A., Op. No. 4370 (S.C. Ct of App. April 17, 2008).

The Supreme Court affirmed the trial court's finding that Wingate and his firm did not owe a fiduciary duty to Mrs. Spence concerning her late husband's life insurance policy.

On August 13, 2001, Wingate commenced legal representation of Mrs. Spence to negotiate an agreement between Mrs. Spence and her four sons concerning the division of Mr. Spence's probate estate. Mrs. Spence and her sons entered into an agreement on August 15, 2001. During the course of this representation, Mrs. Spence consulted with Mr. Wingate about Mr. Spence's life insurance policy. In 1988, Mr. Spence named Mrs. Spence and their four sons as beneficiaries of the policy. However, shortly before his death, he attempted to make Mrs. Spence the sole beneficiary. Upon Mr. Spence's death, Mr. Wingate became the attorney for Mr. Spence's estate. Shortly thereafter, the Members Services Office of the U.S. House of Representatives determined that the proceeds from the life insurance policy should be divided equally among Mrs. Spence and the four sons, despite Mr. Spence's attempt to name his wife as sole beneficiary.

Subsequently, Mrs. Spence brought a legal malpractice claim against Mr. Wingate and his firm claiming a breach of fiduciary duty owed to her arising out of Wingate's earlier representation of her in the negotiation of the agreement with her sons concerning Mr. Spence's probate estate. However, Mrs. Spence failed to move under Rule 59(e), SCRCP, for a ruling on the issue of whether Wingate and his firm owed her a fiduciary duty based on her status as their former client. Thus, she did not preserve the issue for appeal. The Court ruled that it could not in good conscience address the issue of whether Wingate's prior representation of Mrs. Spence in a related matter created a genuine issue of material fact as to whether Wingate and his firm owed and breached a fiduciary duty to Mrs. Spence.

MBNA America Bank v. Mark Christianson, Op. No. 4349 (S.C. Ct. of App. March 4, 2008)

The Court of Appeals affirmed the circuit court's decision to grant Mark Christianson's motion to vacate an arbitration award. MBNA filed an arbitration claim against Christianson alleging he defaulted on a credit card agreement. Christianson responded multiple times asserting he never agreed to arbitrate. Despite his assertions, the arbitration panel continued with the claim and awarded MBNA $13,579.57.

Subsequently, MBNA filed an application for confirmation of the arbitration award in the circuit court and Christianson filed a motion to vacate the award. In response to Christianson's motion, MBNA filed a memorandum of law attaching an unsigned, undated photocopy of one page of a pamphlet it alleged was the arbitration agreement. MBNA provided no other evidence. The circuit court found that MBNA failed to provide enough evidence Christianson agreed to arbitrate the matter and the panel had no jurisdiction to hear the matter absent an arbitration agreement. Accordingly, the circuit court vacated the award.

Oysters & Cocktails Legislative Reception

by David A. Anderson

On April 2, 2008 our Defense Trial Attorney Association hosted a legislative reception for the House and Senate Judiciary Committees and their staff. This was the fourth year of this event held at The Oyster Bar in the Vista area of Columbia. This year's event was well attended by both Committees and saw the largest turn out to date. Both Senator Glenn McConnell and Representative Jim Harrison, respective Chairs for their Judiciary Committees, were in attendance and thanked our Association for sponsoring the event. This year we saw 28 members of the Senate and House attend along with various members of the Defense Association.

Our Association Lobbyist, Jeff Thordahl and Association Director, Aimee Hiers made sure that the Committee Staffs felt welcome. The Oyster Bar is conveniently located near the State House and coupled with their excellent food and drink helped to make this year's event a total success. Your legislative committee Chaired by Eric Englebardt along with our lobbyist Jeff Thordahl has been busy keeping track of various legislative initiatives that may have an impact on our Association Membership. This event provides for a relaxing venue for the Association Officers to get to know both the staff and legislators that have the responsibility for many of the statutory provisions important to both our membership and clients.

MBNA argued that the circuit court erred in granting Mr. Christianson's motion because Christianson filed his motion more than ninety days after the entry of the award. However, in this case, Christianson disputed the existence of an agreement to arbitrate with MBNA prior to the entry of the award. Citing a Kansas Supreme Court case, also involving MBNA, the court reasoned that "MBNA could not rely on the debtor's tardiness in challenging the award if the arbitrator never had jurisdiction to arbitrate and enter an award." And, because MBNA could not demonstrate to the circuit court that Christianson had agreed to arbitrate, the circuit court could not confirm MBNA's award at arbitration.

Amendments currently being considered by The Supreme Court of South Carolina.

Rule 701, SCRE, Opinion Testimony by Lay Witness

Regarding opinion testimony of lay witnesses, the amendment would continue to allow lay witnesses to offer opinions based on the perception of the witness, and opinions that are helpful to a clear understanding of the witness' testimony. But, the rule would not allow opinions that require special knowledge, skill, experience or training, based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702, SCRE, Testimony by Experts

This amendment would allow experts to testify in the form of opinion or otherwise only if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Hemphill Award: Call for Nominations

Eligibility: The candidate must be a member of the South Carolina Bar and a member or former member of the SCDTAA. He or she may be in active practice, retired from practice or a member of the judiciary.

Criteria: The award should be based upon distinguished and meritorious service to the legal profession and/or the public; and one who has been instrumental in developing, implementing, and carrying through the objectives of the SCDTAA. The candidate should also be one who is or has been an active, contributing member of the Association.

Procedure: Nominations should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community, and the reasons why the nominee is being put forward.

Nominations due to Aimee Hiers at SCDTAA Headquarters by July 21

SCDTAA
One Windsor Cove, Suite 305
Columbia, SC 29223
For more information contact Aimee at aimee@jee.com

2008

Summer

JOINT MEETING
July 24 - 26
The Grove Park Inn
Asheville, NC

Fall

ANNUAL MEETING
November 13-16
The Ritz Carlton
Amelia Island, FL

South Carolina Defense Trial Attorneys' Association
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