

MGC NEWS

Fall 2002

McAngus, Goudelock & Courie Attorneys at Law



ATTORNEYS AT LAW

Dear Friends and Clients:

Welcome to Volume II of MGC News. We hope you enjoyed the first edition. We continue to encourage you to provide feedback and suggestions. Our goal is for this newsletter to keep you informed while addressing issues that are timely and relevant.

Please mark your calendars for several upcoming MGC events. Our annual Atlanta Workers' Compensation Seminar is set for November 1, 2002. We are pleased to continue co-sponsoring this event with Goodman McGuffey Aust & Lindsey, LLP and Zimmerman, Shuffield, Kiser & Sutcliffe, PA. This year's program includes medical presentations on repetitive trauma, carpal tunnel syndrome, and pain management. As always, the agenda will include break-out sessions on recent developments in North Carolina, South Carolina, Georgia, and Florida.

Plans are being finalized for our North Carolina Educational Seminar and Holiday Reception. This year's seminar and reception are scheduled for November 21, 2002 at the Hilton Charlotte University Place. We are pleased to announce that Tracy Weaver, Executive Secretary of the North Carolina Industrial Commission, and Alan Bass, Chairman of the South Carolina Workers' Compensation Commission, have agreed to speak and provide valuable insight into their agencies. In addition to a great group of speakers, this year's program will feature a litigation "mock trial," workers' compensation and general liability break-out sessions, and a very timely discussion on Medicare settlement issues.

We look forward to visiting with many of you at the South Carolina Workers' Compensation Educational Association's conference in Hilton Head, South Carolina scheduled for October 20-23, 2002. After taking a year off, we will once again host a client reception on Monday night. I hope you will plan to attend the conference as it is always an informative (not to mention fun) event.

We are pleased to welcome four new associates to our firm. Charles D. "Bo" Williams is a University of South Carolina School of Law graduate and will practice in the litigation section of our Columbia office. In Charlotte, we welcome Sally Boswell, a Syracuse University College of Law graduate, to our workers' compensation section and Jeffrey D. "JD" Keister, an Ohio Northern University Petit School of Law graduate, to our litigation section. In Charleston we welcome Brian G. O'Keefe. Brian practiced in Florida prior to returning to South Carolina in 1999. His practice includes both workers' compensation and general litigation.

Thank you for your continued confidence and support of our firm. Our practice continues to grow thanks to you.

With kind regards,

MG&C

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South Carolina Update

From the Courts

Workers' Compensation

Notice Requirement and Statute of Limitations in Occupational Disease Cases

The Supreme Court held a Claimant's informal discussion with a doctor regarding respiratory problems purportedly attributable to the use of cleaning solutions at work did not constitute a "definitive diagnosis" for purposes of triggering the statute of limitations and the ninety (90) day notice requirement. The evidence cited in the Court's opinion indicates the Claimant was aware of a correlation between her symptoms and exposure to chemicals at work for at least two to three years prior to the date she was definitively diagnosed with an occupational disease.

McCraw v. Mary Black Hosp., 565 S.E.2d 286 (S.C. 2002)

Average weekly wage may be based on future earning capacity

The Court of Appeals held a sixteen year old boy rendered a paraplegic in a motor vehicle accident was entitled to an upward adjustment of his compensation rate to reflect his future ambition to become a master electrician. Since the Claimant was only sixteen at the time of his accident and demonstrated the interest, aptitude, and ability to become an electrician, adjustment of the compensation rate was warranted under the circumstances of the case.

Sellers v. Pine Dale Residential Ctr., 564 S.E.2d 694 (S.C. Ct. App. 2002)

Exclusivity provision is not a question of subject matter jurisdiction

Plaintiff filed a tort action against her employer alleging mental and other health problems due to her working conditions. Defendants argued on appeal the circuit court lacked subject matter jurisdiction to hear a case based on allegations that an injury arises out of and in the course of employment. The Supreme Court held the exclusivity provision of the Workers' Compensation Act does not necessarily divest the circuit court of jurisdiction to hear the case as a matter of law. Since the employer failed to plead exclusivity as an affirmative defense, the jury verdict could stand.

Sabb v. South Carolina State Univ., 2002 W.L. 1493695 (S.C. 2002)

Evidence Law

Admission of Insurance Evidence

The Supreme Court held insurance evidence may be admissible to establish a witness' bias if the party offering the evidence establishes a "substantial connection" between the witness and the insurer. The Court deemed the trial judge's decision to exclude evidence about an expert witness' relationship with insurer error because the witness had consulted with insurer in prior cases, derived some income from insurance consulting work, and enjoyed a practice in which almost 20% of the work consisted of reviewing material for insurance companies.

Yoho v. Thompson, 548 S.E.2d 584 (S.C. 2001).

Automobile Insurance Law

Termination Clause

An insurer may unilaterally cancel an automobile insurance policy for one of only two reasons pursuant to S.C. Code Ann. § 38-77-123 (1976): (i) the suspension or revocation of the insured's driver's license during the policy period or (ii) the insured's failure to pay the premium for the policy. An insured must otherwise receive a written cancellation notice or have demonstrated to the insurer by an overt action the express intent to cancel. An automatic termination clause for obtaining "similar insurance" is otherwise invalid under S.C. Code Ann. § 38-77-123 (1976).

S.C. Farm Bureau Mut. Ins. Co. v. Courtney, 563 S.E.2d 648 (S.C. 2002).

Automobile Insurance Law

UIM Coverage

An insurer is not mandated to offer UIM coverage for the inclusion of an additional vehicle under an existing policy if the insurer has previously made a proper offer to the insured.

Smith v. S.C. Ins. Co., 564 S.E.2d 358 (S.C. Ct. App. 2002).

Tort Law

Standard of nurse's liability under S.C. Tort Claims Act

A nurse employed by a governmental entity is not immune from liability, thereby falling squarely under the exceptions to waiver of immunity pursuant to S.C. Code Ann. § 15-78-60(25) (1976) which mandates a governmental entity can only be liable for grossly negligent conduct.

Stewart v. Richland Memorial Hosp., 2002 WL 1159737

(S.C. Ct. App. 2002).

From the Legislature

Commencement of Civil Actions

H.4656 provides that a civil action is commenced for purposes of tolling the statute of limitations when the Summons and Complaint are filed with the Clerk of Court if actual service is accomplished within One Hundred Twenty (120) days after filing. The Governor signed this bill into law on May 24, 2002

Tort Claims Act

The Governor vetoed a bill to amend the South Carolina Tort Claims Act by deleting the requirement that a claim be verified. The House of Representatives sustained the veto.

Fees

The Legislature imposed a fee of \$25.00 for every motion made in the Court of Common Pleas and Family Court. Revenues from this fee are designated for use by the Judicial Department. A separate budget provision imposed an additional fee of \$30.00 for the filing of a first Complaint or Petition in a civil action. Revenues from this fee are allocated between the County and State for use by the Judicial Department. Additionally, the filing fee for workers' compensation appeals to the Full Commission increased from \$75.00 to \$100.00.

Tort Reform

Several bills providing for tort reform were introduced during the 2002 legislative session, including bills establishing standards and procedures for the recovery of punitive damages. All of these bills failed to become law.

Magistrate's Court Practice

A House bill was introduced to allow Magistrate's Court jurisdiction for actions under the South Carolina Tort Claims Act seeking damages of \$7,500 or less. The bill also provided that in tort claim actions for \$7,500 or less, the state agency or political subdivision may be represented by a representative of the insurance carrier, department manager, staff person, or other official. This bill did not become law. An additional bill related to Magistrate's Court practice provided that Magistrate's Court civil actions must be filed in the office of the Chief Magistrate who would then assign the case to any Magistrate in the county. This bill failed to become law.

Railroad Venue

A House bill was introduced to provide that if a Defendant is incorporated in South Carolina or is an individual nonresident of South Carolina, then the action must be tried, at the option of the plaintiff, in the county where cause of action arose or the county of the principal office for the entity in South Carolina. The bill would have repealed S.C. Code Ann. § 58-23-90 (1976) which provides a civil action may be brought against a motor carrier in any county in which the motor carrier operates. The bill failed to become law.

Unauthorized Practice of Law

The Unauthorized Practice of Law Consumer Protection Act was introduced to establish a mechanism for attorneys to report a person engaged in the unauthorized practice of law. The bill allowed a reporting attorney to bring a civil action if the Attorney General did not prosecute. This Act failed to become law.

North Carolina Update

From the Courts

Tort Law

Stricter burden for Plaintiffs in Dog cases

Although a business owner's large dog knocked down a 72 year old woman at the business, the Plaintiff could not recover because she failed to satisfy her burden of proof. The Court of Appeals held the Plaintiff must present evidence regarding the dog's breed characteristics, habits, or propensities to be aggressive in the past. The Plaintiff is also required to present evidence tending to show the owner had notice or some kind of warning the dog was likely to jump on someone or be dangerous in some way. The dissenting opinion sought to uphold the jury award on the grounds that the standard of reasonable care for a business owner was the proper standard of judgment, not the standard for dog owners.

Hill v. Williams, 547 S.E.2d 472 (N.C. Ct. App. 2002).

Statute of Limitations

Estate Statute does not extend 3 year statute of limitations for negligence claim

The Court of Appeals held the Plaintiff has only three years to file a negligence claim arising out of an accident in which the Defendant died even if it takes more than three years to appoint an administrator of the Defendant's estate. The Court affirmed the trial court's dismissal of the action based on the statute of limitations despite the Plaintiff's argument the probate statute allowed him to file the claim within six months of the appointment of an administrator of the decedent/defendant's estate. The Court concluded the six month period did not extend the statute of limitations for negligence claims.

Shaw v. Mintz, 564 S.E.2d 593 (N.C. Ct. App. 2002).

Civil Procedure

Employer can lose negligence defense if co-defendant employee fails to answer discovery

The Court of Appeals held a Defendant employer who denies liability and answers discovery can be found vicariously liable through the co-Defendant employee if the employee fails to answer discovery. Here, the employee left town after having an accident while operating a forklift. The employer answered the complaint and admitted the employee was operating the forklift with its permission and in the course and scope of his employment, but it denied negligence. The Court found negligence on the part of the employee due to his failure to respond to discovery, imputed the negligence to the employer, and upheld the award to the Plaintiff.

Edwards v. Cerro, 564 S.E.2d 277 (N.C. Ct. App. 2002).

Workers' Compensation

Determination of Earning Capacity

Where the employer presented evidence the Claimant would have worked fewer overtime hours due to an economic downturn even if she had not been injured, the Claimant's temporary partial disability benefits should not have been based on her pre-injury wages which included extensive overtime. The evidence showed the Claimant worked extensive overtime hours in her pre-injury position as a floater. However, due to her permanent work restrictions after the injury, she had to work as a lab technician instead of a floater. The evidence revealed the Claimant received the same hourly wages, but she had less overtime than the floater position. However, the replacement floater also worked less overtime than the Claimant had prior to the injury. The Court of Appeals held the proper comparison to arrive at the Claimant's

earning capacity was between the hours of overtime available to the present floater and the overtime available to the plaintiff as a lab technician.

Derosier v. WNA, Inc., 562 S.E.2d 41 (N.C. Ct. App. 2002).

Vocational Rehabilitation

Where the vocational rehabilitation specialists involved agreed the Claimant could not obtain work paying wages as high as those she earned as a flight attendant, the Industrial Commission did not abuse its discretion when it approved the Claimant's return to college as appropriate vocational rehabilitation.

Foster v. U.S. Airways, Inc., 563 S.E.2d 235 (N.C. Ct. App. 2002).

Occupational Disease

Although work as a secretary/graphic artist does not usually expose one to a greater-than-normal risk of mesothelioma, the Claimant's job as a secretary/graphic artist required her to work in a building with significant amounts of friable asbestos. As such, her mesothelioma was compensable. The North Carolina Court of Appeals reasoned there was competent evidence to support this finding because an expert in the pathology of asbestos and asbestos-related diseases of the lungs testified the Claimant's exposure at the building placed her at an increased risk of developing mesothelioma.

Robbins v. Wake County Bd. of Educ., 566 S.E.2d 139 (N.C. Ct. App. 2002).

From the Legislature

Cancellation of Workers' Compensation Policies.

The North Carolina Legislature revised N.C.G.S. § 97-99 which specifically addresses the procedure for cancellation of worker's compensation policies. The Legislature eliminated language allowing for cancellation of a policy for non-payment of premium on 10 days written notice to the insured. The procedure for cancellation of a policy is now codified in new N.C.G.S. § 58-36-105 which specifically sets forth the following criteria for policy cancellation: non-payment, material misrepresentation by the insured, increased hazard or material change in risk that could not have reasonably been contemplated by the parties at the time of the assumption of the risk, substantial breach of contractual duties, fraudulent act against the company by the insured that materially affects the insurability of the risk, willful failure by the insured to institute loss controls, loss of facultative reinsurance, conviction of the insured of a crime arising out of acts that materially affect the insurability of the risk, determination by the Commissioner that the continuation of the policy would place the insured in violation of the laws of North Carolina, and failure of the named insured to meet the requirements contained in the corporate charter or Articles of Incorporation. Furthermore, this new statutory section provides any cancellation permitted by the new statute is not effective unless written notice of cancellation has been given by registered or certified mail, return receipt requested, to the insured not less than fifteen (15) days before the proposed date of cancellation, and such notice shall state the precise reason for the cancellation.

Calendar

OF EVENTS

- Oct 1-3, 2002** North Carolina Workers' Compensation Educational Conference
Raleigh, NC
- Oct 20-23, 2002** South Carolina Workers' Compensation Educational Association
Meeting, Hilton Head, SC
- Nov 1, 2002** McAngus Goudelock & Courie and McGuffey Goodman Aust
& Lindsey Workers' Compensation Seminar, Atlanta, GA
- Nov 8-10, 2002** SCDTAA Annual Meeting
- Nov 21, 2002** McAngus Goudelock & Courie Workers' Compensation Seminar
Charlotte, NC
- Nov 21, 2002** McAngus Goudelock & Courie Educational Seminar, Charlotte, NC
- Dec 5, 2002** McAngus Goudelock & Courie
Client Christmas Party, Columbia, SC

Please join us at the MG&C Educational Seminar on Nov. 21, 2002 at the Hilton Charlotte University Place in Charlotte, NC.

The seminar will provide valuable information regarding NC and SC workers' compensation and general liability law. Please contact Kim Schneider at 803-779-2300 ext. 282 or kschneider@mgclaw.com to learn more.

Web Sites of Interest

CHECK THESE OUT!

www.mgclaw.com

Learn all about our practice and attorneys. The "Useful Tools" section includes a helpful Present Worth table and Number of Weeks calculator for Workers' Compensation claims. Also the "Related Links" section will provide you with a shortcut to a variety of helpful web-sites.

www.claimspages.com

This site contains thousands of free claims sources, including a medical dictionary, drug index, and social security number validator to name a few.

www.WEBMD.com

This site contains a wide variety of medical information.

www.comp.state.nc.us/ncic/pages/all50.htm

This site is a portal for all 50 states and the District of Columbia's home pages and Workers' Compensation agencies.

www.law.com

This site is a great source for finding news, research links, expert witnesses, verdict information from across the country, and a variety of other helpful services for general liability attorneys and adjusters.

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News

Births

Tom and Stefanie Chase welcomed into their family **Lynsee Marie** on May 31.

Expecting

Chad and Elizabeth Abramson
Dec. 2002

Nikki and Jay Nicholson
Dec. 2002

Rob and Kiersten Starnes
Jan. 2003

Chuck and Becky Cheney
Feb. 2003

Michael and Kelly Burkett
March 2003

George and Kim Kurani
April 2003

Engagements/Weddings

John Jeffries engaged to
Meredith Holler
Wedding date: Spring of 2003

Tre' Morgan engaged to
Laura Sneed
Wedding date: 2003

George Gallagher and
Allison Mancini
Married August 24, 2002.



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MG&C Profile

NEW ASSOCIATES

Sally G. Boswell



Born: April 21, 1976, Chilhowie, VA. Attended Virginia Polytechnic Institute & State University. Graduated with a Bachelor of Arts degree in Political Science and a minor in Sociology in 1998. Graduated from

Syracuse University College of Law with a JD in 2001.

Sally joined MG&C's Charlotte office in May. Her practice focuses on workers' compensation defense.

Charles O. "Bo" Williams



Born: Sept. 1, 1971, Columbia, SC. Attended Washington and Lee University. Graduated with a Bachelor of Arts degree in English Literature in 1994. Attended University of South Carolina Law School.

Graduated with a JD in 2001.

Bo joined MG&C's Columbia office in June. His practice includes civil litigation, premise liability, product liability, personal injury, first party and coverage law, and general litigation.



Jeffrey D. "JD" Keister

Born: Nov. 25, 1976, Van Wert, Ohio. Attended Bowling Green State University. Graduated with a Bachelor of Arts with a dual major of Political Science and Interpersonal Communication

in 1999. Attended Ohio Northern University Petit School of Law. Graduated with a JD in 2002 with honors.

JD joined MG&C's Charlotte office in August. His practice includes general liability defense, automobile liability, premises liability, and general litigation.



Brian G. O'Keefe

Born: Oct. 22, 1967, Newport News, VA. Attended Furman University and graduated with a Bachelor of Arts in History in 1990. Attended Nova Southeastern University Law School. Graduated with

a JD in 1994.

Brian practiced law with Martin Law Firm in Charleston, SC 2000-2002. He also was the Assistant Solicitor for Charleston in 1999.

Brian joined MG&C's Charleston office in Sept. His practice includes workers' compensation defense and general litigation.

