

MG&C NEWS

Summer 2002

McAngus, Goudelock & Courie Attorneys at Law



ATTORNEYS AT LAW

Dear MG&C Friends:

I hope you enjoy our "new and improved" newsletter. In the past, we published newsletters and sent out bulletins from time to time to keep you informed of recent developments in South and North Carolina. Although we believe our mail-outs were always informative, we never maintained a regular schedule. As our practice grows, it is more important than ever to keep you informed about changes in the law and within our firm.

As you know, we have grown both in numbers and practice areas. We have lawyers in Columbia, Charleston and Charlotte practicing in areas that include employment law, products liability, commercial litigation, construction litigation, arson and insurance fraud, banking, consumer law and bankruptcy, just to name a few. Of course, we are also very proud of our beginnings and still believe our workers' compensation practice in South and North Carolina is second to none.

Our goal is to provide you a quarterly newsletter you will find educational and informative. We will focus on case and statutory law updates as well as changes within the state and federal courts, the workers' compensation commissions, and the various administrative agencies. We will continue popular features such as helpful websites and medical reference guides and keep you informed about our growing firm through announcements and a calendar of special events.

Thank you for your continued support over the past seven years. We hope you find our new publication both informative and enjoyable. We look forward to providing you this service and certainly welcome your input and suggestions.

Kind Regards,

McAngus Goudelock & Courie

COLUMBIA ■ 1517 HAMPTON STREET ■ POST OFFICE BOX 12519 ■ COLUMBIA, SOUTH CAROLINA 29211 ■ 803-779-2300 PHONE ■ 803-748-0526 FAX
CHARLOTTE ■ 6101 CARNEGIE BOULEVARD ■ SUITE 500 ■ POST OFFICE BOX 30307 ■ CHARLOTTE, NORTH CAROLINA 28230 ■ 704-643-6303 PHONE ■ 704-643-2376 FAX
CHARLESTON ■ 39 BROAD STREET ■ SUITE 303 ■ POST OFFICE BOX 877 ■ CHARLESTON, SOUTH CAROLINA 29402 ■ 843-534-0101 PHONE ■ 843-534-0605 FAX
www.mgclaw.com

South Carolina Update

From the Courts

Civil Procedure

Good cause to set aside default

The South Carolina Court of Appeals held an insured/defendant demonstrated good cause to set aside the entry of default where, upon receiving service of suit papers, she consulted an attorney and deferred to his advice to deliver the suit papers to her insurance company. For reasons unexplained, her insurance company failed to answer the complaint and defend her in the suit. The Court held the insured's expectation that her insurance company would answer the suit was reasonable; an insured should be able to rely upon the insurer to protect her rights once an insurer is made aware of a pending suit against its insured. *Pilgrim v. Miller*, 2002 WL 44112 (S.C. Ct. App. 2002).

Insurance

Automobile loss of use under UIM coverage

The South Carolina Court of Appeals held S.C. Code Ann. §38-77-160 requiring insurers to offer UIM coverage up to the limits of the insured's liability coverage also requires the insurer to provide the same type of coverage, including loss of use damages. Since the liability coverage in this case defined "property damage" to include loss of use, the UIM endorsement also included loss of use damages. *Glasscock, Inc. v. USF&G*, 557 S.E.2d 689 (S.C. Ct. App. 2002).

No Private Right of Action under Insurance Trade Practices Act

The South Carolina Supreme Court held the South Carolina Insurance Trade Practices Act prohibiting insurers from misrepresenting an insurance policy with the intent to settle a claim in a manner other than as provided for in and contemplated by the policy of insurance does not create a third-party private right of action. The Act creates an administrative remedy, mandates penalties for violating the statute, provides administrative review and relief for third-parties wronged before the Chief Insurance Commissioner, and vests the South Carolina Department of Insurance with authority to determine whether an insurer is in violation.

Masterclean, Inc. v. Star Insurance Co., 556 S.E.2d 371 (S.C. 2001).

Construction

Statute of Repose

The South Carolina Supreme Court held the Statute of Repose, a thirteen-year statute of limitations period provided by S.C. Code Ann. § 15-3-640 (1976), commenced running upon "substantial completion" of the installation of windows, a "specified area or portion" of the condominium project as a whole, and not upon substantial completion of the larger project or at the time the certificate of occupancy was filed.

Ocean Winds Corp. of Johns Island v. Lane, 556 S.E.2d 377 (S.C. 2001).

Workers' Compensation

Permanent disability not required for future benefits

Although the Workers' Compensation Commission found the Claimant reached MMI with no permanent disability, the Court of Appeals upheld the Full Commission's award of future medical care under *Dodge v. Brucoli Clark & Layman, Inc.* The effect is that a claimant no longer needs to show any permanent disability in order to receive future medical benefits.

Adkins v. Georgia-Pacific Corp., 2001 WL 1841920 (S.C. Ct. App. 2002).

Doctor's note sufficient notice of injury to employer

The Court of Appeals held a doctor's note faxed to the company nurse indicating light duty restrictions for the Claimant constituted

sufficient notice of an injury to satisfy the 90-day reporting requirement. The Claimant never verbally reported a work injury to the employer, and the doctor's note did not mention a work injury. *Etheredge v. Monsanto Co.*, 2002 WL 483580 (S.C. Ct. App. 2002).

Statutory Employee

The Court of Appeals held a driver employed by a common carrier who transports a finished product from the manufacturer to the market place is not the statutory employee of the manufacturer. *Olmstead v. Shakespeare*, 559 S.E.2d 370 (S.C. Ct. App. 2002).

Loss of scheduled member

The Court of Appeals held medical evidence was not necessary to establish permanent disability. All that is required for a Claimant to proceed under the general disability statutes and receive an award for permanent total disability rather than the "scheduled member" statutes is that the Claimant show the injury to the scheduled member "affects" another body part. *Simmons v. City of Charleston*, 2001 WL 1774003 (S.C. Ct. App. 2002).

From the Legislature

Workers' Compensation

Employees Exempt from Workers' Compensation

H. 5034 is currently pending in the House of Representatives. This Bill amends the Workers' Compensation Act to exempt employees covered by the Federal Employers' Liability Act, Longshore Act, Harbor Workers' Act, or the Jones Act from state workers' compensation laws. The bill has been referred to the Committee on Labor, Commerce, and Industry.

Filing fees

Due to state government budgetary constraints, an amendment has been proposed to the annual appropriations bill to allow the Workers' Compensation Commission to charge a fee of \$25.00 for every hearing requested to help defray administrative costs.

Construction

Statute of repose time period

Proposals to shorten the "statute of repose" from 13 to 6 years are still pending in House and Senate committees. H. 3767 has been debated by the House Judiciary Committee several times during the 2002 session. Efforts by plaintiffs' attorneys to amend the bill to treat certain categories differently from others has prevented approval of the bill in the full committee.

Settlements

Procedures for transfer of structured settlements

H. 3943 is currently pending in the Senate. This bill enacts the "Structured Settlement Protection Act" which provides procedures to regulate the transfer of structured settlements, including provisions establishing disclosure requirements and requiring court or administrative authority advance approval for the transfer of structured settlement payment rights.

Employment

Preservation of at-will employment relationship

H. 5035 provides for preservation of the at-will employment relationship in connection with the use of an employee handbook, code of conduct, personnel policy manual, or other informational document.

North Carolina Update

From the Courts

Products Liability

Physical injury not required

Despite no evidence of a physical injury, the North Carolina Court of Appeals allowed the Plaintiff to proceed against the Defendant on breach of warranty and emotional distress causes of action. However, the Court upheld summary judgment for the restaurant on the vicarious liability claim because it conducted an investigation as soon as it discovered the incident and had no warning the employee would contaminate the food, no knowledge of the events as they happened, and no co-workers knew of the events as they happened. For these same reasons, the Court also held the restaurant did not subsequently ratify the employee's behavior. *Phillips v. Restaurant Management of Carolina, L.P.*, 552 S.E.2d 685 (N.C. Ct. App. 2001).

Civil Procedure

Release of defendants pending appeal

After an appeal has been filed, the Plaintiff can settle with and release two of the three Defendants found liable without offering the settlement and release to the third Defendant. The Court noted the trial judge has wide discretion to approve settlements, and a finding that a settlement was made in good faith will only be overturned if it could not have been the result of a reasoned decision. Further, a defendant cannot pursue contribution under North Carolina law unless and until he has actually paid more than his fair share of a judgment. *Sterling v. Gil Soucy Trucking*, 552 S.E.2d 674 (N.C. Ct. App. 2001).

Workers' Compensation

Pursuit of lien against third-party

An employer who paid workers compensation benefits to an employee could not pursue a lien against the recovery the employee received against his attorney in a malpractice suit when the employee's attorney missed the deadline for filing suit against the third party subcontractor who actually caused the employee's injuries. *Grant v. Construction Co. v. McRae*, 553 S.E.2d 89 (N.C. Ct. App. 2001).

Unpaid medical expenses not covered

The Defendant's agreement to pay the Claimant's unpaid medical expenses in the clincher did not constitute an agreement to pay the Claimant's out-of-pocket medical expenses. *Stevenson v. Noel Williams Masonry, Inc.*, 557 S.E.2d 554 (N.C. Ct. App. 2001).

Illegal alien allowed to pursue benefits

A Workers compensation statute defining "employee" to include every person engaged in employment including aliens did not preclude the Claimant from recovering workers' compensation benefits based solely on his status as an illegal alien. *Ruiz v. Belk Masonry Co., Inc.*, 559 S.E.2d 249 (N.C. Ct. App. 2002).

Use of drugs creates rebuttable presumption of intoxication

Where the defendant-employer (1) proved the employee-decedent had used a non-prescribed controlled substance and (2) presented competent evidence the impairment was a proximate cause of the decedent's fatal accident, a rebuttable presumption arose that the employee was impaired. Therefore, it was the decedent's representative's burden to show either the decedent was not impaired at the time of his accident or impairment was not a proximate cause of the accident. *Willey v. Williamson Produce*, 2002 WL 372625 (N.C. Ct. App. 2002).

Punitive Damages

Punitive damages cap is constitutional

Plaintiffs were observed taking a morning stroll around a shopping facility when they were observed by security employees of the Defendant and accused of trespassing. The Plaintiffs were allegedly assaulted by the security personnel. Plaintiffs were awarded approximately \$19,000 in compensatory damages and \$11.5 million each in punitive damages. Pursuant to N.C.G.S. Sec. 1D-25, punitive damages were limited to \$250,000 per Plaintiff. The Plaintiffs appealed, challenging the constitutionality of the punitive damages cap. The Defendant also appealed, alleging that the punitive damages cap should apply per Defendant as opposed to per Plaintiff. The N.C. Court of Appeals upheld constitutionality of statute. *Rhyne v. Kmart Corporation*, 562 S.E.2d 82 (N.C. Ct. App. 2002).

Contributory Negligence

Gross negligence versus contributory negligence

Plaintiff's decedent was operating her vehicle in front of the Defendant's tractor trailer on a rainy and overcast evening. As the tractor trailer approached the decedent's vehicle, the Defendant Lea pulled into the passing lane, activated his turn signal, and blinked his head lights to signal he was passing. As the tractor trailer was approximately even with the vehicle of Plaintiff's decedent, Plaintiff's decedent began to turn left into the path of the tractor trailer. The jury found Defendant was negligent and Plaintiff's decedent was contributorily negligent. The trial court refused to instruct on gross negligence which would have overcome the defense of contributory negligence. The N. C. Court of Appeals held gross negligence occurs when the act is done (1) purposefully and with knowledge that the act is a breach of a duty to others, (2) with a conscience disregard of the safety of others, and (3) in such a manner that the injury or damage itself is intentional. No prior appellate decision recognized gross negligence in the context of a simple traffic violation involving passing and turning. In auto cases, gross negligence has been confined to circumstances involving one of three factors: drunk driving, driving at excessive speeds, and racing. *Yancey v. Lea*, 354 N.C. 48, 550 S.E.2d (N.C. Ct. App. 2001).

From the Legislature

Civil Procedure

Methods of service of process

Under S.L. 2001-379, the methods of service of process by which to serve a summons and complaint on a natural person pursuant to Rule 4 of the N.C. Rules of Civil Procedure have been expanded to include service by depositing of suit with a designated delivery service such as Federal Express.

Litigation

Time period for medical lien eliminated

S.L. 2001-377 allows entities providing medical supplies or services to injured persons to assert a lien on any damages such person recovers in any lawsuit for the injuries necessitating treatment. Previously, the statute required the party asserting the lien to file a claim of lien within 30 days of the filing of the injured person's lawsuit.

Insurance

Commission to study Workers' Compensation classifications.

S. 1084 proposes to amend N.C.G.S. 58-36-10(4) to revise and refile a classification plan for loss modifications in workers' compensation insurance coverage and authorize a legislative research commission to study insurance classifications, including developing and implementation of loss modifications. The plan will "equitably...classify employers for insurance purposes." This proposed legislation apparently only authorizes a study commission.

Calendar

OF EVENTS

- July 25-27, 2002** SCDTAA/CMASC Joint Meeting
Asheville, 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
Client Christmas Party
Charlotte, NC
- Dec 5, 2002** McAngus Goudelock & Courie
Client Christmas Party
Columbia, SC

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.wcc.state.sc.us

In addition to information on the South Carolina Workers' Compensation Commission, this site also provides helpful Fill in Forms.

www.comp.state.nc.us

The official site of the North Carolina Industrial Commission. This site also provides helpful Forms.

www.medmedia.com

The official site of the Wheeless' Textbook of Orthopaedics. Provides authoritative and complete descriptions of all joints, muscles, and nerves. The place to go if you have a question about the medical side of a plaintiff/claimant's injury.

www.findlaw.com

This site is a great resource for all of your research needs. It has links to all of the state codes as well as federal laws and regulations. If you have a question and do not where to start, try this site first.

News

Births

Carly Elizabeth Morgan born 12/17/01.
Proud parents **Doc** and **Julia Morgan**.

Sterling "Graydon" Davies, Jr. born
2/11/02. Proud parents **Sterling** and
Kris Davies.

Engagements/Weddings

Anne Marie Partin and **Jimmy Hagood**
married 2/2/02.

Nikki Martin engaged to **Jay Nicholson**.
Wedding date: 6/22/02

George Gallagher engaged to **Allison
Mancini**. Wedding date: 8/24/02.

Professional Appointments/ Awards/Recognitions:

Jay Courie was elected Secretary of the
South Carolina Defense Trial Attorneys
Association. Jay has been a member of
the SCDTAA Executive Committee since
1997 and has chaired both the
Legislative and Program Committees.

George Kurani was appointed to
the Board of Directors for the North
Carolina Association of Defense
Attorneys. George has been a member
of NCADA since 1996.

Andrew Ussery completed the Boston
Marathon. He came in 5002 out of 16500.



COLUMBIA
1517 HAMPTON STREET
PO Box 12519
COLUMBIA, SC 29211
803-779-2300

CHARLOTTE
6101 CARNEGIE BOULEVARD
SUITE 500
PO Box 30307
CHARLOTTE, NC 28230
704-643-6303

CHARLESTON
39 BROAD STREET
SUITE 303
PO Box 877
CHARLESTON, SC 29402
843-534-0101

www.mgclaw.com

MG&C Profile

NEW ASSOCIATE



Larry A. "Boomer" Foster

- Born: December 20, 1972
- Wife: Kathryne Foster
- Attended University of South Carolina on football scholarship and lettered all four years
- 3 time District III GTE Academic All American
- Graduated with an English degree in 1995.
- Attended University of South Carolina Law School. Graduated with a JD in 1998.

Boomer practiced law with Young Clement Rivers and Tisdale in Charleston, SC from 1998-2002.

Boomer joined MG&C's Columbia office in February. His practice includes general and commercial litigation, arson, and insurance fraud defense and first party insurance matters.

