

MG&C NEWS

Spring 2003

McAngus Goudelock & Courie Attorneys at Law



ATTORNEYS AT LAW

Dear Friends & Clients:

It has been an exciting month at McAngus Goudelock & Courie. We are pleased to announce Steve Bates has joined our firm as a partner in the Columbia office. Steve is a former Administrative Law Judge, general counsel to the South Carolina Speaker of the House, and general counsel to Governor Jim Hodges. With the addition of Steve, the firm announces the formation of the Governmental and Administrative Law Practice Group. Jay Courie and Steve Bates will lead the group. Our new practice area includes governmental relations, health care law, contested Certificate of Need cases, procurement, regulatory, and administrative law. We are all excited about this new and exciting area in our firm.

We also welcome Jim Lichty (Columbia) and Chris Skipper (Charleston) to our firm. Jim graduated from the University of South Carolina and the University of Maryland School of Law. Chris graduated from the College of Charleston and the University of South Carolina School of Law. Chris is a former assistant solicitor for the Ninth Judicial Circuit. Both Jim and Chris will practice workers' compensation law.

We are looking forward to seeing many of you at the Atlanta Claims convention on April 3rd and the North Carolina Self-Insured Conference April 4-6. Mark May 9th on your calendar for our Annual Litigation Educational Seminar co-hosted with Goodman McGuffey Aust & Lindsay in Atlanta and May 2 for our Administrative Law/Certificate of Need seminar in Columbia.

It is hard to believe, but we celebrated our eighth anniversary on March 6, 2003. Our continued success is only possible because of loyal and dedicated clients and friends like you.

Thank you for eight great years.

MG&C

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South Carolina Update

From the Courts

Contract Law

Forum Selection Clause

Although a partnership agreement designated Pennsylvania as the forum to determine any suits arising out of “a breach or an alleged breach” of the agreement, the South Carolina Court of Appeals upheld the trial judge’s denial of the Defendant’s Motion to Dismiss in an unpublished decision. The Court held the suit did not arise out of a breach or alleged breach of the agreement, but rather, the “gravamen of [the] complaint was fraud and breach of fiduciary duty.”
Nardone v. Davis (S.C. Ct. App. No. 2003-UP-101).

Medical Malpractice

Tolling of Statute of Limitations

In an unpublished decision, the South Carolina Court of Appeals held the statute of limitations began to run on a medical malpractice claim against a surgeon as soon as the Plaintiff knew the surgeon treated him and that his medical claim might involve that treatment and not, as the Plaintiff contended, when he became aware of facts sufficient to place him on notice the surgeon had done something wrong.

McClain v. Jarrard, et al. (S.C. Ct. App. No. 2003-UP-056).

Insurance

Insured's Duty to Cooperate

Applying S.C. Code Ann. §38-77-142(B) (1976), the South Carolina Court of Appeals held an insurer could rely on a cooperation clause as a defense to deny a claim. In this case, the insurer did not have actual notice the insured had been served with a summons and complaint, and the insured failed to cooperate to the prejudice of the insurer.

Cowan v. Allstate Co., 571 S.E.2d 715 (S.C. Ct. App. 2002).

Workers' Compensation

Claim Found not Compensable where Claimant Knowingly Violated Employer's Instructions

The South Carolina Court of Appeals affirmed the Workers' Compensation Commission's ruling that the Claimant's motor vehicle accident did not arise out of and in the course of his employment when the Claimant knowingly violated the Employer's instructions not to take the company truck and was subsequently injured in a wreck. Although the Court recognized the Employer's right to limit the “sphere of employment,” it did reiterate that not every violation of an order given to a workman will necessarily remove the worker from the protection of the Workers' Compensation Act. However, when an Employee knowingly acts outside the “sphere of employment” against the Employer's instructions, he is not protected by the Act.

Pratt v. Morris Roofing, Inc., 2003 WL 142233 (S.C. Ct. App. 2003).

Workers' Compensation Commission has Discretion to Order Out of State Medical Treatment

The South Carolina Court of Appeals held the Workers' Compensation Commission has the authority to order payment for out of state medical treatment. Further, the Court reiterated the Commission has discretion in overriding an Employer/Carrier's choice of medical provider and excusing a Claimant's “justified” refusal to seek treatment from the Employer/Carrier's provider.

Gattis v. Murrells Inlet VFW #10420, 2002 WL 319578 (S.C. Ct. App. 2003)

Other Related Updates

Workers' Compensation

Presumption for Law Enforcement Officers in Cardiac Injury Cases

Companion Bills H.3571, S.19, and S.339 amend S.C. Code Ann. §42-11-30 (1976) to include a provision that creates a presumption for law enforcement officers that a cardiac or respiratory related impairment or injury arose out of and in the course of employment if developed while in, or within 24 hours of being in, an incident that involved unusual or extraordinary physical exertion. The Senate Bills are pending in the Judiciary Committee, and the House Bill is pending in the Labor, Commerce, and Industry Committee.

Filing Fee for Hearing Request

A proviso to the Annual Appropriations Bill authorizes the Workers' Compensation Commission to charge a \$25.00 filing fee for each requested hearing. The proviso will be included in the budget bill scheduled for debate.

Employment Law

Employee's Access to Personnel Files

H. 3005 allows employees to inspect and obtain copies of the contents of their personnel records related to information used to determine qualifications for employment, promotion, additional compensation, transfer, layoffs, or termination or other disciplinary action. The Bill provides the manner for requests to be made and time constraints for the employer to respond, including fines and potential civil liability for failing to respond. This Bill is pending in the House Judiciary Committee.

Employment-at-Will Doctrine

S. 290 codifies the employment-at-will doctrine and limits liability for termination of employment by either party. The Bill also states that no handbook, policy, procedure, or other document forms an express or implied contract of employment. This Bill is pending in the Senate.

Litigation

Admissibility of Collateral Sources (H.3055)

H. 3055 allows admission into evidence proof of collateral source payments, including those made pursuant to the Social Security Act, state or federal income replacement, disability, workers' compensation, and/or all types of insurance except life insurance, in all tort actions. Proof of these payments must be considered by the trier of fact in determining an award and the court in reviewing awards for excessiveness. This Bill is pending in the House Judiciary Committee.

Preclusion of Civil Actions Arising Out of Criminal Activities

H. 3111 prohibits a civil action by a plaintiff for injuries or death sustained as a result of criminal activity attempted or committed by the plaintiff. This Bill applies to actions brought against a victim of criminal activity for damages caused to the plaintiff while defending property or life. This Bill is pending in the House Judiciary Committee.

Non-Economic Damages

H. 3139 limits non-economic damages to \$250,000.00 or an amount equal to the awarded economic damages, whichever is greater. This Bill is pending in the House Judiciary Committee.

Filing Fees for Motions

H. 3399 repeals \$25.00 filing fee requirement for every motion made in the Court of Common Pleas and Family Court. This Bill is pending in the House Ways and Means Committee.

North Carolina Update

From the Courts

General Liability

Defendant's Testimony Insufficient to Show Contributory Negligence

In an accident in which the Defendant failed to stop for a stop sign, the North Carolina Court of Appeals held testimony from the Defendant that the Plaintiff was going 45-50 mph in a 35 mph zone at the time the collision occurred was not sufficient evidence for the jury to find the Plaintiff guilty of contributory negligence. The Court reasoned that even if true, the Defendant's testimony did not provide the basis to show the Plaintiff's speed was a proximate cause of the accident.

Ellis v. Whitaker, 2003 WL 346311 (N.C. Ct. App.2003).

Evidence

Doctor's Testimony Admissible Despite Lack of Medical Support

Although the Plaintiff's doctor was unable to say with "any medical certainty" the Plaintiff's accident was the cause or a cause of the Plaintiff's medical condition, the North Carolina Court of Appeals held the video deposition of the doctor was admissible as to causation. It allowed his statement that the shingles condition "could have been caused" by the accident despite the absence of any medical basis.

Johnson v. Piggly Wiggly, 2003 WL 292122 (N.C. Ct. App. 2003).

Workers' Compensation

Claimant's Wage-Earning Capacity

Where the Industrial Commission found the Claimant, a restaurant manager, had "some" wage earning capacity based upon evidence he was actively involved in his own roofing company, the North Carolina Court of Appeals held this evidence was not a sufficient basis for determining his actual wage-earning capacity. The Court noted that managing a self-owned business can be used to demonstrate a claimant's wage-earning ability, but the Industrial Commission must first determine whether those management skills make the claimant competitive in the marketplace in light of the claimant's physical limitations, age, education, and experience.

Devlin v. Apple Gold, Inc., 570 S.E.2d 257 (N.C. Ct. App. 2002)

Defendant's Due Process Rights Not Violated

The North Carolina Court of Appeals held the Deputy Commissioner did not violate the Defendants' due process rights when she ordered the questioning of the *pro se* plaintiff's doctor and, in writing, asked questions which were dispositive of an essential issue. The Court reasoned the questions were neutral and could benefit either the Claimant or Defendants and also noted the questions did not indicate a disqualifying personal bias.

Handy v. PPG Industries, 571 S.E.2d 853 (N.C. Ct. App. 2002)

Frivolous Defense Subjects Defendants to Pay Attorney's Fees

Where the Defendants did not offer any reasonable grounds for defending the claim or provide any evidence to support a reasonable defense, the North Carolina Court of Appeals held the Industrial Commission did not abuse its discretion when it ordered the Defendants to pay the Plaintiff's attorney's fees in addition to the benefits awarded to the Plaintiff.

Chavis v. Thetford Property Management, Inc., 573 S.E.2d 920 (N.C. Ct. App. 2003)

Other Related Updates

Tort Reform

Medical Malpractice/Attorneys' Fees

Senate Bill 9 provides an economic damage cap and limits non-economic damages in medical malpractice awards. If adopted, jurors would not be permitted to award more than \$250,000.00 for pain, suffering, disfigurement, or shortened life span. The Bill also allows periodic judgment payments when the award equals or exceeds \$50,000.00 in future damages and limits contingency fees to plaintiffs' attorneys to 40% of the first \$50,000.00, 33% of the next \$50,000, 25% of the next \$500,000, and 15% of anything over \$600,000.00. The limit on contingency fees would apply regardless of whether there is recovery by settlement, arbitration, or judgment.

Attorneys' Fee

Statutory and Contingency Fees for Attorneys

Under a proposed ethics rule, attorneys who receive statutory attorneys' fees in small injury cases may also collect a contingency fee, provided the total fee recovered is not excessive. This proposed rule reverses a previous opinion of the North Carolina Bar which prohibited attorneys from collecting both statutory and contingency fees. This proposed rule may be presented for a final vote at the Bar's meeting in April 2003.

Alternative Dispute Resolution

North Carolina Court of Appeals Mediation Program

The North Carolina Court of Appeals' voluntary appellate mediation program allows the parties an opportunity to reach a settlement agreement. With the exception of termination of parental rights and juvenile cases, all civil cases are eligible for mediation. The parties may choose either a current Court of Appeals judge trained as a mediator or an outside mediator. If the parties choose a current Court of Appeals judge, the judge will serve without a fee and will not participate further in the appeal. If the parties choose an outside mediator, the mediator will be compensated \$300.00 per day for services.

Restriction of Court Ordered Arbitration

N.C.G.S. §7A-37.1(c) has been amended to provide court ordered arbitration in District Court civil actions in which the claims do not exceed \$10,000. The statute previously provided for court-ordered arbitration in which the claims did not exceed \$15,000. The Amendment becomes effective on October 1, 2003 and applies to all actions filed on or after this date.

Leaders of the Administrative Law and Governmental Relations Practice Group.



James R. Courie

Jay Courie is a founding partner in the firm. Jay has been actively involved in the workings of state and local government through business, professional, and community activities. His extensive legal experience includes more than 15 years of representing business and industry in employment and workers' compensation matters.



Stephen P. Bates

Steve Bates returned to private practice to join MG&C after more than 14 years of service in state government. Steve served as one of the state's first Administrative Law Judges from 1994 to 1999. Most recently, he served as Chief Legal Counsel to

Governor Jim Hodges. He also served as Chief of Staff of the Department of Public Safety and Chief Counsel to the Speaker of the South Carolina House of Representatives. Steve's extensive experience in government law brings a unique perspective to the group.

MG&C Creates Administrative Law and Governmental Relations Practice Group

Our unique group offers a comprehensive package of legal, political, governmental, and communications services. We assist businesses, trade organizations, and others with public policy and legal issues. We offer legislative representation and monitoring, political and legal strategies, administrative and regulatory representation, and general counsel services. Our attorneys have extensive and diverse experience in:

- CONTESTED CASES AND APPEALS BEFORE THE ALJ DIVISION
- HEALTH CARE LICENSES AND CERTIFICATES OF NEED
- ENVIRONMENTAL PERMITTING AND COMPLIANCE
- PROFESSIONAL AND OCCUPATIONAL LICENSES
- LEGISLATIVE SERVICES
- GOVERNMENT PROCUREMENT
- ELECTION AND ETHICS LAW
- BUSINESS AND CONSUMER LAW

Navigating the regulatory and legislative process can be confusing and intimidating. We have a working knowledge of government and understand how it affects individuals and businesses.

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News

Expecting

Doc and Julia Morgan
July 2003

J.Wriley and Paige McKeown
August 2003

Births

Rob and Kiersten Starnes welcomed **Luke Robert** into their family Jan. 10.

Chuck and Becky Cheney welcomed **Anna Cecilia** into their family Jan. 29.

Michael and Kelly Burkett welcomed **Sophie Ann** into their family Mar. 3.

Engagement/Wedding

Regan Ankney engaged to **Cam Werntz**
Wedding date: November 1, 2003

Professional Appointments/ Awards/Recognitions:

The McAngus Madmen came in eighth place out of twenty teams in the Four Person Relay Division at the Run for Peace Marathon. The McAngus Madmen team consisted of **Scott Garrett, Andrew Usery, J.D. Keister,** and **J.Wriley McKeown.**

Rusty Goudelock was appointed to serve as the State Ombudsman for a committee under the U.S. Department of Defense. He works with employers, military reservists, and their families regarding legal issues surrounding active duty deployment.

Calendar of Events

- April 3** Atlanta Claims
Hilton Atlanta, NE
- April 3-4** NC Self Insured Conference
Wilmington, NC
- May 2** MG&C Administrative Law/
Certificate of Need Seminar
Columbia, SC
- May 9** Litigation Education Seminar
presented by MG&C and
Goodman McGuffey Aust
& Lindsey
Atlanta, GA

For more information on upcoming seminars contact Kim Schneider at 803-227-2282 or kschneider@mgclaw.com

MG&C Profile



Stephen P. Bates

Steve received his B.S. from Presbyterian College in 1984. He received his J.D. from the University of South Carolina School of Law in 1987.

Steve served as one of the state's first Administrative Law Judges from 1994-1997. Most recently he served as Chief Legal Counsel to Governor Jim Hodges. He also served as Chief of Staff of the Department of Public Safety and Chief Counsel to the Speaker of the South Carolina House of Representatives.

Steve joined MG&C's Columbia office as a partner in January. His practice includes areas of administrative law, governmental relations, election law, and local government law.



James H. Lichty

Jim received his B.S. from the University of South Carolina in 1997. He received his J.D. from the University of Maryland School of Law in 2001.

Jim joined MG&C's Columbia office in January. His practice focuses on workers' compensation defense.



Christopher A. Skipper

Chris received his B.A. from the College of Charleston in 1993. He received his J.D. from the University of South Carolina School of Law in 1996.

Chris is a former assistant solicitor for the Ninth Judicial Circuit.

Chris joined MG&C's Charleston office in February. His practice focuses on workers' compensation defense.

Websites of Interest

www.osha.gov

This site is a good starting point for all of your workplace safety questions.

www.whitepages.com

This site is a great place for locating people.

www.dictionary.com

This site contains both an online dictionary and thesaurus.



McAngus Goudelock & Courie, LLC