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TEN YEARS AGO

The South Carolina Defense Trial Attorneys' Association held its Eighteenth Annual Meeting at Kiawah Island, South Carolina, October 24-27th. President **WADE LOGAN** presided over the assemblage Friday morning. **DONALD W. BESKIND**, Esquire of North Carolina, spoke on opening statements followed by the **HONORABLE CHARLES L. BECTON**, Judge, North Carolina Court of Appeals, on closing arguements. The second session Friday morning featured the commenting on recent decisions of the Court of Appeals and the Supreme Court, and the new Rules of Civil Procedure. There followed a panel discussion on the impact of the new Rules on the bench and the bar with a panel consisting of the **HONORABLE C. VICTOR PYLE**, Moderator, **HONORABLE JAMES E. MOORE, JOHN HAMILTON SMITH** and **WILLIAM T. HOWELL.** Golf was at Turtle Point Golf Course and the tennis tournament at East Beach Tennis Center.

Saturday morning featured the noted professor of Federal practice, **DR. CHARLES ALLEN WRIGHT.** Following **DR. WRIGHT**, there was a presentation of direct and cross-examination of a rape victim, who was **JUDGE BECTON'S** secretary. Participants were **PROFESSOR JOSEPH KILO**, Moderator, **JUDGE BECTON**, **DONALD BESKIND** and **ROBERT CARPENTER** and **STEVE MORRISON**. The panel of Federal judges discussed recent developments in Federal practice. They were **JUDGE CHARLES E. SIMMONS, JR.**, Chief Judge, along with **JUDGE SOLOMON BLATT, JUDGE MATTHEW J. PERRY, JUDGE FALCON B. HAWKINS, JUDGE G. ROSS ANDERSON, JR.**, and **JUDGE CLYDE H. HAMILTON**. Judges **HOUCK** and **WILKINS** were unable to attend.

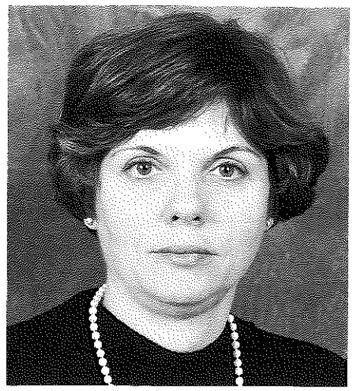
Newly elected officers were **GENE ALLEN**, President, **THERON G. COCHRAN**, President-Elect, **MARK WALL**, Secretary, and **BILL DAVIES**, Treasurer.

TWENTY YEARS AGO

President **JIM ALFORD** welcomed the Association to Hilton Head Inn, Hilton Head, South Carolina, for the Eighth Annual Meeting, October 16, 17, & 18, 1975. An outstanding program was put together by **BRUCE SHAW**, which included **EDWARD HOLDEN**, Vice President, American Mutual Insurance Alliance, speaking on catastrophic losses; **HONORABLE J. DAWSON ADDIS**, Chairman, South Carolina Industrial Commission, on occupational diseases and **DR. ART DAVIS**, Rex Hospital, Raleigh, North Carolina, on the "Knot in Your Stomach." **ERNIE NAUFUL** chaired the Social Committee with a golf tournament at Harbour Town, and tennis at Hilton Head Racquet Club. Officers elected for 1976 were **C. DEXTER POWERS**, President, **JACKSON I. BARWICK, JR.**, President-Elect, **MARK W. BUYCK, JR.**, Secretary-Treasurer, **JAMES W. ALFORD**, Immediate Past President. Executive Committeemen were **PLEDGER BISHOP, JR., M. SPENCER KING,** and **SAUNDERS M. BRIDGES**.

The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

THE PRESIDENT'S PAGE



Kay Crowe

The Annual Meeting was a wonderful event. The seminar was excellent and the social events great fun. The meeting was highlighted by the presentation by United States Supreme Court Justice Anthony Kennedy. Using only a dry eraseboard as a prop and with no visible sign of notes, he delivered a speech that inspired all who attended, reinforcing for each lawyer present the reasons why we became lawyers and the importance of our commitments to our profession.

The work of the new year is begining with the important task of Committee appointments. The South Carolina Defense Attorneys' Association continures to be a vital and active organization because of the work of many people on the various committees. The opportunities are varied and there is truly something there for everyone. By this time you will have received your annual questionnaire about your committee preferences. If you have not completed and returned it, please do so immediately. One real need we have is on the Legislative Committee. If you know any of your local State Legislators and would be willing to serve as a local contact person this would be of great assistance to us. Will Davidson has agreed to serve as Legislative Chair for a second term. We would like to see increased support from around the State for our efforts in being one of the Legislators' sources and advisors about bills which impact upon Civil Trial Practice.

I hope to have the 1996 Annual Meeting continue the high standards set by the 1995 Meeting. The 1996 Annual Meeting will be held at the Ritz Carlton Buckhead in Atlanta, Georgia. We will offer a variety of social and sporting events to include golf and tennis. We hope that we will be able to arrange for a group of tickets at the Fox Theater. For many of us, all we have seen of Atlanta is the airport and a succession of dismally similar deposition rooms. This meeting will give us a chance to explore the fun side of this wonderful city. Mark Phillips and Mills Gallivan have agreed to co-chair this meeting acting as both Convention Chairs and Program Chairs.

We will once again sponsor a Trial Academy. The chairmen of this event will be Steve Darling and Sam Outten. The Trial Academy offers an opportunity for lawyers to participate as mentors and also instructors.

In 1996, we will co-sponsor a seminar with the South Carolina Bar Association. The tentative date for this seminar is November 15, 1996. Mike Bowers will be the chairman responsible for this seminar.

Clarke McCants has agreed to chair the Defense Line committee for 1996. One of my goals for 1996 is to continue to improve this publication. If you enjoy writing please consider serving on this committee. If you receive any interesting or significant Orders of any kind we are interested in revitalizing the recent decisions column in the Defense Line.

I thank all of you for the opportunity to serve as your President. I am open to any suggestions any of you have as to how we can improve the South Carolina Defense Trial Attorney's Association. I am committed to increasing our voice in the Legislative process, to producing a high quality and useful magazine, to providing for our members the finest possible CLE programs that address the real issues we face in our practices and in providing in the midst of a world far more focused on marketing and competition than the world I practiced in when I became a defense attorney, an opportunity for community.

Technology is here and luckily I have teenagers to help me with the trick parts. Please feel free to communicate with me on the internet, screen name "AuChila".

TIME TO ACT:

IMPLEMENTATION OF APPORTION OF DAMAGES BETWEEN DEFENDANTS

STEVEN A. SNYDER AND J. ANTONIO DELCAMPO

(The September/October 1995 issue of South Carolina Lawyer contained 2 articles on joint and several liability. This is a follow-up article discussing apportionment of damages and possible methods of implementing apportionment.)

A growing number of states have adopted comparative fault systems and are now allocating damages between defendant wrongdoers based on proportionate fault.

South Carolina has implemented the doctrine of comparative negligence. However, neither the legislature nor the Courts of this state have addressed the issue of whether fault and damages should be equitably attributed between defendant wrongdoers in this era of comparative negligence.

The state's trial lawyers are persistent in their efforts to change and create law favorable to the interests of their clients. The comparative negligence issue offers a case in point. Perhaps the time has come for the defense bar to take up the challenge and provide the Courts and/or the legislature with an opportunity to implement apportionment of damages as the law of this state.

A GROWING TREND:

States that have adopted some form of legislation apportioning damages based on fault include California, Connecticut, Indiana, Kansas, Nevada, New Hampshire, Ohio, Pennsylvania, Utah, Vermont and Wyoming. The statutes include: CAL. CIV. CODE § 1431.2 (Deering 1986); CONN. GEN. STAT. ANN. § 52-572h (West 1994); IND. CODE ANN.§ 34-4-33 (5)(b)(4) (West 1994); KAN. STAT. ANN. § 60-258a (West 1993); NEV. REV. STAT. § 41.141 (1993); N.H. REV. STAT. ANN. § 507:7-d (1993); OHIO REV. CODE ANN. § 2315.19 (1992); PA. STAT. ANN. tit. 42 § 7102 (1994); UTAH CODE ANN. § 78-27-38(3) (1994); VT. STAT. ANN. tit. 12 § 1036 (1993); and WYO. STAT. § 1-1-109 (1994).

While the list of states that have adopted legislation apportioning damages based on fault is not exhaustive, it certainly highlights the trend toward the more equitable allocation of damages. In most instances, these jurisdictions reason that there is no social policy that should compel defendants to pay more than their fair share of the loss. See, e.g., Brown v. Keill, 580 P.2d 867 (KS. 1978).

In interpreting the comparative negligence statute of Kansas, the court in Brown stated:

> Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute.
>
> It appears more reasonable for the legislature to have intended to relate duty to pay to the degree of fault. Any other interpretation [of the statute] destroys the fundamental conceptual basis for the abandonment of the contributory negligence. (580P.2d at 874)

PRO'S AND CON'S:

In this era of comparative negligence, apportionment of damages between defendants is clearly a more equitable approach than joint and several liability. If the South Carolina doctrine of comparative negligence empowers a jury to equitably apportion fault between a plaintiff and a defendant, it logically follows that a jury should similarly be able to determine the degrees of fault between multiple defendants and decide the amount of the damages each defendant should contribute. As such, there seems to be no reasonable basis for maintaining the obvious inequities of joint and several liability.

The practical advantages of apportionment of liability for defense lawyers, their clients and insurers should be readily apparent. Any defendant found by a jury to have contributed to the plaintiff's injuries and damages would be responsible only for his percentage of fault, irrespective of the defendant's financial status. For example, a defendant found to have caused 33 percent of the plaintiff's damages would not be held responsible for the other 67 percent of the damages, even if the 33 percent defendant had the deepest pocket or the 67 percent co-defendant(s) were judgment proof.

Of course, one disadvantaged party might be the defendant who principally caused the plaintiff's injuries and has the ability to pay. This, however, would seem to be an appropriate result. It would certainly be more equitable than forcing a virtually innocent defendant with a "deep pocket" to pay for injuries principally caused by a co-defendant who for whatever reasons lacks the ability to pay.

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TIME TO ACT

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PLAN OF ACTION:

Advocates of apportionment of damages between defendant wrongdoers have two principal alternatives. One is to take the issue to the legislature by contacting local representatives and educating them to the obvious and equitable merits of this concept. Legislation could then be drawn and acted upon.

The other option is to create a solid record at trial and take the issue up on appeal. The keys to an effective appeal would include selecting an appropriate case, presenting sufficient evidence on the issue and proposing a well crafted charge to the jury.

1. The Appropriate Case: An appropriate case might be easier to describe than to find. After all, the plaintiff would oppose the effort as might a co-defendant likely to suffer an adverse result from apportionment of damages. Additionally, a defendant with a winnable case on liability is unlikely to present the evidence necessary for an appeal if it might appear to a jury to be an admission of some minor contribution to the plaintiff's damages. However, in a case of multiple defendants where liability is admitted or otherwise a foregone conclusion as to each defendant and where the co-defendants are not bound by any indemnification agreements, apportionment of damages might arise as an important issue.

For example, by way of a hypothetical case, assume liability is admitted or will certainly be established as to each defendant in an automobile wreck case. The defendants might include a drunken driver, the manufacturer of defectively designed seat belts in the plaintiff's vehicle, and the manufacturer of a defectively manufactured brake system in the defendant's vehicle. The plaintiff is seriously and permanently injured, suffering significant damages. The defendant driver proximately caused the accident but has only minimal liability insurance and no substantial assets. The product defects did not cause the accident but proximately caused the plaintiff's injuries to be enhanced. The two vehicles and the components in question were manufactured by separate and unrelated manufacturers. The plaintiff's fault was minimal, if any. Obviously, cases like this are not at all common.

However, the issue of apportionment of fault could be important if you represented such a manufacturer defendant who contributed only insignificantly to the damages of the plaintiff. The issue achieves even greater importance in light of the drunken driver's inability to pay a portion of the damages commensurate with his contribution to the plaintiff's injuries.

2. The Record At Trial: Once such an appropriate case is headed for trial, it will be necessary to create a strong record for a possible appeal. Specifically, evidence must be presented from which a jury can apportion fault and damages between the defendants. This evidence might include testimony from an accident reconstruction expert who describes and opines as to which of these factors contributed to the different aspects of the accident. It might also include testimony from a bio-mechanics expert, generally a specialized physician who works with the accident reconstruction expert to determine the degrees to which the injuries of the plaintiff were caused by the various contributing factors. This expert might offer an opinion as to the extent to which the plaintiff's injuries were enhanced by the separate product defects.

Without such evidence, the trial judge would have no basis for charging the jury with apportionment of damages and there would be no other basis for arguing that such a charge was appropriate. In the event the trial court refuses to admit such testimony into evidence, it should be proffered outside of the presence of the jury.

3. The Charge To The Jury: Finally, a jury charge on apportionment of damages must be requested. The Honorable Tom J. Ervin, in Ervin's South Carolina Requests to Charge - Civil, addresses the concept of apportionment of damages between defendants in an excellent negligence charge which has been utilized in litigation involving the Tort Claims Act. The charge, which would be appropriate in any apportionment of damages case, states in pertinent part:

> Each defendant shall be liable for that proportion or percentage of the total amount awarded as damages for which he is responsible. For example, if there are two defendants and you find the first to be 35% negligent and the other to be 25% negligent and the plaintiff to be 40% negligent, then the first defendant must pay 35% of the damages to the plaintiff and the second defendant must pay 25% of the damages to the plaintiff.

(T.J. Ervin, Ervin's South Carolina Requests to Charge - Civil, General Negligence, Section 23-4 (1994)).

Because South Carolina courts have yet to adopt and implement apportio ment of damages in cases which do not involve the Tort Claims Act, trial judges would most likely refuse to charge the jury on this point. (See, Southeastern Freight Lines v. Hartsville. S.C. , 443 S.E.2d 395 (1994), which appears to repeal portions of the Tort Claims Act.) However, a defendant seeking to raise the issue should present the instruction to the Court and request that it be charged. Exception should then be taken to the Court's failure to charge.

PRACTICAL POINTERS:

As a practical matter, it would be prudent to informally advise the Court and the other counsel of record of your intent to raise this issue at trial. Although counsel for the plaintiff and counsel for a more blameworthy defendant may object, such advance notice would better enable all parties, including particularly the trial judge, to create a clean record from which to appeal. It might also be beneficial to emphasize that the actual objective is not to discover and establish error on the part of the trial court, particularly given the fact that apportionment of damages is not yet the law of South Carolina. Instead, it should be made apparent that the issue appears to be one of first impression in South Carolina and that, as such, it should be presented to and decided by the Supreme Court.

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SOUTH CAROLINA DEFENSE TRIAL ATTORNEY ASSOCIATION

DEFENSE LINE ARTICLES INDEX

THE NEW RULES OF EVIDENCE– IMPORTANT CHANGES IN SOUTH CAROLINA LAW

THOMAS K. BARLOW

CHILDS & DUFF, P.A.

The new South Carolina Rules of Evidence (SCRE) became effective on September 3, 1995, replacing the often uncertain and generally outdated common law rules of evidence that the state's attorneys and judges relied upon for more than two centuries. This important enactment finally provides a codified, predictable set of evidence rules, and brings this state's courts into line with the federal courts and the thirty-eight other states that have adopted a version of the Federal Rules of Evidence. Since almost four-fifths of the other states have already adopted a version of the federal rules, South Carolina attorneys will have a large body of state and federal case law to aid them in interpreting and applying the new rules. This article summarizes the provisions of the new South Carolina Rules of Evidence that significantly change prior evidence rules under the common law. The South Carolina Supreme Court did not adopt the Federal Rules of Evidence verbatim, and some discrepancies between the two sets of rules exist. To a lesser extent, this article will point out these discrepancies and the likely reasons for the Supreme Court's adoption of language inconsistent with the federal rules.

I. RULES 404 AND 405– CHARACTER EVIDENCE

Rule 404(b) of the Federal Rules of Evidence allows litigants to admit evidence of other crimes, wrongs, or acts to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, intent, or for any other relevant purpose. The list of situations that justify the admission of other crimes, wrongs, or acts is not meant as an exclusive list. It merely provides examples of situations when character evidence will be useful or necessary to prove an element of a claim or defense. In contrast to the federal rule, the corresponding new South Carolina rule limits the admission of other crimes, wrongs, or acts to the situations listed in the rule; the catch-all exception that provides for the admission of character evidence "for any other relevant purpose" has been eliminated. This omission is consistent with the prior South Carolina common law rule set forth in State v. Lyle, 125 S.C. 408, 118 S.E. 803 (1923) and Citizens Bank of Darlington v. McDonald, 202 S.C. 244, 24 S.E.2d 369 (1943) (making Lyle applicable to civil cases).

SCRE 405 sets forth the methods for offering character evidence admissible under Rule 404. The new rule allows a witness to offer testimony as to reputation, or testimony in the form of an opinion about the other party's character. Under prior South Carolina law, only testimony as to a person's reputation was admissible. Opinion testimony clearly was not admissible. State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); In re Greenfield's Estate, 245 S.C. 595, 141 S.E.2d 916 (1965).

II. RULE 406– HABIT

The note following SCRE 406 indicates that some prior South Carolina cases might have implied that evidence of habit or routine was only admissible if no eyewitness saw the transaction take place. See Laney v. Atlantic Coast Line Rail Co., 211 S.C. 328, 45 S.E.2d 184 (1947); State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926); Dowling v. Fenner, 131 S.C. 62, 126 S.E. 432 (1922). The new rule eliminates any uncertainty that these decisions might have created; evidence of habit or routine is now admissible regardless of the presence of an eyewitness.

III. RULE 409– PAYMENT OF MEDICAL EXPENSES

SCRE 409 provides that evidence of an offer or promise to pay medical expenses occasioned by an injury may not be admitted to prove liability for the injury. This changes prior law, in that an offer to pay medical expenses was previously admissible if circumstances indicated that the offer or promise was an admission of liability rather than an act of benevolence. Crosby v. Southeast Zayre, Inc., 274 S.C. 519, 265 S.E.2d 517 (1980). The new rule eliminates the inherent difficulty involved in distinguishing between acts which are merely benevolent, and acts that should be considered admissions of liability. The new rule also alleviates any chilling effect that the prior rule might have had on a party's desire to perform an act of benevolence, and thus, encourages payment of the injured party's expenses.

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IV. RULE 601– COMPETENCY OF WITNESSES

Under prior law, the proponent of the testimony of a child witness under the age of fourteen was required to establish competency by showing that the child was capable of understanding and communicating her testimony to the judge or jury, and that the child was capable of understanding the duty of a witness to tell the truth. The new rule changes the burden of proof; now, the witness is presumed competent and the opponent of the testimony has the burden of establishing incompetency. Additionally, Rule 601(b) provides:

> A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

This codifies the common law competency test and adds language to the federal rule, which does not contain a subsection (b). The adoption of this section reflects the modern view that all relevant testimony should be admitted. It is the jury's duty to determine the credibility of the witness; judges should avoid interfering with this role except in special circumstances. This rule ends the prior practice of automatically excluding the relevant testimony of certain witnesses, and requires the judge to conduct an individualized inquiry before declaring a witness incompetent.

V. RULE 607– IMPEACHMENT OF WITNESSES

Under South Carolina common law, a party was only allowed to impeach his own witness if that witness was first declared hostile upon a showing of actual surprise and harm, or unless the impeaching party was required to call the witness. See State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991); Hicks v. Coleman, 240 S.C. 227, 125 S.E.2d 473 (1962); White v. Southern Oil Stores, Inc., 198 S.C. 173, 17 S.E.2d 150 (1941). Under the new rule, "the credibility of a witness may be attacked by any party, including the party calling the witness."

VI. RULE 609– IMPEACHMENT BY EVIDENCE OF CONVICTION OF A CRIME

The new rule changes prior South Carolina law in two respects. First, Rule 609 allows the admission of evidence of a crime punishable by death or imprisonment in excess of one year, or evidence of a crime involving dishonesty or false statement, regardless of the punishment. Previously, a conviction for a crime involving "moral turpitude" could be admitted to impeach a witness. The new rule provides a clear-cut guideline for trial judges and eliminates the need to delve into the somewhat imprecise concept of "moral turpitude." Professor Walter A. Reiser, Jr.'s 1993 Comparison of the Federal Rules of Evidence with South Carolina Evidence Law illustrates the difficulty of determining whether a crime involves "moral turpitude." Professor Reiser cites South Carolina cases in which the appellate courts have upheld the admission of evidence of convictions for the following offenses as involving "moral turpitude": robbery, housebreaking, larceny, hit and run driving, forgery, making illegal whiskey, arson, criminal sexual conduct with a minor in any degree, possession of marijuana with intent to distribute, manufacturing marijuana, and simple possession of cocaine.

On the other hand, convictions of the following crimes were held inadmissible because they did not involve "moral turpitude": public drunkenness, a first offense of driving under the influence, breach of the peace, disorderly conduct, resisting arrest, driving without a license, possession of an unlawful weapon, involuntary manslaughter, simple possession of marijuana, manslaughter committed while escaping from jail, and bookmaking. Although it seems that the new rule hinders a trial judge's flexibility to take all circumstances surrounding a crime into account in determining whether evidence of the crime should be admitted to impeach a witness, the incongruous holdings detailed above suggest that too much flexibility has led to unpredictability. SCRE 609 provides a precise, predictable standard, and preserves the trial judge's discretion to exclude evidence of prior crimes under Rule 403 if the evidence of the conviction is more prejudicial than probative.

Second, the new rule prevents a party from introducing evidence of a conviction more than ten years old, unless advance written notice is given to the party who intends to call the witness. South Carolina cases such as Green v. Hewett, 305 S.C. 238, 407 S.E.2d 651 (1991), set no time limit on the use of convictions for impeachment purposes. According to the Note following SCRE 609(b), the ten-year limit was adopted to aid trial courts in making uniform determinations of admissibility, and to eliminate the need for trial judges to make difficult determinations of whether convictions are too remote to be relevant.

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VII. RULE 801(D)– STATEMENTS WHICH ARE NOT HEARSAY

A. RULE 801(D)(1)– PRIOR STATEMENT BY WITNESS

Under prior law, if the declarant testified at a trial or hearing and was subject to cross examination, the statements that the declarant made as a witness were admissible in a later proceeding regardless of the nature of the statements. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984). This broad rule considered any statement made at a trial or a hearing as non-hearsay, but the new rules significantly narrow this approach. Under SCRE 801(d)(1), the statement must fit into one of five categories before it can be considered non-hearsay. The statement must be: "(A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and offered to rebut an express or implied charge of recent fabrication or improper influence or motive... (C) one of identification of a person made after perceiving the person, or (D) consistent with the declarant's testimony in criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident," or an admission of a party opponent under 801(d)(2).

VIII. RULE 803(1) AND (2)– HEARSAY EXCEPTIONS

Before the new rules, South Carolina followed the "res gestae" doctrine. A hearsay statement could only be admitted under this common law exception if the declarant made the statement "substantially contemporaneous with the litigated transaction, and [the statement was one of] the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction," so that the circumstances surrounding the statement preclude the idea that the statements were self-serving or false, or allowed the declarant time for reflection. State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); Bain v. Self Memorial Hosp., 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984). In order to satisfy the res gestae exception, the statement had to be both a present sense impression and an excited utterance– the equivalent of meeting both rules 803(1) and (2) of the federal rules. See State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989); SCRE 803, Note. For example, a statement describing an event or condition would not be admissible as res gestae if the event or condition which the declarant was describing was not startling. The adoption of Rules 803(1) and (2) should provide for the admission of many more present sense impressions, since the event described no longer must be startling.

IX. RULES 803(16) AND 901(8)– ANCIENT DOCUMENTS

A document had to be at least 30 years old, under prior evidence law, before it could be admitted into evidence without an authenticating custodian. Atlantic Coastline R.R. Co. v. Searson, 137 S.C. 468, 135 S.E. 567 (1926); Johnson v. Pritchard, 302 S.C. 437, 395 S.E.2d 191 (Ct. App. 1990). SCRE 901(8) provides for the admission of documents that are at least 20 years old without an authenticating custodian or other evidence of authenticity, and SCRE 803(16) provides that statements contained in ancient documents are not excluded by the hearsay rule.

X. RULE 804(B)(2)– HEARSAY EXCEPTIONS– DYING DECLARATIONS

Previously, a statement made by the declarant while under a belief of impending death could only be admitted in a criminal case. See Sligh v. Newberry Elec. Co-op, 216 S.C. 401, 58 S.E.2d 675 (1950). Further, the declarant was required to actually have died from the cause that the statement indicated. State v. Dawson, 203 S.C. 167, 26 S.E.2d 506 (1943). The new rule substantially liberalizes the use of dying declarations, making them admissible in civil cases and eliminating the requirement that the declarant actually perish from the cause of impending death that he relates to the listener. This change in the law will be especially important in personal injury and wrongful death cases, where dying declarations were previously inadmissible.

XI. CONCLUSION

How will the adoption of the new South Carolina Rules of evidence affect trials in the South Carolina circuit courts? On the eve of the adoption of the Federal Rules of Evidence, Wright & Graham offered this observation:

> At least in the short run, cases will be tried as they have before while judges and lawyers learn to accommodate themselves to a codified system of evidence. Once having learned to use the new rules, lawyers will begin to tell each other lies about how awful it was under the old system and wonder how they ever managed. Wright & Graham, Federal Practice & Procedure, Evidence § 5007 (1977). After the bumpy break-in period, the new South Carolina Rules of Evidence should prove to be a vast improvement over the patchy, uncodified decisional rules that attorneys and judges have attempted to make sense of up to this point.

DRI NEWS

DRI has adopted a plan of reorganization that will have significant impact on the way the SCDTAA and DRI will be able to work together to advance the objectives of the defense community. This reorganization will directly impact DRI's governing structure and the composition of its Board of Directors. DRI has determined that one-third of its Board of Directors will be nominated by nominating committees from each of the 11 DRI geographic regions and then elected by DRI members within each region. In other words, each region will have a spot on the Board, and members will directly elect their region's director. Each regional nominating committee will be composed of representatives from qualified state and local defense groups in the region (including the SCDTAA).

Another one third of the Board of Directors will be nominated by the National Nominating Committee and elected by the then current Board. It is anticipated that some of these nominees will be chairs of the DRI Practice and Substantive Law Committees and others who have provided outstanding service to the DRI. The National Committee may also select leaders from state and local defense organizations who may have been overlooked in the regional selection process. The final one-third of the Board will be comprised of the ex-officio members, including representatives from the International Association of Defense Counsel and DRI officers, among others.

This new Board structure is extremely significant to the members of the SCDTAA because it allows members of our association to directly impact the composition of the Board of Directors that governs this national defense organization.

In order for the SCDTAA to remain a qualified organization, capable of selecting the nominators from South Carolina, individual membership in DRI is crucial. In order to remain a qualifying organization, we must maintain a significant percentage of SCDTAA members who are also DRI members. To help increase membership in DRI, DRI has offered two membership incentives: a free one-year membership in DRI to first time members of the SCDTAA or a half price DRI membership to individuals who already belong to the SCDTAA but not to DRI. All SCDTAA members should take this opportunity to join DRI, not only so that our association can continue to have a strong voice in DRI, but also because of the valuable benefits that are available from DRI at these reduced rates.

In addition, all members of DRI are invited to attend DRI's first annual convention in Chicago, which will be held from October 9-13, 1996. This annual meeting will include seminars, workshops for state associations, DRI substantive committee meetings, and the first opportunity for the grassroots membership of DRI to participate in the nominating process for the election of officers.

This past August, DRI Board member Carl Epps hosted the DRI mid-Atlantic regional meeting in Greensboro. This meeting was attended by the presidents and other executive committee members of the defense associations from the District of Columbia, Maryland, Virginia, North Carolina and South Carolina. Various DRI officers and state chairs were also present and moderated discussions on ethics in billing, training associates, marketing, as well as substantive updates on certain national issues of interest to state defense associations.

Finally, it was my pleasure at our association's annual meeting at the Cloister to present outgoing president Mike Wilkes with the DRI Exceptional Performance Award in recognition of the SCDTAA's leadership and contributions to the defense community.

David E. Dukes
South Carolina State DRI Chair
803/733-9451

TIME TO ACT
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The Compelling Equity:

Although South Carolina's Contribution Among Tortfeasors Act remains in effect, the implementation of comparative negligence clearly raises the question of whether apportionment of damages would be similarly appropriate. If South Carolina's legal system seeks merely to redistribute wealth as compensation to those injured and damaged, then the process should remain unchanged. However, if the underlying equities of comparative negligence are consistent with the notion of equitably apportioning damages in direct relation to the liability and responsibility of negligent defendants, then the system needs a corrective adjustment.

Thus, presenting the matter to the legislature or taking the issue up on appeal would provide all litigators, litigants and trial judges with valuable direction and guidance in the administration of the rights of litigants and in the conduct of a multi-defendant trial.

The equitable allocation of responsibility and damages between parties, which is the justification for the doctrine of comparative negligence, is equally as compelling when applied to the doctrine of apportionment of damages between defendant wrongdoers. Perhaps the time has come to take up the challenge and provide the legislature and/or the Courts with the opportunity to address and decide the important issue of apportionment of damages.

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CONVENTION HIGHLIGHTS

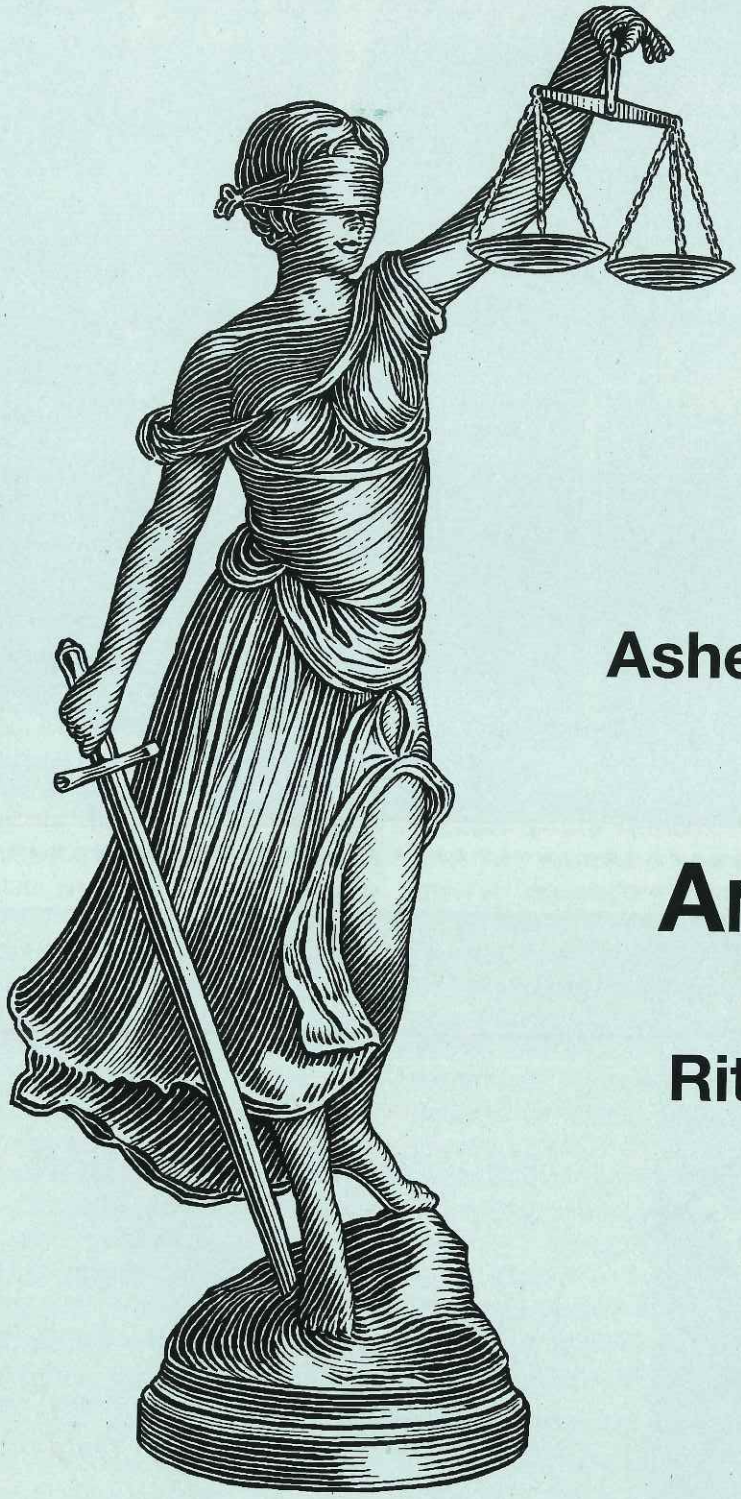
Trial Academy Contributes to

USC Educational Foundation

Clarke McCants presents Dean John Montgomery with a contribution to the USC Educational Foundation. This contribution recognizes the Law School's support of the 1995 SCDTAA Trial Academy. *Left to right: Clarke McCants, Dean John Montgomery and John Bell*

CLE SEMINAR

NOVEMBER 15, 1996



JOINT MEETING

July 25-27, 1996
Grove Park Inn
Asheville, North Carolina

ANNUAL MEETING

November 7-9, 1996
Ritz Carlton Buckhead
Atlanta, Georgia