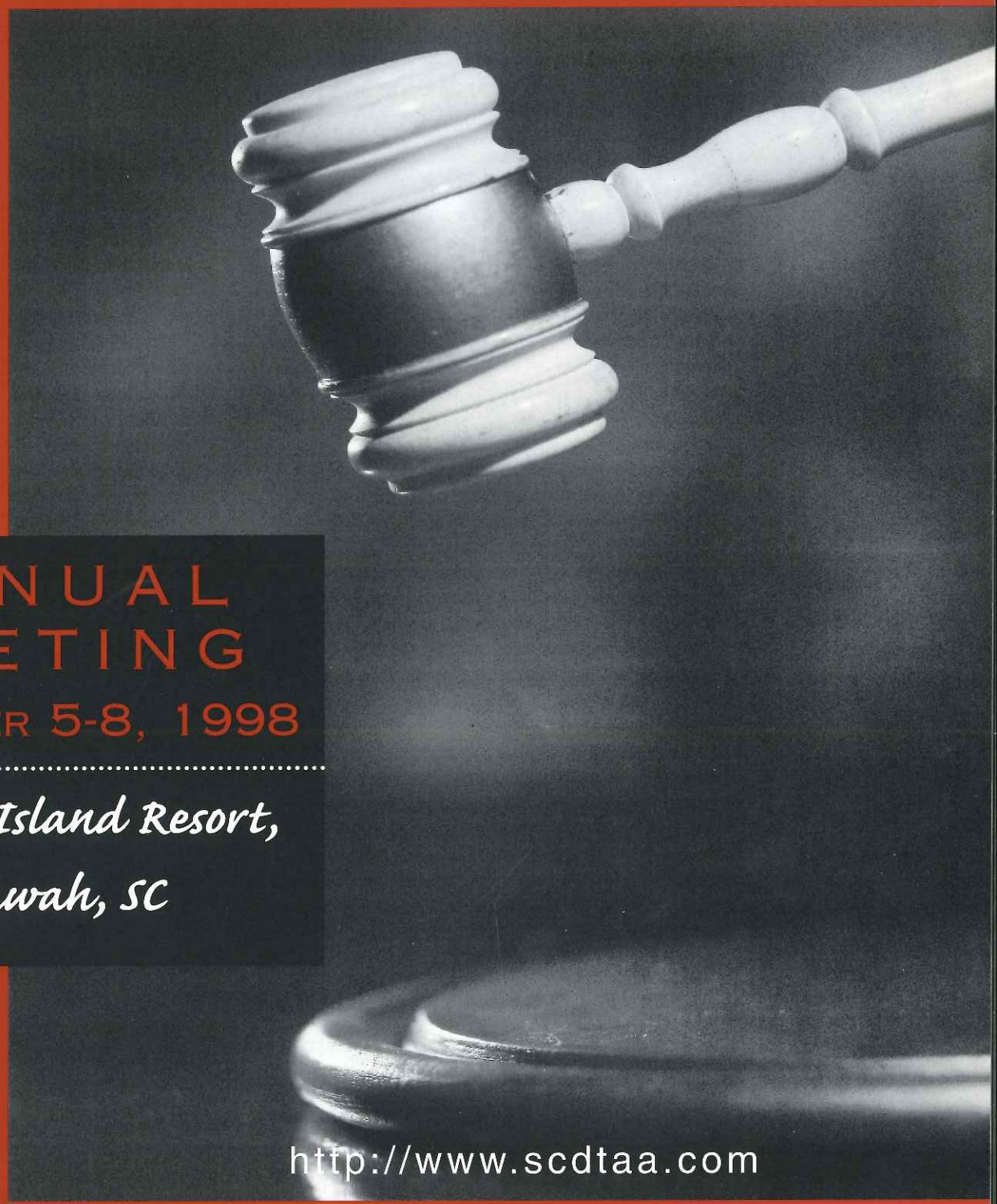
S.C. Defense Trial Attorneys' Association

Volume 26 Number 3 • Fall, 1998

The DefenseLine



ANNUAL MEETING

NOVEMBER 5-8, 1998

Kiawah Island Resort,

Kiawah, SC

http://www.scdtaa.com

SOUTH CAROLINA DEFENSE
TRIAL ATTORNEYS' ASSOCIATION

ANNUAL MEETING

NOVEMBER 5-8, 1998 • KIAWAH ISLAND RESORT • KIAWAH, SC

SCHEDULE OF EVENTS

THURSDAY, NOVEMBER 5, 1998

3:00 to 5:00 pm	Executive Committee Meeting
4:00 to 6:30 pm	Registration
5:00 to 6:00 pm	Nominating Committee Meeting / Substantive Law Committee
7:00 to 8:00 pm	Welcome Reception honoring Trial Academy Graduates and Faculty

Dinner On Your Own

FRIDAY, NOVEMBER 6, 1998

8:00 am to Noon	Late Registration
8:00 to 9:00 am	Coffee Service
8:15 to 8:30 am	Welcome and Announcements - William S. Davies, Jr., SCDTAA President
8:30 to 9:30 am	Ethics - Professor John P. Freeman
9:30 to 10:30 am	Virtual Reality, Its Use in the Courtroom and in an Appellate Setting - Colleen Scherkenbach, Phoneix, AZ
10:30 to 10:45 am	Coffee Break
10:45 to 12:15 pm	Breakouts - A. Workers' Compensation - Patrick Fant B. Employment Law - Scott Justice C. Healthcare Law - Beverly Carroll D. Products Liability - Robert Brunson
1:00 pm	Golf Tournament
1:00 pm	Fishing
2:00 pm	Tennis Tournament
7:00 - 10:00 pm	Cocktails and Dinner at Mingo Point

SATURDAY, NOVEMBER 7, 1998

8:00 to 9:00 am	Coffee Service
8:00 to 8:30 am	SCDTAA Annual Business Meeting/DRI Report
8:30 to 9:00 am	A Look at Recent Decisions and Upcoming Legislative Topics - Jay Courie
9:00 to 9:45 am	Jed S. Ringel, President, Law Audit Services, Wilton, CT.
9:45 to 10:00 am	State of the Judiciary - Chief Justice Ernest Finney
10:00 to 10:15 am	Coffee Break
10:15 to 11:15 am	It's a Long Way to Richmond or Columbia and Back Again (State and Federal Judges as Panel Members) - William M. Grant, Jr.
10:15 - 12:15 pm	Breakouts A. Workers' Compensation - Patrick Fant B. Employment Law - Scott Justice C. Trade Secrets - Cherie Blackburn
11:15 to 12:15 pm	Evidence Issues (Federal and State Judges Panel) - E. Warren Moise
7:00 to 8:00 pm	Cocktail Reception (Black Tie Optional)
8:00 to Midnight	Dance to the Music of the Catalinas

SUNDAY, NOVEMBER 8, 1998

10:00 to 11:00 am	Farewell Reception Honoring William S. Davies, Jr.

The DefenseLine

Ten Years Ago

Kiawah Island was the site of our Annual Meeting held October 27, 1988. Associate Justice DAVID HARWELL reported on the state of the judiciary. Chief Judge ALEX SANDERS of the Court of Appeals and G. DUFFIELD SMITH, JR., President-Elect of DRI, also addressed our meeting. Our entire program outstanding attorneys, STEVEN SALTZBURG, Deputy Assistant Attorney General at the Department of Justice, along with GREGORY P. JOSEPH of the New York firm of FRIED, FRANK, HARRIS, SHIVER and JACOBSON. The Saturday feature was MARK A. DOMBROFF, Esq. of Washington, who educated us on "dirty tricks and unfair tactics." The Honorable VICTOR C. RAWL of the SC Workers Comp Commission, addressed the breakout session for worker's compensation.

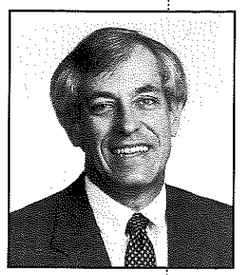
Officers elected at the 1988 Annual Meeting were FRANK H. GIBBS, III, President; MARK H. WALL, President-Elect; GLENN BOWERS, Secretary; WILLIAM M. GRANT, JR., Treasurer; CARL B. EPPS, III, of course, was the immediate Past-President. HAROLD W. JACOBS was the recipient of the first annual Hemphill Award. Note was taken of the fact that DONNA McINTOSH ROBINSON of Columbia, was elected President of the S.C. Claims Association.

Twenty Years Ago

The 1978 Joint Meeting of the Defense Trial Attorneys' and Claims Management Association combined and performed a program with fine entertainment. The meeting was the best attended to date with some 100 attorneys and claims managers enjoying the hospitality of the Grove Park Inn, Asheville, North Carolina. The program included updates from Workmans Compensation and legislative activity. Other sessions of the agenda were devoted to structured settlements and aggressive trial techniques. President MACK TIMMERMAN of the Claims Management Association deserved special thanks for his leadership as did MARK BUYCK, President of the SC Defense Trial Attorneys' Association. GENE ALLEN reported on the Eleventh Annual Meeting which would be our first meeting to Kiawah Island.

President's Letter

William S. Davies, Jr.



Your Association has concluded two highly successful programs since the last issue of *The Defense Line*. The Trial Academy and the Joint Meeting were both tremendous successes. The members of this organization who were responsible should be thanked and congratulated by all of us.

The Trial Academy was held July 8-10 in Columbia. Presentations on the first two days were at the law school with the mock trials being held Friday at the Richland County Courthouse. Clarke McCants, Matt Henrickson, and Skip Utsey did a wonderful job as co-chairs on this committee. They were assisted tremendously by Cris Malseed of Nelson Mullins Riley & Scarborough. John Bell was also quite helpful in obtaining the Richland County Courthouse through the Clerk of Court, Barbara Scott. John also helped in obtaining excellent judges for the mock trials to include Judge J. Ernest Kinard, Jr., Judge Thomas W. Cooper, Jr., Judge Costa M. Pleicones, Judge L. Henry McKellar and Judge James R. Barber, III. Justice Jasper M. Cureton of the South Carolina Court of Appeals also participated with a discussion on Protecting the Trial Record. An outstanding faculty agreed to participate at no charge. Two past presidents of this organization, Wade Logan of Charleston and Bruce Shaw of Columbia, gave presentations which were well received by all. A number of other leading lawyers participated.

The highlight of the Academy was the mock trial competition on the final day. The five trials each used a new case scenario which was primarily prepared by Matt Henrickson. The case involved all the legal issues which might possibly arise from a game injury resulting in the death of a college football player. Witnesses included doctors, football officials and football coaches. Cris Malseed was able to get volunteers who are actually football coaches and officials to play those parts. This certainly added realism to the presentations. Each trial was held before one of the judges and at least ten jurors. Additional realism was added by the fact that one of the judges had a tee time of 3:00 that afternoon and was hurrying the case along, and another changed the courtroom shortly before the trial was to start.

Programs similar to our Trial Academy are not easy to find. This is our eighth year of presenting this opportunity to young lawyers in the state. The overall program has improved every year it has been presented. Any young lawyer would find that there is a tremendous opportunity for learning and experience to be gained from spending three days even in Columbia's heat.

The Joint Meeting of the South Carolina Defense Trial Attorneys' Association and the Claims Managers Association of South Carolina was held July 23-25 at the Grove Park Inn Resort in Asheville, North Carolina. The program chairs responsible for this meeting were Steve Darling, Sam Outten, and David Rheney. The program itself was a joint effort between members of both of the organizations involved. The result was outstanding and appealed to both lawyers and claims managers.

We were lucky in having Judge William B. Traxler, Jr. address a very important topic in an irreverent manner as he talked on "Great Ways to Lose Your Motions." Not to be outdone, Judge Henry M. Herlong, Jr. made an outstanding presentation on "Courtoom Technology Now and in the Future" which included some interesting audio-visual portions. As well as the backbone portions of the program, there were several very well done breakout sessions which allowed us to address particular practice areas.

Coincident with the Joint Meeting of the Defense Attorneys and the Claims Managers, the Defense Research Institute held its Mid-Atlantic Regional Leadership Conference at the Grove Park. Officers of our association attended with the officers of the major defense organizations from the District of Columbia, Maryland, Virginia and North Carolina. One of the main focuses of the DRI meeting was the issue of third party audits being required by insurance companies. This is a national concern in which South Carolina and a number of other states have issued advisory ethics opinions. A very lively discussion on this topic occurred in the DRI meeting and Professor Robert M. Wilcox discussed the same topic in the Joint Meeting. Members of the DRI meeting attended some of the meetings of our organization.

The most important event sponsored by our Association every year is the Annual Meeting. This year's meeting will be held at Kiawah on November 5-8. We will again be inviting all of the state and federal trial and appellate judges as our guests for two nights of the meeting. Please sign up as soon as you receive the registration materials. This should be an outstanding program, chaired by Will Davidson and the opportunity to meet with the judges is unparalleled. I look forward to seeing you at Kiawah.

Unbuckling the Evidentiary Restraints of the South Carolina Seat Belt Statute

by Elbert S. Dorn,
Turner, Padget, Graham & Laney, P.A.

It seems indisputable that a vehicle occupant's utilization of a seat belt is the singlemost, overriding factor to prevent or reduce the risk of ejection, serious injury, or death in a vehicular accident. The national statistics in support of this notion are overwhelming. Depending on the type of vehicle and location of the occupant, seat belts reduce the risk of fatal injury by 45 to 60 percent and the risk of moderate-to-critical injury by 50 to 65 percent.[1] *The "Highways or Dieways"* and *"Buckle Up"* campaigns vividly portray the untoward consequences of not wearing a safety restraint. Newspaper articles appear daily which chronicle serious accidents and specifically point out the failure of victims to wear seat belts. Although seat belt use cannot prevent an accident, it can prevent ejection and reduce the occurrence or extent of resulting injury. Notwithstanding the political issues of personal choice and liberty from governmental regulation, an individual's decision not to wear a seat belt violates the law and, based on empirical data, amounts to the assumption of known risks of enhanced and even fatal injuries.

Yet, as evident and well-known as the adverse consequences of not wearing a seat belt may be, a South Carolina statute prohibits a defendant from introducing evidence of a plaintiff's failure to wear a seat belt.[2] This seems unfair in any case which involves personal injury arising from a vehicular accident.[3] It is particularly unjust in "crashworthiness" cases where the very issue before the fact finder is the ability of the vehicle to prevent or reduce enhanced injury in an accident. This article is dedicated to assisting the defense practitioner overcome the gag of the seat belt statute, particularly in "crashworthiness" and related cases.

The South Carolina seat belt law provides, in relevant part, that "the driver and every occupant of a motor vehicle, when it is being operated on the public streets and highways of this State, shall wear a fastened safety belt which complies with all provisions of federal law for their use."[4] The same statutory scheme, at 56-6-6540, also provides that a "violation of this article [entitled "Safety Belts"] does not constitute negligence per se or contributory negligence and is not admissible as evidence in a civil action."[5] No South Carolina appellate decision has addressed the seat belt law since its passage almost ten years ago. In *Keaton v. Pearson*,[6] which pre-dated the seat belt statute, the South Carolina Supreme Court held that "in the absence of an affirmative statutory duty, a plaintiff's failure to use a seat belt does not constitute contributory negligence or a pre-injury failure to minimize damages," thereby dodging the imposition of a common law duty but implying that the violation of an existing statutory duty would constitute contributory negligence and a failure to mitigate damages.[7] Thus, the *Keaton* court declined to judicially impose a penalty on those who fail to wear a seat belt but invited the state legislature to do so.[8] Unfortunately, as evidenced by the above-cited statutory language, the legislature imposed a seat belt requirement which is enforced under the penal code but the violation of which has no effect on the civil side.

Because there is no appellate decision interpreting the seat belt statute, its full influence on

Continued on page 6

Continued from page 7

civil litigation is unsettled. The following provides a summary of various arguments to avoid or minimize any gag effect of the seat belt statute.

1. The Seat Belt Statute is Outmoded by the Adoption of the Comparative Negligence.

When the legislature enacted this statute in 1989, a plaintiff's contributory negligence in the slightest degree was a complete defense under South Carolina law. The gag provision of the seat belt law was undoubtedly designed to protect an injured person against the harshness of the contributory negligence bar. By its terms, it prevented a defendant from proving a plaintiff's contributory negligence or negligence per se by introducing evidence that a plaintiff violated the mandatory seat belt statute. If the statutory violation were admissible, it would effectively bar a plaintiff from recovery under the contributory negligence doctrine because violation of a statute constitutes negligence per se. However, in 1991, the South Carolina Supreme Court, in *Nelson v. Concrete Supply Company*,[9] abrogated contributory negligence in favor of comparative negligence. Under *Nelson*, a plaintiff has a much wider latitude of potential recovery notwithstanding his own causative negligence. Accordingly, the original objective behind the gag clause of 56-5-6540 has been displaced by the judicial adoption of comparative negligence.[10] Likewise, the proscriptions contained in the statute are outmoded when sought to be applied in the realm of comparative negligence. Because the statute speaks in terms of "contributory negligence," it has no application in a system of comparative negligence. The plaintiff's failure to use a seat belt should be weighed in the equation of comparative negligence.

2. The Seat Belt Law Only Prohibits Evidence of a Statutory Violation, Not Seat Belt Non-Usage..

The seat belt statute does not prevent the admissibility of a plaintiff's failure to wear a seat belt. A well-established rule of statutory construction is that a court must interpret a statute according to its plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.[11] Further, where the terms of a statute are clear, the court must apply those terms according to their literal meaning.[12] The statute does prohibit admitting evidence of "a violation of this article" in a civil action. It does not, however, bar evidence of the failure to wear a seat belt. Cf. N.C.Gen.Stat. 20-135.2A(d)(1995)("evidence of a failure to wear a safety belt shall not be admissible in any criminal or civil trial, action or proceeding except in an action based on a violation of this section.") (emphasis added).

Thus, it can be argued that, under a literal reading of the statute, it only prevents the defendant from introducing evidence that a plaintiff violated the law by not wearing a seat belt. While the statute would prevent a defendant from arguing that the violation of this traffic code demonstrates negligence per se on the part of the plaintiff, it should not prevent evidence of seat belt non-usage where there is no reference made to the statute itself requiring seat belt use.

3. The Seat Belt Statute Only Prevents Evidence of Non-Usage to Show Contributory Negligence or Negligence *Per Se*.

Even if the above argument fails and a court gives broader effect to the statutory language than its literal reading so as to exclude evidence of seat belt non-usage, a good argument can be made that evidence of seat belt non-usage should only be excluded where it is intended solely to show contributory negligence or negligence per se. The language of the statute itself is couched in the terms of contributory negligence and negligence *per se*. It makes no mention of the numerous other legal principles to which seat belt non-usage would be relevant. For example, failure to wear a seat belt is relevant to the issues of assumption of the risk, product misuse, proximate causation, failure to mitigate damages, and the mechanics of injury. See, *Barron v. Ford Motor Company of Canada Ltd.*, 965 F.2d 195 (7th Cir. 1992) (interpreting North Carolina's total bar on evidence of failure to wear a seat belt as limited to issue of plaintiff's negligent failure to mitigate the consequences of the accident and allowing evidence for other purposes).

4. The Seat Belt Law Does Not Prevent Evidence of Seat Belt Non-Usuage in Crashworthiness Cases.

Automotive product liability cases, particularly of the "crashworthiness" variety, provide the most compelling setting for the admissibility of seat belt evidence. In a crashworthiness case, the claim is that the manufacturer failed to use reasonable care in designing its crash protection system to prevent injuries. The test for a design defect is whether the product was unreasonably dangerous taken as a whole. When examining the safety of the product as a whole, the availability of safety devices is an essential consideration. The seat belt is an integral and crucial part of any vehicle's crash protection and occupant restraint system. A jury cannot give meaningful consideration to the adequacy of the crash protection system's design without considering the seat belts. In *Gardner v. Chrysler Corp.*,[13] the Tenth Circuit held "it is the fact that Chrysler designed an occupant restraint system that included the seat belt which we cannot foreclose Chrysler from establishing in this case."[14] Similarly, the Michigan Supreme Court explained:

> Evidence of the seat belt restraint system goes to the heart of the issue in crashworthiness cases in which the plaintiff's injuries are sustained after being ejected, a result which seat belts are specifically designed to prevent . . . . Evidence of product safety features specifically designed to prevent the injuries complained of is entirely relevant to this issue. No reason, even arguably sound, exists for excluding such evidence on this liability issue.[15]

The court in *Barron v. Ford, supra*, held that North Carolina's statute limiting evidence of seat belt use in civil actions did not affect the vehicle manufacturer's right to show that the vehicle was reasonably safe. In fact, the language of North Carolina's seat belt gag rule is even more restrictive than South Carolina's statute:

> Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers.[16]

Barron involved the rollover of a Ford vehicle with a sunroof. The plaintiff alleged that she was ejected because the sunroof used breakable, tempered glass. In short, the claim was that an unbelted occupant was ejected in a rollover solely because of the vehicle's design.

Judge Posner, who authored the *Barron* opinion, initially noted that a literal reading of the statute's language would preclude evidence of plaintiff's failure to wear a seat belt in all cases, but further noted that "the literal interpretation of North Carolina's rule . . . is almost certainly incorrect."[17] The court then went on to examine the purpose of the statute, which was to avoid penalizing individuals for failing to wear seat belts, because non-use was rampant in the state.[18] In holding that evidence about the presence of seat belts was admissible, the court explained:

> Ford's point was merely that the provision of seatbelts was a part of the automobile's overall restraint system, so that the reasonableness of making the sunroof of tempered rather than of laminated glass was a function in part of the other steps Ford had taken to prevent occupants from being flung out.[19]

Notably, Judge Posner further held that Ford could not effectively make this point without indicating that the plaintiff had not been wearing her seat belt since "if she had been and it had not kept her from flying through the sunroof Ford's argument about its total restraint system would fall flat on its face."[20] Thus, the manufacturer was permitted to show the existence of seat belts and plaintiff's failure to use a seat belt despite an unequivocal statutory gag on seat belt evidence.

Similarly, in *McElroy v. Allstate Ins. Co.*,[21] a

Continued on page 8

Continued from page 9

Louisiana appellate court stated that it was essential for the jury to take into account all features (including seat belts) designed in the automobile for the purpose of keeping passengers inside the vehicle in the event of a collision. More recently the Louisiana court restated this notion in even stronger terms:

> . . . admitting evidence of the plaintiff's failure to use seat belts in this products liability action does not result in unfair trial argument or undue prejudice to plaintiff. In fact, excluding the evidence would result in undue prejudice to [the manufacturer] since it would be prohibited from presenting evidence that the plaintiff failed to use the primary restraint system - i.e., the seat belt. [22]

In Whitehead v. American Motor Sales Corp.,[23] the Utah Supreme Court considered whether a plaintiff's failure to use seat belts was admissible in a crashworthiness case notwithstanding a statutory gag rule that precluded introduction of failure to use seat belts "as evidence in any civil litigation."[24] The court held that although Utah's statutory gag rule precluded the defendant from introducing evidence of the plaintiff's failure to use a seat belt to prove contributory negligence or failure to mitigate damages, "evidence of how the presence of the seat belts affected the design safety of the vehicle should be admitted."[25] Other favorable decisions on this issue are: Jordan v. General Motors Corp., 624 F. Supp. 72 (E.D. La. 1985) (holding seat belt evidence admissible to show whether automobile design was reasonably safe); Wilson v. Volkswagen of Am., Inc., 445 F. Supp. 1368 (E.D. Va. 1978) (same); Dapaepe v. General Motors Corp., 33 F.3d 737 (7th Cir. 1994).

5. Evidence of the Presence of Seat Belts and Plaintiffs' Failure to Wear Them is Admissible to Rebut Causation. .

Evidence of the availability of seat belts and plaintiffs' failure to wear them is admissible on the causation issue. Several courts have addressed this point:

> Even though plaintiff may not have had a duty to wear a seat belt, and even though contributory fault would not be relevant in a products liability action, a defendant may attempt to prove that the injuries were caused by something other than an alleged design defect.[26]

More recently, the Supreme Court of Delaware reached a similar conclusion in General Motors Corporation v. Wolhar27:

> Permitting a plaintiff to allege that she was injured by a defective vehicular design, while at the same time, preventing the defendant manufacturer from introducing evidence that that plaintiff's failure to use an essential safety device designed and supplied by the manufacturer was the supervening cause of the plaintiff's injuries, would essentially remove the issue of proximate cause in crashworthiness litigation.[28]

The court then concluded:

> Accordingly, we hold that because the plaintiffs are alleging that [the] enhanced injuries were proximately caused by a design defect in her vehicle, the defendants must be permitted to introduce seat belt evidence for the limited purposes of establishing: the safety design of the vehicle as a whole; and, that non-use of the seat belt, rather than the vehicle's seat design, was the supervening cause of those enhanced injuries.[29]

6. Excluding Evidence of the Availability of Seat Belts and Plantiffs' Failure to Wear Them Violates Defendant's Due Process Rights.

The Fourteenth Amendment to the United States Constitution provides that states may not deprive any person of property without due process of law.[30] Due process includes the right to a fair trial by jury. In a products liability action, South Carolina law affords manufacturers a number of defenses, including assumption of the risk, product misuse, and lack of proximate causation. These defenses provide a manufacturer with boxing gloves with which it can defend itself. A manufacturer could hardly defend itself in a crashworthiness case without utilizing seat belt evidence. A ruling to the contrary amounts to a deprivation of rights at the constitutional level. Although the constitutional argument may not carry the day at the trial court level, it should be raised to preserve the issues for any appeal.

7. The State Seat Belt Law Has No Application in Federal Court.

In federal court, an argument can be advanced that the South Carolina seat belt law sets an evidentiary rule which is inapplicable and pre-empted by the Federal Rules of Evidence. Under the analysis of *Erie v. Tompkins*,[31] and its progeny, a federal court sitting in diversity jurisdiction is required to apply state substantive law and federal procedural law.[32] Specifically, federal courts apply the Federal Rules of Evidence, as validly enacted federal rules, rather than state evidentiary rules.[33] Under the broad definition of relevancy in Rule 401 of the Federal Rules of Evidence, the failure of the plaintiffs to wear seat belts at the time of the accident is indisputably relevant, and thus should be admissible under Rule 402.34 To the extent that 56-5-6540(C) simply states a rule of evidence that is governed by the Federal Rules of Evidence, it has no applicability in a federal diversity case. Before the appropriate tribunal, this may be an appealing argument. However, it may be an uphill battle. While no federal court has reached a determination with respect to South Carolina's seat belt law, the Seventh Circuit, after close scrutiny, decided that North Carolina's statute was substantive in nature.[35]

8. Evidence of Seat Belt Usage is Not Prohibited .

The gag rule under 56-5-6540, at best, prohibits evidence of seat belt non-usage. However, it does not prevent the introduction of evidence, where otherwise relevant, of seat belt usage. This can prove helpful in cases in which some of the occupants were belted and some were not. Even if the court will not allow evidence of a plaintiff's failure to wear a seat belt, it should allow evidence of seat belt usage by other occupants because there is no proscription against it and it would be relevant to causation issues. Particularly in crashworthiness cases, it is persuasive to show that belted occupants remained in the vehicle and were relatively unharmed whereas the unbelted plaintiff was ejected or injured. Even if the court will not permit specific evidence of a plaintiff's failure to wear a seat belt, "converse" evidence regarding other occupants' usage of seat belts can be effective and is entirely permissible under any reading of the seat belt law.

Conclusion

Depending on the type of case, some of the above arguments are more effective than others. Some are untested while others have been successfully utilized to avoid the seat belt gag rule. Until our courts specifically rule on the issue, the effect of the seat belt gag rule is unsettled and can be assailed by the above points. The only other option is to lobby the legislature to change the law, as many states have done across the country, to allow seat belt non-usage as direct evidence on issues of comparative negligence, failure to mitigate damages, and proximate causation. Since the original motives for the seatbelt gag rule have been displaced and the attributes of seat belt use are now entrenched in our society, seat belt evidence should be allowed in our civil justice system.

Footnotes

[1] Traffic Safety Facts 1996-Occupant Protection, National Highway Traffic Safety Administration (U.S. Department of Transportation), Washington D.C., 1996 at 1.

[2] S.C. Code Ann. 56-5-6540(C)(Law. Co-op. 1989).

[3] A recent editorial cited the inherent injustice of withholding seat belt information from the jury in a Charleston case which resulted in the largest verdict ever in an automotive products liability action. Carroll A. Campbell, Jr., Editorial, "Whole Truth Not Always Heard in Courtroom", *The State*, May 20, 1998 at A11.

[4] S.C. Code Ann. 56-5-6520 (Law. Co-op. 1989).

[5] S.C. Code Ann. 56-5-6540 (C) (Law. Co-op. 1989).

[6] 292 S.C. 579, 358 S.E.2d 141 (1987).

[7] *Id.*

[8] *Id.* at 580, 358 S.E.2d at 141-42.

[9] 303 S.C. 243, 399 S.E.2d 783 (1991).

[10] The mandatory safety belt law was passed as part of the "Automobile Insurance Reform Act of 1989," the stated purpose and intent of which was "to reduce insurance losses, including those of the Reinsurance Facility, and, consequently, the cost of mandatory automobile insurance." A good argument can be made that this purpose and intent can be best achieved by allowing evidence of seat belt non-usage to reduce damage awards in automobile accident cases tried under our comparative negligence scheme. 1989 S.C. Acts 148.

[11] *Rowe v. Hyatt*, 312 S.C. 366, 468 S.E.2d 649 (1996).

[12] *Ardis v. Ward*, 312 S.C. 65, 467 S.E.2d 742 (1996).

[13] 89 F.3d 729 (10th Cir. 1996).

[14] *Id.* at 737.

[15] *Lowe v. Estate Motors Ltd.*, 428 Mich. 439,472 410 N.W.2d 706, 720 (1987).

[16] N.C. Gen. Stat. 20-135.2(d)(1995).

[17] 965 F.2d at 198.

[18] *Id.* at 199.

[19] *Id.* at 198.

[20] *Id.*

[21] 420 So.2d 214, 217 (La. Ct. App. 1982).

[22] *Fedele v. Tujague*, No. 98-0843, 1998 WL 264001, (La. App. 4th Cir. April 15, 1998).

[23] 801 P.2d 920 (Utah 1990).

[24] *Id.* at 928.

[25] *Id.*

[26] *LaHue v. General Motors Corp.*, 716 F.Supp. 407, 416 (W.D. Mo. 1989).

[27] 686 A.2d. 170 (Del. 1996).

[28] *Id.* at 176 (citing *MacDonald v. General Motors Corp.*, 784 F.Supp. 486, 499-500 (M.D.Tn. 1992).

[29] *Id.* at 176-77.

[30] U.S. Const. amend. XIV.

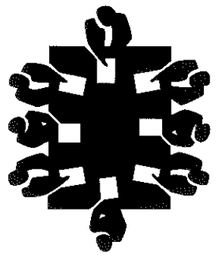
[31] 304 U.S. 64 (1938).

[32] *Hanna v. Plummer*, 380 U.S. 460 (1965).

[33] *CaVallo v. Star Enterprises*, 100 F.3d. 1150 (4th Cir. 1996); *Leitman v. McAusland*, 934 F.2d 46 (4th Cir. 1991).

[34] Fed. R. Evid. 401, 402.

[35] *Barron*, 965 F.2d at 198-200.



Recent Order

In the Court of Common Pleas, C.A. No.: 96-CP-23-1125, for the State of South Carolina, County of Greenville. Janet B. Murphy and David M. Murphy, Plaintiffs, vs. Owens-Corning Fiberglas Corporation, et al., Defendants.

Order

This matter came before the undersigned upon Defendant's Motion to Dismiss and Motions for Summary Judgment. Plaintiffs commenced this action seeking recovery for injuries resulting from Janet B. Murphy developing mesothelioma allegedly contracted from household or "familial" exposure to asbestos based upon contact with her father, Dr. Charles Baker, who she alleges was exposed to asbestos during his employment with E.I. du Pont de Nemours and Company ("Du Pont") at facilities located in South Carolina, Virginia, and the Netherlands. Murphy was born in 1960 and lived at home with her parents until their return from the Netherlands in 1978. (Murphy Depo., pp. 9, 32-34).

Dr. Baker was an employee of Du Pont continuously from 1951 until his retirement in 1984, where he worked at the Du Pont facility in Waynesboro, Virginia from 1951 until 1966; worked at the Du Pont facility in Camden, South Carolina from 1966 until 1969; returned to the Du Pont Waynesboro facility in 1969 until 1974; worked at the Du Pont facility in the Netherlands from 1974 until 1978; and returned to the Du Pont Waynesboro facility in 1978 to finish his career. (Baker Depo., pp. 12, 14-15). Plaintiffs are residents of Virginia and Ms. Murphy's mesothelioma was diagnosed in Virginia. (Plaintiffs' Answers to Defendants' Standard Interrogatories ##7 and 8).

Motion to Dismiss

Defendants' Rule 12(b)(1) Motion to Dismiss asserts that the court lacks subject matter jurisdiction pursuant to South Carolina's "Door Closing Statute." The Door Closing Statute provides that:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in circuit court:
>
> (1) By any resident of this state for any cause of action; or
>
> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this state.

S.C. Code Ann. Section 15-5-150 (Law. Coop. 1997). The South Carolina Supreme Court has interpreted this statute as conferring subject matter jurisdiction, not merely venue. *Federal Land Bank of Columbia v. Davant*, 292 S.C. 172, 355 S.E.2d 293 (1987). The function of the door closing statute is to provide a forum for wrongs connected to the State while avoiding the resolutions of wrongs in which the state has little interest. *California Buffalo v. Glennon-Brittan Group, Inc.*, 910 F.Supp. 255, 258 (D.S.C. 1996).

Since Plaintiffs and Defendants are not residents of this State, jurisdiction rests on where the cause of action arose.[1] South Carolina law describes a cause of action as "a legal wrong threatened or committed against the complaining party." *Ophuls & Hill, Inc. v. Carolina Ice & Fuel Co.*, 160 S.C. 441, 158 S.E.2d 824, 827 (1931), *Recreonics Corp. V. Aqua Pools*, 638 F.Supp. 754, 757 (D.S.C. 1986). South Carolina courts use the verbs "arise" and "accrue" interchangeably while determining *when* a cause of action comes into existence. *Stephens v. Draffin*, S.C., 488 S.E.2d at 309 fn 4 (1997). A cause of action does not come into existence until "the moment when the plaintiff has a legal right to sue on it." *Stephens*, 488 S.E.2d at 309.

A cause of action is that bundle of rights and facts which create a right to sue and includes all of the necessary elements for recovery. Thus a cause of action arises, accrues, and springs into action only when **all** of the elements exist and one has a right to seek relief (*i.e.* a cause of action) based on such elements. Mere threat of future injury is too speculative to support present adjudication. *Waters v. Land Resources Cons. Comm'n*, -S.C.-, 467 S.E.2d 913, 918 (1996). "The phrase '*damnum absque injuria*,' that is, damage without injury, expresses the general principal that a plaintiff cannot recover for loss or damage suffered by him unless he was injured in a legal sense."[4] South Carolina Jurisprudence *Action* Section 18 (1991). Where actual damage is an element of the cause of action, the phrase '*injuria absque damno*' expresses the principal that injury without damage does not constitute a good cause of action. 4 South Carolina Jurisprudence *Action* Section 19; *See also, e.g., Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971)("It is basic that a negligent act is not itself actionable and only becomes such when it results in injury or damage to another."); *Cole v. Lane*, 67 F.R.D. 615, 617 (D.S.C.) ("There is a cause of action whenever one pary acts wrongfully with the proximate result of damages to another party.")

In particular regard to asbestos claims, claims for personal injury do not accrue until an asbestos-related disease or condition, is, or should have been, diagnosed. See *Quattlebaum v. Carey Canada, Inc.*, 685 F.Supp. 939, 940 (D.S.C. 1988); *Hinson v. Owens-Illinois, Inc.*, 677 F.Supp. 406, 411 (D.S.C. 1987). Injury occurs not with inhalation of asbestos fibers, but with diagnosis of an asbestos -related injury.

> [W]e are confronted in this case with a medical condition that does not arise at a specific point of time, as does a broken bone; mesothelioma results over a period of time, the beginning of the period being unknown. In other words, the cancer--the hurt--the harm--the injury--did not spring up at infliction of the wrongful act, that is, when the dust was inhaled.... Rather, the tumor--the hurt--the harm--the injury manifestly occurred... when the mesothelioma was diagnosed... Simply put, legally and medically there was no injury upon inhalation of defendants' asbestos fibers.

Locke v. Johns-Manville, 275 S.E.2d 900, 905 (Va. 1981); See also *Wilder v. Amatex Corp.*, 336 S.E.2d 66, 70 (N.C. 1985) ("[O]ne or even multiple exposures to an offending substance in these kinds of diseases may not constitue an injury. The first identifiable injury occurs when the disease is diagnosed as such, and at that time it is no longer latent.").

A Complaint brought by Ms. Murphy prior to her diagnosis of mesothelioma could have alleged only a duty imposed on defendants and a breach of that duty. She could not have alleged injury and resulting damages and of course there would be no question of proximate cause as to a nonexistant injury. Such a Complaint would be subject to dismissal for failure to state a cause of action upon which relief can be granted. S.C. R. Civ. P. 12.

Ms. Murphy's cause of action did not arise until she was diagnosed with mesothelioma. Her cause of action arose in Virginia, where the final element (injury) needed for a valid cause of action transpired. Ms. Murphy's action against all Defendants is hereby Dismissed. Mr. Murphy's loss of consortium action against Defendants is accordingly Dismissed.[2]

IT IS SO ORDERED

July 15, 1998
York, South Carolina
John C. Hayes, III
Presiding Judge

Footnotes

[1] "Subject of the action" does not apply in personal injury cases because it refers to either property or a contract and its subject matter. Ophuls & Hill, Inc. v. Carolina Ice and Fuel Co., 160 S.C. 441, 158 S.E.2d 824, 827 (1931)(stating "[t]he 'subject of the action' is ...not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is, ordinarily, the property, or the contract and its subject matter, or other thing involved in the dispute.")

[2] Since Mr. Murphy's loss of consortium claim is dependent on Ms. Murphy's injury, his ability to maintain a claim against Defendants is dependant upon the validity of Ms. Murphy's claims. Hinson, 677 F.Supp. 406.

UPDATE

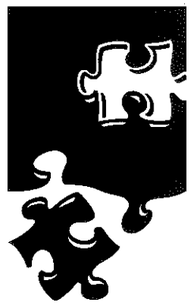
At press time, an update to Judge Hayes' Order was issued. If you are interested in this new order, contact SCDTAA Headquarters at 1-800-445-8629

Evidence Matters

E. Warren Moise
Grimball and Cabaniss, L.L.C.

A Brief Primer on The Business-Records Exception to the Hearsay Rule in South Carolina

(Or Don't Get Rec'ed By Rule 803(6))



Writing of the business-records exception in 1835, Judge David Johnson of the South Carolina Court of Appeals appeared skeptical. "That the introduction of this rule has subjected the community to frauds and impositions, no one who has any experience in the ordinary concerns of life will for a moment doubt . .. ."[1] He might have been surprised to learn that not only would the rule outlive him by 163 years but that it would be greatly expanded to include computer and other technological record keeping never dreamed of in his era. In modern courtrooms, prior-inconsistent statements and party admissions in business records often provide valuable impeachment material. Adverse diagnoses and opinions can destroy a lawyer's case. Like a river, the scope of rule 803(6) narrows and widens at places. Some of the issues pertaining to it follow below:

I. History of the Rule

The business-record exception's ancestor is the English common-law shopbook rule of the 1600s. Referred to by Blackstone in 1768 as "this dangerous species of evidence," it was exported to America in the form of English common and statutory law during colonial times. Originally the exception just dealt with records of tradesmen and craftsmen. Later it was broadened to encompass a wide range of records. (The federal rule 803(6) has been held to include records as diverse as a blackjack dealer's diary of tips and notations on a calendar of illegal drug sales.)[4] Congress enacted a statutory shopbook rule in 1936 allowing a business records exception to the hearsay rule.[5] In that same year the Commissioners on Uniform State Laws created the Uniform Business Records as Evidence Act,[6] later adopted by South Carolina in 1978 and codified at Section 15-5-510.[7] Federal Rule of Evidence 803(6) became law in 1975, and South Carolina's version of that rule became effective in 1995.

II. Rationale for the Rule

The reason that business records are seen as sufficiently reliable to constitute a hearsay exception harkens back to the rule's origin. The shopkeepers' books, just as those of modern companies, were necessarily reliable because their very profitability depended upon the accuracy of their records. Also, the shopkeeper learned how to keep precise records through regularity and continuity. Business records today are audited, their balances are checked, and employees may be disciplined for mistakes in such records.[8] The same premise may be transferred to other types of businesses. For example, a patient's life might depend upon the accuracy of an emergency room doctor's records.

III. Hearsay Within Hearsay

As noted by the Fourth Circuit Court of Appeals, although a document itself might be admissible under federal rule 803(6), written words and statements in the document might constitute hearsay.[9] Thus, for example, an employer may not introduce through the business records exception an employee's file containing the employer's warnings to the employee; this is because they constitute hearsay.[10] Of course the statements might be admissible under rule 805 if they also meet a hearsay exception, such as when offered against a party as an admission or prior-inconsistent statement.

IV. Who May Testify About the Records?

Not only the records custodian, but another qualified witness with knowledge about the records may establish a foundation under either the federal or South Carolina rule. The witness need not have been employed by the business at the time the records were made [11] and need not have personal knowledge of how the actual records were created;[12] however, he must be able to testify about the mode of preparing the documents.[13] "Other qualified witness" should be "given the broadest possible interpretation"[14] and need not be an employee of the business so long as he understands the system of keeping the records.[15]

V. Made At or Near the Time of the Recorded Transaction

Whether a record was made contemporaneously with the transaction is necessarily dependent upon the facts. At issue is whether the length of time between event and the entry is so long that it suggests a danger of inaccuracy through lapse of memory.[16] A lengthy time between event and entry also might suggest irregular record keeping and a motive related to litigation.[17]

VI. Made in the Regular Course of Business

The general rule is that all links in the chain of participants must be acting for a business purpose. This includes the person speaking or writing the initial statement or facts through the final compiler of the record. Thus, under the general rule a plaintiff may not admit under this exception a record containing his own medical history to the patient-intake administrator in a hospital; this is because the plaintiff was not a regular participant in that business.[18] Of course, it may be admissible against an adverse party as an admission, by the plaintiff as a statement for the purposes of medical diagnosis, or under some other hearsay exception.

VII. Problem Areas With Rule 803(6)

(A) Data or Accident Reports

Data or accident reports created for use in litigation are a troublesome area. The courts of various jurisdictions sometimes have held that such do not meet the "recorded in the regular course of business" element under 803(6),[19] which incorporates the concerns noted by the Supreme Court in *Palmer v. Hoffman*.[20] The focus of *Palmer* and other cases generally has been upon a **motive to misrepresent** by the persons involved with making the report.[21] As put by the Court of Appeals for the Second Circuit, the recorded statement of a person who might have caused an accident may be "dripping with motivations to misrepresent."[22] Another problem is that admitting the exculpatory recorded statement of an adverse party, especially when he does not testify at trial, would "[open] wide the door to avoidance of cross-examination."[23] Such records might, however, be used as party admissions by an opponent.[24]

(B) Subjective Opinions

(1) Federal Courts

Another troublesome area concerns diagnoses and subjective opinions in business records, the scope of which courts have tended to limit.[25] Even before adoption of the Federal Rules of Evidence, the Fourth Circuit Court of Appeals in *Kissinger v. Frankhouser*[26] and *Thomas v. Hogan*[27] interpreted the former federal shopbook statute as allowing diagnoses in medical records to be admitted except when they appear unreliable.[28] The *Hogan* court read the statute as carrying a presumption that the person diagnosing or testing the party was qualified, although the court noted that non-routine diagnoses and tests (such as the diagnosis of a rare disease or an infrequently done test) might not be admissible.[29]

Since setting forth the general rule in *Hogan*, the Fourth Circuit has not hesitated to exclude opinions in business records when there is a lack of objectivity on the author's part.[30] As noted by the advisory committee to the Federal Rules of Evidence, although a doctor's report of a personal-injury claimant would appear to be within the normal routine of business, such a report has been held inadmissible by the claimant [31] but admissible by the adverse party.[32] Similarly, the Court of Appeals for the Fourth Circuit has held that a government accountant's unchecked records made in preparation for a prosecution and containing opinions based upon his judgment and discretion of what the defendant's tax records contained did not carry the earmarks of reliability necessary for admissibility.[33]

As noted above, in the federal courts a motivation to misrepresent usually has been a critical issue in excluding business records with opinions;[34] however, the federal rule was drafted with the idea that formulation of specific language to cover all situations is impossible. Thus rule 803(6) was created with the idea that business records fitting within the rule were admissible but subject to exclusion when "the sources of information or other circumstances indicate a lack of trustworthiness"[35] as discussed in *Palmer*.

(2) South Carolina State Courts

The South Carolina state courts have followed a different path from that of the federal courts regarding diagnoses and subjective opinions. [36] The state courts often focus upon denial of the right to cross-examine [37] as well as a motive to misrepresent. The South Carolina General

Continued on page 14

Assembly repealed various evidence-related statutes when the rules of evidence became law. It did not repeal the Uniform Business Records as Evidence Act found at Section 15-5-510,[38] which roughly parallels rule 803(6). Section 15-5-510 has a long history of judicial interpretations by the South Carolina courts. The South Carolina rule is different from the federal rule regarding subjective opinions and judgments. State rule 803(6) specifically provides that subjective opinions and judgments in business records are inadmissible.

Despite the prohibition against subjective opinions, the first part of state rule 803(6) (adopted virtually verbatim from the federal rule) permits admissibility of a "diagnosis," which is a doctor's opinion of a patient's medical condition;[39] however, the rule should be read in light of a long history of past South Carolina decisions excluding subjective opinions and judgments in records. This state courts' prohibition against admitting subjective opinions and judgments in records is not limited to those in business records. It includes other hearsay exceptions as well.[40] The opinions generally have prohibited the use of doctors' records as evidence when the medical condition is controverted.[41] Moreover, the fact that state rule 803(6) contains a prohibition against subjective opinions and judgments but also allows admissibility of diagnoses is not necessarily inconsistent: all diagnoses are not necessarily subjective,[42] and straightforward observations are not "subjective."

Footnotes

[1] *Thayer v. Deen*, 20 S.C.L. (2 Hill) 677, 678 (Ct. App. 1835).

[2] *See* 3 William Blackstone, Commentaries *369 (1768).

[3] *Keogh v. Commissioner*, 713 F.2d 496 (9th Cir. 1983).

[4] *United States v. Lizotte*, 856 F.2d 341 (1st Cir. 1988). *Cf. State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996)(disciplinary records also containing drawing of bottle with another inmate's caption admissible, although drawing not not relevant).

[5] *See* 28 U.S.C. Section 1732 (1994). The present form of the statute deals with copies of business records. Originally the statute included elements of the business records exception to the hearsay rule roughly corresponding to those in rule 803(6).

[6] 9A U.L.A. 506.

[7] S.C. Code Ann. Section 15-5-510 (Law. Co-op. 1976). The common law predates the statute. *See Thayer v. Deen*, 20 S.C.L. (2 Hill) 677, 678 (1835).

[8] *See generally* 2 Kenneth S. Broun *et al.*, *McCormick on Evidence*, Section 286, at 264-65 (4th ed. 1992)[hereinafter *McCormick on Evidence*]. Judge Weinstein cites similar justifications for the rule on both grounds of reliability and need. The records are seen as reliable because: (1) they are customarily checked for accuracy; (2) regularity and continuity in the keeping of the records allegedly produce habits of precision by the records keeper; (3) businesses rely upon the records to be kept accurately; and (4) employees who keep the records risk embarrassment or worse if they fail to record the information accurately. There is a need for the exception because it is burdensome to the business to require all participants in the creation of the records to testify, and many of the participants would not remember the details of their creation anyway. *See* Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* Section 16.06[01](b) (1996)[hereinafter *Weinstein's Evidence Manual*].

[9] *See TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 401 (4th Cir. 1994).

[10] *Connelly v. Wometco Enters., Inc.*, 314 S.C. 188, 442 S.E.2d 204 (Ct. App. 1994). *See also Phoenix Mut. Life Ins. Co. v. Adams*, 828 F. Supp. 379, 389 (D.S.C. 1993)(words on document admissible under 803(3), and document itself admissible as business record under 803(6)).

[11] *United States v. Smith*, 609 F.2d 1294, 1301 (9th Cir. 1979).

[12] *See Island Car Wash, Inc. v. Norris*, 292 S.C. 595, n.1, 358 S.E.2d 150, 152 n.1 (Ct. App. 1987); *United States v. Linn*, 862 F.2d 735 (9th Cir. 1988); *Itel Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1259 (11th Cir. 1983).

[13] *See State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983).

[14] *Weinstein's Evidence Manual*, *supra* note 8, at Section 16.06[01](c). *Cf. State v. Duncan*, 274 S.C. 379, 264 S.E.2d 421 (1980)(witness qualified even though records kept in another location).

[15] *Weinstein's Evidence Manual*, *supra* note 8, at Section 16.06[01](c).

[16] *McCormick on Evidence*, *supra* note 8, Section 289, at 273.

[17] *See Thayer v. Deen*, 20 S.C.L. (2 Hill) 677, 678 (Ct. App. 1835)(noting inadmissibility grounded in part upon irregularity of peddler's record keeping).

[18] *McCormick on Evidence*, *supra* note 8, Section 283, at 280.

[19] *See Palmer v. Hoffman*, 318 U.S. 109, 114 (1943)(quoted in *Barnes v. Norfolk S. Ry. Co.*, 333 F.2d 192, 196 (4th Cir. 1964)). *See also Hartzog v. United States*, 217 F.2d 706, 710 (4th Cir. 1954)(applying *Palmer* to exclude accountant's records and noting that business records not recorded as part of any efficient accounting system). The limiting language in rule 803(6) appears to incorporate the holding in *Palmer*. *See McCormick on Evidence*, *supra* note 8, Section 288, at 272. Moreover, the rule has been interpreted to require that all participants in the chain be acting in the regular course of business under a duty to report. *See United States v. Snyder*, 787 F.2d 1429 (10th Cir. 1986); *Weinstein's Evidence Manual*, *supra* note 8, at Section 16.06[01]. *But see Wright v. Farmers Co-op of Arkansas and Oklahoma*, 681 F.2d 549, 552-53 (8th Cir. 1982)(statement of defendant's employee taken by adjuster admissible as admission). Consider a police officer's report incorporating a statement from an informant. The officer was acting within the normal course of business when taking the statement but the informant was not. Fed. R. Evid. 803(6) advisory committee note (citing *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) as leading case for this proposition). For another case addressing business records and litigation, see Willco Kuwait (Trading) *S.A.K. v. de Savary*, 843 F.2d 618, 628 (1st Cir. 1988).

[20] 318 U.S. 109, 114 (1943).

[21] Fed. R. Evid. 803(6) advisory committee note. In *Barnes v. Norfolk S. Ry. Co.*, 333 F.2d 192, 197 (4th Cir. 1964)(citing *Kissinger v. Frankhouser*, 308 F.2d 348 (4th Cir. 1962); *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962)) the Court held that certain opinions in business records were inadmissible because their authors lacked saving graces of objectivity and expertise.

[22] *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942)(quoted in Fed. R. Evid. 803(6) advisory committee note).

[23] *Palmer*, 318 U.S. at 114. *Accord United States v. Burbach*, 907 F.2d 1140, 1990 WL 86147 (4th Cir. 1990)(right to confrontation violated by admission of deposition of written questions from prior case in which party not involved)(unpublished opinion). Note that unpublished opinions are disfavored in the Fourth Circuit, but they may be used under the requirements and in circumstances noted in Fourth Circuit Court of Appeals Local Rule 36(c).

[24] *Potamkin Cadillac Corp.*, 38 F.3d at 633-34 (use by the lower court of computer records in supporting its decision was proper); *Wright*, 681 F.2d at 552-53 (statement of defendant's employee taken by adjuster admissible as admission).

[25] *McCormick on Evidence*, *supra* note 8, Section 293, at 281. Before adoption of federal rule 803(6), courts drew distinctions between diagnoses involving "conjecture and speculation" and those upon which "competent physicians would not differ." *Weinstein's Evidence Manual*, *supra* note 8, at Section 16.06[01](g). The leading case is *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 300 (D.C. Cir. 1945).

[26] 308 F.2d 348 (4th Cir. 1962).

[27] 308 F.2d 355 (4th Cir. 1962).

[28] *See also Nationwide Mut. Ins. Co. v. Stephens*, 313 F. Supp. 890, 894 (W.D. Va. 1970)(not abuse of discretion to admit unsigned insurance application under business-records exception to hearsay rule as it carried indicia of reliability). Unlike Federal Rule of Evidence 803(6), the shopbook statute did not specifically allow admission of diagnoses.

[29] *See Hogan*, 308 F.2d at 360. *See also United States v. Farmer*, 820 F. Supp. 259, 266 (W.D. Va. 1993)(blood-alcohol certificate admissible under rule 803(6)).

[30] *See, e.g., Barnes v. Norfolk S. Ry. Co.*, 333 F.2d 192, 196 (4th Cir. 1964); *Hartzog v. United States*, 217 F.2d 706, 710 (4th Cir. 1954)(applying *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943)). Consider, for example, a situation where the authors of hospital records are neither plaintiff nor defense litigation "experts for hire" but instead are on-staff medical personnel at the hospitals where the injured parties first are taken after an accident as the case in *Thomas v. Hogan*, 308 F.2d 355, 357 (4th Cir. 1962) and *Kissinger v. Frankhouser*, 308 F.2d 348, 350 (4th Cir. 1962). In such a situation, their opinions and diagnoses give the records indicia of trustworthiness. *See Barnes*, 333 F.2d at 197 (excluding records which lacked the "saving graces" of objectivity and expertise).

[31] *Yates v. Bair Transp., Inc.*, 249 F. Supp. 681 (S.D.N.Y. 1965)(cited in Fed. R. Evid. 803(6) advisory committee note).

[32] *Korte v. New York, N.H. & H.R. Co.*, 191 F.2d 86 (2d Cir. 1951)(cited in Fed. R. Evid. 803(6) advisory committee note).

[33] *Hartzog v. United States*, 217 F.2d 706, 710 (4th Cir. 1954)(applying *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943)).

[34] Fed. R. Evid. 803(6) advisory committee note.

[35] *Id. Cf. Thayer v. Deen*, 20 S.C.L. (2 Hill) 677, 678 (Ct. App. 1835)(noting that the rule has "subjected the community to frauds and impositions").

[36] *But see Kershaw County Dept. of Social Servs. v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981)(citing *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962) for proposition that judge has authority to exclude, or require additional proof regarding, business records if their authority or veracity is a genuine issue).

[37] *See McCaskill*, 276 S.C. 360, 278 S.E.2d 771.

[38] S.C. Code Ann. Section 19-5-510 (Law. Co-op. 1976).

[39] *See Webster's New Universal Unabridged Dictionary* 502 (2d ed. 1983)(defining "diagnosis" as an "opinion resulting from . . . examination").

[40] For examples of these cases, see *South Carolina Dept. of Social Servs. v. Flemming*, 271 S.C. 15, 244 S.E.2d 517 (1978)(interpreting predecessor to Family Court Rule 7(c) as not permitting introduction of written statements of controverted diagnosis without physician present); *Peagler v. Atlantic Coast Line Railroad Co.*, 234 S.C. 140, 107 S.E.2d 15 (1959)(subjective opinions inadmissible under public-records exception found at S.C. Code Ann. Section 6-26-101 (Michie 1962)); *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985)(subjective opinions in medical records inadmissible under South Carolina Code Ann. Section 19-5-510 (Law. Co-op. 1976)). *See also Kershaw County Dept. of Social Servs. v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981) where the supreme court held that the prohibition against subjective opinions and conclusions in hospital records involving judgment and discretion survives adoption of South Carolina Code Section 19-5-510 (Law. Co-op. 1976)(Business Records as Evidence Act). The *McCaskill* court cited *South Carolina Dept. of Social Servs. v. Flemming*, 271 S.C. 15, 244 S.E.2d 517 (1978), *State v. Fowler*, 264 S.C. 149, 213 S.E.2d 447 (1975), and *Peagler* for the proposition that such opinions are inadmissible.

[41] See, for example, *Flemming*, 271 S.C. 15, 244 S.E.2d 517 in which the supreme court disallowed admissibility of subjective opinions in a doctor's report when the doctor did not testify. Although Family Court Rule 18(c) (now found at Family Court Rule 7(c)) carried no express prohibition against subjective opinions, the court noted: that the condition being diagnosed was the dispositive issue in the case, that the adverse party would be prohibited from cross-examining a critical witness, and that the rule was never intended to encompass written statements concerning a controverted diagnosis of a medical condition.

[42] For example, a statement by a doctor that a bullet followed a certain path inside the victim's body is a purely factual observation, no different than a description of where two cars rested in relation to one another after an accident. *State v. Toomer*, 277 S.C. 214, 248 S.E.2d 781 (1981). Similarly the diagnosis as to the cause of a man's death who had been decapitated by a cannon shell while talking to a friend would involve no subjectivity.

[43] For example, entries in a document that a person moved his arms and legs well or had good skin tone are not subjective opinions or judgments under state law and, thus, should be admissible. *See Ellis v. Oliver*, 323 S.C. 121, 473 S.E.2d 793 (1996).

The DefenseLine

Another Successful Trial Academy

by Franklin "Trey" Turner III

This past July 9, 1998, I was fortunate enough to take part in the Trial Academy sponsored by the South Carolina Defense Trial Attorneys' Association. As a rising third year law student I found the experience especially beneficial. My particular role to play in the Trial Academy was that of a juror. In this role I was able to watch talented attorneys, each with a unique style, develop and present their particular analysis of the facts and of the relevant law. As a juror I was also able to segment the trial and analyze which method of presentation was most effective for a particular section. Thus, I found that I particularly liked one attorney's cross examination style and another's method of delivering a closing argument. Ultimately, for any law student considering a career in litigation, the ability to watch four attorneys, drawn from various aspects of the profession, present a case is invaluable.

Another beneficial aspect of the trial academy derived from my actual role as a member of the jury. I believe any litigator would jump at the chance to actually serve on a jury - it is the easiest and best way to develop a feel for the interaction that takes place among the people actually considering the merits of the arguments. Personally, the most educational aspect of the Trial Academy experience was the jury deliberation. In the jury room, after closing arguments, I quickly learned that what I felt to be important was very different from what some other jurors felt to be important. I also quickly learned that the arguments of various jurors may be every bit as crucial to the outcome as the arguments of the attorneys. Should I ever become a litigator you may be certain that my arguments will incorporate the knowledge I gained from my experience as a Trial Academy juror.

South Carolina Defense Trial
Attorneys' Association
3008 Millwood Avenue
Columbia, SC 29205

Address Service Requested

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE PAID
Columbia, SC 29201
PERMIT NO. 383