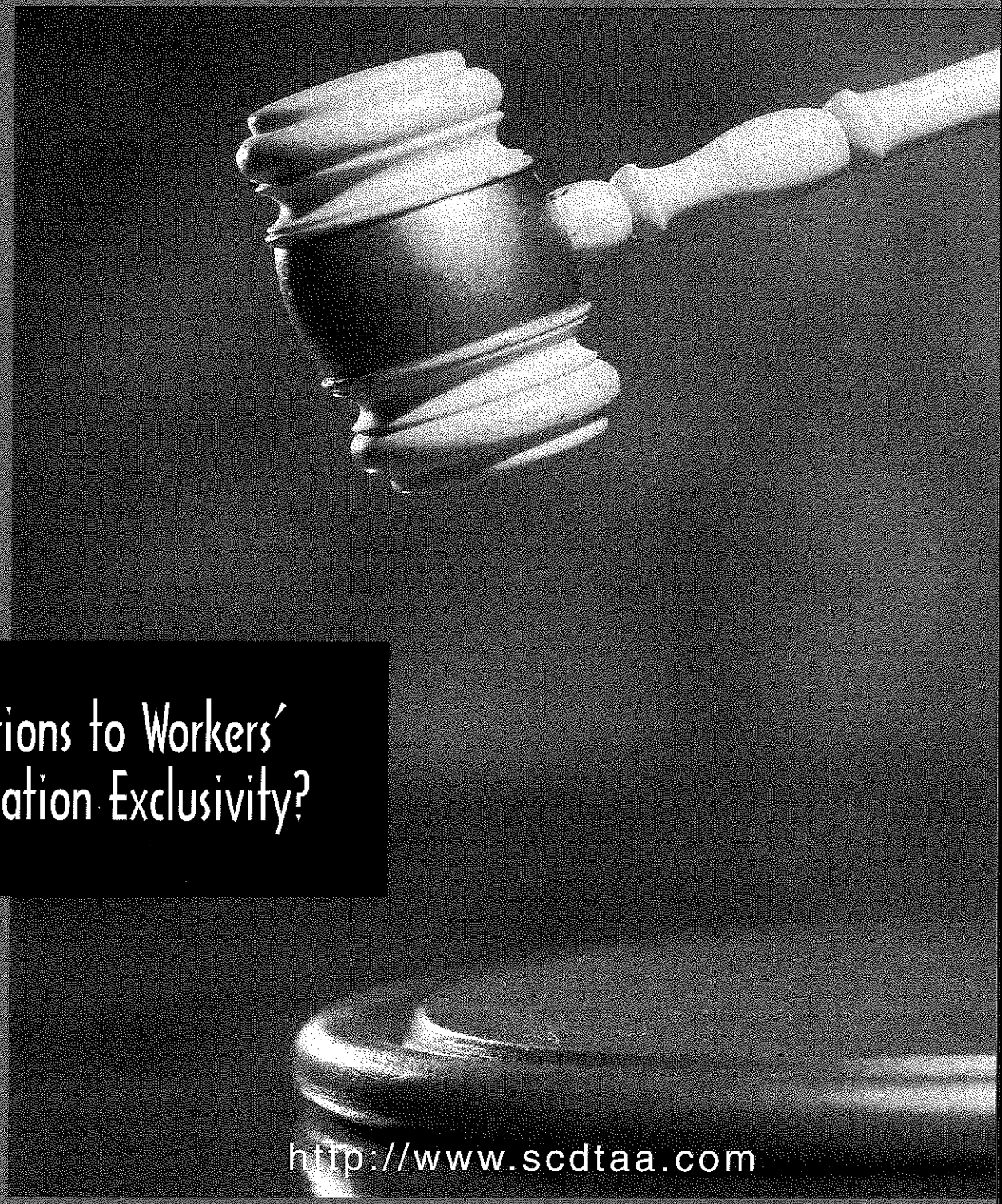
S.C. Defense Trial Attorneys' Association

Volume 27 Number 4 • Winter, 1999

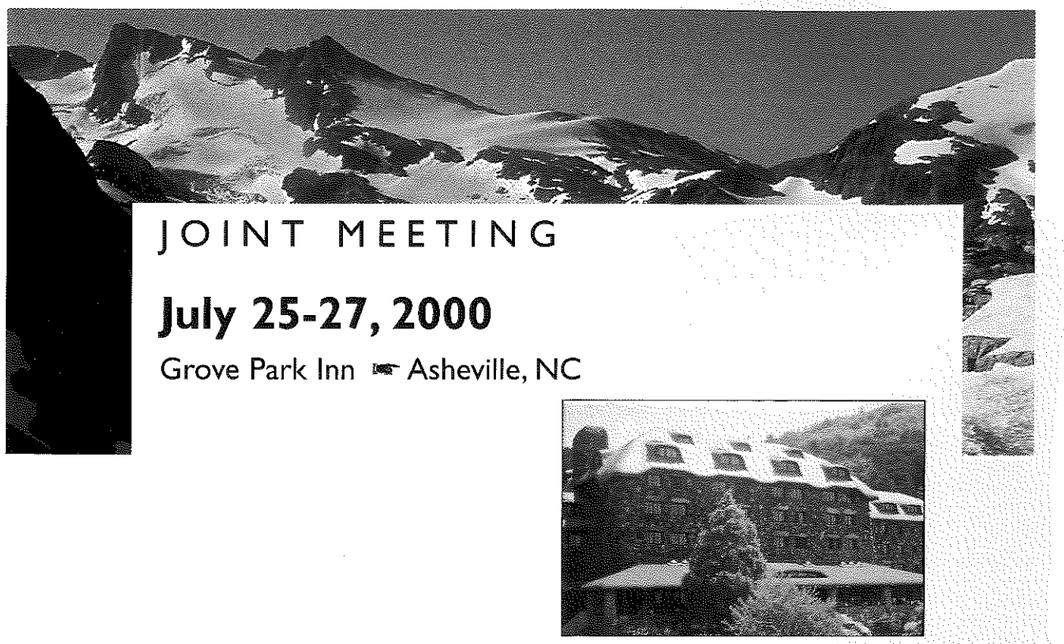
The DefenseLine



Exceptions to Workers' Compensation Exclusivity?

http://www.scdtaa.com

SEE YOU IN THE MILLENNIUM !



JOINT MEETING

July 25-27, 2000

Grove Park Inn ☛ Asheville, NC

ANNUAL MEETING

November 1-4, 2000

Kiawah Island Resort ☛ Kiawah, SC

For Additional Meeting Information Check Out SCDTAA's Website

http://www.scdtaa. com

The DefenseLine

Ten Years Ago

The S.C. Defense Trial Attorney's Association held its 22nd Annual Meeting November 2-5, 1989 at The Cloister, Sea Island, Georgia. A tribute was made to C. DEXTER POWERS of Florence, who died July 22, 1989, at the age of 68. DEXTER served as our President in 1976. President FRANK GIBBS paid kudos to DAVID NORTON, Amicus Curiae Committee, GEORGE JAMES (now deceased) Judiciary Committee, BILL COATES, Membership Committee, Practice and Procedures Committee, BILL LYNN (now deceased), DRI Committee, STEVE MORRISON, Finance Committee, BILL GRANT, Ethics Committee, ALBERT JAMES, and Bylaws Committee, TOM BOULWARE. HUGH McANGUS chaired the Legislative Committee and CHARLES RIDLEY and JOHN WILKERSON the Public Information Committee. JACK BARWICK chaired the *Defense Line* Committee with contributions from WILL DAVIDSON. KAYE CROWE chaired the Joint Meeting Committee and MIKE WILKES chaired the Annual Meeting. The Seminar Committee was chaired by JACK MCCUTCHEN and BILL SWEENEY. Special credit was given to the committee chaired by TOM WILLS with support from CAROL DAVIS and NANCY COOPER of the Association. The Long Range Committee was chaired by MARK WALL and Nominating Committee by CARL EPPS. Our Association was in good shape and heading up.

Twenty Years Ago

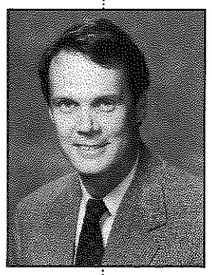
President BRUCE SHAW pointed toward our Twelfth Annual Meeting scheduled for the Hilton Head Inn October 25, 1979. Invitations were extended to the State and Federal Judiciary for a program which included Professor CHARLES ALLEN WRIGHT, and Chief Judge CLEMENT HAYNESWORTH, JR., as speaker. CARL "BUTCH" EPPS, Program Chairman, promised a stimulating program. BOB IRWIN was still in Greenwood. WALTER T. COX, JR. was holding Common Pleas Court in Greenville, SC.

Thirty Years Ago

The S.C. Defense Attorney's held its first Annual Meeting October 10th and 11th, 1969 in Columbia, SC at the Sheraton-Hilton Hotel. Fifty members with their wives were in attendance out of a membership of 130. Officers elected at the Annual Meeting were President, GRADY KIRVEN ANDERSON, Vice-President HAROLD JACOBS of Columbia, Secretary-Treasurer ED MULLINS, JR. of Columbia. Executive Committee men were DANA SINKLER of Charleston, FRANK PLAXCO of Greenville, and WESTON HOUCK of Florence.

President's Letter

by W. Francis Marion, Jr.



I am excited to act as president of the SCDTAA for the year 2000. Due to the dedication of the membership and the excellent leadership that has preceded me, many things can be accomplished this year. In addition to on-going projects, the primary objectives this year are to enhance your membership with the Association and plan for the future. Several initiatives are underway that should directly benefit members.

First, with the advent of instant communication both within our firms and externally with our clients and associates, the Association is revamping SCDTAA web site to make communication with members easier and more meaningful. We are attempting to have all firms and individual members listed with relevant personal information including e-mail addresses. This database will be searchable by name, firm and location. E-mail addresses will be organized by committee, committee chairs, board members and offices in order to facilitate sharing information between members. To compete effectively with our brethren from across the bar, we need to take a lesson from them by sharing our experiences and alerting members to recent decisions or problems we encounter.

Second, the board will be looking at ways to improve every aspect of the services the Association currently provides to its members. For example, *The Defense Line* provides treatises on legal topics on a quarterly basis. On occasion, however, more timely information needs to be disseminated to members. As part of this initiative, we will look at e-mailing vital information to members as issues arise. The continued viability of the joint meeting has been an issue over the last several years. Consequently, a committee made up of representatives of the SC Claims Managers Association and the SCDTAA will be looking into ways to make the Joint Meeting more meaningful to a larger segment of the Association membership.

Third, strategic planning for the Association is necessary this year. Secretary Steve Darling has agreed to undertake this effort. A committee will be formed for the purpose of making recommendations to the board to adopt a 4-year plan.

These are ambitious goals particularly considering the on-going functions of the Association, but thanks to the strong and effective leadership of John Wilkerson and Bill Davies over the last two years, these initiatives can be accomplished. Our organization, however, can be effective only with your involvement and input. Please put the website address, www.scdtaa.com, in your address list. If you think of ways to improve the site or have suggestions to improve the Association let us know.

I am enthusiastic about leading the association this year. With your help and input this will be an exciting year for all of us.

SCDTAA Committee Assignments

Amicus Curiae	Donna Givens
Annual meeting	Sam Outten
Annual Meeting Program	David Rheney & Skip Utsey
By-laws	Phillip Kilgore
Defense Line	John Massalon
Ethics & By laws	Phillip Kilgore
Internet	Darrell Smalls
Industry relations/ethics	Jeff Ezell
Joint Meeting	Jay Courie
Joint Meeting Program	Larry Orr & Elbert Dorn
Judiciary	Mike Horger
Legislative	Will Davidson
Long term Planning	Mike Bowers & Steve Darling
Membership	Bill Duncan
New members/young lawyers	Darrell Smalls
Practice and Procedures	Bev Carroll
Pro bono	Reynolds Williams
Substantive Law committees	Mark Phillips
Trial Academy	Matt Hendrikson & John T. Lay

Exceptions to Workers' Compensation Exclusivity?

Samuel W. Outten and John Patrick Riordan
Leatherwood Walker Todd & Mann, P.C.

Workers' Compensation provides the exclusive remedy to workers injured in the course of their employment. Right? Maybe not. Section 42-1-540 of the Workers' Compensation Act ("Act") seemingly establishes an exclusive remedy for work-related injuries and specifies the limited, recognized exceptions.[1] However, Section 42-5-250, the final section of the Act, states:

> This title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards. But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

S.C. Code Ann. Section 42-5-250.

What is the impact of Section 42-5-250? How does Section 42-5-250 affect the widely accepted exclusivity provisions of the Act?

While Section 42-5-250 has existed, in some form, since the Act's inception in 1936, it has yet to be cited in a reported South Carolina case. This has not, however, prevented the predictable attempts to utilize Section 42-5-250 to recover awards by employees against employers in addition to workers' compensation. The writers are aware of four such attempts recently, three in the Court of Common Pleas and one in Federal Court. While none have proceeded to trial, two have survived Motions for Dismissal and/or Summary Judgment.

The language of the respective Orders point to fundamental differences in the statutory interpretation applied. Two of the recent Orders follow, one granting and one denying Motions for Dismissal and/or Summary Judgment. Perhaps one of these cases will result in an interpretation of Section 42-5-250 by our Appellate Court.

A CASE FOR THE ACT:

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
C.A. No. 99-CP-23-2535

James Restrepo and Louis Garcia
Plaintiffs,
v.
McGee Brothers Company, Inc.
Defendant

Plaintiffs filed suit against Defendant as a result of on the job injuries they sustained in an accident in Greenville, South Carolina. Defendant filed a Motion for Summary Judgment under Rule 56 of the South Carolina Rules of Civil Procedure and/or dismissal under Rule 12(b)(1) of the South Carolina Rules of Civil Procedure for lack of subject matter jurisdiction. In opposition, Plaintiffs assert that Section 42-5-250 of the South Carolina Code creates an exception to the exclusivity provision of the South Carolina Workers' Compensation Act. Finding Plaintiffs' argument unpersuasive, Summary Judgment is granted to Defendant.

Material Facts

On June 27, 1996, the Plaintiffs, employed as brick masons by the Defendant, were injured when the scaffold upon which they were working collapsed. There is no dispute that Plaintiffs were performing their jobs within the course and scope of their employment at the time of the accident. Both Plaintiffs sought and received benefits through the South Carolina Workers' Compensation Commission.

Applicable Law

The South Carolina Workers' Compensation Act provides the exclusive remedy against an employer for employees who are injured in the course and scope of employment.

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> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employees, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.
>
> Provided, however, this limitation of actions shall not apply to any injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

S. C. Code Ann. Section 42-1-540 (1998). This exclusive remedy provision of the Act "bars all actions against an employer where a personal injury comes within the Act . . . [making] the Act the exclusive means of settling all such claims." *Hook v. Mack's Transfer and Storage*, 291 S.C. 84, 88, 352 S.E.2d 296, 298 (1986). Without regard to their acceptance of benefits under the Act, Plaintiffs argue that Section 42-5-250 of the Act provides an exception to the above cited exclusivity provision.

Plaintiffs assert that Section 42-5-250 excludes injuries arising out of a "single catastrophe" from the scope of the Act and therefore allows them to seek recourse against Defendant outside of the workers' compensation scheme. The text of Section 42-5-250 provides:

> This title shall not apply to policies of insurance against loss from explosion of boilers, fly wheels or other similar single catastrophe hazards. But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

S. C. Code Ann. Section 42-5-250 (1998).

Section 42-5-250 has not been interpreted by any South Carolina Court, nor have the appellate courts of other states with similar provisions in their workers' compensation acts addressed the language of this provision. It thus becomes the Court's duty to interpret the statute at issue to ascertain its meaning and application to the present case.

Ruling

The primary role of statutory construction is to ascertain and give affect to the legislature's intent. *Walton v. Canal Insurance Company*, 326 S.C. 482, 485 S.E.2d 107 (Ct. App. 1997). Statutory provisions should be given reasonable construction consistent with the policy and purpose of the act. *Jackson v. Charleston County School District*, 316 S.C. 177, 447 S.E.2d 859 (1994). "Where an employer is covered by Worker's Compensation, the Act is the exclusive remedy of an employee injured in the course and scope of employment." *Tatum v. MUSC*, Opinion No. 2986 (S.C. Ct. App. Filed May 3, 1999)(Shearouse Adv. Sh. No. 16 at 27, 30), citing *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994).

> [A]n injured worker's employment status, as it affects jurisdiction, is a matter of law for decision by the court and includes necessary findings of fact relating to jurisdiction. *Wheeler v. Morrison Machinery Co.*, 313 S.C. 440, 438 S.E.2d 264 (Ct. App. 1993). Any dispute in the facts giving rise to this issue should be resolved by the court, not a jury. *Id.*, 438 S.E.2d at 265. *See also, Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 132 S.E.2d 18 (1963) ("[i]t has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the court, which includes the finding of the facts which relate to jurisdiction.").

Nix v. Columbia Staffing, Inc., 322 S.C. 277, 281, 471 S.E.2d 718, 720 (Ct. App. 1996).

Much removed from Section 42-1-540, Section 42-5-250 is the final provision in a chapter of the Workers' Compensation Act entitled "Insurance and Self-Insurance." *See* South Carolina Code Annotated Section 42-5-10 *et seq.* Nonetheless, Plaintiffs assert that an exception to the exclusivity provisions of Section 42-1-540 is provided.

The Court is unconvinced. South Carolina courts are bound by the "primary rule of statutory construction [which] is to give statutes their plain and ordinary meaning where the statute's language is unambiguous." *Brooks v. Northwood Little League*, 327 S.C. 400, 406 489 S.E.2d 647, 650 (Ct. App. 1997). The language of the exclusivity provision of the Act is clear and unambiguous, and the plain language of the text "exclude(s) all other rights and remedies . . . at common law or otherwise" on account of accidental personal injury. S.C. Code Ann. Section 42-1-540 (1998). Significantly, Section 42-1-540 expressly provides exceptions to the exclusive remedy rule where injuries result from certain acts of a subcontractor. Other narrow exceptions to the exclusive remedy rule are found in the plain language of Section 42-1-540. For example, an employee may proceed at common law against his employer when his injury is not in the nature of a personal injury, as required by the statute. *See Loges v. Mack Trucks, Inc.*, 308 S.C. 134, 417 S.E.2d 538 (1992). Also, an employee may sue his employer at common law for intentional acts because the exclusive remedy provision applies only to personal injuries caused by an accident. *See McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991). These exceptions to the exclusive remedy rule are rooted in the language of Section 42-1-540 and support the integrity and purpose of the Workers' Compensation Act.

By contrast, Plaintiffs urge the court to undermine the entire Workers' Compensation System by importing a provision from a portion of the Act regulating Workers' Compensation insurance and to engraft it onto Section 42-1-540. This Court is not empowered nor inclined to do so. Because the Court perceives no basis in Section 42-1-540 for excepting injuries arising from a catastrophic hazard from the scope of the Act, the Court is constrained to conclude that the sole remedy for an employee's personal injuries arising from catastrophic hazards in the course and scope of their employment, like any other accidental personal injury, is Workers' Compensation.

Conclusion

Summary judgment is appropriate when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "To determine whether an issue of fact exists, the court must view the evidence and all its inferences in a light most favorable to the nonmoving party." *Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership*, 331 S.C. 385, 503 S.E.2d 184, 186 (Ct. App. 1998). Here, viewing the evidence and its inferences in the light most favorable to Plaintiff, no genuine issue as to any material fact can be found to exist. Summary Judgment for Defendant is appropriate as a matter of law as to all causes of action. Therefore, Defendant's Motion for Summary Judgment under Rule 56 is hereby granted.

The Honorable Gary E. Clary, Presiding Judge
Dated: October 5, 1999

A CASE FOR 42-5-250 :

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON
IN THE COURT OF COMMON PLEAS
Civil Action No. 98-CP-15-647

Cynthia Purdue, Personal Representative of the Estate of Zan C. Pender,
Plaintiff,
v.
Dogwood Hills Country Club, Inc.
Defendant

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Exceptions to Workers' Compensation Exclusivity?

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This matter came before the court on defendant Dogwood Hills Country Club's ("Dogwood Hills") motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) SCRCP. Dogwood Hills bases its request for dismissal on grounds that plaintiff's claims are barred by the South Carolina Workers' Compensation Act, S.C. Code Ann. Section 42-1-10 *et seq.* which provides the exclusive remedy for injuries to employees covered by the Act.[2]

This is a wrongful death action filed by the wife and personal representative of Zan Pender who was killed in an explosion at Dogwood Hills on June 14, 1998. The complaint filed in this action alleges that Mr. Pender was an employee of Dogwood Hills and was killed when a tank that was part of the irrigation system exploded. At the hearing on this matter, counsel for both parties submitted photographs of the scene which unquestionably show that an explosion occurred at the time of Mr. Pender's death.

The plaintiff maintains that this action is exempted from the Act by Section 42-5-250 which provides:

> This title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards. But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

The plaintiff introduced into evidence an insurance policy that provides coverage for the explosion that killed the decedent. She argues that because Dogwood Hills maintained a policy of insurance that covered the loss that Section 42-5-250 allows her to pursue this coverage and that she is not limited to an award under the Act.

Dogwood Hills contends that the tank that exploded was not a boiler and, the provision is inapplicable for this reason. The court finds that the tank that exploded was a boiler tank based upon the affidavit of Madison Walling, a former employee of Dogwood Hills, and the OSHA material presented to the court, but this finding is not necessary because the event is clearly a single catastrophe hazard as contemplated by the section. The court further finds that the explosion that killed the decedent was an event of the type contemplated by Section 42-4-250.

Dogwood Hills next contends that because the employer and employee accepted the provisions of the Workers' Compensation Act that Section 42-5-250 is inapplicable and that therefore the plaintiff is restricted to recovery under the Act. This argument is contrary to a plain reading of the statute. Section 42-5-250 is a part of the Workers' Compensation Act and by its language clearly provides an exception to the Act. The question presented to the court is what is excepted from the Act, and more importantly does this provision allow plaintiff to maintain the present action.

Section 42-5-250 has not been interpreted by any South Carolina court nor have the appellate courts of other states with similar provisions in their Workers' Compensation Acts addressed the language of this provision.[3] It thus becomes the court's duty to interpret the statue at issue to ascertain the meaning and application to the present case. The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *Walton v. Canal Ins.*, 485 S.E.2d 103 (Ct. App. 1997). Statutory provisions should be given a reasonable construction, consistent with the policy and purpose of the Act. *Jackson v. Charleston County School Dist.*, 447 S.E.2d 859 (1994).

The first sentence of the statute provides: "This title shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards." The heading of the section reads: "Title not applicable to insurance for single catastrophe hazards." It is clear that the focus of this section is on insurance policies that provide coverage for catastrophe hazards such as explosions. The provision does not say that all claims involving such hazards are excluded from the Act but is directed toward insurance policies.

The only logical interpretation of this language is that the Act was not intended to prevent claims for injury caused by an explosion if there is an insurance policy that provides coverage for the event. The Act is not available to the insurance carrier as a defense to bar claims made under the policy. Because the statute only excludes insurance policies, it does not allow for a claim against the employer over and above any loss covered by an insurance policy. If a policy of insurance does not exist covering the event, then Section 42-5-250 has no application. There must exist both a catastrophic event such as an explosion and a policy of insurance that provides coverage before the section is applicable. If these criteria are met, this action is not barred.

Both of these criteria are present in this case. There was an explosion which killed Mr. Pender and there is insurance coverage for the loss occasioned by the explosion. The court has reviewed the policy of insurance provided by Companion Property and Casualty Group. The policy provides Employer Liability insurance. The coverage provides that the insurance company will pay all sums which employer must pay because of bodily injury including death by accident to any employee arising out of the employee's employment. This policy clearly provides coverage for the loss occasioned by Mr. Pender's death. Because the requirements of Section 42-5-250 have been met, the plaintiff can maintain this action to recover any available insurance proceeds but cannot recover from the employer in a tort suit more than the insurance coverage. The employer is, however, still liable for benefits payable under the Act by virtue of the second sentence contained in Section 42-5-250.

> But nothing contained in this section shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe.

By this sentence the legislature sought to prevent an employer from escaping his responsibility under the Act because of the existence of an insurance policy that provided coverage pursuant to the first sentence. There can be no other purpose for this language.

In essence Section 42-5-250 allows an avenue for additional compensation, when an employee is injured or killed in an explosion and separate insurance coverage is available. This interpretation is consistent with the purpose of the Act which was enacted to ensure compensation for the employee for injuries arising out of and in the course and scope of employment and at the same time protect the employer from unlimited tort liability. By excluding only insurance policies from the Act, the legislature intended to allow employees to recover benefits in addition to the benefits under the Workers' Compensation Act, but at the same time not expose the employer to liability unless an insurance policy covered the loss.

A review of the history of the Workers' Compensation Act supports the above interpretation. Section 42-5-250 was included in the original Act which was adopted in 1936, 1936 Act No. 1231. A review of the legislative history reveals no recorded discussions of 42-5-250. However, what is clear from the history is that at least some legislators felt the benefits provided were too low.

For example, then State Senator Strom Thurmond, spoke out against the Act because the compensation "brackets" were "entirely too low." 1935 *Senate Journal* p. 1515. Other comments included that the "low compensation for such severe and serious injuries is altogether unfair." (*Id.*) Further, that "[t]he amounts provided in the brackets would hardly support the man and his family during his illness, much less allow him any compensation for the loss of an eye, foot, hand, or other injury that he might sustain." (*Id.*) The low "brackets" complained of by Senator Thurmond and others were incorporated in the Act as signed by Governor Johnston in 1936.

It is entirely consistent with this legislative history that the legislature recognized that severe injury or death was the likely result when a boiler exploded or some other catastrophic event occurred. In this same light it is consistent that the legislature recognized that the compensation rates provided in the Act would be inadequate and intended to allow for additional compensation if there was a policy of insurance

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1999 Annual Meeting Highlights
The Cloister, Sea Island, Georgia

After an afternoon of skeet and sporting clay shooting at the 1999 Annual Meeting L to R: Henry Grimball (Charleston, SC), Sam Clawson (Mt. Pleasant, SC), Judge Paul Burch (Pageland, SC), John Kent (Sea Island Shooting School), Stephanie McDonald (Mt. Pleasant, SC), Justin Jones (Sea Island Shooting School), Christine Story (Mt. Pleasant, SC), Judge Henry McKellar (Columbia, SC) and Judge Edward Cottingham (Bennettesville, SC)

Exceptions to Workers' Compensation Exclusivity?

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covering the loss.

Based on the foregoing discussions, the court interprets Section 42-5-250 to allow the plaintiff to pursue the present action but only to the limits of any insurance policies which provide coverage for the explosion at issue.

The defendant's motion to dismiss is therefore denied.

IT IS SO ORDERED.

Diane Goodstein, Presiding Judge
Simpsonville, SC
May 11, 1999

While the lack of the specified insurance policies would bar recovery per the above Order, nothing would prevent the filing of suit and the necessity of mounting an appropriate defense. Given that nearly any injurious, work-related incident could arguably qualify as a "single catastrophe hazard," the potential deleterious effects of Section 42-5-250 upon both the Workers' Compensation System and the Courts of Common Pleas would be immeasurable.

While protection of the Workers' Compensation System and the Courts of Common Pleas would seemingly encourage Appellate Court adoption of the former Order's stance, perhaps the State would best be served by Legislative intervention and action. In the meantime, all corporate clients would be well advised to review all "policies of insurance against loss from explosion of boilers, fly wheels or other similar single catastrophe hazards to ensure that the benefit provided justifies the exposure if the reasonings of the second order is adapted in South Carolina."

Footnotes

[1] The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss or service or death.

Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

[2] The court was presented with no evidence that the parties hereto were covered by the Act and was asked by counsel to assume that the Act applied for purposes of this motion.

[3] North Carolina, Tennessee and Virginia have almost identical provisions in their Workers' Compensation Acts. NC St. Section 97-99 (1944-1997); TN. St. Section 50-6-405; VA St. Section 65-___ 16.

Draft Form Letter to Comply with Ethics Advisory Opinions 97-22 and 98-6
(Legal Audit Billing Reviews)

[Name of Insured]
Mailing Address
Re: Caption of Case _____
Docket No.:_____
Our File No.:_____

Dear [Insured]:

Your insurance company, **[Name of Insurer]** has retained us to defend you in the above referenced law suit. In connection with your defense **[insert any matters specific to the representation - e.g., please call upon receipt to discuss, answer or advise of any counterclaims you might wish to assert or, if none, omit entire sentence]**.

Under the terms of your policy, your insurer is responsible for paying our legal fees associated with your defense in this matter in accordance with our current fee agreements and billing guidelines. Under these guidelines we are required to submit detailed billing information concerning our activities on your behalf directly to a legal audit service, **[Name of legal audit service]** for review and payment. The detailed billing information required in our statements includes a description of the specific activity engaged in, the subject matter of communications, the persons involved and the amount of time expended.

The general purpose for your insurer's request to submit billing statements directly to a legal audit service for review is to monitor our firm's adherence to the insurer's billing guidelines. In most cases, this information is relatively routine but it can include descriptive information or detail that might be considered attorney/client privileged and/or confidential. The South Carolina Bar, among several other states, has issued ethical advisory opinions which advise that presenting legal bills to an independent audit service such as **[Name of legal audit service]** may be providing privileged information to a third party which may waive the attorney/client privilege. In that circumstance, other parties, such as plaintiffs to the litigation, may be able to obtain access to our bills and possibly our files, or to other privileged communications, between us as your lawyers, you and/or insurer. Accordingly, we are seeking your consent or permission to comply with the insurer's request to submit our bills to the legal audit service. We will not submit our bills to the legal audit service unless we have your consent.

Please feel free to contact us, or your own personal or corporate attorney, if you have questions about this, since waiving the attorney/client privilege could have a significant impact on your case. We would appreciate your indicating on the enclosed copy of this letter whether or not you consent for us to submit our billings to [Name of legal audit service]. Please respond immediately, since this program is presently in effect. Enclosed is a stamped self-addressed envelope for your convenience.

If you have any questions concerning this matter, please call me at your earliest convenience.

Sincerely,

___ 1. I consent for you to provide information and billings to the legal audit service. I understand that transmittal of this information may act to waive the attorney/client privilege and/or other confidentiality privileges.

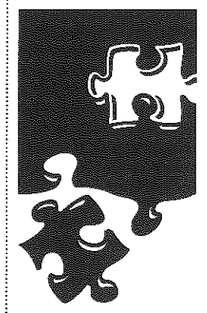
___ 2. I do not consent you to provide information and billings to the legal audit service, but direct that the insurance company pay the bills directly..

Date:_____

Signed:_____

Evidence Matters

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



LAY OPINIONS IN THE FEDERAL AND STATE COURTS OF SOUTH CAROLINA

Lay opinions, the country cousins of their glamorous relatives, expert opinions, permeate virtually every trial, although they are largely ignored by legal commentators. "He had a strong odor of alcohol about him," "the car was going *at least* 90 miles an hour," and "visibility was excellent that day" are just a few examples of the typical testimony offered daily in courtrooms across America. When the opinion is especially harmful, the knee-jerk response usually is, "Objection. The question calls for a conclusion." However, without lay opinions, trials would take much longer and be unnecessarily complicated. A brief discussion into this area of the law follows:

1. Metamorphosis of the Rule

Federal and South Carolina Rules of Evidence 701 have their roots in medieval law.[1] The underlying theory, reflected in Mansfield's comment in 1766 that "[i]t is mere opinion, which is not evidence,"[2] actually had its basis in the rule requiring witnesses to have personal knowledge of matters about which they testify.[3] The orthodox rule allowed lay witnesses to testify about facts but not give opinions. Legal commentators have stated, however, that the distinction between fact and opinion is the clumsiest tool given to judges in regulating examinations of witnesses: "The difference between so-called 'fact,' . . . and 'opinion,' is . . . but a mere difference in degree with no recognizable line to mark the boundary."[4]

For this and other reasons, the rule regarding lay opinions is loosening. The second incarnation of the rule was to allow lay opinions only when strictly necessary: "non-experts may, in cases when it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts . . . ."[5] Under this rule, witnesses could give opinions if they could not "accurately, adequately and with reasonable facility describe the fundamental facts upon which the opinion is erected."[6] As described by Professor Dreher of the University of South Carolina School of Law in 1967, "The more concrete description is preferred to the more abstract, but the latter is not to be excluded if it is the best that can be had."[7] This second version of the lay opinion rule (allowing them only when "necessary") was rejected in 1975 by the drafters of the Federal Rules of Evidence in favor of a more liberal approach.[8]

The basis for the more modern rule is John Wigmore's principle that lay opinions should be rejected only when superfluous, meaning that they will be of no value to the jury.[9] This is the approach of Federal and South Carolina Rules of Evidence 701, as well as Revised Rule of Evidence 701.[10] Under this approach, the emphasis seems to be on admissibility ("should only be **rejected**") as opposed to the approach under the old rule (a witness "may not" give an opinion).[11] The theme behind more relaxed admissibility[12] of lay (and expert) opinions seems to be that, in the absence of any special considerations, (a) defects in a lay opinion can be brought out in cross-examination, and (b) the jury is capable of determining the weight of this type evidence.[13] Thus, the Supreme Court of Alabama held in 1923 that a witness who sat up all night with a sick person, or one with a serious head injury, should be allowed to give an opinion whether he was conscious "for what it is worth."[14]

2. Must the Witness Give the Basis for Her Opinion?

Apparently not, unless the judge requires it.[15] Of course, sometimes the judge might require disclosure of the underlying details (i.e., require a foundation to be laid) if he is unable to determine whether the opinion is adequately based upon the witness' personal knowledge or if it is helpful. If the judge feels that the lay opinion is not misleading or prejudicial, however, he may leave it to the other lawyer during cross-examination to flesh out any problems.[16]

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3. May a Lay Witness Give an Opinion on an Ultimate Issue?

Usually not.[17] This would include a highway patrolman's statement that a vehicle owner should assume liability, or opinions about guilt and negligence.[18] South Carolina Rule of Evidence 701(c) states that the opinion must be on a matter not requiring specialized knowledge.

But what about a party admission? In their pleadings, parties generally admit and deny ultimate issues. For example, "the Defendant admits mere negligence in the accident but denies gross negligence." If parties can admit negligence, damages, breach of contract, and other ultimate issues in their pleadings, why not permit them to be cross-examined about such issues? Moreover, a party admission may be made without personal knowledge of the matter admitted, unlike ordinary lay testimony.[19] The opinion rule has been held to be inapplicable to party admissions, and no predicate needs to be laid for them.[20]

On the other hand, all attorneys know from experience that lay clients often are unknowledgeable about the law, even after the law has been explained to them. The United States Court of Appeals for the Seventh Circuit ruled in *United States v. Baskes*[21] that an *attorney* who was an indicted coconspirator in a drug case could not be asked if conduct by the other coconspirators was "unlawful" or "wilful,"[22] as these solicited improper lay opinions.

In *United States v. Espino*[23] the Seventh Circuit held that a lay defendant in a drug conspiracy case could not be required to answer the following question: "Essentially what you're doing here today, [Mr. Espino], is you're admitting the conspiracy; aren't you?"[24] The court held that the question requested an improper lay opinion under rule 701[25] and that a lay witness might be unfamiliar with the contours of criminal law. (There would have been no problem, however, with asking the witness if there had been an "agreement" to sell drugs, because this was a *factual* matter.[26]) Other courts have held similarly when the witness is asked to opine about a legal term at issue in the trial.[27]

Probably the better rule is that although a party might properly admit a legal conclusion through his attorney such as in pleadings or through stipulations, a lay party's cross-examination at trial about a legal term of art should be avoided unless a foundation is laid showing that he fully understands the matter being admitted.[28]

4. What Are Some Examples of Admissible Lay Opinions?

In the past, lay opinions have been allowed in the state courts about the following matters: intoxication,[29] fear,[30] affection,[31] certain mental conditions,[32] an animal's physical condition,[33] the best interests of a child by a guardian ad litem,[34] damages to property, whether given by the owner[35] or another lay person with some knowledge of the property's value,[36] handwriting,[37] whether words are defamatory,[38] speed, [39] including statements by train passengers that a train was going "too fast,"[40] distance,[41] and whether an employee was able to perform his work properly after an injury.[42] In the Fourth Circuit, lay opinions have been allowed concerning matters of citizenship,[43] whether the plaintiff was a victim of racial discrimination,[44] codes used in tape-recorded phone conversations,[45] a conclusion that certain behavior was "suspicious,"[46] violations of land development permits,[47] effectiveness of vehicle emergency flashers,[48] knowledge of classified budget documents,[49] valuation of real estate leases,[50] and identifications of the defendant based on photographs and familiarity.[51] In other jurisdictions, lay opinions have been allowed: that a person looked like he was dying,[52] about whether the witness said anything to influence the testator's decision about his beneficiaries,[53] that the condition on the street would cause a stranger on a rainy night to drive off into the river,[54] describing a floor as "slippery,"[55] and that a person was under the influence of or addicted to drugs.[56]

5. The Future of Lay Opinions in South Carolina

In light of the liberal thrust of the Federal Rules of Evidence, it would appear that future decisions will broaden admissibility of lay opinions. The federal courts often tend to view objections to lay opinions as going more to weight than admissibility. Assuming that this approach carries through under South Carolina Rule of Evidence 701, lay opinions will tend to be more accepted in the state courts also.

Footnotes

[1] *See* Phipson, *Evidence* 475 n.2 (10th ed. 1963)(discussing requirement in 1349 A.D. that witnesses must have personal knowledge).

[2] *Carter v. Boehm*, 3 Burr. 1905, 1918 (1766)(quoted in 7 John M. Wigmore, *Wigmore on Evidence* Section 1917, at 7 (Chadbourn rev. 1978)).

[3] 1 Kenneth S. Broun *et al.*, *McCormick on Evidence* Section 11, at 41 (4th ed. 1992)[hereinafter *McCormick on Evidence*].

[4] *Id.* at 42-43.

[5] *Baltimore & Ohio Ry. Co. v. Schultz*, 43 Ohio 270, 1 N.E. 324, 331 (1885).

[6] Morgan, *Basic Problems of Evidence* 217 (1961).

[7] James F. Dreher, *A Guide to South Carolina Evidence Law* 9 (1967)(emphasis omitted).

[8] Fed. R. Evid. 701 advisory committee's note ("necessity rule" had proved unworkable).

[9] *See* 7 John M. Wigmore, *Wigmore on Evidence* Section 1918 (Chadbourn rev. 1978)[hereinafter *Wigmore on Evidence*]. The South Carolina Supreme Court has adopted the more modern view. *See State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996).

[10] The language of federal and state rules 701 are identical, except that the state rule has subsection (c) relating to expert opinions. The language of the federal and state rules is substantially the same as in Uniform Rule of Evidence 56(1). *See* Fed. R. Evid. 701 advisory committee's note.

[11] *Also see State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) and *Jones v. Fuller*, 19 S.C. 66 (1883) for cases on this issue.

[12] *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)(noting the "'Federal Rules' general approach [under rules 701-705] of relaxing the traditional barriers to 'opinion' testimony")(cited in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

[13] Fed. R. Evid. 701 advisory committee's note.

[14] *See Deris v. Deris*, 210 Ala. 308, 311, 98 So. 27 (1923).

[15] See, for example, Federal and South Carolina Rules of Evidence 104(a), 611(a)(1), and 614(b) regarding a judge's authority. Of course, there generally must be a foundation laid showing personal knowledge of the matter. Also, under the rule of necessity noted above in the text of Section 1, a witness was required to state the basis for an opinion if it could be done. *See Nelson v. Charleston & W.C. Ry. Co.*, 92 S.C. 151, 121 S.E. 198 (1911).

[16] 1 *McCormick on Evidence*, supra note 3, Section 12, at 46-47 (quoting Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence* Section 701[02], at 701-30 (1988)).

[17] 1 *McCormick on Evidence*, supra note 3, Section 12, at 47 (general statements from witnesses about how a case should be decided or amount of unliquidated damages would be excluded by all courts).

[18] *Grismore v. Consolidated Prods.*, 232 Iowa 328, 5 N.W.2d 646 (1942)(dictum).

[19] "A statement by a party may qualify as an admission [under rule 801] regardless of . . . the nature of the statement as being too conclusory [or] in the form of an admission." 29 **Am. Jur. 2d** *Evidence* Section 760, at 125 (1994). *See also id.* at 125 n.65 (citing *United States v. Porter*, 544 F.2d 936 (8th Cir. 1976)(opinion); *State v. Harberts*, 315 Or. 408, 848 P.2d 1187 (conclusory)); 29 **Am. Jur. 2d** *Evidence* Section 760, at 125 n.66 (citing *Harberts*, 315 Or. 408, 848 P.2d 1187 (opinion)). *But see Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994)(opinion that non-arrest policy in domestic violence cases would constitute equal-protection violation was inadmissible conclusion regarding ultimate issue, even if it were a party admission).

[20] *Owens v. Atchison, Topeka, and Santa Fe Rwy. Co.*, 393 F.2d 77, 79 (5th Cir. 1968)(cited in Michael H. Graham, *Federal Practice and Procedure* Section 6715, at 487 n.12 (Interim ed. 1992)); *Cox v. Esso Shipping Co.*, 247 F.2d 629, 632 (5th Cir. 1957).

[21] 649 F.2d 471 (7th Cir. 1980).

[22] *See id.* at 478.

[23] 32 F.3d 253 (7th Cir. 1994).

[24] *Id.* at 257.

[25] *See id.* (citing 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* Section 701[02], at 701-13 to -17 (1978)).

[26] *See id.*

[27] *See United States v. Skeet*, 665 F.2d 983 (9th Cir. 1982)(victim could not testify whether shooting was "accidental"); *Scheib v. Williams-McWilliams Co., Inc.*, 628 F.2d 509 (5th Cir. 1980)(witness in Jones Act case could not give opinion about "dangerous state" of boat).

[28] "Loaded terms such as "stolen," "accident" and "assault" should be avoided by witnesses when they are the very issues to be decided. 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* Section 10.02[02], at 10-16 (1996).

[29] *Sellers v. Public Savings Life Ins. Co*, 255 S.C. 251, 178 S.E.2d 241 (1970)(as defense to insurance-policy exclusion); *State v. Ramey*, 221 S.C. 10, 68 S.E.2d 634 (1952)(DUI prosecution); *Bennett v. Wilbro, Inc.*, 310 S.C. 371, 426 S.E.2d 812 (Ct. App. 1992)(comparative negli-

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gence case). *See United States v. Ketchem*, 420 F.2d 901, 903 (4th Cir. 1969)(reversing for failure to allow cross-examination into alcohol usage).

[30] *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973).

[31] *State v. Smith*, 220 S.C. 224, 67 S.E.2d 82 (1951).

[32] *Hellams v. Ross*, 268 S.C. 284, 233 S.E.2d 98 (1977)(competency to make a will); *State v. Hinson*, 253 S.C. 607, 172 S.E.2d 548 (1970)(insanity defense). But see S.C. Code Ann. Section 19-11-95 (Law. Co-op. 1976)(limitations on admissibility when mental health-care provider involved).

[33] *McElveen v. Atlantic Coast Line R. Co.*, 210 S.C. 556, 43 S.E.2d 485 (1947).

[34] *Richmond v. Tecklenberg*, 302 S.C. 331, 396 S.E.2d 111 (Ct. App. 1990).

[35] *State Highway Dep't v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970)(owner presumed to know value of property).

[36] *City of Spartanburg v. Laprinakos*, 267 S.C. 589, 230 S.E.2d 443 (1976); *Roland v. Palmetto Hills & Dunes Constr. Co.*, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992).

[37] *Pee Dee Prod. Credit Ass'n v. Joye*, 284 S.C. 371, 326 S.E.2d 650 (1984).

[38] *Nettles v. McMillan Petroleum Corp.*, 210 S.C. 200, 42 S.E.2d 57 (1947).

[39] *Livingston v. Oakman*, 251 S.C. 611, 164 S.E.2d 758 (1968).

[40] *Nelson v. Charleston & W.C. Ry. Co.*, 92 S.C. 151, 121 S.E. 198 (1911).

[41] *State v. Battle*, 304 S.C. 191, 403 S.E.2d 331 (Ct. App. 1991).

[42] *Thompson v. Aetna Life Ins. Co.*, 177 S.C. 120, 180 S.E. 880 (1935).

[43] *United States v. Akumeh*, 153 F.3d 722 (4th Cir. 1998).

[44] *Brown v. Stafford County Pub. Schs.*, 151 F.3d 1028 (4th Cir. 1998).

[45] *United States v. Sanchez*, 45 F.3d 428 (4th Cir. 1995).

[46] *United States v. Simmons*, 34 F.3d 1067 (4th Cir. 1994).

[47] *Winant v. Bostic*, 5 F.3d 772 (4th Cir. 1993).

[48] *Mattison v. Dallas Carrier Corp.*, 947 F.2d 110 (4th Cir. 1991).

[49] *United States v. Fowler*, 932 F.2d 312 (4th Cir. 1991).

[50] *MCI v. Telecomms. Corp. v. Wanzer*, 897 F.2d 703 (4th Cir. 1990).

[51] *United States v. Robinson*, 804 F.2d 282 (4th Cir. 1986); *United States v. Allen*, 787 F.2d 936 (4th Cir. 1986).

[52] *Pollard v. Rogers*, 234 Ala. 92, 173 So. 881 (1937).

[53] *Dulaney v. Burns*, 218 Ala. 493, 513, 119 So. 21, 24 (1928).

[54] *City of Beaumont v. Kane*, 33 S.W.2d 234 (Tex. Civ. Ct. App. 1930).

[55] *Allen v. Matson Navigation Co.*, 255 F.2d 273, 278 (9th Cir. 1958).

[56] For cases going both ways on the intoxication issue, see Caroll J. Miller, Annotation, *Competency of Nonexpert Witness to Testify, in Criminal Case, Based Upon Personal Observation, as to Whether Person Was Under the Influence of Drugs*, 21 **A.L.R.4th** 905 (1981 & Supp. 1999). For a case allowing lay opinions that a defendant was not "strung out" on drugs, see *People v. Williams*, 44 Cal. 3d 883, 245 Cal. Rptr. 336, 751 P.2d 395 (1988).

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