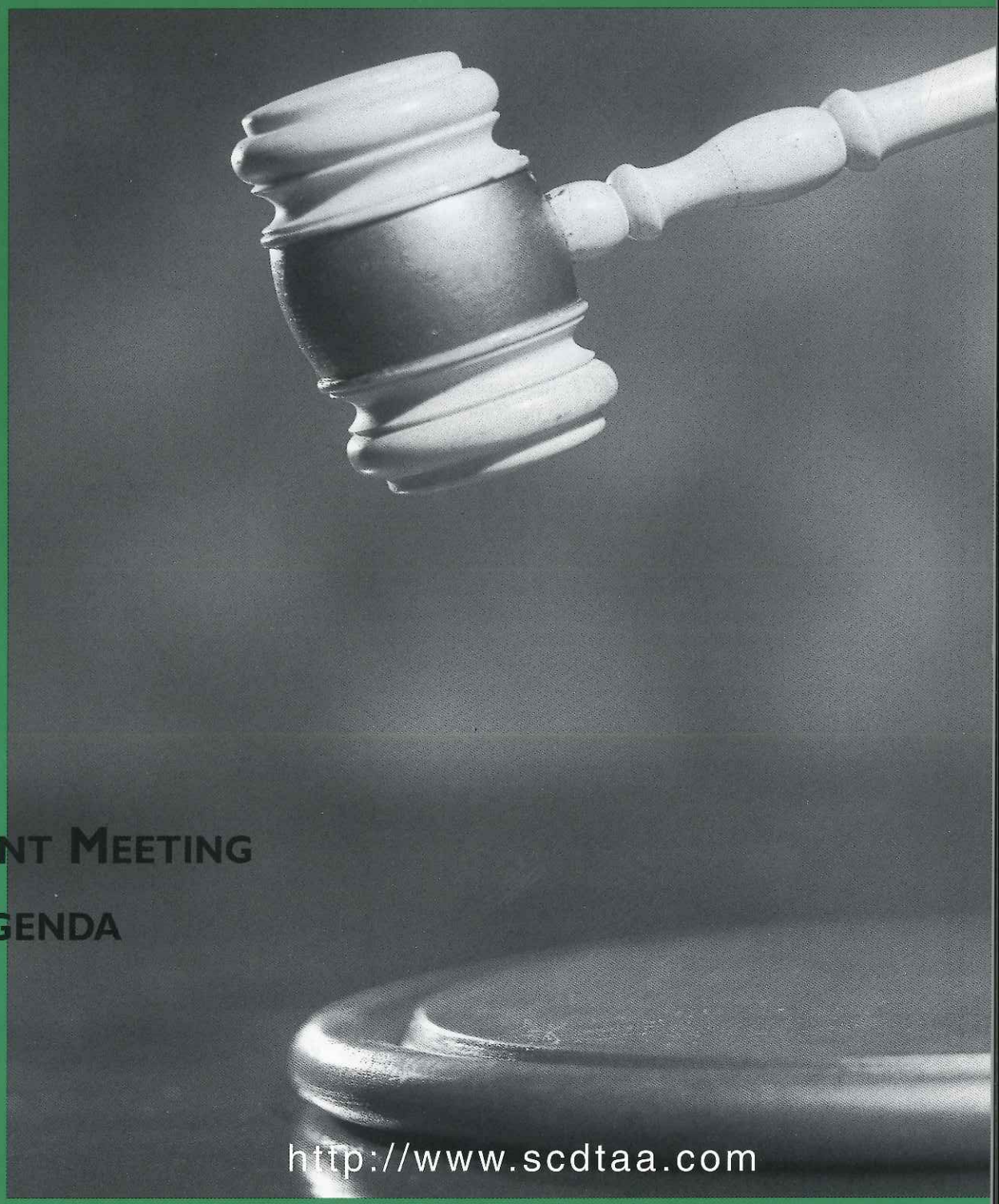
S.C. Defense Trial Attorneys' Association

Volume 29 Number 2 • Summer, 2001

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



2001 Joint Meeting Agenda

http://www.scdtaa.com

SCDTAA Trial Academy
July 11 - 13, 2001
Hyatt Regency • Greenville, SC

The South Carolina Defense Trial Attorneys' Association will hold its annual Trial Academy on July 11-13, 2001. The first two days will be held at the Hyatt Regency in Greenville. The mock trials will be held on July 13 and will take place at the Greenville County Judicial Center.

The goal of the Trial Academy is to provide basic to intermediate level trial training for defense lawyers. The program has been updated to include basic training for newer attorneys who have tried no cases or only a few cases. In addition, it will include training appropriate for attorneys who have participated in some trials or who have tried cases on their own, but who can benefit from intensive trial advocacy training to help them move "to the next level" in their ability to try cases. Students should be lawyers in your firm with one to five years' experience and who are ready to begin trying cases on a regular basis or who need to improve their courtroom skills.

Each of the participants will learn both by lectures from experienced defense lawyers and by practicing their own skills in small breakout sessions. We anticipate that approximately 18 hours of CLE credits will be given for this program.

The registration fee is $600.00 exclusive of room and board. We have reserved a block of rooms at the Hyatt Regency at a rate of $98.00 single/double. Room charges will be paid directly by the participants to the hotel upon checkout. If you need a room at the Hyatt Regency, please call (864) 235-1234 and identify yourself as being with our group to get this special rate. Reservations should be made by June 19, 2001 to ensure this rate.

We expect that we will again have an outstanding faculty. Enrollment will be limited to 24 students. In addition, Federal and State Court Judges have volunteered their time to preside over the mock trials to be held on July 13.

Checks for registration and the completed enclosed registration form should be made payable to the South Carolina Defense Trial Attorneys' Association and mailed to SCDTAA Headquarters, 3008 Millwood Avenue, Columbia, South Carolina 29205.

Matthew H. Henrikson & John T. Lay, Jr.
Co- Chairs

ABOUT THE ACADEMY:

This three-day trial advocacy course is designed for practitioners with up to five years of experience in jury trials. The course will focus on the successful handling of all major aspects of a trial from opening statement to closing argument, as well as trial preparation and post-trial matters. There will be demonstrations and lectures by experienced defense trial attorneys. However, the majority of time will be spent on reviewing and critiquing the performance of the participants in breakout sessions and in their conduct of a mock trial. Eighteen hours of CLE credit (possibly including ethics credit) is anticipated.

*** Trial Academy Cancellation Policy***

1. Any cancellation more than 30 days before the first date of the Trial Academy will be entitled to a full refund.
2. Cancellations from 15-30 days before the first date of the Trial Academy will be entitled to a 50 percent refund. However, if the canceling party succeeds in finding a replacement for himself/herself, he/she will be entitled to a full refund upon payment by the replacement.
3. Cancellations less than 15 days shall not be entitled to any refund. However, if the canceling party succeeds in finding a replacement for himself/herself, he/she will be entitled to a full refund upon payment by the replacement.
4. Law firms who reserve a spot for one attorney in the firm may substitute another attorney of that firm at any time without any penalty.

ADVANCE REGISTRATION IS ENCOURAGED AS ENROLLMENT IS LIMITED.

Please register me for the Eleventh Annual SCDTAA Trial Academy:

Name:_____

Firm:_____

Address:_____

City, State, Zip:_____

Telephone:_____ Fax:_____

Email:_____

Bar Number:_____

I understand that the registration fee for this seminar is $600.00 (including a $25.00 non-refundable processing fee)

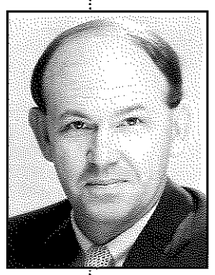
For more information, call SCDTAA Headquarters (800) 445-8629
Return to: SCDTAA, 3008 Millwood Avenue, Columbia, South Carolina 29205

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

President's Letter

by H. Michael Bowers



I can hardly believe that summer is here and my term is half over. Time does pass very quickly. Summer brings back memories of long lazy days of swimming, baseball, going to the beach and hanging out with friends. I hope everyone has time this summer to take a vacation and to replenish themselves for the remainder of the year.

The second half of the year is a very active time for our Association. The 11th Trial Academy will be held July 11-13 in Greenville, SC. Please make a note of the changed venue and make sure your attorneys are signed up so that we can have a full house. Thanks to Matt and John T. for putting together such an excellent program and thanks to the Judges and Attorneys who will be participating. This is a tremendous effort by our organization to educate new and young attorneys in trial skills.

The 34th Joint Meeting with the Claims Managers will be held at The Grove Park Inn in Asheville, NC, July 26-28. Jay Courie and Jeff Ezell have put together an excellent program with a variety of vendors and activities this year. Our meeting committee is making an effort to increase client participation as well. Also, we have invited the South Carolina Workers Compensation Commissioners to the meeting. Please make plans to attend. This is one of my favorite settings and the new health spa is open.

Our 34th Annual Meeting is just around the corner and it will be at The Cloister, Sea Island, Georgia, November 8-11, 2001. This is also one of my favorite locations. Actually, I have a lot of favorite places and they usually have a golf course near by. Please make plans to attend this meeting. We plan to have another outstanding program.

In closing, I look forward to seeing many of you at the Trial Academy and Joint Meeting in July. It is not too late to get involved with the activities of the Association if you have not already done so. Have a great summer!

SCDTAA Joins with NuVox

The association has recently formed a working partnership with NuVox Communications (a service of TriVergent Communications). The partnership was formed for the benefit of our members, and we would invite you to participate. Individuals or law firms who take advantage of the comprehensive services provided by NuVox Communications will be contributing to the initiatives of the South Carolina Defense Trial Attorneys' Association at the same time. When you get your local and long distance service, internet and web technologies together under the NuVox Communications umbrella, a percentage of your total expenditures returns to the association.

NuVox delivers a wide array of bundled products and services for business customers, including high speed internet access, web and data services, and local, domestic and international telephone service.

During the next few weeks, a NuVox account executive may contact you regarding their services. As always, your continued support of the association is appreciated.

NUVOX COMMUNICATIONS

NuVox Communications is a rapidly growing, facilities-based integrated communications and applications services provider formed by the union of Gabriel Communications and TriVergent.

NuVox is privately held and has its headquarters at 16090 Swingley Ridge Road in Chesterfield, MO. NuVox has launched a new website URL - www.nuvox.com.

2001 Joint Meeting Agenda SCDTAA and CMASC

Grove Park Inn • Asheville, NC

July 27 - 29, 2000

THURSDAY, JULY 26

3:00 p.m.
Tennis Tournament - Bill Besley, Chair

3:00 to 5:00 p.m.
Executive Committee Meeting

4:00 to 6:00 p.m.
Claims Managers Meeting

4:00 to 7:00 p.m.
Registration

6:30 to 8:00 p.m.
Welcome Cocktail Reception

DINNER ON YOUR OWN

FRIDAY, JULY 27

8:00 a.m. to 12 noon
Registration
Exhibit Hall Open

8:15 to 8:45 a.m.
Coffee Service

8:15 to 8:30 a.m.
Welcome
H. Michael Bowers - SCDTAA President
Judy McBreart - CMASC President

Opening Remarks, Announcements and Introductions
James R. Courie - Program Chair

8:30 to 9:30 a.m.
Federal Local Rules Update 2000-2001
Virginia L. Vroegop

9:30 to 10:30 a.m.
The 2000 Outlook Juror Survey: A View From the Box
Rick R. Fuentes & Susan Bowers - DecisionQuest

10:30 to 10:45 a.m.
Coffee Break

10:45 to 12:15 p.m.
Substantive Law Breakouts
• Workers' Compensation
Anne Marie Partin
• Insurance and Torts
Chuck Turner

10:45 to 12:15 p.m.
Office Administrators Breakout
Leah Wallace

12:15 to 1:15 p.m.
Beverage Break

12:15 to 6:00 p.m.
White Water Rafting Trip

12:30 p.m.
Golf Tournament
Scott Garrett, Chair

6:30 to 10:00 p.m.
Children's Program at Grove Park
(Dinner Included)

6:30 to 8:00 p.m.
Cocktail Reception/Silent Auction
Grove Park Inn

DINNER ON YOUR OWN

SATURDAY, JULY 28

7:30 to 8:30 a.m.
Coffee Service

7:30 to 1:15 p.m.
Exhibit Hall Open

8:00 to 8:30 a.m.
SCDTAA Business Meeting & Announcements

8:30 to 9:30 a.m.
Ethics in the Movies
G. Mark Phillips

9:30 to 10:30 a.m.
Meeting the expectations of Claims Managers, Risk Managers, and Corporate Council
– A round table discussion

10:30 to 10:45 a.m.
Coffee Break

10:45 to 11:45 a.m.
The Technology Treadmill
Marvin Chavis - FirmLogic

11:45 a.m. to 12:15 p.m.
The Midnight Rider and the Four Day Creeper
The Honorable William B. Traxler, Jr.

12:15 p.m. to 1:15 p.m.
Adjournment / Beverage Break

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Out and About in Asheville, North Carolina

ASHEVILLE

Asheville boasts a 200-year tradition as a resort city. Hundreds of intriguing attractions and festivities prove it. The city has been attracting tourists long before its native son Thomas Wolfe wrote about it in his novel, Look Homeward Angel or George Vanderbilt thought about creating America's largest home, the 255-room Biltmore House. Whether you're looking for an adventure or a place to unwind, you'll discover that the mountains have more to offer than fabulous views.

Asheville is ideally located near the famous Blue Ridge Parkway on both banks of the French Broad River, near the French Broad Basin. The Blue Ridge Parkway is a 470-mile stretch of uninterrupted highway weaving its way through some of the most beautiful and inspirational mountain scenery this side of the Mississippi. With all its exciting attractions, the beauty of the land, and the year-round mild climate, Asheville is clearly a top choice for hosting successful meetings.

CLIMATE

Asheville has a temperate, but invigorating climate. Average temperatures for late July will be with highs in the lower 80s and lows in the high 50s.

THE GROVE PARK INN

When the Grove Park Inn opened in the summer of 1913, newspapers across the country christened her "the finest resort hotel in the world.". Through the efforts of owner Edwin W. Grove and architect Fred L. Seely, the Grove Park Inn drew the rich and famous to Asheville, North Carolina, where they basked amid the panoramic views and soothing climate of the Blue Ridge Mountains. In her early years, the Grove Park Inn served as a summer retreat for Presidents Woodrow Wilson, Calvin Coolidge, and Herbert Hoover, along with such noted personalities as Henry Ford, Harvey Firestone, Thomas Edison, Will Rogers, and John D. Rockefeller, Jr.

After struggling through the Great Depression and serving her country during World War II, when the United States government utilized it as an internment center for Axis diplomats, the Grove Park Inn teetered on the brink of obscurity. In 1955, Texas businessman Charles A. Sammons purchased the forty-two year old hotel and instituted a restoration and expansion program designed to both preserve the aura of the grand old inn and accommodate future generations of guests. When the Grove Park Inn celebrated her seventy-fifth birthday in 1988, she had risen once again to join the ranks of the finest resort hotels in the country. In doing so, she fulfilled the prophecy of William Jennings Bryan, who, at the inn's opening on July 12, 1913, had declared that the Grove Park Inn was "built for the ages".

The Grove Park Inn is a resort complex on 140 acres on Sunset Mountain. The Inn has 510 guest rooms, including 12 suites, located in the Main Inn and the Vanderbilt and Sammons wings. Deluxe and private accommodations provided on the club floor include oversized guest rooms with Jacuzzi, newspaper delivery and a private club lounge.

The Spa is now open with over 40,000 square feet dedicated to your comfort and relaxation. For our sports enthusiasts, the Inn has an 18-hole, par-72 championship golf course sculpted by Donald Ross, designer of Pinehurst #2. The indoor sports center offers two racquetball courts, an international squash court, an 18 station Paramount fitness center, and an aerobics room. If you prefer, you can relax and enjoy the whirlpool sauna or indoor pool. There are 3 outdoor tennis courts and 3 indoor courts. You may also enjoy the outdoor pool at the country club.

CHECK IN, CHECK OUT

Check-in time at The Grove Park is after 4:00 p.m. and check-out is before Noon. If your travel arrangements do not coincide with these times, the bell staff will be happy to store your luggage.

Recent Order

United States District Court,
D. South Carolina,
Anderson Division.

ROYAL INSURANCE COMPANY OF AMERICA,
as subrogee and assignee of Carolina
Material Handling, Inc., Plaintiff,
v.
RELIANCE INSURANCE COMPANY Defendant.

No. CIV.A. 8:00-1256-13B.G

April 19, 2001.

ORDER

This is a case of first impression in South Carolina. Plaintiff Royal Insurance Company of America (Royal) complains that Defendant Reliance Insurance Company (Reliance) paid its primary insurance policy limits directly to a plaintiff who was suing their mutual insured. Royal maintains that primary insurers owe a continuing duty to excess insurers never to compromise their joint leverage with respect to plaintiffs. If such a compromise occurs, Royal argues that the excess insurer should then recover from the primary insurer its ultimate settlement payments as damages. Royal asserts that this duty arises from an alleged custom of the insurance industry. [1]

This Court has jurisdiction over this dispute by virtue of title 28 U.S.C. Section 1332 in that there is complete diversity of citizenship between the parties and the amount in controversy is in excess of Seventy Five Thousand Dollars ($75,000.00) exclusive of interest and costs. Venue is properly laid in this Court pursuant to title 28 U.S .C. Section 1391 because a substantial part of the events giving rise to the claim occurred in this District. Pursuant to agreement of the parties, this matter is before the undersigned for non-jury trial. 28 U.S.C. Section 636(c).

The Parties and Their Insured

In 1993, Carolina Material Handling, Inc. (CMH) insured its employees against workplace injury through two insurance policies purchased from Reliance and Royal.[2] Reliance, as primary insurer, provided Nine Hundred Thousand Dollars ($900,000) of liability insurance coverage, above a CMH retention of One Hundred Thousand Dollars ($100,000). Royal, as excess insurer provided additional liability coverage of Five Million Dollars ($5,000,000).

WOOD v. GASTON COPPER & CMH

On September 14, 1993, an accident occurred at the plant of Gaston Copper Recycling Corporation (Gaston Copper) in Gaston, South Carolina. CMH had a contract with Gaston Copper to repair a crane on the Gaston premises. Charles D. Wood, an employee of CMH, was working on the job, when a cement-filled bucket fell from a crane striking him.

Responsibility for this catastrophic event remains an open question. The bucket was a clumsy substitute ballast which Gaston Copper employees were using to lower the crane hook. Thus Gaston Copper had created a hazardous condition. On the other hand, CMH employees, like Wood, were proud of the company slogan, "We Stand By Our Work, Not Under It." Wood himself could, thus, have been guilty of negligence or assumption of the risk by standing under the bucket. Then again, conditions in the Gaston Copper plant were dark and dusty, witnesses said, which could have prevented Wood from being aware of the danger. While causation is not an issue in this case, the existence of these conflicting views is very important for an understanding of the present lawsuit.

Miraculously, Wood survived the accident, but he was badly injured and ultimately rendered paraplegic. Wood was married. Complicating the situation, his wife, Judy, suffered from cerebral palsy. She had depended upon him to be her caretaker and also to play a major role in rearing their three children. Suddenly and permanently, their roles were reversed. Despite her affliction, she was forced to shoulder the major burdens of family life--for the rest of their lives.

On February 16, 1995, Charles Wood filed an action against both Gaston Copper and CMH in the state courts of South Carolina, and Judy Wood sued for loss of consortium. These actions alleged negligence against both the defendants. While CMH was statutorily barred from asserting most affirmative defenses; Gaston Copper was not.

Aside from the legal questions of proximate causation, statutory employment status under the Workers Compensation Act, and indemnification, the Woods' case also presented a question of value. The Woods' attorney, J. David Standeffer, testified at the trial of this case: "I thought that there was an outside chance or a chance that we could even get as high as a[n] eight figures in that case, I knew it would never settle for that. That would have to be a trial verdict if we got that." [3] As discussed below, the record contains evidence of jury verdicts in compa-

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rable cases between Eight and Ten Million Dollars ($8,000,000-$10,000,000) as well as a range of values supplied by the parties' expert witnesses.

Gaston Copper bought its peace in February, 1996. Its carrier, Insurance Company of North America (INA), settled with the Woods by paying Three Hundred Fifty Thousand Dollars ($350,000) as a lump sum and thereafter paying Two Thousand Three Hundred Seventy Six Dollars ($2,376) monthly for Wood's life. The total present value of the settlement agreement was between Eight Hundred and Nine Hundred Thousand Dollars ($800,000/$900,000). [4]

Although CMH managed to keep Gaston Copper in the lawsuit on a cross-claim, the INA settlement clearly left CMH exposed for the entire remaining value of the claim and bereft of any affirmative defenses. On September 5, 1996, Attorney F. Dean Rainey, as independent counsel for CMH, wrote to Reliance, and to Royal, demanding that both insurers offer their policy limits to the Woods under South Carolina's *Tyger River* doctrine, which in South Carolina bears the name of the lead case dealing with the duty of insurers to defend and reasonably settle claims against the insured. *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 346, 170 S.E. 346 (S.C.1933).

On October 7, 1996, Reliance paid its policy limits of Nine Hundred Thousand Dollars ($900,000) to the Woods. Almost a year later, on September 13, 1997, Royal concluded the case by paying to the Woods the sum of One Million One Hundred Twenty Five Thousand Dollars ($1,125,000), approximately one fourth of its policy coverage. In all, the Woods received from Gaston Copper ($800,000- $900,000), from Reliance ($900,000), from CMH ($100,000), and from Royal ($1,250,000), for a total settlement exceeding Three Million Dollars ($3,000,000).

I. THE DUTY NOT TO PAY

Royal argues that Reliance should not have paid the Woods directly. Instead, Royal claims that primary insurers owe a duty to tender policy limits only to the excess insurers, and never to pay victims directly. To pay the victim, Royal asserts, is negligent claims adjustment. Therefore, because Reliance did in fact pay the Woods, Royal claims that a part of its ultimate settlement is a damage. Specifically it is a damage caused by Reliance's breach of the duty owed by primary to excess insurance carriers to maintain a united insurance front against suing plaintiffs. More starkly stated, the position of the excess carrier is that it is the primary insurer's duty to give no aid to the victim, thus by financial necessity forcing the victim to accept a lesser amount from the excess insurer.

The existence of such a duty is a question of first impression in South Carolina. While Royal argues that this duty exists by reason of custom or usage in the insurance industry, it also bases its claim alternatively on South Carolina's *Tyger River* doctrine of bad faith insurance claims settlement and/or equitable subrogation. [5]

II. INSURANCE INDUSTRY CUSTOM

Royal insists that it is the custom of the insurance industry to pay primary coverage to excess insurers and never to victims. It is hard to find this principle explicitly stated in either insurance law cases or the literature of the industry. [6]

Thus, the Court is left with the testimony provided by the parties at trial. Royal called two independent attorneys as expert witnesses to establish that payment to the excess insurer, not to the victim, is the custom and usage of the industry. Royal also produced its own claims employee, Gene Murray, and the attorney, James H. Watson, who was retained to handle the Woods' case. Reliance produced one independent attorney as expert witness, along with its own Vice- President, Michael Mangino, and the counsel it retained for the Woods' case, William Kehl. Reliance also called the Woods' attorney, J. David Standeffer, as well as the attorney for CMH, F. Dean Rainey. [7]

Royal's first expert witness testified that a critical moment in the Woods' case occurred in February, 1996, when Gaston Copper achieved its separate settlement with the Woods. At that point, the plaintiffs had already received approximately One Hundred Thousand Dollars ($100,000) of benefits directly from CMH. Thereby, the Woods acquired access to the total sum of about One Million Dollars ($1,000,000), characterized as a "financial cushion" with which to continue prosecuting their claims against CMH.

At least three times in his testimony, this witness described how such money reduced the "leverage" which Royal could bring to bear in settlement negotiations. [8] Thus, the witness calculated, the additional payment of Nine Hundred Thousand Dollars ($900,000) by Reliance further reduced this "leverage" as follows:

> So when he's already got basically the first and second million in his pocket, it's pretty hard to convince him not to go for the whole thing and hope for the huge verdict that's going to--you know, that's going to really make waves. But if he didn't have that nine hundred thousand dollars already sealed up, if that was at risk, even though he didn't think it was a great risk, I think I would be able to work on him to convince him to take a lot less than he would under the circumstances of this case. [9]

Royal's second expert witness was a well-known and experienced plaintiff's attorney, who on a regular basis settles or tries multi-million dollar cases. He testified as follows:

> And what you are looking for once you reach that line where they can make it and the family is stable, can you get more? The question--the answer is of course you can get more, but you run the risk of getting less. And that risk of going below the survivability line is always an unacceptable risk to get money which in effect the people don't--can't spend. These are working class people. They really only know how to spend a certain amount. [10]

Later, this expert continued with the view that plaintiffs, such as the Woods, coming from modest backgrounds tend to accept modest settlements not simply because of their class backgrounds but also because the quest for a large jury verdict, compared to money actually on the table, becomes an unacceptable risk:

> But he can't spend the other four thousand dollars. He doesn't know what to do with it. He got eight thousand dollars a year--a month, tax free. He used to work in a slaughter house in West Virginia, you know, cutting up cows. And he was an electrician and at the peak of his life, and he sounds like a pretty good fellow.
>
> He was making thirty-five thousand dollars a year. He's got a wife and three kids. He got a modest--his family is modest. Her family is modest. They can't afford to lose. That's what controls the value of the case. They can't afford to lose when this number's on the table. That's it. That's how I get there... And that's where the risk is. The risk is you win your case. You get a nice group of well meaning people. All right. And they go out and give you all the money they can conceive of. Okay. All of it they can conceive of it, and it comes up to be less than that million and a half that's on the table. And it happens all the time. But it don't happen to me because I take the million and a half dollars. [11]

Royal called its own claims employee, Gene Murray. From a strategic point of view, Murray assessed the case as one of primary liability on the part of Gaston Copper for allowing a dangerous condition to persist on its premises. However, by "opting out" of the Workers' Compensation regime, CMH, Murray's insured, had complicated its own defense. [12]

Notwithstanding the statutory bar to most affirmative defenses, Murray nonetheless assessed the exposure of his company, Royal, as minimal. He established a reserve in the amount of One Hundred Thousand Dollars ($100,000) against Royal's coverage of Five Million Dollars ($5,000,000):

> I didn't see this as a real case of liability against Carolina [CMH], but my practice experience has been that attorneys very rarely let excess carriers just walk on serious injury cases. It usually takes some nominal contribution. It could have settled within the Reliance's policy, but I needed something as a cushion.... [13]

Mr. Murray was the witness who articulated Royal's view that there was a duty to present a "united front" between primary and excess insurers against plaintiff victims. Since he believed the case was "worth" less than a million dollars, Murray expected a settlement within Reliance's policy limits. If Murray's carrier, Royal, took over the defense, he believed, it would signal a higher value to the Woods and their attorney:

> A: Well, once Royal takes over the defense, that's a clear signal to the plaintiff's attorney that the primary carrier's policy limit is there, is available, and that becomes the floor for any further negotiations.
>
> Q: All right, sir.
>
> A: It's practice many times for a primary carrier to tender to the excess carrier, but still remain at the forefront of the discovery. [14]

In his experience in the insurance industry, Murray claimed that he had never seen a case where the primary carrier paid its money directly to the

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victim and that this was not customary.[15] Yet, paradoxically, he also testified that when he had seen such payments made, the plaintiffs' appetites were only whetted:

> It's been my experience that when the primary limits such as this are paid up front, that it gives the plaintiff an extra cushion--they're cushioned that they can take more of a risk in taking the case to trial. It causes the overall value of the case to go up because there's more risk that the plaintiff is willing to take because they have their--they would have a large foundation of a settlement already there. [16]

The picture of personal injury settlement practice drawn from Royal's witnesses is not a pretty one. Their view is that insurers owe a duty to one another to preserve "leverage" over and against plaintiffs, to exploit the modest expectations and psychological vulnerabilities of ordinary accident victims, and above all to deny plaintiffs a "cushion" from which they could comfortably pursue a larger verdict or settlement. In a letter written to F. Dean Rainey, CMII's attorney, on September 3, 1997, Gene Murray characterized the settlement by Reliance as follows:

> Their action has provided the plaintiffs with a "war chest" to continue to prosecute an action against Carolina Material, and it has also made negotiations more difficult. [17]

Royal's case, thus, rests on its own caricature of the insurance industry as a monolith which must impoverish plaintiffs in order to achieve favorable settlements. Yet even Gene Murray (himself the creator of this caricature) admitted in the end that the practice of starving plaintiffs produces at best mixed results:

> Q: Does it make it easier to settle with the plaintiff if he is not financially well off?
>
> A: Sometimes it does, and sometimes it doesn't. They can go both ways. I have had cases go both ways. [18]

In opposition to Royal's evidence, Reliance produced its own attorney expert witness who testified that direct payments from primary insurers to plaintiffs, was common practice.[19] Given that the attorney experts disagree among themselves, and given the absence of any guiding authority to establish the duty upon which Royal relies, this Court is not able to conclude that the insurance industry has established a custom or usage with respect to the payment of primary policy limits. Royal's first cause of action, based on negligent claims adjustment, cannot therefore be sustained.

III. BAD FAITH UNDER THE *TYGER RIVER* DOCTRINE

Royal asserts that a cause of action by excess against primary insurers arises under the line of South Carolina cases following *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 346, 170 S.E. 346 (S.C.1933). Undeniably, South Carolina has long imposed a duty upon insurers to diligently and in good faith investigate, evaluate, adjust, settle and/or defend claims. Royal relies upon this *Tyger River* doctrine to contend that Reliance was obligated to pay its policy limits to Royal, rather than to the Woods. Royal claims that the failure so to do is bad faith.

Tyger River however is a theory of recovery aimed at insureds or their assignees, as demonstrated by its progeny. *Tadlock Painting Company v. Maryland Casualty Company*, 322 S.C. 498, 473 S .E.2d 52 (S.C.1996); *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (S.C.1993); *Nichols v. State Farm Mutual Automobile Insurance Company*, 279 S .C. 336, 306 S.E.2d 616 (S.C.1983). *Nichols* was foreseen by this Court in *Trimper v. Nationwide Insurance Co.*, 540 F.Supp. 1188 (D.S.C.1982) and *Robertson v. State Farm Mutual Automobile*, 464 F.Supp. 876 (D.S.C.1979).

South Carolina, however, has not extended this cause of action to third parties who are not named insureds. *Kleckley v. Northwestern National Casualty Company*, 338 S.C. 131, 526 S.E.2d (S.C.2000); *Gaskins v. Southern Farm Bureau Casualty Insurance Company*, 343 SC 666, 541 S.E.2d 269 (S.C.Ct.App.2001). In both the *Kleckley* and *Gaskins* cases, the claimants were victims of accidents but were not in privity of contract with the defendant insurers. If South Carolina has not extended *Tyger River* to third- party victims of accidents, it seems improbable that the doctrine would find application in a suit by an excess insurer against a primary insurer in the absence of a contract otherwise providing.[20] If anything, South Carolina seems inclined to the opposite position. Therefore Royal's second cause of action cannot be sustained.

IV. EQUITABLE SUBROGATION

Equitable subrogation exists in South Carolina as a principle of natural justice. *Calvert Fire Insurance v. James*, 236 S.C. 431, 114 S.E.2d 832 (S.C.1960). Its elements are: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; and (4) no injustice will be done to the other party by the allowance of the equity. *United Carolina Bank v.. Caroprop, Ltd.*, 316 S.C. 1, 446 S.E.2d 415 (S.C.1994).

South Carolina has not had occasion to decide upon the availability of equitable subrogation in cases between primary and excess insurance carriers. South Carolina has so far declined to grant equitable subrogation to health insurers, where a statute specifically allows contractual subrogation in health insurance policies. *Shumpert v. Time Insurance Company*, 329 S.C. 605, 496 S.E.2d 653 (S.C.1998). Confronted with the facts of this case, it seems both logical and likely that the South Carolina Supreme Court would apply the principles of equitable subrogation, since the parties both are tied to CMH, the insured, by duties of good faith and fair dealing.

It appears beyond dispute from the trial that the first three tests of equitable subrogation are met affirmatively: Royal did pay into the settlement of the Woods' claims; Royal was not a volunteer; Royal was in fact directly liable for excess liability. Ultimately, the dispositive issue under this theory is whether or not an injustice to Reliance arises by granting the equity. For this purpose, a detailed factual inquiry is made below.

A. History of the Settlement

On September 16, 1993, Adjustco (whose role is unknown) generated the first written evidence respecting this case. Its letter to Reliance, ostensibly its principal, regarding the accident outlined a plan for initial investigation. [21] Over the next seventeen (17) months, Reliance corresponded with the Greenville law firm of Ashmore, Rabon and Sullivan, P.A., monitoring medical benefit payments to Charles Wood. [22]

A "Large Loss Report" from Michael Mangino to Reliance Vice-President, Robert Hall, on May 24, 1994, summarized Reliance's view of the case at that time.[23] Mangino noted that CMII, the insured, had serious "exposure" because it had opted out of workers' compensation.

Mr. Gene Murray opened the Royal file on this case in July, 1994.[24] The earliest correspondence between Reliance and Royal seems to be a letter from Mangino to Murray on September 23, 1994.[25] In a pre-trial Affidavit, however, Murray indicated that Royal had previously been notifiedof the claim by telefax on June 30, 1994.[26] Murray retained Attorney James Watson to represent the interests of CMH and Royal, although it is not clear the time frame of this decision. At least by the Fall of 1994, Reliance and Royal were both aware of, and more or less engaged in, the Woods' claim.

The state court case of *Wood v. CMH & Gaston Copper* commenced on February 23, 1995. The Complaint contained a prayer for damages of Twenty Five Million Dollars ($25,000,000).[27] Under South Carolina law, Royal's duty to defend became "absolute" at this moment, because the prayer clearly implicated the excess coverage. *Hartford Accident and Indemnity Company v. South Carolina Insurance Company*, 252 S.C. 428, 166 S.E.2d 762 (1969). Of course, this prayer exceeded the excess insurer's coverage by a factor of five. Thus, Murray's rationale for not assuming the defense outright not only became meaningless as a practical matter, but was clearly contrary to South Carolina law. [28]

Reliance hired Attorney William W. Kehl, and the Greenville law firm of Wyche, Burgess, Freeman and Parham to defend this cause of action on March 10, 1995.[29] On March 14, 1995, Kehl wrote to Royal advising of his representation, and drawing attention to the fact that the prayer exceeded Reliance's coverage.[30] This letter by Attorney Kehl represents an almost textbook example of the manner in which primary insurers should discharge the duties they may owe to excess insurers under the law of equitable subrogation.

In the Woods' litigation, Kehl filed a cross-claim against Gaston Copper, to protect CMH, the insured. In July, 1995, Kehl (for Reliance) and Watson (for Royal) actively discussed and cooperated in resisting Gaston Copper's attempt to dismiss this CMH cross-claim. Typical of their correspondence, is a July 24, 1995, letter from Watson to Kehl reporting on consultations with Bobby Carpenter, principal of CMH, their mutual insured.[31] Much later, on April 11, 1996, Kehl argued in opposition to Gaston Copper's Motion to Dismiss the cross-claim and on June 4, 1996, he reported that the Motion had been denied for those claims resting upon equitable indemnity and negligence. Thus, Reliance and its attorney had successively preserved for the benefit of all parties (Reliance, Royal and CMH) the slender reed which was their cross-claim against Gaston Copper. [32]

The July, 1995, letter from Watson also illuminated another aspect of counsel's handling of this case. In his trial testimony, pre-trial deposition and Affidavit, William Kehl clearly articulated his concern about having represented the Carpenter family, and CMH, as counsel prior to being retained by their primary insurer, Reliance. He therefore advised CMH to retain its own independent counsel, and F. Dean Rainey was hired. It would be an understatement to observe that all three attorneys--Kehl, Rainey and Watson-- were conducting themselves in accordance with the highest standards of their profession, meticulously documenting their analyses, correctly discerning the limits of their respective representations, and demonstrating superlative strategic and tactical judgment in the context of a very serious litigation. [33]

Meanwhile, the adjusting staff of Reliance kept Royal fully informed of developments and actively solicited Royal's input and participation. For example, Mangino informed Kehl on November 2, 1995, that he was conferring with Royal about a settlement mediation and that Royal was willing to attend and even make a contributionto settlement. Watson kept Murray fully informed of all correspondence from Reliance's attorney, including a prognostication on July 3, 1996, that Reliance would most likely tender its policy limits and Royal would finally be required to take over the defense.[34]

In fact, Kehl's letter on June 4, 1996, signaled that the time for Reliance to tender policy limits was approaching. During the Summer of 1996, Reliance and Royal both recognized that the excess insurer's coverage was clearly implicated by the course of settlement. It is curious, however, that Watson felt

Continued on page 12

compelled in a letter of June 28, 1996, to suggest to Murray--not once but twice--that his notion of a "nominal" contribution by Royal was unrealistic:

> I told him [Kehl] that I did not know, but assumed we would be willing to sweeten the pot by some nominal amount. We both agreed, however, that a contribution by Royal of some $25-50,000.00 or something in that area probably would not be enough to effectuate a settlement. Gaston's insurer has already paid approximately $800,000.00, Kehl's insurer might put its coverage of approximately $1 million in the pot, and our thinking is if that won't settle the case, another $25-50,000.00 added to it will not settle it either. [35]

On September 5, 1996, F. Dean Rainey, as independent attorney for CMH, wrote a classic *Tyger River* letter to his colleagues, Kehl and Watson, in which he carefully compared the facts of the Woods' case against three jury verdicts from across South Carolina in which the awards ranged from Eight to Ten Million Dollars ($8,000,000/$10,000,000). [FN36] The most recent verdict in July, 1996, had been rendered in the normally conservative upstate region in the amount of Eight Million Dollars ($8,000,000) for a lost limb, whereas Wood had been rendered paraplegic. As noted, Wood's wife was suffering from cerebral palsy and had, up to September, 1993, relied upon Wood as her caretaker as well as support in rearing their three children.

It is frankly difficult to understand how, at this point, Murray could have clung to his illusion that Royal would escape its legal responsibility to defend, to settle, and to pay significant sums in this case. Moreover, Reliance's decision to tender its policy limits was not simply a prudent course of action. It had been demanded by CMH, the insured.

B. Weighing the Equities

The weighing of equities, under a theory of equitable subrogation, boils down to three factual questions in this case. First, at any time did any party believe the Woods' claims would be worth less than One Million Dollars ($1,000,000), the primary coverage and CMH retention? Aside from Murray, no one in this case seems to have seriously entertained this idea. In February, 1995, when Wood's initial Complaint demanded Twenty Five Million Dollars ($25,000,000), all doubt should have been dispelled.

Second, was there at any time a possibility of settling the Woods' claims within the One Million Dollars ($1,000,000) primary policy limits? And if so, when? This question was clearly answered by Woods' attorney at trial:

> Q: Did you ever consider setting with Reliance for its limits?
>
> A: No. No. [37]

Third, is there evidence of any acts or omissions by Reliance which prevented settlement of the Woods' claims for less than the Three Million Dollars ($3,000,000) ultimately paid? The record contains no such evidence. Taken as a whole, the record reveals no equities on the side of Royal. Almost from the date of the accident itself, Royal was informed about and closely followed the progress of the Woods' claims. The conclusion is inescapable that Royal has no claim against Reliance under the theory of equitable subrogation, and thus no cause of action.

V. SPECULATIVE DAMAGES

Even if Royal had a theory of recovery, a further fatal flaw in its case is the speculative nature of its damages. Royal invoked the doctrine of "prevention" as a substitute for proof. The argument is that Reliance, through its settlement with the Woods, prevented any lesser settlement which might have been accomplished through pooling of primary and excess insurance funds. Of course, the logical reply to this argument is that Royal was as well placed as any party to propose and initiate such a settlement by offering funds to Reliance. Murray testified himself that a minimal contribution by Royal might have settled the case early on. He provided no explanation why he failed to initiate this process himself.

More fundamentally, however, Royal's reliance on the doctrine of "prevention" is seriously misplaced. The case of *Champion v. Whaley*, 280 S.C. 116, 311 S.E.2d 404 (S.C.App.1984) was a suit upon a conditional contract whereby a broker through an exclusive listing agreement would earn a commission upon sale. The defendant had repudiated the contract, by selling the property to another buyer on the side. He asserted, however, that the failure to consummate the sale offered by the broker relieved him of his obligation to pay the broker's commission. This effort to escape from the contract failed, because of the doctrine of "prevention"--that is, by preventing the condition precedent from arising, the defendant had in fact relieved the broker from or waived the condition and thus he remained bound by the agreement to pay the commission.

The doctrine of "prevention" has yet to be applied as a substitute for proof of damages. In this case, the various witnesses offered ranges of values for the underlying action by the Woods. Murray steadfastly maintained that the claim was worth no more than a total of Two and a Half Million dollars ($2,500,000). Royal's expert witnesses testified that the total realistic value was approximately One and Half Million ($1,500,000). On the other hand, a *Tyger River* letter written by the independent attorney for CMH, F. Dean Rainey, to the attorneys for Reliance and Royal recited verdicts in comparable cases between Seven and Ten Million Dollars ($7,000,000/$10,000,000).

The evidence simply could not allow this Court to establish a dollar value for the damages claimed by Royal. In point of fact, Royal managed to settle the Woods' claim for approximately one-fourth of its coverage. There is neither evidence nor authority to deem this result a damage or prejudice.

VI. STATUTE OF LIMITATIONS

As indicated Royal's claim is without merit and can not support recovery of any specific damage. Thus, it is almost superfluous to add that this action was not brought within the South Carolina Statute of Limitations. Section 15-3- 535 Code of Laws of South Carolina requires that an action "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." This so-called "discovery" rule received classic formulation in the South Carolina Supreme Court decision of *Snell v. Columbia Gun Exchange*, 276 S.C. 301, 278 S.E.2d 333 (1981):

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

In the present case, Royal had formulated a full-blown theory of recovery on January 15, 1997, more than three years and three months before the filing of the Complaint on April 24, 2000. On January 15, 1997, Murray drafted a "File Memorandum" which recited the following:

ISSUES RELATED TO RELIANCE'S CONDUCT

- Reliance put its self-interest ahead of that of its insured's interest
- Reliance put its self-interest ahead of the Royal's interest as excess carrier.
- Reliance had an obligation to defend under their policy. Little or no meaningful discovery against the co-defendant, the true responsible party, had been conducted prior to the co-defendant's settlement with the plaintiff; the plaintiff's deposition, or the planned settlement conference.
- Reliance appears to have conveyed to the plaintiff its willingness to tender its limits even before the plaintiffs deposition without consulting with Royal.

Royal was disadvantaged by Reliance's settlement because it

- provided the plaintiff with "war chest" to continue the case against the insured and the excess carrier
- gave the plaintiff a comfortable "cushion" of $900,000, allowing the plaintiff to "roll the dice" at trial and making it impossible for Royal to conduct meaningful negotiations.
- Reliance's inadequate defense, up to the point that they paid their money and tendered to Royal, put Royal at a decided disadvantage in applying pressure on the co-defendant to pay a larger share of the settlement Indeed, by the time that Reliance tendered to Royal, the co-defendant had settled out of the case, giving Royal no chance to correct the deficiencies of the inadequate defense furnished by Reliance.
- Reliance conducted virtually no initial local discovery, forcing Royal as excess carrier to retain an investigator to preserve the physical evidence and other important discovery matters.

Reliance had a viable alternative to tendering to the plaintiff. They could have tendered directly to Royal However, Reliance wanted to cut off its defense expenses the fastest way possible, regardless of how it impacted its insured and Royal as excess carrier.

For the first time in this case, this document (marked as Defendant's Exhibit 9) was authenticated by its author, Gene Murray, at trial:

> Q: Is Exhibit Number 9 your file memorandum?
>
> A: Yes, it is.
>
> Q: And just to summarize this, does Exhibit Number 9 basically summarize the claims that you're making here today?
>
> A: Essentially, yes.[38]

In fact, Murray's memorandum states the essence of Royal's claims for negligence (violation of insurance industry custom), bad faith, and equitable subrogation. There is no evidence to suggest that over the next three years Royal made any additional discoveries with respect to its claims. Accordingly, Section 15-3-535 Code of Laws of South Carolina must apply with full force.

Judgment is entered for the Defendant Reliance Insurance Company.

AND IT IS SO ORDERED.

George C. Kosko, Magistrate Judge

FOOTNOTES

[1] Royal argues that custom becomes law over time. It invokes *Love v. Gamble*, 316 S.C. 203, 448 S.E.2d 876 (S.C.App.1994) which, however, was an action on an implied contract. The *Love* case applied the Uniform Commercial Code, Section 36-1-205(2) Code of Laws of South Carolina and cited the nineteenth century case of *Hayward v. Middleton*, 14 S.C.L. (3 McCord) 121 (1825), an action in assumpsit. *Hayward* and its progeny tell us that custom may be *recognized* by law in interpreting contracts. *See Burden v. Woodside Cotton Mills*, 104 S.C. 435, 89 S.E. 474 (1916); *Friedheim v. Walter Hildic Co.*, 104 S.C. 378, 89 S.E. 358 (1916); *Thomas v. Graves & Toomer*, 8 S.C.L. (1 Mill Const.) 308 (1917); *Walker v. Chichester*, 4 S.C.L. (2.Brev.) 67 (1806). In the end, however, *Love* held that custom and usage alone cannot create a contract. This rule is of no use, therefore, to Royal in this case. Custom is also part of negligence law. The *Restatement (Torts) 2d*, Section 295A declares: "In deter-

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mining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them." This variant of custom, however, presupposes that a duty already exists. Royal in this case is attempting to create a duty which so far the law has not recognized.

[2] Prior to 1996, South Carolina permitted employers such as CMH to self-insure and thus "opt out" of the statutory regime of workers compensation. Sections 42-1-330 and 42-1-340 Code of Laws of South Carolina (repealed by 1996 Act. 424 Section 10). Opting out, however, meant that the self-insured employer could not assert affirmative defenses in negligence cases: the employee's negligence; negligence of a fellow employee; or assumption of the risk. Section 42-1-510 Code of Laws of South Carolina (repealed by 1996 Act 424 Section 11)

[3] Transcript, pp. 112-113.

[4] Transcript, pp. 37, 88

[5] Royal's Complaint alleges it is an "assignee and subrogee" of the insured, CMH. At various times, Royal has claimed to hold an actual assignment of rights from CMH, but the instrument was never introduced into this litigation. Thus, claims resting upon assignment are deemed abandoned. The Complaint states causes of action for bad faith and negligence and also seeks a declaratory judgment. The action for declaratory judgment asked ths Court to strike a provision for policy release contained in the Reliance policy. This cause of action, too, seems to have been abandoned at trial. Thus, Royal has proceeded in this case on theories of negligence, *Tyger River* bad faith, and equitable subrogation.

[6] The *Guiding Principles for Insurers of Primary and Excess Coverages* were adopted in 1974 by the Claims Executives Council, composed of the American Insurance Association, the American Mutual Insurance Alliance, and eight unaffiliated companies. The *Guiding Principles* have been used by courts as at least an indication of insurance business practice. *See United States Fire Insurance Company v. Nationwide Mutual Insurance Company*, 735 F.Supp. 1320 (E.D.N.C.1990); *American Centennial Insurance Company v. Warner-Lambert Company*, 293 N.J.Super. 567, 681 A.2d 1241 (1995). Basically, there are nine rules:

1. The primary insurer must discharge its duty of investigating promptly and diligently even those cases in which it is apparent that its policy limit may be consumed.

2. Liability must be assessed on the basis of all relevant facts which a diligent investigation can develop and in light of applicable legal principles. The assessment of liability must be reviewed periodically throughout the life of a claim.

3. Evaluation must be realistic and without regard to the policy limit.

4. When from evaluation of all aspects of a claim, settlement is indicated, the primary insurer must proceed promptly to attempt a settlement, up to its policy limit if necessary, negotiating seriously and with an open mind. 5. If at any time, it should reasonably appear that the insured may be exposed beyond the primary limit, the primary insurer shall give prompt written notice to the excess insurer, when known, stating the results of investigation and negotiation, and giving any other information deemed relevant to a determination of the exposure, and inviting the excess insurer to participate in a common effort to dispose of the claim.

6. Where the assessment of damages, considered alone, would reasonably support payment of a demand within the primary policy limit but the primary insurer is unwilling to pay the demand because of its opinion that liability either does not exist or is questionable and the primary insurer recognizes the possibility of a verdict in excess of its policy limit, it shall give notice of its position to the excess insurer when known. It shall make available its file to the excess insurer for examination, if requested.

7. The primary insurer shall never seek a contribution to a settlement within its policy limit from the excess insurer. It may, however, accept contribution to a settlement within its policy limit from the excess insurer when such contribution is voluntarily offered.

8. In the event of a judgment in excess of the primary policy limit, the primary insurer shall consult the excess insurer as to further procedure. If the primary insurer undertakes an appeal with the concurrence of the excess insurer the expense shall be shared by the primary and the excess insurer in such manner as they may agree upon. In the absence of such an agreement, they shall share the expense in the same proportions that their respective shares of the outstanding judgment bear to the total amount of the judgment. If the primary insurer should elect not to appeal, taking appropriate steps to pay or to guarantee payment of its policy limit, it shall not be liable for the expense of the appeal or interest on the judgment from the time it gives notice to the excess insurer of its election not to appeal and tenders its policy limit. The excess insurer may then prosecute an appeal at its own expense being liable also for interest accruing on the entire judgment subsequent to the primary insurer's notice of its election not to appeal. If the excess insurer does not agree to an appeal it shall not be liable to share the cost of any appeal prosecuted by the primary insurer.

9. The excess insurer shall refrain from coercive or collusive conduct designed to force a settlement. It shall never make formal demand upon a primary insurer that the latter settle a claim within its policy limits. In any subsequent proceedings between excess insurer and primary insurer the failure of the excess insurer to make formal demand that the claim be settled shall not be considered as having any bearing on the excess insurer's claim against the primary insurer.

It appears that the *Guiding Principles* are themselves no guide to the correct payment of primary coverage.

[7] The Carpenter family, principals in CMH, were regular clients of William Kehl. When he was retained by Reliance, at the Carpenters' request, Kehl realized that a conflict might arise between CMH and Reliance. From an abundance of caution, therefore, he requested that CMH retain independent counsel, and recommended F. Dean Rainey, an experienced and skilled litigator, to protect their interests. [Transcript, pp. 245-246.]

[8] Transcript, pp. 38, 42, 44.

[9] Transcript, p. 46

[10] Transcript, p. 76, 89

[11] Transcript, pp. 91, 93

[12] Transcript, pp. 136-137, 139

[13] Transcript, pp. 144-145

[14] Transcript, p. 148.

[15] Transcript, p. 150

[16] Transcript, pp. 150, 152.

[17] 12-1, Exhibit C.

[18] Transcript, p. 153

[19] Transcript, p. 278.

[20] As noted above, Royal never demonstrated to this Court the instrument of assignment whereby it was making its claim against Reliance under the Complaint.

[21] Plaintiff's Trial Exhibit 1.

[22] Plaintiff's Trial Exhibits 5,4,6,7 and 8

[23] Plaintiff's Trial Exhibit 26

[24] Transcript, p. 131.

[25] Plaintiff's Trial Exhibit 13.

[26] Plaintiff's Response to Motion for Summary Judgment, Tab 17 [22-1]

[27] Plaintiff's Response to Motion for Summary Judgment, Tab 11, and Plaintiff's Trial Exhibit # 10 [22-1]

[28] Transcript, p. 148.

[29] Plaintiff's Trial Exhibit 9.

[30] Plaintiff's Trial Exhibit 10.

[31] Plaintiff's Trial Exhibit 30.

[32] Plaintiff's Trial Exhibits 20, 15 and 19.

[33] Transcript, pp. 245-246, 268; 22-1, Tab 1, Deposition, pp. 20- 21; 12-1, Exhibit D. It is disappointing, though not altogether surprising, that in a "File Memorandum" dated October 8, 1996, Gene Murray cast aspersions upon Attorney Kehl. In this somewhat self-serving paper, Murray related a telephone conversation with Michael Mangino protesting that Reliance's payment to Woods was funding a "war chest against their insured and the excess carrier." In the same paragraph, Murray offered the following insinuation: "I also asked him [Mangino] if he was aware that Mr. Kehl was the insured's personal counsel and had been for years. He seemed surprised by that but said that that may be true, but for the purposes of this litigation, he was counsel retained by Reliance. I do not think he understood the implications of the potential conflict of interest." [Defendant's Trial Exhibit 14.] At least, Kehl, Rainey and Watson had understood and obviated any potential conflict.

[34] Plaintiff's Trial Exhibits, 14, 33,34 and 35; see also Defendant's Trial Exhibits 5, 6 and 7.

[35] Plaintiff's Trial Exhibit 33.

[36] Defendant's Trial Exhibit 2.

[37] Transcript, p. 114.

[38] Transcript, p. 173

Evidence Matters

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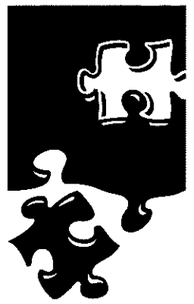
Six Misshapen Stones in the Tower of Babel

(Or What Jeremy Bentham Might Say About Some Modern Litigation Rules)



The body of nineteenth century evidence theorist Jeremy Bentham, or what is left of it, is kept on display in a glass case at University College in London. At his death in 1832, his entire estate was willed to the University College Hospital in London. Once each year, Jeremy Bentham's body is removed from the glass case and wheeled to the university's boardroom. The chairman of the board then announces, "Jeremy Bentham - present but not voting." Clearly, he was not the average philosopher, but black humor aside, Bentham was a free thinker who argued persuasively against exclusion of relevant evidence and who was unafraid to speak out against the establishment of his era. Not surprisingly, Bentham found a great deal to be displeased about in the trial procedures of his time. He did not suffer lightly the unduly restrictive nineteenth century evidence rules of the legal establishment. Legal icon William O. Blackstone was frequently within the cross hairs of Bentham's rhetorical musket, especially in *A Fragment on Government*. Similarly, the law lords, judges, and English barristers were derisively dismissed as "Judge & Co." In hindsight, Jeremy Bentham's criticisms often were right on the mark, later being adopted by both the British and American courts. Even today, the worldwide web is awash with commentary and discussions of Bentham.[1]

Modern evidence law is fairer than in Bentham's day, but still flawed in many respects. The evidence codes are essentially a series of exclusionary rules. Many rules were developed at different times over centuries, with each having its own goal and public policy, which sometimes conflicts with those of other rules. As recognized by the United States Supreme Court, "We concur . . . that much of this [evidence] law is archaic, paradoxical, and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter privilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance . . . than to establish a rational edifice."[2] Although the Federal and South Carolina Rules of Evidence made some changes in the law, they more often than not were simply codifications of the grotesque structure. This is especially true of the federal rules, which were the result of numerous political compromises.

Judges and evidence scholars sometimes speak of illogical or sophistic evidence rules as things that would rattle the bones of Jeremy Bentham. In the spirit of Bentham's approach to evidence law, this column addresses some modern trial rules that even today are probably rattling his bones and in this writer's opinion, could be made better or discarded.[3]

1. The Collateral-Matters Rule

Federal and South Carolina common law provided that a witness may not be impeached on a collateral matter. The rule is a necessary one. However, the common-law doctrine should be subsumed into rule 403, as is being done in some federal circuits, which will better regulate these types of evidence concerns.[4] A separate doctrine is confusing and unnecessary.

The word "collateral" is not found in the Federal or South Carolina Rules of Evidence. The federal courts sometimes discuss whether a trial judge abused her "discretion" in allowing impeachment upon collateral matters,[5] but the better view is to analyze admissibility using rule 403, which grants the court discretion to exclude relevant evidence if outweighed by dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless cumulative evidence. In a pre-evidence rules case, the South Carolina Supreme Court held in *State v. Williams*[6] that the sole purpose for the rule against impeachment on collateral issues was to prevent confusion of issues and unfair surprise. Confusion of issues is, of course, a factor in a rule 403 analysis. *Unfair* surprise will rarely be a factor in modern civil litigation where broad discovery is permitted, although this problem might appear in criminal trials where there are more limited discovery rules. Considerations of undue delay, waste of time, and needless cumulative evidence are not even addressed by the common-law doctrine, but these also are proper issues to be decided by the trial judge. In fact, a prohibition against mini-trials was one of the justifications for the collateral-matters rule in the seminal case of *Attorney-General v. Hitchock*:[7] "If we lived for a thousand years, . . . and every case were of sufficient importance, it might be possible and perhaps proper to . . . raise every possible inquiry as to the truth of the statements made. But I do not see how that could be . . . ."[8]

Rule 403 allows all of these concerns to be addressed on a case-by-case basis under a single evidence rule. The collateral-matters rule should be substituted by an analysis under rule 403.

2. Federal Rule 611(b)

In the state courts, cross-examination may be into any matter relevant to the case. Although the trial judge has discretion to open up cross-examination, the federal rule restricts cross-examination to the subject matter brought out on direct, and to credibility issues. The rule in its present form was partially the result of the Justice Department's lobbying during the Congressional hearings on the proposed federal rules. The argument was that by allowing broader cross-examination, the prosecutors' orderly presentation of evidence would be disrupted. The Department of Justice exerted substantial political muscle in Washington, and despite opposition, the Justice Department had its way.

South Carolina Rule of Evidence 611(b) carries forth the common law, allowing essentially unrestricted cross-examination into relevant matters. This has proved workable even in complex trials. The federal rule should be amended to follow the law of the states.

3. State Rule 404(b)

Federal rule 404(b) is an open-ended rule allowing evidence of prior conduct for reasons other than showing character. State rule 404(b), following *State v. Lyle*,[9] allows prior conduct for only five purposes. *Lyle* often is cited as the seminal case in South Carolina on admission of prior bad acts, but it was not the first case in this state to permit such evidence. Possibly the first South Carolina case to set forth a semblance of the law that eventually would evolve into the *Lyle* rule was *State v. Petty*.[10] Decided 100 years before *Lyle*, *State v. Petty* was a forgery case in which the issue was whether other forged notes were admissible. Writing for the Constitutional Court, Judge Colcock used archaic language to state the modern rule:

> *The question was, whether the prisoner passed the bill,* ***knowing it to be counterfeit.*** *Any circumstances which went to shew this knowledge, are clearly admissible. What effect the testimony is to produce, must be left to the jury . . . .*[11]

In support of his holding, Judge Colcock cited the "recent" English case of *King v. Wylie*.[12] By 1829, the *Petty* rule was settled law in South Carolina, and in trials where guilty knowledge was at issue, other distinct and substantive offenses by the accused were allowed to prove scienter.[13] Sounding very much like a contemporary appellate jurist, Judge John Belton O'Neall stated in *State v. Houston*[14] a few years later that the fact that the accused had been acquitted of one of the prior bad acts was irrelevant to admissibility, as this went solely to the *weight* of the evidence.[15]

As noted above, in *State v. Petty* Judge Colcock cited English common law as authority. That case, *King v. Wylie*,[16] discussed a trial in which an English judge properly had allowed evidence of three burglaries because "they were all so connected."[17] Thus *Wylie* set forth another ground for admissibility, which later would become the "common scheme or plan" exception embodied in *Lyle* and rule 404(b). As of the late 1800s, this exception to the rule was firmly rooted in South Carolina jurisprudence.[18]

The state courts by 1909 had established three species of cases in which prior similar-acts evidence was allowed: conspiracies, uttering forged instruments and counterfeit coins, and receiving stolen goods.[19] This type evidence was allowed to show intent, guilty knowledge, to show a continuous transaction, and possibly for other reasons. *State v. Owens*,[20] decided in 1922, set forth the rule that evidence of other crimes "is admissible to show the guilty knowledge, intention or bad faith of the defendant"[21] and noted that evidence of prior wrongs committed by a defendant had long been allowed in proper cases.

Then came *Lyle*. The importance of *Lyle* is that Justice Marion, its author, set forth in a masterfully written and well-researched opinion an illustrative history of contemporary American common law regarding admissibility of a defendant's prior bad acts. Moreover, he adopted the clear, concise, and easily remembered rule found in the New York case of *People v. Molineux*,[22] which today is embodied in South Carolina Rule of Evidence 404 and still followed by the New York state courts.[23]

Lyle was decided at a time when the tide of evidence law was beginning to rise from its strict and unyielding origins, but the rule had the effect of anchoring the common-law rule to jurisprudence of the early 1900s. Since 1923 when *Lyle* was decided, South Carolina evidence law in this area has grown vertically rather than horizontally. By "growing vertically," it is meant that the same type evidence admitted under federal rule 404(b) is generally admitted in state courts, except that it comes in through other theories or rules rather than through rule 404(b) or *Lyle*. For example, prior knowledge of a dangerous condition may be admitted in a slip-and-fall case under federal rule 404(b) to show the storekeeper owed a duty to correct the danger or warn of it. In South Carolina, the courts use a similar approach as under *Lyle*, but must employ another rule (401 or 402) to admit the same evidence.

The list of five permissible uses set forth in state rule 404(b) should be expanded beyond those set forth in *Lyle*. By allowing under a single rule

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(404(b)) evidence of other crimes, wrongs, and acts for purposes other than proving character, this difficult area of the law may be simplified and made uniform.[24] Being of common-law origin, rule 404(b) may be modified by the courts on a case-by-case basis. Judge Lanneau DuRant Lide in *The Trial Judge in South Carolina*[25] subscribed to the pragmatic view that saw "the law as a growth and development in a constant state of evolution."[26] Professor James F. Dreher would take this theme a great leap further: "[E]xcept for some aspects of the parol evidence rule, the principle of *stare decisis* should have little or no bearing on evidence decisions."[27] Justice Oliver Wendell Holmes in *The Common Law*[28] noted that "scrutiny and revision [of the common law] are justified." *Lyle*/rule 404(b) should be scrutinized, revised into an open-ended rule, and brought into the modern era.

4. The Hedgepath/England Rule

In *South Carolina State Board of Medical Examiners v. Hedgepath*[29] and *McCormick v. England*[30] the Supreme Court of South Carolina and the South Carolina Court of Appeals held that there is a duty of confidentiality not to disclose a patient's confidences, absent consent by the patient or compulsion of law. Both cases involved domestic relations actions. The court of appeals recently declined to extend the same rule to workers' compensation cases.[31]

Although a welcome step forward for patients' privacy rights, the *Hedgepath/England* rule should not be extended to personal-injury litigation. Since these cases were decided, defense attorneys have been unsure whether they are permitted to speak privately to treating doctors, and as a practical matter, all contact (except in depositions) by the defense with the plaintiffs' healthcare providers has ceased for the first time in South Carolina legal history. This uncertainty has caused expense to clients, many of whom (including some of this writer's penurious clients) cannot afford expensive discovery. When the defendant desires to call one of the plaintiff's physicians to trial as a witness, trial preparation is impossible; the defendant may only send a subpoena then question the healthcare provider on the stand. Not so for the plaintiff.

In personal-injury cases, the plaintiff voluntarily puts his medical condition in issue. It is the central issue in the trial, and no privilege extends to physician-patient communications. Requiring equal, unfettered access to the adversary's witnesses is a cornerstone of evidence law.[32] When the plaintiff's medical history is the entire focus of the trial, one party should not be hamstrung in its trial preparation while the other enjoys free access to healthcare witnesses. It is contrary to our adversarial system of justice to permit one party the right to regularly consult doctors, nurses, psychologists, or EMS attendants in private and prepare them for trial while denying the adversary the same privilege. For these reasons, an implied waiver of patient-physician confidentiality (excepting specially retained expert witnesses) should be recognized in personal injury actions.

5. Contemporaneous Trial Objections

The practice in South Carolina is to require a second contemporaneous objection to evidence, even when a motion in limine had been ruled upon on the same matter.[34] Jury research shows that objections frequently highlight for the jury the evidence sought to be excluded. The recent amendment to federal rule 103(a) was long overdue and makes trials more user friendly. Federal Rule of Evidence 103(a) now includes new language dealing with motions in limine: "*Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.*" *The key word is "definitive."* The burden of showing that the judge's ruling was definitive is upon counsel. Nothing prevents the trial judge from revisiting his or her prior ruling; if the court changes its ruling or the other party violates the terms of the judge's initial ruling, an objection is required. Federal rule 103(a) is a welcome relaxation of a trial technicality in the Benthamite mold, and this change in trial procedure should be adopted in South Carolina.

6. Federal Rules of Evidence 413 and 414

These two rules allow evidence of other similar offenses committed by the defendant in sexual-assault and child-molestation trials. Rules 413 and 414 prove the point of why consistency has never been the forte of evidence law. The result of a political deal by Congress, the two rules received unanimous criticism by two committees of the Judicial Conference of the United States and have been roundly denounced since they became effective. Sexual-assault and child-molestation cases are among the most disgusting offenses possible. However, there is no justification for allowing propensity evidence for one crime but not another.[35] Rhetorically speaking, why should propensity evidence be admitted when the defendant is accused of sexually assaulting the victim, but not if he murders and dismembers her? To the extent that the rules are admissible for reasons other than character, rule 404(b) is available. Rules 413 and 414 should be abrogated, or in event, rule 403 should be liberally applied.

Footnotes

[1] For one particularly useful website, go to http://www.ucl.ac.uk/Bentham-Project.

[2] *Michaelson v. United States*, 335 U.S. 469, 486 (1948).

[3] *Cf.* Aeschlyus, *Seven Against Thebes* (467 B.C.)("The laws of a state change with changing times.").

[4] *See, e.g., Barrera v. E.I. Dupont de Nemours & Co.*, 653 F.2d 915 (5th Cir. 1981)(holding that proper inquiry is balancing test of rule 403); *see also Hogan v. American Tel. & Tel. Co.*, 812 F.2d 409, 410-411 (8th Cir. 1987)*cited in Lewis v. Sentara Alternative Delivery Sys.*, 139 F.3d 890 (4th Cir. 1998) (unpublished opinion) for proposition that judge has discretion under rule 403 to exclude litigation of collateral matters)(unpublished opinion); 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* Section 12.01[03] (1996)(advocating abandonment of collateral-matter test and substituting rule 403 balancing test).

[5] *See United States v. Johnson*, 219 F.3d 349, 357 (4th Cir. 2000)("[W]e are confident that the district court did not err in refusing to allow the Johnsons to question a witness about Piranti's misconduct, because the [judge] found that such questioning would only confuse the jury on a tangential matter: . . . [quoting the trial judge] '[A]ll this will do is promote confusion, it's a collateral matter.'"); *United States v. Gaston*, 176 F.3d 476 (4th Cir. 1999)(judge had discretion to exclude independent evidence of prior drug deal because collateral issue)(unpublished opinion); *United States v. Bullock*, 94 F.3d 896 (4th Cir. 1996)(judge properly excluded collateral issues rather than becoming involved in mini-trials).

[6] 263 S.C. 290, 210 S.E.2d 298 (1974).

[7] 1 Exch. 91, 154 Eng. Rep. 38 (1847).

[8] *Id.* at 104, 154 Eng. Rep. at 38 (Rolfe, B.).

[9] 125 S.C. 406, 118 S.E.2d 803 (1923).

[10] 16 S.C.L. (1 Harp.) 59 (1823).

[11] *Id.* at 61 (emphasis in original).

[12] 127 Eng. Rep. 393 (Ex. Ch. 1804); *see also State v. Jacob*, 30 S.C. 131, 8 S.E. 698 (1889)(citing Wylie).

[13] *State v. Houston*, 17 S.C.L. (1 Bail.) 300, 301-02 (1829) *cited with approval in State v. Hooper*, 18 S.C.L. (2 Bail.) 37 (1830). The South Carolina courts cited treatises such as Thomas Sturkie, *A Practical Treatise on the Law of Evidence* (2d ed. date unknown) and *King v. Wylie* as authority.

[14] 17 S.C.L. (1 Bail.) 300 (1829).

[15] *Id.* at 303. *Accord State v. Jacob*, 30 S.C. 131, 8 S.E. 698 (1889)(citing *Houston* for this proposition).

[16] 127 Eng. Rep. 393 (Ex. Ch. 1804).

[17] *Id.* at 394.

[18] *See State v. Weldon*, 39 S.C. 318, 321 (1893)(holding that although other crimes usually inadmissible, one exception is when other crimes so connected as to constitute a continuous transaction)(citing *State v. Robinson*, 35 S.C. 340, 344 (1891)).

[19] *See State v. Winter*, 83 S.C. 251, 257-58, 65 S.E. 243, 245 (1909); *see also State v. Ray*, 91 S.C. 551, 551-52, 75 S.E. 174, 175 (1912)(prior forgeries); *State v. Talley*, 77 S.C. 99, 57 S.E. 618 (1906)(other acts admissible to show intent to obtain money by false pretenses); *State v. James*, 34 S.C. 49, 12 S.E. 657 (1891)(conspiracy); *State v. Jacob*, 30 S.C. 131, 8 S.E. 698 (1889)(receiving stolen goods). The state courts also cited common-law treatises such as *Greenleaf on Evidence* and *Roscoe on Criminal Evidence*, and presumably the expansion of the common law cited in these books was being followed in South Carolina.

[20] 124 S.C. 220, 117 S.E. 536 (1922).

[21] *Id.* at 220, 117 S.E. at 537.

[22] 168 N.Y. 264, 61 N.E. 286 (1901). The five permissible purposes listed in *Molineux* are the same as those in case law following *Lyle*, although in slightly different order.

[23] For a federal case discussing *Molineux*, see *Williams v. Lord*, 996 F.2d 1481, 1484 (2d Cir. 1993).

[24] By expanding the *Lyle* list of permissible *types* of prior-acts evidence, this would not mean that the courts would allow any greater *number* of bad acts per theory. Thus, if under prior law three prior burglaries were admitted in a given case to show a common scheme, merely by expanding the *Lyle* list to include "knowledge," "opportunity," etc. would not change the fact that only three burglaries would still be admissible. Criminal defendants would suffer no prejudice, because the only real difference in expanding rule 404(b) would be that *existing* other-acts evidence would simply be brought under a single rule.

[25] Lanneau DuRant Lide, *The Trial Judge in South Carolina* (1953).

[26] *Id.* at xiii.

[27] James F. Dreher, *A Guide to Evidence Law in South Carolina* foreword at v (1967).

[28] O. Wendell Holmes, *The Common Law* 33 (1881).

[29] 325 S.C. 166, 480 S.E.2d 784 (1997).

[30] 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

[31] *See Brown v. Bi-Lo, Inc.*, 341 S.C. 611, 535 S.E.2d 445 (Ct. App. 2000).

[32] *See id.*, 341 S.E.2d 611 (citing *Felder v. Wyman*, 139 F.R.D. 85, 88 (D.S.C. 1991)(noting South Carolina does not recognize a physician-patient privilege and stating, "Absent a privilege no party is entitled to restrict an opponent's access to a witness . . . ."); *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983)("[N]o party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness . . . .")); *see also Brown*, 341 S.C. at ___, 535 S.E.2d at 449 ("[A]llowing employers and their representatives the opportunity to interview physicians outside the presence of the employee merely provides employers and their representatives the same access to medical evidence as the employee."). The courts historically have allowed adverse inferences to be drawn when one party hampers another party's access to evidence.

[33] n small claims trials and state cases filed under $10,000 there is no right whatsoever to depose a medical care provider. However, the plaintiff may privately consult with the healthcare provider until the moment she steps upon the stand to testify.

[34] *State v. Glenn*, 285 S.C. 384, 330 S.E.2d 285 (1985); S.C. R. Evid. 105(a)(1) staff note.

[35] *Cf. United States v. Mound*, 157 F.3d 1153 (8th Cir. 1998)(Arnold, J., dissenting)(rule 413 runs counter to history's skeptical eye towards propensity evidence).

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