South Carolina Law Review

Volume 19
Issue 4 *Survey of South Carolina Law 1967*

Article 7

1967

Evidence

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EVIDENCE

I. Relevancy

In *McVey v. Whittington*,[1] a personal injury suit, the plaintiff had testified on cross-examination that no one in the car in which she was riding had been drinking and that she did not smell alcohol on the breath of anyone in the car. The defendant sought to ask a patrolman whether he had smelled alcohol on the breath of the driver of the car in which the plaintiff had been riding. Objection to this question was upheld on the ground of irrelevancy. On appeal the defendant contended that the question should have been allowed as bearing on the credibility of the plaintiff. The supreme court, in line with the general rule, held that a party cannot be impeached on a collateral issue and therefore the question was properly ruled inadmissible.[2]

Rochester v. North Greenville Junior College[3] was an action arising out of an automobile collision. An allegation as to the existence, near the scene of the accident, of a double highway sign reading "School Bus Crossing" and "35 M.P.H." was ordered struck as irrelevant. This ruling by the trial court was held to be error. The school bus crossing sign did not limit the applicability of the speed limit to the time of day when school buses were operating nor was it solely for the protection of those riding on school buses. Thus the speed limit at the scene of the accident was relevant to the issue of negligence.

The defendant argued that the testimony of the plaintiff's witness, a patrolman, to the effect that the speed limit at the scene was fifty-five miles per hour was binding on the plaintiff and precluded him from complaining of the exclusion of evidence relating to the sign. The court noted that the evidence of the sign had been previously excluded and therefore the patrolman's testimony was no more binding on the plaintiff than testimony which is contrary to the law would be binding on the court, the speed limit being fixed by statute, not by the patrolman's testimony.

Toole v. Salter[4] was a personal injury and property damage suit arising out of a collision between a moving and a parked

1. 248 S.C. 447, 151 S.E.2d 92 (1966).

2. *See* Smith v. Smith, 194 S.C. 247, 9 S.E.2d 584 (1940); State v. Brock, 130 S.C. 252, 126 S.E. 28 (1925); State v. Milam, 88 S.C. 127, 70 S.E. 447 (1911).

3. 249 S.C. 123, 153 S.E.2d 121 (1967).

4. 154 S.E.2d 434 (S.C. 1967).

automobile. The trial court refused to take judicial notice of the time of sunset on the day of the collision, holding that such time was irrelevant. The supreme court reversed, holding that the time of sunset is relevant to the question of whether the accident took place during the time when parking lights are required by statute to be displayed.[5] The court further held that the trial court should have taken judicial notice of the time of sunset.[6]

In *Reid v. Swindler*,[7] a wrongful death action, the plaintiff's intestate was struck by an automobile while crossing the street in front of the school in which she was a student. The question arose as to whether rules issued by the school concerning safe crossing of the street were admissible as evidence of contributory negligence on the part of the deceased. The court, relying on cases in other states, held that such rules, not having been given compulsory effect by the legislative body, are not admissible in civil actions as evidence of negligence due to their violation.[8]

In *State v. Thomas*[9] the defendant appealed his conviction for rape, complaining that evidence of other crimes committed before and after the alleged rape should not have been admitted over his objection. The court admitted the existence of the general rule precluding the admission of evidence of other crimes but noted several common exceptions to the rule. Evidence of other crimes has generally been admitted to show (1) motive, (2) intent, (3) the lack of mistake or accident, (4) a common plan in which proof of one crime tends to prove commission of the others, and (5) the identity of the defendant.[10] Evidence of Thomas' prior conviction for the theft of the present prosecutrix' watch was admissible to show that she was able to identify Thomas during the later crime and also to show motive. Evidence of crimes of violence and physical abuse toward the prosecutrix after the alleged rape was admissible to show a scheme

5. S.C. CODE ANN. § 46-539 (1962) requires parking lights to be displayed, under specified conditions, "during the hours between a half hour after sunset and a half hour before sunrise. . . ."

6. *Accord,* Fields v. Jackson, 102 Ga. App. 117, 115 S.E.2d 877 (1960); 29 AM. JUR. 2d *Evidence* § 98 (1967); 31A C.J.S. *Evidence* § 100 (1964).

7. 154 S.E.2d 910 (S.C. 1967).

8. *Accord,* Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963); Long v. Tomlin, 22 Tenn. App. 607, 125 S.W.2d 171 (1938).

9. 248 S.C. 573, 151 S.E.2d 855 (1966).

10. *See* State v. Bullock, 235 S.C. 356, 111 S.E.2d 657 (1959); State v. Brooks, 235 S.C. 344, 111 S.E.2d 686 (1959); State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Weldon, 39 S.C. 318, 17 S.E. 688 (1893).

or continuous transaction and went to prove lack of consent and to explain why no immediate outcry was made by the victim.

II. HEARSAY

In *Lee v. Gulf Insurance Company*[11] the plaintiff sought to recover a judgment previously obtained against an insured of the defendant company. The defense was based, *inter alia*, on non-coverage under the terms of the policy. The defendant's proffered evidence, both written and oral, of statements made by the insured was excluded as hearsay. The court accepted as settled law that the plaintiff possessed the rights of the insured and was subject to defenses existing against the insured in favor of the insurer.[12] The court refused to accept, however, the defendant's view that hearsay which would be admissible, under an exception, against the insured if he were the plaintiff, is also admissible against the injured party as the plaintiff here.[13] The rationale of allowing the introduction of an admission of a party adversary, that he is in no position to object on the basis of lack of confrontation or of opportunity to cross-examine, is not applicable in this instance. The court noted that the allowance of such proffered testimony would encourage prevarication and put a premium on false swearing in affidavits.

III. WAIVER OF OBJECTION TO ADMISSIBILITY

State v. Murray[14] reaffirmed the well settled rule that prejudicial evidence in a non-capital case, if not objected to at trial, may not be the ground for an appeal as the objection is considered waived.[15]

In *Gentry v. Watkins-Carolina Trucking Company*[16] a witness for the plaintiff was allowed, over the defendant's objection, to testify from notes made from company records which the witness maintained. The court found it unnecessary to pass on the best evidence question as the defendant cross-examined the witness on the subject without reservation of his objection,

11. 248 S.C. 296, 149 S.E.2d 639 (1966).
12. Crook v. State Farm Mut. Auto. Ins. Co., 231 S.C. 257, 98 S.E.2d 427 (1957).
13. *Accord,* Columbia Cas. Co. v. Thomas, 101 F.2d 151 (5th Cir. 1939).
14. 248 S.C. 473, 150 S.E.2d 920 (1966).
15. McCreight v. MacDougall, 248 S.C. 222, 149 S.E.2d 621 (1966); State v. Cokley, 83 S.C. 197, 65 S.E. 174 (1909).
16. 154 S.E.2d 112 (S.C. 1967).

thereby waiving his objection. The defendant also assigned as error a ruling by the trial judge excluding statements made by the plaintiff and the defendant to a patrolman at the scene of the accident, contending that the statements should have been admitted as part of the res gestae. The court held that since the defendant had requested the exclusion of the testimony at the trial he could not now complain of the ruling.[17]

In *State v. Jenkins*,[18] as in *Gentry*, the defendant lost his objection by failure to reserve it prior to cross-examination on the subject. The court, however, by way of dictum, discussed the merits of the defendant's objection. The court concluded that when reckless homicide is charged, heedlessness or willfulness being an essential element thereof, evidence of the manner and speed of driving as early as fifteen minutes before the accident is admissible as bearing on the state of mind of the defendant.[19]

IV. OPINION EVIDENCE

In *Easterlin v. Green*[20] an expert testified that one with the percentage of alcohol in his blood that was found in a sample of the defendant's blood would be "drunk." The court held in this wrongful death action that this opinion was not conclusive on the jury so as to support a directed verdict, the term "drunk" being a relative one subject to interpretation.

In *Gentry v. Watkins-Carolina Trucking Company*,[21] the personal injury and property damage suit mentioned above, the plaintiff called a doctor who testified concerning the medical history given him by the plaintiff. The defendant contended that the doctor was consulted solely for the purpose of qualifying him as a witness and that therefore he could not testify as to the patient's statements. While the court found no evidence in the record to support this contention, it went on to say that even if the contention were correct the patient's statements were admissible, not as substantive proof of the truth of the patient's statements, but as information relied on by the doctor in arriving

17. *See* Wright v. Gilbert, 227 S.C. 334, 88 S.E.2d 72 (1955); Smith v. Metropolitan Life Ins. Co., 191 S.C. 310, 4 S.E.2d 270 (1939); Nock v. Fidelity & Deposit Co., 175 S.C. 188, 178 S.E. 839 (1935); Snipes v. Augusta-Aiken Ry. & Elec. Corp., 151 S.C. 391, 149 S.E. 111 (1929).

18. 155 S.E.2d 624 (S.C. 1967).

19. *See* Annot., 46 A.L.R.2d 13, 14 (1956).

20. 248 S.C. 389, 150 S.E.2d 473 (1966).

21. 154 S.E.2d 112 (S.C. 1967).

at his diagnosis and prognosis. In this dictum the court indicated it thought this majority view to be the sounder one.[22] The parties are entitled to an instruction to the jury on the limitation of such doctor's testimony, but here the defendant did not request an instruction.

V. HYPOTHETICAL QUESTIONS

In *Chapman v. Foremost Dairies, Inc.*[23] the court held that an objection to a hypothetical question asked an expert witness must be specific enough to give counsel an opportunity to rephrase the question to meet any meritorious objection.[24] Thus the general objection that a hypothetical question is an improper one, containing matters not supported by the record and omitting matters of importance, was properly overruled in a workmen's compensation hearing.

C. PINCKNEY ROBERTS

22. *See generally* C. MCCORMICK, EVIDENCE §§ 266-67 (1954); Annot., 130 A.L.R. 977 (1941); Annot., 80 A.L.R. 1527 (1932); Annot., 67 A.L.R. 10 (1930).

23. 154 S.E.2d 845 (S.C. 1967).

24. *See* 88 C.J.S. *Trial* § 129b (1955); *cf.* Greer v. Greenville County, 245 S.C. 442, 141 S.E.2d 91 (1965).